REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.82 OF 2011

JOSEPH MWANGI KARIUKI…….…..... APPELLANT

VERSUS

REPUBLIC…….....……...RESPONDENT

(An appeal from original conviction and sentence in Nakuru Criminal Case No.1941 of 2010 by Hon. B.M. Atiang', Principal Magistrate dated 17th March, 2011).

JUDGMENT

1. The appellant was charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**
2. A brief summary of the particulars is that on the 5th day of April, 2010 near Tuskys Mid-Town Supermarket in Nakuru, jointly with others not before the court he robbed Samuel Kungu Ngandu of Kshs.3000/=, a mobile phone valued at Kshs.5,400/= and immediately before or immediately after the time of such robbery used actual violence to the said Samuel Kungu Ngandu, (P.W.1).
3. The appellant was convicted and sentenced to suffer death as provided by the law.
4. The appellant being aggrieved by the decision of Hon. B.M. Atiang', Principal Magistrate, preferred this appeal.
5. In his Petition of Appeal, the appellant listed six (6) grounds of appeal which are as listed hereunder:
    i. That the evidence produced by the prosecution was flimsy and unsubstantiated to sustain charge.
    ii. That the prosecution witness did not give statutory declaration before giving their statements.
    iii. That the learned trial magistrate erred in law and fact by failing to take into account the circumstances of identification.
    iv. That the theory of conspiracy between the appellant and the purported others to be involved in a robbery was not proved beyond any reasonable doubt.
    v. That the learned trial magistrate did not give a cogent reason of rejecting the appellant's defence.
    vi. That the appellant prays that the honourable court to find that justice was not done and consequently quash the conviction and set the sentence aside.

6. At the hearing of the appeal, the appellant chose to rely on his written submissions whereas learned prosecuting State Counsel, Ms. Indagwa made oral submissions.

ISSUE FOR DETERMINATION

7. After hearing the submissions, we find the following issue for determination:

Identification – whether the evidence of P.W.1 on identification was fraught with material contradictions and inconsistencies.

ANALYSIS:

8. This being the first appellate court, it is duty bound to re-assess and re-evaluate the evidence on record and arrive at its own independent conclusion. Refer to the case of **Okeno** V. **Republic,** 1972 EA 32.
9. It was the appellant's submission that the complainant (P.W.1) testified that the incident occurred at 6.30a.m. and the appellant contends that it was still dark making observation generally difficult.
10. The appellant further submitted that the trial magistrate erred in law in convicting him based wholly on the evidence of a single identifying witness without first cautioning himself. The appellant also challenges the evidence of P.W.1 on recognition and further contends that the trial magistrate erred in fact and in law in failing to take into account the circumstances of identification
11. The appellant urged the court to quash the conviction and set aside the sentence.
12. The appeal was not opposed by the State. It was submitted that the evidence of P.W.1 on identification had a lot of contradictions and inconsistencies and was not credible, in that P.W.1 had stated in evidence that he had been attacked from behind by a group of five (5) boys.
13. The boys held him from behind by the neck, robbed him and thereafter fled. Despite being attacked from behind, P.W.1 stated that he was able to identify the appellant.
14. The State, in conclusion submitted that the conviction was not safe and that the appeal be allowed.
15. Upon perusing the evidence on record, we note that the evidence on identification was that of a single witness. The single witness being the complainant (P.W.1). There was no corroboration of P.W.1's evidence on identification of the appellant, particularly when the attack took place.
16. In his judgment, the trial magistrate after considering the evidence of P.W.1, made the following observation:

> **"I do not have reasons to doubt the complainant's**
>
> **evidence….."**

17. From the court proceedings, the complainant's (P.W.1) evidence was that he was attacked from behind by five (5) boys who stole from him and ran away.
18. It was his evidence that it was the appellant who held him from behind by the neck and that as he turned, he recognized the appellant and that he had known him prior to the incident and that he also identified him by his clothing.
19. The complainant's identification was therefore that of identification by recognition.
20. This court makes reference to the renowned case of **Republic** V. **Turnbull and others**, (1976) All ER at page 552 where it is stated that evidence by recognition should be treated with great caution and the following observation was made by Lord Midgery, C.J:

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

21. The complainant (P.W.1) makes no mention of the duration of the attack nor the duration of his observation of the Appellant.
22. The court is persuaded by the aforementioned authority that identification by recognition ought to be treated with caution.
23. Going back to the evidence of P.W.1, he stated that after being attacked, his five attackers all fled.

24. The witness, P.W.1 testified that he returned to the crime scene escorted by two (2) Administrative Police and he further stated that they found all the five (5) boys at the scene and we quote as follows:

"When they saw us, they all ran away."

25. This piece of evidence is in contradiction to the evidence of P.W.2 who was one of the Administration Police Officers who had escorted P.W.1 back to the crime scene.
26. P.W.2 stated in evidence that there were three (3) boys and two (2) fled and under cross examination, he stated and we quote:

"…..P.W.1 pointed at you, you did not run

away……."

27. The evidence of P.W.3, who was the other Administrative Policeman, was that there were three (3) boys at the crime scene. Two of the boys ran away but the appellant remained.
28. Meaning that the person they arrested did not flee whereas, P.W.1 had testified that the appellant fled.
29. Upon perusal of the court record, we find no mention of any description or details of the appellant's appearance nor of the clothing the appellant wore on that material day, by P.W.1, in his evidence.
30. We also note that P.W.1 did not give the Administrative Police Officer any prior description of the Appellant's appearance or clothing prior to the arrest.
31. We also note that P.W.1's evidence is not corroborated by P.W.2 and P.W.3 (the APs). P.W.1 stated that all the five (5) boys fled, but no mention is made as to who then pursued the appellant and arrested him.
32. In their evidence, both P.W.2 and P.W.3 stated that the appellant was found at the crime scene and made no attempt to flee or run away.

FINDINGS

33. After an overall evaluation of the evidence, we find that the conviction was solely based on identification by a single witness. There was no corroboration of the evidence of P.W.1 and nothing that had been stolen from P.W.1 was found or recovered from the appellant.
34. We find that P.W.1's evidence has material contradictions and inconsistencies in the number of the assailants, the mode of arrest and that the identification by recognition is not supported by any cogent evidence.
35. It is trite law that where any doubt arises, the appellant should be given the benefit of the doubt.
36. We therefore find that the prosecution failed to prove beyond reasonable doubt that the appellant was positively identified by P.W.1 as being one of the attackers/robbers.
37. We also find that the trial magistrate failed to caution himself before proceeding to convict the appellant.
38. For the reasons, stated above, we find the conviction to be unsafe and find that Ground of Appeal No.(iii) of the appeal has merit and is hereby allowed.

CONCLUSION

39. The conviction is hereby quashed and the sentence is hereby set aside.
40. The appeal has merit and is hereby allowed.
41. The appellant is to be set at liberty, forthwith unless otherwise lawfully held.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 5th day of September, 2013.

R. P. V. WENDOH

JUDGE

A. **MSHILA**
B. **JUDGE**