REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 38 & 8 OF 2012

1. PAUL MUTAMA MASINDE

2. JOHN NJOROGE MUREITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from original conviction and sentence of Hon. T. A. ODERA, PM at Kitale

in Criminal Case No. 757 of 2011 on the 30th day of January, 2012]

J U D G M E N T

The two appellants, **Paul Mtama Masinde** and **John Njoroge Mureithi**, appeared before the Principal Magistrate at Kitale charged with Robbery with violence, contrary to section 296 (2) of the penal code, in that on the 1st March, 2011 at Bidii Farm Trans-Nzoia County, jointly with others not before court while armed with pangas and wooden sticks robbed Albert Khalawa Luazwa of a motor cycle make TVS Star Registration No. KMCL 472H red in colour valued at Kshs.78,000/= and at our immediately before or immediately after the time of such robbery used actual violence to the said Albert Khalawa Luazwa.

The first appellant **(Paul)** faced an alternative count of handling stolen goods contrary to section 322 (1) (2) of the penal code in that on the 5th April, 2011 at Chepchoina Trans-Nzoia County otherwise than in the course of stealing, dishonestly received or retained one motor cycle make Tvs Star red in colour without registration number knowing or having reason to believe it to be stolen.

After a full trial, the first appellant was convicted on the alternative count and sentenced to five (5) years imprisonment while the second appellant **(John)** was convicted on the main count and sentenced to death.

Being dissatisfied with the conviction and sentence, both appellants filed separate appeals which were consolidated and heard together. The grounds of appeal are contained in the respective petitions of appeal filed on the 22nd March 2012 and 3rd February, 2012.

At the hearing of the appeals, both appellants appeared in person and relied on their respective written submissions in support of the appeals.

The Learned Prosecution Counsel, **M/S Kiigi**, opposed the appeals on behalf of the State/Respondent and submitted that the burden of proof was discharged by the prosecution as PW1 testified of how he was attacked and robbed by a group of six people armed with pangas and wooden planks. That, PW1

identified two of the attackers who included the first appellant and a person called Kulundu. That, identification was made possible by the motor cycles headlights and the emerging of the attackers from the front of the motor cycle. That, PW4 confirmed that the complainant was injured during the attack and although the trial court duly warned itself with regard to identification by a single witness, this was a case of recognition as the complainant knew the first appellant.

Learned Prosecution Counsel further submitted that the stolen motor cycle was later recovered from the second appellant by PW2 who was its owner and established as much by producing necessary documents. That, the second appellant was rightly convicted on the second count as he was a relative of the person Kulundu who was one of the attackers but escaped. The Learned Prosecution Counsel contended that the appeals lacks merit and urged this court to dismiss them.

Having considered the submissions by both sides as well as the grounds of appeal, our duty was to reconsider the evidence and draw our own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

Accordingly, we have considered the prosecution case as narrated by the complainant, **Albert Khalawa (PW1)**, the owner of the material motor cycle, **Christopher Khisa (PW2)**, the officer who arrested the first appellant, **Cpl Gabriel Mwaniki (PW3)**, the clinical officer who examined the complainant and filled the necessary P3 form, **Francis Barchebo (PW4)** and the officer who investigated the case, **P.C Joseph Maweu (PW5).** We have also considered the defence raised by the appellants respectively in which they both denied the offence with the first appellant stating that on the 2nd April, 2011, a police reservist called Stephen Omollo complained to him that his goats had eaten his (Omollo's) crops. He (first appellant) confirmed the allegation and offered compensation in the sum of Kshs.200/= which Omollo declined and demanded Kshs.600/=. He could not pay that amount prompting Omollo to vow that he would sue him. Omollo returned to his (first appellant's) farm on 5th April,, 2011 with three people and two motor cycles. He was then arrested and taken to Chepchoina police patrol base before being transferred to Kitale police station where he was charged.

Appellant two stated that he was at his place of work on 2nd March, 2011 and at 6.00 p.m. he closed business and returned home. It was while he was at home at 7.00 p.m. that police officers arrived there and told him that he was required at the chief's office. He proceeded to the chief's office from where he was taken to Kitale District hospital where he saw a person who was unknown to him. He was thereafter returned to his house where a search was conducted. He was later re-taken to Kitale police station where he spent a night prior to being arraigned in court for the present offence. He contended that his co-accused was a stranger to him.

From all the evidence by both the prosecution and the appellants, we have no doubt and agree with the learned trial magistrate that the offence of robbery with violence was indeed established by the prosecution through evidence adduced by the complainant (PW1) and the clinical officer (PW4) which was not disputed whatsoever in that regard.

