REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NOS.511 & 517 OF 2007

(An Appeal arising out of the conviction and sentence of U.P. KIDULA - CM delivered on 26th October 2005 in Thika CMC. CR. Case No.4499 of 2004)

WILLY JUMA OPONDO...1ST APPELLANT

SWAHIB MOHAMED SWAHIB ……………………..……………..2ND APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

JUDGMENT

The Appellants, Willy Juma Opondo Swahib and Mohamed Swahib, were charged with the offence of **Robbery with Violence** contrary to **Section 296(2)** of t0he **Penal Code**. The particulars of the offence were that on 23rd May 2004 at Jamhuri Estate, Thika Township, the Appellants, jointly with others not before the court, while armed with offensive weapons namely iron bars and bottles, robbed Virginia Nyambura of cash Kshs.100/-, and one cap all valued at Kshs.350/- and at or immediately before or immediately after the time of such robbery threatened to use violence to the said Virginia Nyambura. The Appellants were further charged with the offence of attempted Robbery with Violence contrary to Section 297(2) of the Penal Code. The particulars of the offence were that on the same day and in the same place, the Appellants, jointly with others not before court, while armed with offensive weapons namely iron bars and bottles attempted to rob Margaret Njambi of Kshs.6,000/- and a mobile phone and at or immediately before or immediately after the time of such attempted robbery, the Appellants used personal violence to the said Margaret Njambi. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. The prosecution called a total of seven (7) witnesses in their bid to prove the charges against the Appellants. The Appellants gave unsworn statements in their defence. After evaluating the evidence adduced, the trial magistrate found that the prosecution had established the two counts facing the Appellants to the required standard of proof beyond any reasonable doubt. The Appellants were sentenced to death on both counts as is mandatorily provided by the law. The Appellants were aggrieved by their conviction and sentence and have filed separate appeals to this court.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the evidence of identification which was made in circumstances that were not conducive for positive identification and therefore the possibility that there was an error or mistaken identity could not be ruled out. They faulted the trial magistrate for relying on the evidence of their alleged recognition during the robbery incident when infact the recognizing witnesses did not explain how they were able to recognize the Appellants in situation of insufficient light. They were aggrieved that they had been convicted yet the prosecution was not able to establish the circumstances of their arrest. This was because the prosecution did not adduce evidence relating to the

circumstances of their arrest. They faulted the trial magistrate for failing to take into account the totality of evidence adduced which constituted glaring discrepancies which raised reasonable doubts as to the prosecution's case. They were aggrieved that the trial court had failed to take into consideration their defence before arriving at the decision to convict them. They faulted the trial magistrate for convicting them for the offence of robbery and attempted robbery yet nothing that was robbed from the victims of the robbery was found in their possession. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the death sentences that were imposed on them.

During the hearing of the appeal, the two separate appeals filed by the Appellants were consolidated and heard together as one. The 1st Appellant, Willy Juma Opondo, presented to the court written submissions. He further orally submitted that he was arrested eight months after the robbery incident. He submitted that from the report made to the police, it was not clear whether he was accused of assault, stealing or robbery with violence. He told the court that it should be taken to consideration the fact the mother of the 1st complainant (PW1) was in court when the complainant was testifying. He urged the court to disregard her evidence. It was the 1st Appellant's appeal that he had not been recognized by the complainants during the robbery incident. He pleaded with the court to allow the appeal, quash his conviction and set aside the sentence that was imposed upon him.

Mr. Mathenge appeared for the 2nd Appellant. He submitted that the evidence of prosecution witnesses, particularly PW1, PW2 and PW6 was full of contradiction. He explained that the robbery took place at night and it was therefore not possible for the complainants to be positive that they had identified the Appellants. He took issue with the fact that the investigating officer was not called to testify before court. He submitted that it was not clear from the evidence who arrested the 2nd Appellant and for what offence he was initially supposed to be charged with. He urged the court to take into consideration the fact that the trial court did not address itself to the question whether there was sufficient light which would have enabled the complainants to identify the 2nd Appellant. He was of the view that PW3's testimony could not be trusted in view of the fact that he did not tell the court how he was able to identify the 2nd Appellant in the dark. Mr. Mathenge submitted that the evidence of identification adduced by the prosecution witnesses was flawed and could not therefore support the conviction of the 2nd Appellant.

Miss Matiru for the State opposed the appeal. She submitted that the 1st complainant knew the Appellants before the robbery incident. She explained that from the 1st complainant's testimony, it was clear that she was able to recognize the Appellants when they attacked her. Her testimony was corroborated by PW3 and PW4 who recognized the Appellants after the 1st complainant had screamed to raise alarm. It was her submission that the identifying witnesses who testified knew the Appellants because they lived with the Appellants in the same estate. She explained that all the ingredients of attempted robbery with violence were established because the Appellants attempted to rob the 1st complainant and in the course of the attempted robbery she was injured. She submitted that the respective defences of the Appellants did not exonerate them from the crime. On the issue of the OB report, she urged the court to consider that the evidence adduced by the prosecution witnesses was clear and cogent and therefore the conviction and the sentence imposed by the trial court should be upheld.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the Appellants on the charges of **Robbery with Violence** contrary to **Section 296(2)** and **Attempted Robbery with Violence** contrary to **Section 297(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

