REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 114 OF 2009

JORAM HADHARI……..……………………………...……………………………..APPELLANT

VERSUS

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

(*Being an appeal from the original conviction and sentence in Criminal Case No.3586of 2008 Republic vsJoramHadhariin the Resident Magistrate's Court at Eldoret by D. K. Kemei, Senior Resident Magistrate on 15th July 2009*)

JUDGMENT

1. The appellant was convicted on a count of attempted robbery with violence contrary to section 297 (2) of the Penal Code. He was sentenced to death. The appellant has appealed against his conviction and sentence.
2. The particulars of the charge were as follows:

> *"That on 27th July 2008 at King'ong'o village in Uasin Gishu District within the Rift Valley Province, jointly with others not before the court, with intent to steal from Rajab Makokha and at or immediately after such attempted robbery with violence wounded the said Rajab Makokha".*

3. The petition of appeal was filed on 23rd July 2009. It raises six grounds of appeal. The principal grounds urged can be condensed into five. First, that the learned trial Magistrate erred in relying on the testimony of single identifying witness; secondly, that the evidence tendered was inconsistent, contradictory and uncorroborated; thirdly, that conditions for identification were not favourable; fourthly, that the appellant's defence was not taken into account; and fifthly, that police investigations were incomplete or shoddy. In a synopsis, the appellant's case is that the capital offence was not proved beyond reasonable doubt.
4. The State has contested the appeal. The case for the State is that the evidence tendered at the trial proved the charge beyond reasonable doubt.Regarding identification of the appellant, the State submitted that there was sufficient moonlight on the material night. The appellant was armed with offensive weapons; a knife and an iron bar. It was submitted that the defence put forth by the appellant was not convincing.In a nutshell, the State submitted that the appeal lacked merit and should be dismissed.
5. This is a first appeal to the High Court. We are required to re-evaluate all the evidence on record and to draw our own conclusions. In doing so, we have been careful because we have neither seen nor heard the witnesses. See _Njoroge v Republic_ [1987] KLR 99, _Okeno v Republic_ [1972] EA 32, _Kariuki Karanja v Republic_ [1986] KLR 190, _Felix Kanda v Republic_ Eldoret, High Court Criminal Appeal 177 of 2011 (unreported).

6. The complainant (PW1) lives in King'ong'o. On 27th July 2008 at about 8.00p.m, he was walking home. He was in the company of Mary Kadenyika (PW2). Two "boys" overtook them and stopped 25 metres ahead. One, whom the complainant identified as the appellant, had an iron bar. He hit him on the back. The other one had a knife and stabbed him on the left hand, head and back. He testified that the appellant *"had an intention of robbing me a [sic] mobile phone but failed to take [it]"*. The complainant fell down and became unconscious. PW2 later came to his rescue. The screams by PW2 attracted some people. The complainant was taken to hospital. PW5, Dr. Imbenzi, produced the P3 classifying the complainant's injuries as harm. He confirmed the complainant had a cut wound on the head, four stab wounds on the back and one on the upper left arm. PW4, a police constable, produced the metal bar and kitchen knife recovered from the appellant. Those items were recovered by PW3, a village elder, who responded to the screams. He and members of the public went to the appellant's house. They arrested him and recovered the offensive weapons.PW1, PW2 and PW3 did not identify the weapons at the trial. Like we have said, they were produced by PW4, the investigating officer, at the end of the trial.
7. We have also considered the defence proffered by the appellant. He testified that at about 7.00a.m the next day he was heading to work in Eldoret. He encountered a group of people. One was PW3 who asked him where he stays and where he was headed. The appellant said PW3 was not happy with his answers and accused him of being rude and a drunk. They assaulted him. They arrested him and took him to Baharini police Station. In a synopsis, the appellant denied committing the offence.
8. In the judgment, the learned trial Magistrate found that failure to identify the metal bar and kitchen knife was not "fatal". With great respect, we disagree. PW3 said he and the public recovered the weapons from the appellant's house. PW1, PW2 and PW3 did not identify the exhibits produced by PW4, the investigating officer, at the tail end of the prosecution's case. PW4 first interviewed the complainant on 5th August 2008, a week after the incident. There are serious inconsistencies in his evidence. He said the following-

> *"The accused was arrested on the spot with the iron bar and a kitchen knife. I have the same in court and I want to produce the same as exhibits"*

9. First, the appellant was not arrested *on the spot* with the metal bar and knife. PW3 stated that on the material night, he and other people went to the scene and confirmed the attack on PW1 and PW2. The next day, 28th July 2008, at about 8.00a.m, they arrested the appellant, went to the appellant's house and recovered two "bloodstained" metal bars and a kitchen knife. Secondly, the complainant, PW2 and PW3 all failed to identify the weapons in court. That lacuna could not be cured by the investigating officer who said he received the weapons from PW3. Fundamentally, there was then no *direct* connection between the weapons and the appellant. There was no medical analysis to show that the weapons were used in wounding the complainant. The learned trial Magistrate in fact noted the loophole. He said that *"although no bloodstains were taken for analysis or DNA profiling…..the evidence nevertheless placed the appellant squarely at the scene of crime"*. In our view, once the chain *linking* the accused to the weapons was broken, it created some *doubt* in favour of the appellant.
10. The offence required proof of an intention to steal. PW1 merely stated that the intention of the appellant was to steal his mobile phone. Why the mobile phone and not anything else in possession of the complainant? It may well be presumed from the circumstances that the violence meted out upon the complainant was *geared* towards theft. The learned trial Magistrate stated as follows-