Basically, the issue that presented itself for determination was whether the appellants were positively identified as having been responsible for the offence which occurred at about 10.00 p.m. thereby presenting difficult conditions for identification. The sole evidence of identification came from the complainant who said that he was in the course of his duty as a motor cycle operator when he was hired by a customer headed to a place called Bidii. On the way near Lessos forest they were attacked by a gang of six people armed with wooden posts and machetes (panga). The gang slashed him on the head after having thrown a wooden post at them causing him to fall down. His customer also fell down and was assaulted and because the headlights of his motor cycle were on, he (complainant) recognized the attackers as being fellow motor cycle operators based at Laini Moja. He particularly recognized John Njoroge (the second appellant) and a person called Kundu when they emerged from the front of the motor cycle such that he was able to see them due to the presence of light from his motor cycle's headlamps. He called out their names and they threatened to kill him for having recognized them. Nonetheless, he managed to run away leaving his motor cycle and his customer at the scene.

The complainant thus implied that his identification by recognition of the second appellant was made possible by existence of favourable conditions for identification in the form of light emanated from his motor cycle's headlamps.

The customer was not called to testify and corroborate the complainant's evidence of identification which even though was essentially identification by recognition nonetheless required careful treatment before it could be acted upon by the trial court considering that the identification was by a single witness in difficult circumstances.

It is worth nothing that evidence of visual identification in criminal cases can cause miscarriage of justice if it is not carefully tested. Thus, before a conviction can be entered against a suspect on account of visual identification, such evidence must be waterlight as it is possible for even an honest witness to make a mistake **(see, Kiarie Vs. Rep (1984) KLR 739)**. In cases of recognition,it was stated in the English case of **R V. Turnbull (1976) 3 ALL ER 549;** that:-

> ***"Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognized someone who he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made".***

With regard to identification by a single witness we draw guidance from the case of **Abdalla Bin Wendo & Another Vs. Rep (1953) 20 EACA 166,** where it was stated that:-

> ***"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but the 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".***

This principle was quoted with approval in **Roria Vs. Republic (1967) EA 583 and Odhiambo Vs. Rep [2002]1 KLR 241.**

It was therefore incumbent upon us to examine afresh and with extra care the complainant's evidence of identification of mostly the second appellant to ensure that any possibly of error is eliminated (see, **Huka & Others Vs. Rep (2004) EA 266)**. The first appellant did not feature in this evidence as the evidence against him was grounded on his alleged unlawful possession of property suspected to have been stolen.

It is our view the evidence of the alleged identification of the second appellant by the complainant was not waterlight enough for a finding that it was free from the possibility of error or mistake and hence reliable. We say so because it was at night when a group of about six people suddenly emerged from the dark and immediately embarked on attacking the complainant and his customer. The episode appeared to have occurred in a flash of second such that there was no sufficient opportunity for the complainant to see and identify any of the attackers even if it was by recognition. Coupled with that, the episode must have dislodged the complainant's frame of mind to be able to make a reliable and correct identification of the attackers. He was in shock and may not have been thinking straight. This must have inhibited his capacity to make a correct identification of any of the attackers. Besides, he clearly did not demonstrate how and at what juncture he actually saw and identified the appellant and one Kundu with the help of the lights from the motor cycle. He did not say how far they were from him when he saw them and whether the intensity of the light from his motor cycle's headlamps was strong or bright enough for a positive identification of any of the attackers. And if there was moonlight at the material time, there was no indication from the complainant as to whether it was bright enough to enable proper identification of the attackers.

For the reasons foregoing, we find it difficult to agree with the learned trial magistrate that the second appellant was unmistakenly identified as having been part of the gang which robbed and injured the complainant in the process. We are convinced that from the circumstances surrounding the alleged identification, the complainant was unable to make a positive identification of the second appellant free from the possibility of error or mistaken identity.

We therefore hold that the conviction of the second appellant was neither sound nor safe.

As indicated hereinabove, the evidence with regard to the first appellant was circumstantial and based on his alleged possession of the complainant's stolen motor cycle. That evidence, in our view, could not maintain the main or alternative count against the first appellant for the simple reasons that there was lack of clarity with regard to whether the motor cycle allegedly found with the first appellant was that which was stolen from the complainant. The element of recovery of the motor cycle from the first appellant was also not sufficiently proved by the evidence of Christopher (PW2) or Cpl Mwaniki (PW3). This raised reasonable doubt as to whether indeed the first appellant was in possession of property which he knew or had reasons to believe that it was stolen.

We must therefore also hold that the conviction of the first appellant on the alternative count was not safe.

In sum, the appeals by both appellants are allowed with the result that their respective conviction by the trial court is quashed and the resultant sentences set aside .

Both appellants shall forthwith be set at liberty unless otherwise lawfully held.

Ordered accordingly.

J. R. KARANJA **K. KIMONDO**

..... **.....**

JUDGE **JUDGE**

[Delivered & signed this 18th day of November, 2014]

[[In the Presence of the Appellants and M/S Koga for the state]