We have carefully re-evaluated the facts of this case. We have also considered the submission made by the Appellants in support of their respective opposing positions. We have also considered the grounds of appeal put forward by the Appellants. The Appellants were convicted essentially on the evidence of identification. According to the 1st complainant (Margaret Njambi Ngugi), on the night of 23rd May 2004 (it was about 11.00 p.m.) as she was walking home from Thika town, she met with the Appellants on the footpath. The 1st complainant was accompanied by the 2nd complainant (Virginia Nyambura). She testified that when she met with the Appellants, she greeted them. She knew them by name. She recognized them because there was a bright moonlight. She recalled that the Appellants were in company of another man called Tony. After greeting them, one of them stayed behind and pretended to be urinating. The other two walked ahead of them. It was then that the three men attacked them. The 1st complainant was hit on the head with a sharp object. She started bleeding. She screamed. She pleaded with the Appellants not to injure her. They demanded that she gives them money. There was a struggle. The 1st complainant was not robbed of anything. During this time, the 1st complainant was referring to the Appellants by their names Swahib and Jumbi. Jumbi is the nickname of the 1st Appellant. During the struggle, the 2nd complainant managed to escape. This was after she had been robbed of Kshs.100/- and a cap.

The screams of the 1st complainant alerted PW3 (David Kinyanjui Wamburu) and PW4 (Abdalla Mohamed). PW3 and PW4 are members of a vigilante group which was at the time patrolling the estate to secure it. They testified that when they reached the scene where the 1st complainant had been attacked, they saw the Appellants running away. Again PW3 and PW4 identified the Appellants by name. PW3 testified that when the 2nd Appellant saw them, he threw a bottle at them. When they reached the scene, they saw that the 1st complainant had been injured. The police on a patrol arrived on the scene. They took the 1st complainant to Thika District hospital where she treated and discharged. PW5 Dr. Kisiangani John Welime produced the P3 form of the 1st complainant. He noted that the 1st complainant was injured on her face. She was injured on the left side of her face below her left eye. The injury had resulted in the disfigurement of her face. He assessed the degree of injury as grievous harm. PW6 Tabitha Waithera Ngugi, the mother of the 1st complainant testified that on the night of the robbery incident, she heard her daughter scream. She saw the injuries that the daughter had sustained. She testified that a few days after the incident, the mothers of the Appellants went to see her with a view to reconciliation. She told them that she would consider only reconciliation after the 1st complainant had recovered. They did not go back to see her.

When the Appellants were put to their defence, they both denied committing the offences. The 2nd Appellant testified that the 1st complainant was her former girlfriend. They parted when the 2nd Appellant realized the 1st complainant was unfaithful. She attributed the complaint lodged by the 1st complainant with the police to a grudge. He was of the view that he was a victim of trumped up charges. The 1st Appellant denied committing the offence. Other than narrating the circumstances of his arrest, he did not say anything directly to do with the robbery.

As stated earlier in this judgment, the prosecution relied on the evidence of identification to convict the Appellants. Upon re-evaluation of the evidence adduced before the trial court, we have no doubt that indeed the Appellants were property identified by the complainants. The 1st complainant knew the Appellants before the robbery incident. She spoke to them prior to the robbery incident. She greeted them by name. They were attempting to rob her. She even pleaded with the Appellants. She called them by their names. We are of the view that the evidence of identification was that of recognition. The 1st complainant was not identifying total strangers at night. She recognized persons she had lived with in the same neighbourhood. The Court of Appeal in **Anjononi –Vs- Republic [1980] KLR 54 at P.60** held

thus:

"Being night time the conditions for identification of robbers in this case were not favourable. This was however a case of recognition not identification of assailants; recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because he depends upon personal knowledge of the assailant in some form or other."

We were not convinced with the testimony of the 2nd Appellant that the 1st complainant was his former girlfriend or that there existed a grudge between them. Although the source of light was the moonlight, we have no doubt that the Appellants were recognized by the 1st complainant. If there was any doubt as to the identity of the Appellants, PW3 and PW4 testified that they saw the Appellants immediately after the complainants had been attacked and robbed.

In the premises therefore, we hold that the prosecution proved its case on the two offences of **Robbery with Violence** contrary to **Section 296(2)** and **Attempted Robbery with Violence** contrary to **Section 297(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. The prosecution established that indeed the 2nd complainant was robbed of Kshs.100/- and her cap. The Appellants robbed the 2nd complainant after they had threatened her with physical harm. The prosecution established that the Appellants attempted to rob the 1st complainant. In the course of the robbery she was injured with a sharp object. Her injuries were assessed as grievous harm. The respective defences of the Appellants did not dent the otherwise strong case against them put forward by the prosecution.

In the premises therefore, we find no merit with the respective appeals filed by the Appellants. The two appeals which were consolidated lack merit and are hereby dismissed. The conviction and the sentence of the trial magistrate's court are hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF NOVEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE