REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 73 OF 2009

GEORGE NDUNGI THAIRU …............................ APPELLANT

VERSUS

REPUBLIC…………………………………......……RESPONDENT

(From original sentence and conviction in Criminal Case No.14 of 2008 of the Principal Magistrates court at Kikuyu by G.W. Macharia – Senior Resident Magistrate)

JUDGMENT

GEORGE NDUNGI THAIRU, the appellant herein, was convicted for the offence of Robbery with violence. The particulars of the charge were that the appellant, jointly with others who were not before the court, robbed the complainant of 2 pairs of Jeans trousers, a packet of maize flour, a kilo of sugar and a pair of shoes.

The incident took place on 23rd August 2008, at Ruthigiti Village in Kiambu. And at the time of the robbery the assailants were armed with an offensive weapon, namely a stick. They used the said stick to inflict injuries on the complainant.

The evidence tendered by the prosecution Can be summarised in the manner following.

PW 1 is the complainant. He was walking towards his home at about 9.00p.m, Ahead of him, **PW 1** saw one person.

Shortly after **PW 1** passed that person, 2 other men emerged.

The first person hit **PW 1** on the head, using a rungu.

PW 1 dropped the paper bag which he was carrying. It is inside that paper bag that **PW 1** had his jeans trousers, sugar, maize flour and a pair of shoes.

PW 1 fled to a neighbour's house, but the assailants pursued him. During the chase, **PW 1** looked back and recognized the appellant, who was his neighbour.

PW 1 testified that there was light from an electric power pole. The light was said to illuminate a radius of 20 metres.

PW 2 is the person into whose compound **PW 1** fled. He testified that **PW 1** told him that he had recognized the appellant as one of the robbers.

PW 2 phoned the police.

PW 3 and **PW 4** are both police officers. It is they that **PW 2** phoned. They respondended by going to **PW 2's** home, where they found **PW 1** and **PW 2.**

PW 1 then led the police to the home of the appellant.

The appellant refused to open his door, and the police officers had to force it open.

The police arrested the appellant after **PW 1** identified him as one of those people who had robbed him.

However, none of the items which were stolen from **PW1** were recovered.

PW 4 is a police officer. He was at the Kikuyu Police Station when **PW 1** reported the incident**.**

As **PW 1** had sustained some injuries**, PW 5** issued him with a P3 form.

PW 6 is a medical doctor. He examined **PW 1** and verified that **PW 1** had suffered injuries. **PW 6** attributed the said injuries to a blunt weapon.

When the appellant was put to his defence, he denied committing the offence. He said that at the material time he was at their home, where he was helping his mother with some work.

Whilst conceding that the police arrested him at his house, the appellant reiterated his innocence.

In his appeal, the appellant contends that his alleged identification was not free from the possibility of an error.

He describes the circumstances prevailing as harsh, and the period when **PW 1** allegedly saw him as fleeting.

The appellant pointed out that because the attack on **PW 1** was at 9.00p.m, it must have been dark.

The appellant also emphasized that **PW 1** had recognized his assailant as a person named **NDUNGU.** Therefore, that person cannot be the appellant, who is called **NDUNGI.**

The appellant posed the question about the identity of the person into whose home **PW 1** fled**. PW 1** said that he fled to the home of one, **NYAGA.** But **PW 2,** who said that **PW 1** fled to his house, gave his name as **RWANGI DAVID NJAGI,** not **NYAGA.**

That prompted the appellant to submit that the person to whose house **PW 1** fled, did not testify.

It was also the appellant's contention that **PW 2** is not the person who phoned the police officers. That was because **PW 3** received a call from **DAVID ICHANGI**.

The appellant also pointed out the discrepancy between the charge sheet and the complainant regarding the quantities of items which he lost to the robbers. The said inconsistencies were further enhanced as other prosecution witnesses gave particulars that were different from what **PW 1** talked about.

The identity of the person who opened the gate to the appellant's home is also said to be in doubt. **PW 2** said that the person was a son of the appellant whilst **PW 4** said it was the appellant's brother.

Finally, the appellant faulted the prosecution for failing to exhibit the panga which the police found him holding, inside his house.

For those reasons, the appellant asked us to allow his appeal.

But Miss Nyauncho, learned state counsel, opposed the appeal. She submitted that the case against the appellant had been proved beyond any reasonable doubt.

The respondent submitted that there was no room for any mistaken identification as there was sufficient lighting at the scene of crime.

