REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT EMBU

CRIMINAL APPEAL NO. 32 OF 2013

ABIUD MUCHIRI……..……1ST APPELLANT

DAVID KARIUKI INTHABARA……..2ND APPELLANT

VERSUS

REPUBLIC ……...…..……RESPONDENT

(AS CONSOLIDATED WITH CRIMINAL APPEAL NO. 31 OF 2013

DAVID KARIUKI INTHABARA VERSUS REPUBLIC)

(Being an appeal against conviction and sentence in a judgment delivered in Siakago Principal Magistrate's Court Criminal Case No. 674 of 2011 (Hon. G.M. Mutiso) on 24th May, 2013)

JUDGMENT

On the night of 7th October, 2011, at around 10.00pm James Mugo Njeru was asleep when he was woken up by the movement of people outside in his house at Kanyuambora in Embu County. These people, who were armed with a panga and a slasher, forced their way into Mugo's house and injured him before they made away with his property said to have been valued at Kshs 8,070/=.

In his evidence in the lower court, Mugo testified that he identified one of the attackers as a person he knew before; this is the 1st Appellant herein, Abiud Muchiri, whom the complainant was able to recognise because, according to him, the moonlight on the material night was bright enough to recognise him.

The property of which Mugo was robbed was recovered in a store in the home of Euphrate Igoki Nyaga. According to Mugo, it is the 1st Appellant who led him and the Administration Police officers from Kanyuambora Administration Police camp where he reported the robbery to where the stolen property had been kept. Nyaga did not dispute that Mugo's property was in her store; her case was that when this property was brought to her home, she was away on a trip and her cousin Patrick Muchangi Mugo, whom she had left to keep watch over her home, had received and kept the stolen property in her store while she was away. Muchangi himself confirmed that he not only received the items in issue but that he also received them from the 1st Appellant on the night when the robbery was executed on 7th October, 2011. According to Muchangi, the 1st appellant, whom he knew before, was in the company of one Jimmy and had wanted to sell the stolen fertilizer and cow peas to Igoki Nyaga. In her absence, Muchangi could not buy the fertilizer and the cowpeas; however, the 1st appellant is said to have prevailed upon Muchangi to have these goods kept in Nyaga's store since it was late in the night. It is in these circumstances that the Ikogi Nyaga was found in possession of the complainant's property.

Besides leading the police to where the complainant's property was, the 1st appellant also gave the names of three other people with whom he was accompanied when they allegedly attacked and robbed the complainant. One of those people, identified as Jimmy, managed to escape; three others, including the appellants herein, were arrested and inevitably charged at the Senior Principal Magistrate's Court at Siakago with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**.

The particulars of the charge were that on the 7th day of October, 2011 at Kiambusho village, Kanyuambora in Mbeere North District of Embu County, jointly with others not before court while armed with offensive weapons namely pangas and slashers the appellants robbed James Mugo Njeru of one bag of 50 kilogrammes of fertilizer, four tins of beans, fourteen tins of cow peas, nine tins of green grams and one panga all valued at Kshs. 8,070/= and or immediately before or immediately after the time of such robbery used actual violence to the said James Mugo Njeru.

After hearing the case before him, the learned magistrate found the appellants guilty as charged but acquitted the third accused person for reasons that there was no sufficient evidence linking him to the offence. The appellants were sentenced to death upon conviction.

Being dissatisfied with the learned magistrate's decision, the appellants filed separate appeals in this court against the sentence and conviction. Since they were jointly charged and tried of an offence arising from the same transaction, their appeals were consolidated and heard together before us on 6th November, 2013. They relied entirely on their respective hand-written submissions.

In their appeals, two appellants relied more or less on the same grounds; these grounds are as follows:-

1. The learned magistrate erred in law and fact when he failed to consider that the appellants had pleaded not guilty to the charge against them;

2. The learned magistrate erred in law and fact when he relied on the evidence of a single eye witness in convicting and sentencing the appellant;

3. The learned magistrate erred in law and fact when he relied on the hearsay evidence to convict the appellants;

4. The learned magistrate erred in law and in fact when he failed to note that no exhibit was recovered on either of the appellants during arrest;

5. The learned magistrate erred in law and fact when he failed to note that the DNA test was not done in accordance with the law;

6. The learned magistrate erred in law and fact when he failed to note that the 1st appellant's name did not feature when the report of the robbery was made to the police. This is as far as we can understand the 1st Appellant's 5th ground of appeal;

7. The learned magistrate erred in law and fact when he failed to take into account the land dispute between the 1st appellant and the complainant;

8. The learned magistrate erred in law when he relied on a confession that had neither been taken before a magistrate or a judge;

9. The learned magistrate erred both in law and in fact when he failed to consider that the investigation officer was not summoned for further cross-examination as requested by the 2nd Appellant;

10. The learned magistrate erred in law in rejecting the appellant's defence and thus violated **section 169 (1)** of the **Criminal Procedure Code**.

