IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 31 OF 2011

(LESIIT AND MAKAU, JJ)

PETER LOKORIO………………………………. APPELLANT

VERSUS

REPUBLIC……………………………………RESPONDENT

(An appeal from the conviction and sentence of M. Maundu, PM Isiolo, on 5/7/2011).

J U D G M E N T

1. The appellant was charged before Principal Magistrate Isiolo with the main count of robbery with violence contrary to Section 296(2) of the Penal code. The appellant faced an alternative charge of handling stolen goods contrary to Section 322(2) of the Penal code.

2. After full trial the appellant was convicted of the main count and sentenced to suffer death. The appellant being aggrieved by the conviction and sentence preferred this appeal. He filed what he referred to as home-made grounds of appeal but at the time of hearing of the appeal he relied on amended grounds of appeal namely:-

i. ***That the pundit trial magistrate erred in both points of law and fact when he failed to consider that the appellant was not booked with the case of which he was charged with in the OB.***

ii. ***That the trial magistrate erred in both points of law and facts when he failed to consider that no exhibit was recovered in possession of the appellant to link him with the instant case (the alleged phone and clubs).***

iii. ***That the trial magistrate erred in both points of law and fact when he failed to consider that the charge sheet was defective to stand conviction.***

iv. ***That the pundit trial magistrate still erred in both points of law and facts when he failed to consider that the complainant did not prove the ownership of the alleged stolen phone with any ownership document (ie. Receipt).***

v. ***That pundit trial magistrate erred in both point of law and fact when he failed to consider that no weapon was recovered was recovered in possession of the appellant during arrest.***

vi. ***That the pundit trial magistrate rejected my defense on weak reasons and violated section 169(1) of CPC.***

3. When the appeal came for hearing the appellant relied on amended grounds of appeal and the written submissions. The appellant added that the OB and investigation diary showed that the report made at the police station against him was of stealing while in a bar and not of a robbery. He urged that there were contradictions regarding the alleged stolen phones and having been found with him. He urged the court to look at his written submissions and P3 form in respect of his injuries.

4. Mr. Makori, learned prosecution counsel represented the State in this appeal. Counsel opposed the appeal urging that the appellant raised two grounds one of the charge being defective and identification. On the charge of robbery with violence Mr. Makori, learned Counsel urged that the appellant was armed with dangerous weapon namely a club and was in company with others. That the appellant threatened to use actual violence therefore he submitted the charge was properly framed and the same was not defective.

5. Mr. Makori, learned State Counsel urged that PW1 recognized the appellant at the time of the attack, gave chase of the appellant who entered into a house from which he was flushed out by the owner. The counsel urged that the chase was continuous until the appellant was removed from the house he had entered. He urged PW1, PW2 and PW3 positively identified the appellant. The appellant at the time of the chase dropped the PW1's phone which was still ringing. He urged that PW2 corroborated evidence of PW1 on a continuous chase and recovery of the phone from where the appellant was. He urged that the phone was identified by the complainant and he produced a receipt. However, he submitted the report show that the complainant did not have the receipt during the retrial but had it at the original trial.

6. We have carefully considered this appeal and have subjected the evidence adduced before the trial court to a fresh analysis and evaluation and have drawn our own conclusion bearing in mind that we did not see or hear any of the witnesses and have given due allowances for the same. We are guided by the **Court of Appeal decision of Okeno V Republic EA 32.**

7. The brief facts of the case were that on 27/2/2008 at about 8.30 p.m. the complainant(PW1) was walking from Isiolo Town to his home at Kulamawe when he was accosted by two men outside "sunny bar" in Soko Mjinga estate. One of them held him by the neck from behind and took away his mobile phone which he was holding by his right hand while the other ransacked him and took away Kshs.450/- from his right trouser pocket. The complainant's phone was ringing and the complainant was screaming. That one Ben came and the two confirmed the face of the appellant.

8. PW1 chased the assailant and was joined by PW2 and others in the chase. The assailant entered into a certain plot, dropped the phone down which was still ringing and entered into a house which was open. That with the help of the owner of the house the assailant was removed outside. The assailant was then escorted to Kulamawe police post. The complainant(PW1) did not loose sight of the accused person from the scene upto the time they arrested him. The other attacker escaped. The assailants were armed with sticks and dropped them at the scene of the incident.

