IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NUMBERS 322 AND 323 OF 2008

(From original conviction and sentence in Makadara Chief Magistrate's Court Criminal Case No. 2979 of 2007, K Muneeni, SRM on 18th September 2008)

JACKSON WANYOIKE NJUGUNA & ANOTHER……APPELLANTS

VERSUS

REPUBLIC……...…..……..….RESPONDENT

JUDGEMENT

The appellants in this appeal, **Jackson Wanyoike Njuguna** and **Joseph Maina Njoroge,** were charged in the Chief Magistrate's Court at Makadara in Criminal Case No. 2979 of 2006 with one count of Robbery with violence contrary to section 296(2) of the Penal Code and were convicted of the same and sentence to suffer death. The particulars of the charge were that the appellants on the 25th Day of June 2007 at Matopeni Village Kayole within Nairobi area, jointly with another not before court being armed with offensive weapons namely iron bars robbed **Anthony Muchiri Kariuki** a mobile phone make SAGEN-3020 valued at Khs.5,000/= and cash money 150/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Anthony Muchiri Kariuki**.

Being dissatisfied with the conviction and sentence, the two appellants, **Jackson Wanyoike Njuguna** and **Joseph Maina Njoroge**, filed Criminal Appeal Nos. 322 and 323 of 2008 respectively which appeals were consolidated under Criminal Appeal No. 322 of 2008 and were heard together with the two appellants being the 1st and 2nd appellants respectively.

The 1st appellant appealed against the same on the following grounds:

1. **That, the learned trial magistrate erred in law and fact when he convicted me in the instant case yet failed to find that the evidence adduced was insufficient as vital witnesses did not testify.**
2. **That, the learned trial magistrate erred in law and fact when he convicted me in the instant case yet failed to find that the alleged identification by recognition was not free from error or mistakes as the same was not affirmatively supported by a promptly and a cogent firstly report.**
3. **That, the learned trial magistrate erred in law and fact when he convicted me in the instant case yet failed to find that the evidence on the record remained in consistent.**
4. **That, my defense was erroneously rejected as the crown case was weak hence reasons unfounded.**

On his part the 2nd appellant raised the following grounds:

1. **THAT the trial magistrate erred both in law and fact when he convicted by putting reliance**

on the evidence of visual identification/recognition yet failed to find that the same wasn't affirmatively supported by the provisions of section 137(d) CPC.

2. **THAT the trial magistrate erred in law and fact when he acted on insufficient evidence to convict as vital witnesses did not testify in the instant case contravening section 150 CPC.**
3. **THAT the trial magistrate erred in law and fact when he relied on contradictory and inconsistent testimonies that could not base and sustain a safe conviction.**
4. **THAT the trial magistrate erred in law and fact when he dismissed my defence c/s 169/1 CPC**

Briefly the evidence presented before the trial court was as follows. PW1, **Anthony Muchiri**, a soldier based at Moi Air Base Eastleigh was on 25th June 2007 at 5.30 am going to work when near Matopeni Primary School he met with the apelants who asked him where he was going and demanded money from him. He gave them Kshs 150/- and they demanded his phone which he also gave to them but when he asked for his Sim card they declined but instead threw something at him which hit him on the face removing his right eye. He was admitted in Hospital where he was fitted with an artificial eye. According to him the 1st appellant whom he knew by name was known to him for one year while he used to see the 2nd appellant at Matopeni. He however did not know the third person. He relayed the information to his neighbours and the appellant were arrested the same day. PW2, **Dennis Maweu**, was a neighbour to the appellants and was alerted by a scream from a woman known as **Mama Kariuki** that her husband had been stabbed by thugs. He saw the man bleeding and he was shown the accused by Masai. The 1st appellant said he had given the phone to **Ngige** to sell in Njiru. The second appellant according to him was found in the company of the 1st appellant and he had known the 2nd appellant for 5-6 years. PW3, **PC Nicholas Muli**, was in the office on 25th June 2007 when the appellants were brought to him by members of the public and he put them in the cells. However, there was no exhibit that was brought to him. PW1 was examined by PW4, **Dr. Zephania Kamau**, for assault and he produced the P3 form.

On his part the 1st appellant testified that on 25th June 2007 he went to work and later in the day when he went to take tea he saw a crowd beating up a man-**Leishetan Lampate** and on inquiring what the matter was about he was told that he was in the group and was told to sit down. He was however saved by a woman who told the crowd to take him to the police station where he was booked and was later charged in court. According to him, he saw the complainant for the first time in court. In cross-examination he however admitted that the complainant had known him before as he had worked for him. He however denied being at the scene. The 2nd appellant testified that on the same day of the incident a lady colleague of his had been arrested and he went to see her at Kayole Police Station and while they were waiting for the **OCS, Maweu** and others asked him to show the four young men. At 5.00pm **Maweu** came with three young men who arrested him and the owner of the bar and they were taken to the victims who denied that they were the ones. They were then taken to the police station where he found the 1st appellant. The employer was however released after he paid Kshs 15,000/- to the police officers. Similarly, **Leishatan** was released. According to him he was never known to the complainant before the incident.

In his judgement the trial magistrate while warning himself of the dangers of relying on the evidence of a single witness to convict the appellants found that the appellants were well known to complainant before the attack. He further found that there was full moon and there was no history of bad blood between the appellants and the complainant. He was therefore satisfied that the appellants were positively identified and found them guilty as charged, convicted them and sentenced them accordingly.

Since the appellants have come before us by way of a first appeal, we are, by law, obliged to re-assess and re-evaluate the evidence ourselves and come to our own independent decision on the various issues raised before us, of course not ignoring the findings and conclusions made by the learned trial Magistrate who was able to physically see and hear the witnesses who testified before him. See **Okeno vs. R [1972] EA 32.**

The first issue raised by the appellants was on identification. From the evidence on record, it is clear that the case before the learned trial Magistrate was a case not of identification but that of recognition since PW1 testified that he knew the appellants before the date of the incident. In cross examination, the 1st

appellant admitted that PW1 had known him before and that he had worked for him. The appellant however submitted that from PW1's evidence, PW1 did not know the 1st appellant. That however is not correct since the proceedings clearly show that the statement "I do not know you" was uttered by the 1st appellant to the witness. In his judgement the learned trial Magistrate warned himself of the danger of convicting based on the evidence of a single identifying witness. As was held in ***Anjononi & Others vs The Republic [1980] KLR 59***:-

> ***"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

In Stephen Karanja vs. Republic [2011] eKLR, the Court of Appeal held:

> **"The evidence of the complainant was that the robbery took place at about 8:00 a.m. hence in broad daylight. The appellant was known to the complainant prior to that day. This makes the evidence of identification, although by a single witness, free from any possibility of error as it was, indeed, evidence of recognition."**

In this case the robbery took place at 5.30 am and according to him there was moonlight. PW1 knew the appellants before the incident and the same day he informed his neighbours about the incident and the appellants were arrested the same day. Accordingly there was evidence on record upon which the learned trial Magistrate could properly make a finding that the appellants were properly identified.

It was further submitted that in light of the failure to call PW1's wife to give evidence, that failure was fatal to the prosecution case. However there was no evidence that PW1's wife did witness the robbery. What was on record was that she was seen by PW2 screaming that her husband had been robbed. Her evidence in our view would not have added much value to the prosecution case. With respect to the omission to call the people who arrested the accused, the Court of Appeal in Benjamin Mbugua Gitau vs. Republic [2011] eKLR expressed itself as follows:

> **"It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see *section 143* Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys."**

Similarly, we find that the failure to call the members of the public who arrested the appellants caused no prejudice to either the appellants or the prosecution. Since there is no particular number of witnesses who are required for proof of any fact unless the law so requires we do not agree with the appellants' submissions that the failure to call other persons mentioned in the proceedings was necessarily fatal to the prosecution case. In our view the ingredients necessary to prove the offence of Robbery with Violence were proved and since the case hinged on recognition, we are satisfied and agree with **Ms Mwaniki** that the appellants' conviction of the charge of Robbery with Violence was safe and the sentence proper and legal.

The appellants also contended that their defences were never considered. This being a first appeal we are legally bound to re-evaluate the evidence as stated herein above which we have done. The appellants' defences were mere denial and as was held by the Court of Appeal in **Isaac Njogu Gichiri vs. Republic [2010] eKLR:**

> **"With regard to failure by the superior court to give due consideration to the appellant's defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: *"I find that the defence of the 5th accused is not true."* We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated: *"The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances."* We agree with this confirmation."**

We uphold the conviction and sentence and dismiss the appeal in its entirety.

Judgement accordingly

Judgement read, signed and delivered in open court this 27th day of November 2013.

F N MUCHEMI

JUDGE

G.V. ODUNGA

JUDGE

In the presence of:

The State Counsel Ms Ikol

Both appellants