The offence of robbery is defined in section **295** of the **Penal Code**, **Chapter 63 Laws of Kenya**. It states;

"295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

This is simple robbery and the penalty prescribed for this sentence is imprisonment for up to 14 years. The robbery with which the appellants were charged is aggravated robbery or robbery with violence as is commonly called; **section 296 (2)** of the **Penal Code** defines when simple robbery evolves into robbery with violence; it spells out the scope of the offence of robbery with violence as distinguished from simple robbery. That Section provides as follows:

"296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

It is apparent from this section that an accused person will be convicted of the offence of robbery with violence if the prosecution will prove that the robbery victim was not only robbed but also that at the time of the robbery any of the following circumstances were in existence:-

a. The accused was armed with any weapon or instrument that may deemed to be dangerous or offensive;

b. The accused was in the company of one or more persons;

c. Immediately before or immediately after the time of the robbery, the accused wounded, beat up, struck or used violence to any person.

These are the core elements of the offence of robbery with violence and proof of the existence of any of them will lead to a conviction contemplated under **section 296(2)** of the Penal Code. As far as this appeal is concerned, it is necessary to dissect and analyse the evidence at the trial before coming to our own conclusions as to whether the prosecution proved beyond any reasonable doubt that the appellants robbed the complainant in circumstances that may be said to fall squarely within those prescribed in **section 296(2)** of the **Penal Code.**

The thrust of the prosecution evidence at the trial revolved around the testimony of the complainant, James Mugo Njeru. The evidence from the rest of the prosecution witnesses was linked to what Mugo had said or what was alleged to have been happened to him. It is perhaps for this reason that the appellants are concerned that the learned magistrate relied on the evidence of a single witness to convict them. Whether the appellant's interpretation of this evidence stands the scrutiny of the law is a question that will be determined in due course; our humble duty at the moment is to interrogate the veracity and the consistency or lack thereof of the entire evidence as presented at the trial and at the end of it all determine whether the case against the accused was proved to the required standard.

To begin with, the complainant is said to have identified the first appellant who in turn revealed the names of the rest of persons that were jointly charged with him as the people he was in company of when they attacked the complainant. The appellants have taken issue with this aspect of identification in the prosecution evidence. The quick answer to this question is that it is apparent from the record that the 1st appellant was a person well-known to the complainant prior to the robbery. The complainant recognised him by appearance and though the attack took place at night, there was sufficient moonlight for the complainant to pick him out of the gang that attacked him. We have no reason to fault the learned magistrate for this finding of fact.

During his cross-examination, the 1st appellant said knew the complainant though not very well; his defence was, however, that he had a land dispute with the same appellant. It is possible that the extent of familiarity between the complainant and the 1st appellant was such that they knew each other and in ideal circumstances one could pick out the other as the complainant seems to have done in the circumstances of this case. In the absence of any evidence to the contrary or any reason to doubt the complainant's testimony it can safely be concluded that the conditions for the recognition were favourable and therefore the 1st appellant was, no doubt, positively recognised.

If the appellants' gripe with the learned magistrate's judgment is that he relied on the evidence of a single witness on the question of identification of the 1st appellant we need not look any further than the decision of Court of Appeal in the case of **Ogeto versus Republic (2004) KLR 19** where a similar issue arose. The court was of the view that;

" **it is trite law that a fact can be proved by evidence of a single witness although there is need to test with greatest care the identification evidence of such a witness especially when it shown that conditions favouring a correct identification were difficult".**

In the present case the complainant knew the 1st appellant and the conditions in which he was recognised were favourable and therefore there would be nothing wrong in relying on the complainant's sole evidence on the circumstances under which he recognised the 1st appellant.

The goods or items that the complainant was robbed of were recovered; they were identified by the complainant as his property and thus the prosecution produced them and were admitted in evidence as exhibits. It was the complaint's testimony that in an attempt to thwart the robbers' efforts to gain entry to his house, he injured, at least one of them, with his own panga. The import of this injury was that there were blood stains on some of the items that were recovered from the 1st appellant's house and from the complainant's house; the analysis of these stains turned out to implicate the 2nd accused.