> *"The complainant and his companion stated that the accused and his companion had the intention of robbing him of a mobile phone and other properties but the complainant put up a gallant fight for his life and the attackers finally failed to accomplish the mission to steal any property from him….."*

11. PW2 never stated in her evidence in chief or cross-examination about an intention to steal the mobile phone or other property from PW1 or herself. It was thus a misdirection to say that both PW1 and PW2 testified about that intention. To be fair, PW2 did state that she saw the appellant

searching the pockets of PW1. That is doubtful. When they were attacked PW2 took off. PW1 fell and became unconscious from his injuries. It was at night. It is doubtful that PW2 would stand there to watch the appellant search the pockets of the complainant. The finding by the learned trial Magistrate that the attackers failed to accomplish the mission due to the gallant fight by PW1 is not backed by the evidence. Like we stated, it is possible that the appellant intended to steal. However, there is no room for assumptions in a criminal trial. See *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).

12. We shall now turn to the identification of the appellant. The offence occurred at night at about 8.00p.m. PW1 and PW2 stated that there was bright moonlight. They did not know the appellant. When the appellant and his accomplice passed them, they greeted them. PW1 testified that in the course of the struggle, he identified the appellant. When the appellant jumped across a fence, his green jacket was trapped. It helped PW3 and the public to identify the appellant. When PW3 went to the appellant's house, they found the bloodstained knife and metal bars. We have already stated that the weapons were not identified in court or any forensic examination done on the bloodstains. From those facts, the complainant was identified from the moonlight and the green jacket. The appellant and his accomplice were said to have been walking behind PW1 and PW2. When they reached them they greeted them and passed them. They were 25 metres ahead. It was at night. They were all strangers to each other. The attack then occurred. PW2 took off. We are unable to say that the lighting conditions of the moon were favourable under those circumstances to identify a stranger. See *Abdalla Bin Wendo v Republic* [1953] EACA 166, *Joseph Ngumbao Nzalo v Republic* [1991] 2 KAR 212, *Obwana and others v. Uganda* [2009] 2 EA 333 at 337, *Richard Kinyuru and another v Republic* Nairobi, High Court Criminal Appeal 290 of 2009 [2012] eKLR, *Salim Swaleh Mapinga v Republic* [2013] eKLR.

13. That was not all. There were inconsistencies in the evidence of identification. PW4, the investigating officer, said that PW1 told him *"he positively identified [appellant] and another suspect. The source of light was a bright security lights [sic] along the road"*. That is inconsistent with the evidence of PW1 and PW2. PW4 testified that when the complainant and PW2 raised an alarm *neighbours* came to their rescue. PW1 testified that when PW2 raised an alarm, no neighbour came out.PW2 in fact testified that the neighbours came "*after the two suspects had taken off"*

14. The appellant was not arrested the same night. After the green jacket was linked to him, PW3 said that he and other people went to the appellant's house on 28th July 2008 at about 8.00a.m. The offence had occurred on the night of 27th July 2008 at about 8.00pm. That is consistent with the appellant's defence that he was arrested early the *next* morning at about 7.00a.m by PW3 and other people. In short, the identification turned largely on the green jacket and what the complainant and PW2 saw in the moonlight. We do not think in the totality of the evidence that those conditions were favourable. In *Wamunga v Republic* [1989] KLR 424**,** the Court of Appeal held as follows-

> *"It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."*

15. The key ingredients for the felony of attempted robbery with violence are found in section 297 of the Penal Code. It provides as follows-

> *"(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years.*
>
> *"(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats,*

strikes or uses any other personal violence to any person, he shall be sentenced to death".

16. From our reconsideration of the evidence we have found that there was no proof of an *intention* to steal a mobile phone or any other property belonging to the complainant. Fundamentally, there is no clear evidential *nexus* between the offensive weapons and the appellant. The offensive weapons were not identified by PW1, PW2 or PW3 in court. PW4, the investigating officer who produced them, could not connect them to the appellant or his accomplice. No forensic tests were done to connect the bloodstains found on the weapons to the complainant. We have also found that the conditions of identification were less than favourable for total strangers in the course of a vicious and bloody struggle. In addition, we have found serious inconsistencies between the evidence of key witnesses on the occurrence of the offence and identification of the appellant. It then follows as a logical corollary that the key ingredients of the offence of attempted robbery with violence were not proved beyond reasonable doubt.
17. In the end, this appeal is allowed. The conviction and sentence against the appellant is hereby quashed and set aside. The appellant shall be set free forthwith unless held for some other lawful cause. It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 29th day of November 2013

FRED A. OCHIENG **G.K. KIMONDO**

JUDGE **JUDGE**

Judgment read in open court in the presence of

Mr…………………………………………………for the appellant.

Mr……………………………….……………..….…for the State.

Mr…………………………………………………….. Court Clerk.