REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 157 OF 2011

LESIIT, GIKONYO JJ

PETER MWIRIGI KITHIA…….……...APPELLANT

V E R S U S

REPUBLIC……..……RESPONDENT

(*Appeal from a judgment of Chief Magistrates Court at Meru (R. B. Ochieng Principal Magistrate) dated 28.10.2011)*

JUDGMENT

1. The Appellant PETER MWIRIGI KITHIA was charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. He was convicted of the offence and sentenced to death. The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal.
2. The Appellant has raised seven (7) grounds of appeal in his petition of Appeal which are the following:

1. **That the trial magistrate erred in law and fact in convicting the appellant when there was no sufficient evidence tendered thus a miscarriage of justice was occasioned.**
2. **That the trial magistrate erred in law and fact in relying on the evidence of the complainant who was the only eye witness as the other witnesses arrived at the scene when the alleged offence had already been committed and as such no other witnesses, witnessed that the appellant robbing the complainant violently while armed and thus a miscarriage of justice was accusations.**

3. **That the trial magistrate erred in law and fact in relying on the evidence of PW2 and 3 and to convict the appellant when they never witnessed any crime being committed.**

4. **That the trial magistrate erred in law and fact in failing to analyze the identification of the appellant s the alleged offence was said to have been committed during the night as the only light evidence is said to be passing motorists and cannot be said to be free from error though the complainant alleged never lost sight of the appellant.**

5. **That the trial magistrate erred in law and fact in convicting and sentencing the appellant for an offence of robbery with violence when there was no weapon was recovered from him.**

6. **That the trial magistrate erred in law and fact in convicting the appellant on unproved charge and imposing an erroneous sentence and thus the evidence tendered does not meet the ingredients of the charge herein.**

7. **That the conviction and sentence is against the weight of evidence.**

3. The Appellant was represented by Mr. Omari Advocate. Counsel relied on the Appellants seven grounds of appeal. Mr. Omari urged that the evidence of identification which the learned trial magistrate relied on was not free from the possibility of error being the evidence of a single witness, PW3 and the incident having occurred at night. Counsel urged that trial magistrate concluded that the evidence of prosecution in relation to the point of attack was sketchy. Counsel also urged that none of the stolen items were recovered on the Appellant. Counsel relied on five cases which we shall consider.
4. Mr. Moses Mungai, State Counsel represented the state in this appeal. He conceded the appeal on grounds the lighting conditions at the scene were poor for positive identification and secondly on grounds nothing was recovered from the Appellant. Counsel also urged that complainant did not produce a receipt for his phone and that phone found with the Appellant was not an exhibit and concluded that it was not clear who was the thief between the two.
5. The facts of the prosecution case are that the complainant PW3 was walking home from Meru Town at around 8 pm when he noticed 5 people following him. He was ordered to stop. He decided to run at top speed. He fell down as he ran and was grabbed, attacked and injured on his left eye brow and hip. He received a cut and was hit with a stone on the head. PW2 who treated him and filled the P3 form confirmed the injuries. The complainant said that he grabbed one of his attackers after raising an alarm and held onto him until help in form of PW1 and other cause.
6. The Appellant in his defence by way of an unsworn statement denied committing the offence as alleged and said the case was fabricated and nothing was recovered from him.
7. We are a first appellate court. We are mandated to re-evaluate and re-analyze the entire evidence adduced by both the prosecution and defence and to draw our conclusions while bearing in mind that we neither saw nor heard any of the witnesses giving due allowance. We have complied with our mandate. We are guided by the court of Appeal case of **OKENO VS REPUBLIC 1972 EA 32** in which the duties of a first appellate court are given as follows:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."**

8. The learned trial magistrate in his judgment was clearly impressed by the fact the complainant had grabbed the Appellant at some point during or after he was robbed and had the following to say.

> **"Although the evidence of the said prosecution witnesses as to type of light intensity and location of source in relation to point of attack was sketchy at best the fact that the complainant held on to the accused from the time of attack to the time help arrived and the confirmation by complainant and PW1 that the accused indeed attempted to avoid arousing suspicion by claiming it was the complainant who had robbed him of his phone but was shortly found to be lying when his phone rang in his pocket when dialed remedied the unfavourable conditions for identification that might have existed at the time of the incident. By his unsuccessful attempt to falsely**

implicate the complainant before his rescuers the accused unwittingly demonstrated a guilty mind. The complainant and his witness (PW1) gave corroborated evidence on the sequence of events and their evidence without doubt pointed to the accused person as one of the perpetrators of the crime.

9. From the observation of the learned trial magistrate we find that he was very clear about some facts. He was clear that the complainant grabbed the Appellant after he was both robbed and injured. The learned trial magistrate was also clear that the evidence in regard to the nature and intensity of the light and its distance from the scene of attack was sketchy.
10. We have considered the nature of the injuries the complainant suffered which was a cut on the left eye brow among others. We find that having had a cut on his left eye there is a possibility the injury interfered with his ability to see or concentration. The fact the complainant grabbed the Appellant after he was injured is a matter the learned trial magistrate ought to have considered. This is because it was important to consider whether the person the complainant grabbed was indeed one of the five men who attacked him.
11. The scene took place on a public road at around 8 pm. It is a place where one expected to find people walking. That is in fact how PW1 and those who ran to the scene to answer the complainants distress call happened to be near the scene when the complainant shouted for help.
12. The evidence of PW1 is clear that at the time he went to the scene he found the complainant and Appellant struggling and accusing each other of stealing. PW1 did not witness the robbery. He could therefore not say with certainty that the Appellant was one of those who robbed the complainant. PW1 could also not say with certainty that the complainant grabbed one of his attackers before he escaped with his accomplices.
13. It is the learned trial magistrate's finding that the evidence of the lighting at the scene was sketchy. Given that finding it follows that the possibility of the complainant having grabbed an innocent passer by cannot be ruled out.
14. We could not fail to observe the evidence of PW1 and the complainant that when members of public, including PW1 reached the scene, both the Appellant and complainant were asked to give their mobile phone numbers which they did. Both numbers were dialed. While the complainant's number went unanswered, the Appellants rang in his pocket.
15. What we do not understand is how PW1 and others concluded that the Appellant was one of those who robbed the complainant. The phone ringing in his pocket was only proof of one point, that he had given his genuine phone number which means he was honest at least about his phone number.
16. The leaned trial magistrate considered this evidence and concluded.

> "**However, considering his evidence and that of his witness that he provided his phone number to his rescuer who on dialing some could hear the phone ring insistently without being answered. I believe their evidence entirely and on the basis of the same find the evidence of the said two prosecution witnesses sufficient to prove theft of complainants cash and cell phone"**

17. We find that the learned trial magistrate misdirected himself of the importance of the prosecution evidence especially the significance of the phone numbers. The learned trial magistrate relied on conjecture and led to among conclusion that the Appellant was one of five men who robbed the complainant. We find that the evidence against the Appellant was that of suspicion and however strong, suspicion cannot found a conviction.
18. The circumstances surrounding the Appellants apprehension by the complainant were inconclusive for reason of poor lighting, fact the complainant had been injured on one eye and the fact that the scene of attack was public road. We find that the prosecution evidence fell far bellow proof beyond any reasonable doubt required of criminal Cases. The conviction was in the circumstances unsafe.
19. We find merit in the Appellants appeal and allow it. Consequently we quash the conviction and set aside the sentence.
20. The Appellants should be set free forthwith unless he is otherwise lawfully held.

DATED SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF NOVEMBER, 2013.

J. LESIIT

JUDGE.

F. GIKONYO

JUDGE.