REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

HIGH COURT CRIMINAL APPEAL NO. 339 OF 2013

(Appeal from the Original Conviction and Sentence in Criminal Case No. 2676 of 2008 dated 5th February 2010 in the Chief Magistrate's Court at Thika by Hon. L. W. Gicheha - SRM)

MARTIN MWANGI NDUNGU……..APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGEMENT

The Appellant Martin Mwangi Ndungu was convicted by the Hon. SRM Gicheha for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was tried and upon conviction sentenced to suffer death.

He has appealed to this Court against the said conviction and sentence. The Memorandum of Appeal had the following grounds:-

1. That the learned trial Magistrate erred in law and facts when she convicted the Appellant in this case while relying on a point of recognition without considering that there was no light at the scene of the alleged crime.

2. That the learned trial Magistrate erred in law and facts when she convicted the Appellant in this case without considering that he had a grudge with PW1 who is his relative and that could have led to PW1 planning a case on Appellant.

3. That the learned trial Magistrate erred in law and facts when she convicted the Appellant in this case without considering that the exhibits of cap, wallet and spectacles were not recovered in Appellant's possession and after all they were recovered at complainant's compound.

4. That the learned trial Magistrate erred in law and facts when she convicted the Appellant in this case without considering that there was no watertight evidence that could lead to the Appellant's conviction.

He was furnished with the certified proceedings and filed Amended Grounds of Appeal. He also filed Written Submissions. The Amended Grounds of Appeal were:-

1. **That**, the learned trial magistrate erred in both law and facts when he convicted the Appellant by relying on the evidence adduced by both PW1 and PW2 that of the identification/recognition of voice without the Court considering that there wasn't any voice identification made by the Prosecution side as well also the circumstances at the *locus in quo* was not positive.

2. **That**, the learned trial magistrate erred in both law and facts when he convicted the Appellant without finding out that Appellant never took the plea which was contrary under Section 207 of the Criminal Procedure Code.

3. **That**, the learned trial magistrate erred in both law and facts when he convicted the Appellant by relying on contradicted evidence that was adduced by the prosecution witnesses.

4. **That**, the learned trial magistrate erred in both law and facts when he convicted the Appellant without considering that the charge sheet was defective.

5. **That**, the learned trial magistrate erred in both law and facts when he convicted the Appellant without considering that the prosecution side failed to prove their case beyond all reasonable doubts.

6. **That**, the learned trial magistrate erred in both law and facts when he convicted the Appellant while relying on the P3 from without finding out that the same was ought to have been disregarded from the evidence as the said P3 form had no names of the (bearer) the complainant.

7. **That**, the learned trial magistrate erred in both law and facts when he convicted the Appellant without properly explaining the reasons for its rejection and thus violated the law provision under sec.169 (i) of the Criminal Procedure Code

The Appellant appeared at the appeal on 14th October 2013 and urged his Appeal. The State was represented by Mr. Okeyo.

The Appellant stated that the charge was defective in that it did not mention the type of weapons used in the incidence of the robbery and that was contradicted by the evidence of in chief of the prosecution witnesses. He stated that P3 form was produced by a clinical officer who was incompetent to produce it in terms of Section 48 of the Evidence Act. The Appellant further submitted that PW2 contradicted himself when the case started *de novo* as his testimony was different when the case was restarted. No inquiry was made as to the nature of lighting. The Appellant stated further that PW2 contradicted himself as to where he found the Appellant. The other points raised on appeal were that the identifying witness was not clear whether he recognised the clothes the Appellant was wearing during the night including the KTDA dustcoat or whether he recognised him as a neighbour. Finally, the Appellant submitted that PW5 elaborated that PW2 was able to recognise the voice however he was not clear on what the Appellant said, in what language, the frequency and number of times he heard the voice. The Appellant referred us to the case of **Paul Mwathi Sungu v Republic [2005] eKLR** in support of his assertions.

Mr. Okeyo for the State opposed the Appeal and indicated that the Appellant had been charged with robbery with violence of a mobile phone Nokia 2300, spectacles a cap and wallet belonging to the complainant. The incident took place on the night of 2nd July 2008 at 10.30pm and the conviction was mainly based on recognition. The Appellant and complainant were close relatives and the complainant has known the Appellant since childhood. During the day on the material day, the complainant and the Appellant were together. He was able to see the clothing the Appellant wore which clothing the complainant was able to recognise later when he saw him. The witness was categorical one of the clothing the Appellant wore was an overall with distinct mark. It had initials KTDA. That particular overall was recovered from the house of Appellant by PW5 when a search was conducted. During the search the Appellant never disowned that clothing. Apart from the clothing, the circumstances when the offence took place that particular night there was full moonlight. That is captured in the evidence and the scene of attack was close to a house which was well lit and by electricity. These provided the complainant with an opportunity to recognise the Appellant's fase. During the proceedings in the lower court the Appellant was given an opportunity to explain whether there existed any grudge between him and his uncle the complainant. He categorically denied the existence of any grudge. This proves that no reason existed to frame the Appellant. Mr. Okeyo further submitted that the charge sheet was properly framed as per the law. In any case, if the Appellant had

any issue with the Charge sheet he should have raised it at the first instance during the trial. On the issue of the clinical officer PW2, the State Counsel stated that the clinical officer was the one who treated the complainant and he was the maker of the document he produced. In conclusion the State held that taking into account the circumstances there could not have been a mistaken identify regarding the Appellant. He urged that the Appeal lacked merit and the sentence meted out was lawful and thus urged that this bench dismisses the Appeal and upholds the conviction and sentence.