The respondent also pointed out that the whole incident lasted 5 minutes. Therefore, that period of time was sufficient for positive identification.

The fact that the complainant named the appellant as one of his attackers, at the earliest opportunity, convinced the respondent that the identification was positive.

The refusal, by the appellant, to open his door when the police ordered him to do so, is described by the respondent as the conduct of a person who was guilty.

Although the charge sheet cited 2 trousers whilst the complainant testified about 3 trousers, the respondent submitted that that discrepancy was not prejudicial to the appellant.

The respondent submitted that the fact of the robbery, coupled with the actual violence visited upon the complainant was sufficient proof of the offence of Robbery with violence.

Being the first appellate court, we have re-evaluated all the evidence tendered at the trial.

On the one hand, the case appears very simple, as it is the complainant who led to the arrest of the appellant, shortly after he was robbed.

But on the other hand, the discrepancies regarding the names of the appellant,the names of **PW 2** and the quantities of the various items stolen from **PW 1** cannot be wished away.

Having given careful consideration to the evidence adduced, we first note that the identification of the appellant was by a single witness. That, of itself, does not reduce the efficacy of the identification. However, we are alive to the need for the court to caution itself about the danger of relying on the evidence of a single identifying witness unless the court was satisfied that there was no possibility of any error in the said identification.

In this instance, the incident took place at 9.00p.m. The appellant says that it was dark. But the complainant said that there was electric lighting from a power pole.

The appellant was said to have hit **PW 1** with a rungu. His accomplices then joined in beating up **PW 1**.

Obviously, that meant that the assailants were literally next to the complainant.

PW 1 made it clear that the electric lighting was bright enough to enable him identify the appellant. Indeed, he explained that the light illuminated a radius of 20 metres. That means that the appellant was mistaken when he submitted that there was darkness at the scene of crime.

We also note that **PW 1** looked back after he was hit on his head. That is the first time when he recognized the appellant.

He was then assaulted by the appellant and his 2 accomplices. But, when **PW 1** freed himself, he ran away.

As he was running, with his assailants in pursuit, **PW 1** looked back. At that point, the appellant was

about 10 feet from **PW 1**.

We find that because there was electric light in the area through which the assailants were pursuing **PW 1**, and because the appellant was within 10 feet of the complainant, that provided another opportunity for **PW 1** to further recognize the appellant. In effect **PW 1** did not jut have a fleeting glance of the appellant.

As soon as **PW 1** got to the home of **PW 2** , he told **PW 2** that he had recognized one of his attackers. **PW 1** named Ndungu.

If the police had arrested the appellant in the absence of the complainant, and in the arrest was effected only on the strength of the name provided to the police, there might have been room to argue that the police had arrested the wrong person.

Similarly, if **PW 2** had not testified and corroborated the evidence of **PW 1**, there might have been room for argument that **PW 1** had sought refuge at the home of a person other than **PW 2**.

But in this case **PW 2** testified that **PW 1** ran to his home. **PW 2** phoned the police, who went to his home, where they found **PW 1**.

And even though the police gave a slightly different name for **PW 2**, the fact is that all persons involved (i.e. **PW 1, PW 2**, **PW 3** and **PW 4**), all corroborated the evidence of one another.

The appellant was not prejudiced by the slight differences in the names. He had every opportunity to cross-examine the witnesses.

We also find that although the appellant had a panga at the time of arrest, the prosecution witnesses were right to have testified that they did not recover any exhibits.

The panga was not in the hands of the appellant at the time of the robbery. At that time, he only had a stick.

The injuries inflicted on the complainant were consistent with the use to which the assailants applied the blunt weapon. The panga was never used. It was thus immaterial to the case before the court.

It is our further finding that the appellant was not prejudiced at all by the slight discrepancy between the items cited in the charge sheet and those about which the complainant testified.

The substance of the charge was that the complainant lost jeans trousers, maize flour, sugar and a pair of shoes.

Whether the trousers were 2 or 3 pairs, or whether the maize flour and sugar were in quantifies of 1 or 3 kilogrammes each, could not have altered the substance of the charge. The appellant knew the nature of the charge he was tried for.

We are satisfied that the case against the appellant was proved beyond any reasonable doubt. There is therefore no merit in this appeal. It is dismissed.

We uphold both the conviction and the sentence.

Dated, Signed and Delivered at Nairobi, this 25th day of

July, 2013.

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A. MBOGHOLI MSAGHA **FRED A. OCHIENG**

JUDGE **JUDGE**