REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 433 OF 2013

PETER SILA KYALO……..…….APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(An appeal from conviction and sentence of the Chief Magistrates' Court at Thika, Criminal Case No. 5567 of 2008, Hon. B. A. Owino (SRM) delivered on 17th February, 2011)

JUDGMENT

1. The Appellant was charged with the two counts of robbery with violence contrary to **Section 296(2)** of the Penal Code. He also faced additional charges of burglary contrary to **Section 304(2) (a)** and **(b)** of the **Penal Code** and being in possession of public stores contrary to **Section 324(2)** of the **Penal Code**. After the hearing, the trial Court convicted him on the first three counts and acquitted him of the charge of being in possession of public stores. Consequently he was sentenced to death on the counts of robbery with violence and three years' imprisonment for the offence of burglary.

2. Aggrieved by decision of the Court, the Appellant filed an appeal to challenge the conviction and the sentence. The Appeal is premised on the following grounds:

a. The trial Magistrate erred by relying on the evidence of visual identification despite finding there was no such identification,

b. The trial Magistrate erred by founding a conviction on contradictory prosecution evidence which did not support a safe conviction,

c. The trial Magistrate relied on suspicion to convict the Appellant,

d. The trial Magistrate did not consider the evidence by the Appellant as required under Section 169 of the Criminal Procedure Code.

3. Our duty as the first appellate Court, is to reconsider and evaluate the evidence adduced before the trial Court and make our own independent conclusions, while alive to the fact that we did not have the opportunity to see or hear the witnesses. From the onset, we must comment on the anomaly of the sentences meted out against the Appellant. Having sentenced the Appellant to death for the offences of robbery with violence, the trial Court ought to have suspended the sentence of imprisonment.

4. The Appeal was opposed. Mr. Okeyo for the state, while reiterating the prosecution evidence,

stated that the incidents complained of by **PW1, PW3** and **PW6** were in series of events committed on on 4thDecember 2008. Counsel submitted that the evidence of **PW1, PW2,** and **PW6** was not controverted by the Appellant, and was therefore credible as it placed the Appellant at the scene. The Learned State Counsel concluded that the conviction was safe and the sentence lawful, and urged the Court to dismiss the Appeal.

5. On the 1st and 2nd grounds of appeal, the Appellant faulted the trial court for concluding that he was one of the robbers on the ground that he was positively identified and arrested within the vicinity of the crime area without exhaustively examining and evaluating the evidence on record. On the 3rd and 4th grounds of appeal, the Appellant submitted that the evidence was contradictory and unreliable to found a conviction. He added that the prosecution witnesses gave contradictory testimony in that **PW1** testified that the Appellant was found with Ksh. 1,800/= and later changed the amount Ksh. 1,100/= during cross-examination. He also submitted that the sequence of marking of exhibits was different between **PW1** and **PW4**. He submitted that those exhibits could not be said to have been found on the Appellant and that they were not properly produced in court and therefore not support a conviction.

6. On the 4th ground, the Appellant submitted that the Court did not give adequate consideration to his defence as required. He added that the trial Court failed to address the issue of whether he was arrested after being identified. He submitted that the evidence surrounding his arrest exonerated him from the crime since no incriminating item was found on him; and that only personal items were recovered from him. It is his submissions that he was arrested on mere suspicion and that he was a victim of circumstances, he was simply arrested on the presumption that he was one of the attackers.

7. The determination of this appeal primarily hinges on the issue of whether or not the Appellant was positively and properly identified as one of the attackers. The Appellant challenged the manner in which he was arrested.He submitted that his arrest was premised on a description of the dressing worn by one of the assailants and not by positive identification of the Appellant. He urged the court to find that no safe conviction can be founded on suspicion however strong the suspicion is.

8. From the evidence before the trial Court, it is clear that none of the prosecution witnesses identified him. The basis of his arrest and indictment were the jacket and the cap. **PW1** was attacked in his house on the material night at around midnight. From the torch light, PW1 testified he was able to see that the attacker was wearing a *jungle jacket*, resembling the one worn by police officers. The attacker hit **PW1** on the head when PW1 demanded that he identified himself. He struggled with the attacker and broke free and fled to a neighbour's house. He mobilized neighbours with whom they followed footprints up to Elumandi Trading Centre where they also discovered some shops had been broken into and several people robbed. They followed the footsteps up to Kieki bus stop where they met the accused carrying a small bag. On inquiry, he indicated he had not seen anyone ahead of him. They searched his bag and recovered the jungle jacket, a headgear, and a catapult (not produced in court); The Appellant also had Ksh. 1,800/= in his pocket. He was then taken to the police station.

9. Although PW1 testified to have seen the appellant, he did not identify him. During cross-examination, **PW1** stated that he did het see the attacker's face during the incident and only concluded that the Appellant must have been the attacker from the jungle jacket which was similar to the one worn by the person who had attacked him. **PW1** also added that that they followed the footsteps up to Kisieki using flashlights, and found that the Appellant was wearing shoes bearing the same footprints. **PW2** who was one of the people involved in the tracing of the attackers did not see the attackers and his evidence is therefore not relevant for verifying identification of the assailants. **PW3** testified that on the material night, he saw two people outside, one was tall who wore a cap and the other one was short, who had a jungle jacket, similar to the one worn by police officers. The two men claimed to be police officers, and PW3 opened the door at which point the tied him and frog-marched him to his neighbour's home and tied him to a tree in the compound. This witness did not take part in the arrest.

10. On her part, **PW6** testified that she was also attacked on the material night. She attempted to flee from the house but the attackers caught up with her and one of the attackers led her back to the house. **PW6** stated he was at the house, she was able to see the attacker properly. According to her, the assailant was short and dark complexioned and wore a jungle jacket and a *yellowing* cap.

11. The pivotal consideration, on the basis of which we determine this Appeal is whether the evidence adduced could satisfactorily link the Appellant to the offences he was charged with. Firstly, from the above, we note that the witnesses' testimonies varied with respect to the description of the attacker. From PW2'S testimony, the attacker who wore the *jungle* jacket was tall, while the one wearing a cap was short. PW1 did not give any description besides that the attacker wore a *jungle* jacket. PW6's testimony is to the effect that the attacker was short and dark complexioned and wore a *jungle* jacket. Notably, there is no description of the Appellant that was given for the Court to possibly determine if he fits any of the descriptions given. It is not in dispute that the *jungle* jacket which appears to be common identifying item was recovered from the Appellant. To reach a finding on this, we address ourselves thus: was the finding of the items that were identified to have been worn by one of the attackers conclusive proof that the Appellant was indeed one of the assailants?

12. None of the witnesses stated to have identified the attackers save by the manner of dressing. When the Appellant was arrested by PW1 and others, and handed over to the police, no attempts were made to verify this identification, say, by conducting an identification parade involving the witnesses who were not present during the arrest, namely, **PW3** and **PW6.** The evidence adduced in Court was circumstantial and the Court ought to have directed itself to the principle stated by the Court of Appeal ***Simoni Musoke v Republic*** **[1958] 715** following the decision in *Teper v Republic, [1958] EA 715,* that

"In a case depending exclusively on circumstantial evidence, he must find before conviction, that the inculpatroy facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."

The Court added that,

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would destroy the inference."

13. The trial Court in reaching a conviction stated as follows;

"Accused was found with a bag containing the 2 distinct items that the 3 victims noted during the incident. PW1 and PW6 identified the accused as one of the assailants. In my view, the evidence of identification by the prosecution witnesses was consistent and corroborated. PW1, PW3 and PW6 all had ample time to see the accused…Accused was later on found with the items not too far from the scenes."

14. We respectfully depart from the trial Court's reasoning. The incidents of robbery took place at night, and there was no description of the condition of lighting. The witnesses testified that they were able to see the robbers using the light from the torches. Even the testimony that they traced the footprints that resembled those of the shoes worn by the Appellant is remote as a reliable nexus for linking the Appellant to the offence. Even with the recovery of the jacket in question from the Appellant, there is still the undetermined link to conclusively find that firstly, that the jacket was the actual one worn by the attacker, and even if it was the same jacket, it is not safe to conclusively find without a doubt that the Appellant was the assailant who wore that jacket. The trial Court, itself while dismissing the third Count stated, ***"I take judicial notice that lately there are civilian garments made in that design and colour and the same can be bought throughout the republic."***

15. The burden of proof in criminal cases is always on the prosecution to prove every element of the

charge. Making an inference that the Appellant was the attacker on the basis of description of the attackers mode of dressing and nothing else, while this may be a probable inference, it is still an inconclusive supposition that falls short of the standard to prove the guilt of the Appellant beyond reasonable doubt. As was stated in the case of ***Sawe v Republic*** **(2003) KLR 364** suspicion, however strong cannot be a basis for inferring guilt, which must be proved by evidence beyond reasonable doubt.

16. In our view, the evidence falls short of the standard of the proof and this Appeal therefore succeeds. We accordingly quash the conviction and set aside the sentences. The appellant shall be set free forthwith unless otherwise lawfully held.

SIGNED, DATED and DELIVERED in open court this 27th day of November,2013.

A. MBOGHOLI MSAGHA

JUDGE

RADIDO STEPHEN

JUDGE