9. The appellant denied the charge and stated that on the material date at about 8.30 pm he was walking home when he was stopped by five(5) men outside Sunny Bar, amongst whom PW1, PW2 and PW3 were in the same group. PW1 was armed with a rungu whereas Pw2 had a panga and Pw3 had an iron bar. They demanded money but he resisted and he was assaulted by PW1, PW2 and PW3 injuring him seriously. He then surrendered Kshs.2,000/- and his foodstuffs. That after robbing him hey escorted him to Kulamawe police post and met PC Emilio who they gave Kshs.1,000/- in order to frame him up with an offence of stealing. He was later escorted to Isiolo Police Station in company of PW1, PW2, and PW3 who on arrival gave PC Miriga(PW4), PC Karanja and PC Kiome Kshs.3,000/- in order to book him with an offence of robbery with violence. He was later charged with the instant offence.

10. The appellant in his submissions and petition of appeal urged that trial magistrate failed to consider that the charge sheet was defective to support a charge of robbery. The particulars of the

charge sheet are as follows:-

> ***"On the 27th day of February, 2008 at Kulamawe in Isiolo District within Eastern Province jointly with others not before the court, being armed with dangerous weapons namely clubs, robbed JAMES MUTHOMI of cash Kshs.450/- and a mobile phone Nokia 1112 valued at Kshs.4,000/- at the home of such robbery threatened to use actual violence to the said JAMES MUTHOMI."***

The offence of robbery is defined under Section 295 of the Penal Code as follows:-

> ***295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***

11. In the case of **Oluoch V Republic(1985) KLR 548** at page 556, Court of Appeal stated:-

"Under Section 296(2) of the Penal Code robbery with violence is committed in any of the following circumstances:

1. ***The offender is armed with any dangerous or offensive weapon or instrument, or***
2. ***The offender is in company with one or more other person or persons or***
3. ***At or immediately before or immediately after the time of robbery, the offender wounds, beats, strikes or uses other personal violence to any person.***

The ingredients of the offences of robbery under Section 296(1) of the Penal Code are:

a. ***Stealing anything and***
b. ***At or immediately before or immediately after the time of stealing,***
c. ***Using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.***

So, it is not the degree of actual violence used that differentiates the two offences as the Senior Resident Magistrate stated

12. We have looked at the evidence and we do agree with the submissions by Mr. Makori, learned Counsel that since the assailant was armed with a stick which is a dangerous weapon and not in company of another and threatened to use violence at time of the robbery the offence of robbery was proved and the charge was not defective.

13. It is trite law that a fact can be proved by evidence of a single witness so long as the evidence is tested and found to be strong enough to establish that fact. The complainant testified that the robbery was committed at 8.30 p.m. The complainant's evidence of identification must be received with caution being evidence of single identifying witness made at night. In the celebrated case of **Abdullah Bin Wendo V R 20 EACA 166** it was held:-

> ***"Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error."***

14. The way to test the evidence of identification made at night was succinctly discussed in the case of **Charles O.Maitanyi V R(1985)eKLR 75** in which the court held:-

> ***"It must be emphasized what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness so the chances of a true impression being received improve.***
>
> ***That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available; what sort of light, its size, and its position relative to the suspect are all important matters helping to test the evidence with greatest care. It is not a careful test helping to test if none of these matters are known because they were not inquired into. In days gone by, there could have been a careful inquiry into these matters by the committing Magistrates, State Counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of Senior Magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the greatest care the evidence of a single witness?"***

15. The court in such cases should be concerned with the strength of the light and distance the complainant and the assailant were from that light. The position of the assailant at the time of the attack is also material. In the instant case PW1 was alone and the assailant approached him from his back. We note the complainant on being cross-examined by the appellant he stated:-

> "***I would not identify you when you were robbing me since you were behind me from the scene."***

16. The complainant in his evidence testified that they confirmed the face of the assailant. We are disturbed and concerned with the complainant evidence as there was no mention of light. We are unable to understand how the complainant was able to confirm the face of the assailant without any light at night and how he was able to follow the assailant to a house and how he was able to see the assailant drop the phone. The witness did not state how close he was to the assailant. The only source of light mentioned is electricity light at the house where the assailant is said to have entered. The position of the light is not disclosed nor is there evidence as to what kind of house and whether it was a gated compound or not . Further we note that there is no evidence as to whether there were other people entering the house or not at the time the assailant is alleged to have entered into the house.

17. The complainant's evidence is that when he was chasing the assailant he did not have a stick and there is not time he lost sight of the assailant. PW2 evidence is that he joined in the chase, the assailant fell down and dropped the phone and entered a neighbour's house. PW2's evidence is that the chase was for 50 metres and that there was security light from a church. We are once again disturbed by the evidence of Pw1 and PW2 whereas PW2 talked of security light of church during his cross-examination he had not mentioned of any light in his evidence in chief. PW1 did not mention of any security light from a church. Pw2 though he mentioned of security light from the church he did not mention its intensity or how far it was from the assailant and whether there were no impediments of the light.

18. PW2 and PW3 had not seen and identified the assailant at the scene of the incident. PW1 had not seen the assailant as he was attacked from the back and no evidence was called from the owner of the house to confirm indeed the person who entered the compound and who was being chased was the appellant and was the only person who entered the compound which PW2 stated had a gate.

19. That Without a clear knowledge of the intensity of the light, its source, the distance at which the assailant was seen by the complainant, PW2 and PW3 as he was being chased, the type of the gate

to the compound to which the assailant entered; no one can say with certainty whether the identification was positive and without the possibility of error or mistake. What was required was other evidence implicating the appellant with this offence.

20. We now turn to whether there was such other evidence. The prosecution witness PW2, and Pw3 did not witness the robbery. PW1 testified the attackers put the stick down before the attack and when he was chasing the assailant he did not have the stick. PW1 testified his phone was Nokia 112 which the assailant dropped down before he entered the house he was running into. PW2 testified the person they were chasing dropped the phone when he fell down. He testified the phone was Nokia 1110.

21. PW2 testified that there was a time he temporarily lost sight of the person they were chasing for about 5 seconds when he entered the plot. Pw3 testified that the person who was arrested was being chased by one person and when he was arrested he was holding a Nokia 112 belonging to PW1 and he also had a rungu which they recovered. PW4 testified a Nokia 112 was recovered from the appellant. The mobile phone in the charge sheet is Nokia 112. The prosecution did not produce the phone as an exhibit nor did they produce the receipt in support of PW1's ownership of the Nokia 112. PW1 testified that after the phone had been returned to him after determination of the original case before the case was ordered for a retrial the phone got lost together with the receipt. He gave the mobile Number as 3573400235206. The original case file was not produced and one could not ascertain whether a receipt had been produced and whether PW1's phone serial No.was 35734002352206.

22. We have carefully analyzed and evaluated the prosecution evidence and find no other evidence implicating the appellant with the offence. PW1 and PW2 were contradicted by PW3 and PW4 whose evidence was that the mobile phone was found with the appellant whereas PW1 and PW2 evidence was that the appellant dropped the phone before he entered the house. PW1 testified the appellant left the stick at the scene of incident whereas PW3 testified he was found with a rungu. Pw1 gave his phone as Nokia 1112 whereas PW2 stated it was 1110 and PW4 gave it as a Nokia 112. We are unable from the prosecution evidence to reconcile on the complainant's phone nor can we find any other evidence implicating the appellant with this offence.

23. Having carefully considered this appeal we have come to the conclusion that the evidence of identification by PW1 was made in unexplained circumstances and without disclosure of the kind of lighting conditions and therefore needed to be corroborated by material evidence implicating the appellant with the offence. The evidence of PW2 was based on identification under unclear conditions and it also needed corroboration. We have in addition of that found the evidence of PW1, PW2 and PW3 to be contradictory and full of inconsistencies.

24. It is trite law that evidence that needs corroboration cannot be used to corroborate other evidence also needing corroboration. No other evidence was adduced in this case implicating the appellant. The evidence against the appellant is unsafe to found a conviction. The conviction entered against the appellant was therefore unsafe and cannot be allowed to stand. We therefore in view of the evidence which we have analyzed and re-evaluated find merit in this appeal and accordingly we allow the appeal, quash the conviction and set aside the sentence.

25. The appellant should be set at liberty forthwith unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THS 24TH DAY OF JULY, 2014.

J. LESIIT **J. MAKAU**

JUDGE **JUDGE**