REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 149 OF 2009

ISAACK MUNYAO MUSEMBI…….. APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 1281 of 2007 in the Chief Magistrate's Court at Kibera – Mr. Maundu (SRM) on 1st April 2009)

JUDGMENT

1. The appellant, **Isaack Munyao Musembi** was convicted and sentenced to suffer death for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 11th May 2006 at Loresho within Nairobi, jointly with others not before the court, being armed with a dangerous weapon namely a pistol, they robbed Priscilla Tavia of one home theatre, one decoder, one Philips TV set, one phone 1100, assorted clothes, assorted shoes and jewellery all valued at Kshs.350,000/= and at, or immediately before the time of such robbery threatened to use actual violence against the said Priscilla Tavia.

2. The appellant subsequently filed an appeal in which, in sum, he argued that the possibility of error in the evidence of recognition loomed high, that the prosecution case was not proved and that his alibi defence was un-shaken.

3. Miss Wang'ele the learned state counsel opposing the appeal on behalf of the state, submitted that no grounds had been advanced to warrant the court to re-evaluate the evidence afresh, and that the prosecution had proved their case beyond reasonable doubt. Miss Wang'ele contended that it was procedural for the prosecutor to discuss the case with the witnesses before the hearing as he was required to hold pre-trial conferences with them.

4. Miss Wang'ele pointed out that when the prosecutor applied and was allowed to substitute the charge, the new charge was read out to the appellant and he responded to it afresh. She also averred that no prejudice was occasioned to the appellant by reason of being arrested by police officers from Spring Valley police station instead of those from Tala Police Station where he was and that the appellant's defence was considered and the provisions of **Section 169** of the **Criminal Procedure Code** complied with.

5. In re-evaluating the evidence afresh to reach our own conclusions as was our mandate as the first appellate court, we carefully directed ourselves regarding the conditions prevailing at the time of identification and the circumstances under which **PW1** said she had identified the appellant, to test them for possibility of error. We warned ourselves on the dangers inherent in placing reliance on the evidence of identification as a basis for conviction even if that identification is based on recognition. That is more so in a case such as this where there was a single identifying witness.

6. We are aware that the possibility of error may exist even where a witness or witnesses are honest, and it is immaterial that those witnesses were able to identify the appellant in the dock. We made reference to **Kiarie v Republic [1984] KLR pg. 740**, in which Kneller, Chesoni and Nyarangi JJA held *inter alia*, that:

> **"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken.**
>
> **Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction.**
>
> **The identification of an accused person in court by a complainant is almost worthless without an earlier identification parade."**

7. The evidence of recognition in this case was faulted by the appellant, hence our caution in re-examining it. That the need to exercise care even in cases of evidence of recognition exists, was stated in **R. V. Turnbull (1976) 3 ALL ER 549, page 557,** where the court stated that:

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

8. The main evidence of identification came from **PW1** the complainant. She was the house help in the home where the robbery occurred. According to her testimony she had worked in that home for one month and known the appellant who worked there as a gardener, for an equal amount of time. He was therefore someone she knew very well. One of the other robbers was the appellant's brother who did the family laundry three times a week, while the other two were strangers to her.

9. We are therefore, persuaded that there was no possibility of error in the identification of the appellant since the single identifying witness herein had known and worked with the appellant in the same compound for a month prior to the attack. The conditions under which the identification was done were favourable. The robbery occurred in broad day light, and lasted from 10.30 a.m. to 1.45 p.m. according to **PW1**. In our view in the circumstances set out above the witness had ample time to see and identify her attackers as they were in close proximity to her. The observation of the assailants by the witness was not hampered because, whereas she was gagged she was not blindfolded.

10. Having placed the appellant at the scene of the robbery we further scrutinized the evidence to establish what part if any he played in what transpired. **PW1**'s evidence was that it was one Joseph, a brother to the appellant who pounced on her, held her by the neck and dragged her to the servant quarters, as the appellant stood outside the servant quarters looking on. The appellant then followed her into the servant's quarters and kicked her on the left foot. It was the appellant who produced the cord with which **PW1**'s hands and legs were bound, and the tape with which her mouth was sealed.

11. It was also the testimony of **PW1**, that it was the appellant who ordinarily had custody of the keys to the gate and would open the gate to let in and out those who came to the compound. On the

date in question he had those keys in his hands as he observed **PW1** being dragged into the servant's quarters. The male guest whom **PW1** found in the appellant's room in the servants quarter, slapped her, urinated on her and threatened to shoot her with a pistol. The female guest taped her mouth shut.

12. **PW1** testified that she was dragged back into the main house after she was bound and gagged. She lay on the floor and watched and listened to the intruders as they went back and forth, removing her employer's household goods and personal effects that they intended to take away. They also took **PW1**'s mobile phone. They loaded the said goods into a motor vehicle and left. The appellant left together with the other three robbers. He was never seen again by the witnesses until ten months later on 2nd February 2007 when he was traced and arrested in Kangundo by the police.

13. The appellant in his unsworn testimony admitted that he had been employed as a gardener in the home where the complainant worked, in the month of April 2006. The appellant however raised an alibi defence in which he stated that he left employment when his employer's dog bit his hand, and he had to seek medical attention which cost him some Kshs.2,400/=. That his employer refused to pay the bill on his behalf, and instead released him on 20th April 2006 to go back home and recuperate. He was surprised when he was later arrested at his aunt's home and subsequently charged. He denied the offence.

14. We are aware that the appellant was under no burden to prove his alibi - see **Kiarie v Republic [1984] KLR pg 740**, where the Court of Appeal held *inter alia* that:

> **An alibi raises a specific defence and an appellant who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.**

15. We re-evaluated his defence and found that it was difficult to believe in the context of the rest of the evidence on record. His alibi defence was not put to **PW1** or **PW3** in cross examination, and in our humble view, coming at this late stage in the trial, it was an afterthought meant only to exonerate the appellant from blame. According to **PW6** the arresting officer, it was **PW3** the appellant's employer who produced a receipt for Kshs.2,400/= from Mecca Medical Centre at the time of the appellant's arrest as proof that the appellant had been in her employment and that she had settled his medical bill when he fell ill.

16. On whether the prosecution had proved the case of robbery with violence against the appellant, the evidence indicates that there were four assailants who included the appellant and who wielded a pistol. The said robbers used personal violence against **PW1** by assaulting, binding and gagging her. Proof of the assault was confirmed by **PW5**, Dr. Kamau who produced a P3 form duly filed, as evidence that **PW1** suffered injuries amounting to harm.

All the three ingredients necessary under **Section 296(2)** of the **Penal Code** were proved in this case, even though proof of any one set of ingredients would have sufficed.

17. The evidence of **PW1** was supported in some material parts by that of **PW2** who was sent home by his employer, **PW3**, to find out why **PW1** was not answering the phone on the fateful day. When he hooted at the gate, the appellant who was the gardener did not open the gate as was expected. While at the gate **PW2** heard **PW1** screaming from inside the house. **PW2** rushed to the estate barrier where he fetched a guard and also went to the nearby police station where they fetched a police officer. Back at the scene they found that the gate was not locked. When they gained entry into the house, they found **PW1**'s hands and feet still bound with a wire and her mouth taped over.

18. **PW3** confirmed that she was the employer of **PW1**, **PW2** and the appellant. She testified that on

the material date she sent **PW2** to check on her house when **PW1** did not answer her phone calls. She also stated that **PW2** called her from her gate and told her that he could hear **PW1** screaming from within. By the time **PW3** got home the police and the estate guard had already arrived and untied **PW1**. She however noted **PW1**'s swollen face and bloodied mouth. She also noted that the appellant was gone and so were her household goods listed in the charge sheet.

19. Having re-evaluated the evidence on record, we are satisfied that the prosecution proved their case against the appellant beyond reasonable doubt and that the learned trial magistrate was right in entering a verdict of guilt against the appellant. The appeal is therefore without merit and is dismissed.

It is so ordered.

SIGNED DATED and **DELIVERED** in open court this **24th** day of **September 2013**.

A.MBOGHOLI MSAGHA

JUDGE

L. A. ACHODE

JUDGE