The trial proceeded before Principal Magistrate A. K. Kaniaru (as he then was) and was later taken over by Senior Resident Magistrate L. W. Gicheha. After the explanation under Section 200 of the Criminal Procedure Code the Appellant opted to have the case start *de novo*. In general usage, **de novo** is a Latin expression meaning from the beginning, afresh, anew, or beginning again. In the context of the law it means to start the case afresh. It is as if the initial trial had not taken place.

The Court below when hearing the case afresh had no business referring to the previous testimony on record. The learned Magistrate did not err by not considering the previous testimony of the witnesses for the prosecution. It is not as if the Appellant had had two trials. He had one trial before the Hon. Gicheha. If he had opted for the case to continue from where he the matter had reached and recall the witnesses he could attack the contradictory evidence adduced since the evidence would be part of the same trial. A *de novo* trial is a fresh trial. The learned trial Magistrate heard the complainant and all the other witnesses for the Prosecution who were presented by the State and determined the case. The Appellant was recognized by the complainant and not identified.

Identification falls under the category of facts that establish the identity of the suspect or accused person. Visual identification can be done in two ways. It can be either recognition or identification.

Recognition is the identification of a person from previous encounters or knowledge. On the other hand identification is the action or process of identifying someone and is a means of proving a person's identity, it could be distinguishing marks such as a scar or physical deformity, gait, height, facial expression, colour of hair, lips, eyes, tattoos etc.

The main distinction between recognition and identification is that recognition is more reliable than mere identification. Where the complainant had recognized the accused, then it would constitute good evidence of identification.

In the case of identification of the accused by one or more witnesses, it is useful to bear in mind the guidelines laid down in the case of **R v Turnbull 1976, 63 Cr App R 132** which have been consistently applied in England and in a number of Commonwealth countries.

The guidelines in Turnbull are aimed at assessing the quality of the identification. The court said:

> *"In our judgement when the quality is good as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the Jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it.*
>
> *When in the judgement of the Trial Judge, the quality of the identifying evidence is poor as for example when it depends solely on a fleeting glance, or on a longer observation made in difficult conditions, the situation is very different. The Judge should then withdraw the case from the Jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification".*

It is a well settled principle in our criminal jurisprudence that evidence of visual identification in criminal cases could lead to the miscarriage of justice if not carefully tested. A court must always satisfy itself that in all circumstances it is safe to act on such identification.

In the case of ***Wamunga v Republic [1989] KLR 424***the Court of Appeal held at page 426 as

follows:-

"..it is trite law that where the only evidence against a defendant is evidence 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 possibility of error before it can safely make it the basis of a conviction."

In the case before the learned trial Magistrate, the Appellant was **recognised** by the complainant who knew him well. They had even met earlier during the day. The Appellant was wearing a dustcoat with the initials KTDA. This dust coat was recovered from the house of the Appellant when a search was conducted. The complainant PW2, a teacher, was categorical that the Appellant accosted him while he was returning home at night. At the time of the attack, the Appellant was in the company of a person whom PW2 could not identify. They both attacked PW2 and dragged him into the coffee bushes and in spite of screams no one came to PW2's rescue. The two asked PW2 for money and the Appellant is the one who cut PW2 on the head. They also fractured PW2's hand. They took a Nokia phone model 2300 valued at 5,000/-, a cap, a wallet and spectacles.

In this case the circumstances of identification were free from possibility of error as the Appellant was seen and heard by PW2 at close proximity during the violent attack. The identification was a sound basis for the conviction.

The offence is grave and carries the death sentence. The three ingredients for a case of robbery with violence were present.

1. The Appellant was armed with a dangerous or an offensive weapon or instrument to wit a panga;

2. He was in company of another person whom PW2 could not identify; and

3. At the time of the robbery, the Appellant wounded and beat the complainant PW2. The Appellant used actual violence on the victim.

In view of the foregoing and having carefully considered the Grounds and Petition of Appeal as well as the Amended Supplementary Grounds of Appeal we find that the learned trial Magistrate did not err either on the law or facts. The conviction was safe and the sentence lawful. We find no merit in this Appeal and dismiss it in its entirety.

Dated, signed and delivered this 28th day of November 2013

Maureen Onyango

JUDGE

Nzioki wa Makau

JUDGE