In particular, Corporal Thomas Muriuki, PW1, testified that he recovered a slasher and two pangas from the 1st appellant's house although the complainant said at one point during cross-examination by the 1st appellant that no recoveries were made at the 1st Appellant's house; irrespective of where these items were found, it was established that they were stained with blood. This witness also collected from the complainant's house a tin cup and a bed sheet; these items were also stained with blood. In order to ascertain whether there was any correlation between the blood stains on these items and the crime under investigation, Corporal Muriuki had blood samples taken from the accused persons including the appellants herein and subjected them to DNA analysis together with the samples of blood stains extracted from the recovered items. The analysis exercise was conducted at the Government laboratory by a Government analyst, Mr Paul Waweru Kang'ethe (PW9). Mr Kang'ethe testified that as at the time he gave his testimony, he had worked as a government analyst for 15 years. In his evidence, he took the trial court through his analysis report and explained how he arrived at the conclusions he had come to in that report.

According to the Government Analyst, between the 26th October, 2011 and 29th November, 2011, he received at the government chemist several items from Corporal Muriuki (PW1) to determine the presence of blood on those items and also the source thereof. These items were the bed sheet, the cup, the slasher and the two pangas. He was also given the blood samples of the three accused persons two of whom are the appellants herein.

In the report, which was produced and admitted in evidence, the Government analyst concluded that the DNA generated from the bed sheet, the tin cup and the slasher marched the blood samples extracted from the 2nd appellant herein.

The appellants complained that the DNA test was not done in accordance with the law and that they were "forced to donate blood" without their consent. In the circumstances of this case, it must be said that it

was necessary that the appellants' human tissues be subjected to scientific analysis; it would have been a fundamental omission in the investigations if such analysis had been ignored in the face of the glaring traces of the suspects' identity which could easily help ascertain the perpetrators behind the violent robbery against the complainant. In our view, the DNA analysis was not only relevant evidence but was also admissible.

In the case of **Kuruna s/o Kaniu versus Republic (1955) 22 E.A.C.A. 364** the Privy Council had occasion to deal with the issue of relevance and admissibility of evidence. The appellant's case was that the evidence proving that the appellant was in possession of rounds of ammunition in breach of the law had been illegally obtained and should not have been admitted. While rejecting the appeal, the Privy Council said at page 366 that;

*"…**the test to be applied in considering whether evidence is admissible is whether it is relevant to matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions which support it and in their lordships opinion it is plainly right in principle."***

The general rule for which we have not found any exception in this appeal is that all evidence which is sufficiently relevant to an issue before the court is admissible. In the **Digest of the Law of Evidence, 12th Edition, art 1** "relevant" in this context has been defined to mean,

"any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence of the other"

Section 9 of the **Evidence Act, Chapter 85**, Laws of Kenya is consistent with this principle of law; in its pertinent part as far as the issue at hand is concerned, section of the Evidence Act provides,

"Facts…which establish the identity of anything or person whose identity is relevant…are relevant in so far as they are necessary for that purpose."

In the absence of anything to suggest that the DNA analysis report was controverted, it would be safe to conclude that apart from being mentioned by the 1st appellant as one of the gang members that attacked the complainant, the 2nd appellant was related to the robbery in question by blood-his own blood. It would have been difficult to convict the 2nd appellant and we would be hesitant to support such conviction if the only evidence against him was the information implicating him by his co-accused. In our view, DNA analysis report is not only corroborative evidence but it is also the kind of evidence that can easily stand on its own to prove the participation of the 2nd appellant in the crime in issue.

A similar scenario happened in the case of **Njoroge versus Republic (1982) KLR 291 where** a finger print expert was called in to determine whether a suspect's thumb print impression matched that lifted from a radiogram in the complainant's house. The expert found that the suspect's left thumbprint matched the one lifted from the radiogram. In rejecting the appellant's appeal against conviction for robbery with violence, the court (Muli J as he then was) said at page 295;

"There was independent expert evidence which stood unchallenged and that was the expert evidence of the finger print expert. Although the appellant was not supposed to prove his innocence, there was no evidence to suggest that the appellant's left thumb impression could have got on the complainant's radiogram otherwise than in the course of the robbery on the night of the incident. The appellant was not a regular visitor to the complainant's house.

"Upon this evidence the learned trial senior resident magistrate convicted the appellant. We think he was justified in evidence before him in reaching the conclusion he did. There was the unchallenged expert evidence of the finger prints of the appellant's left thumb impression found on the radiogram made by the appellant and no other. To this evidence was corroboration, if required, by the evidence of

identification of the appellant by the complainant's sister in law"

The state represented by Ms Ing'ahizu conceded to the appeal; Ms Ing'ahizu's position against the prosecution case is that there was no evidence that the appellant had suffered any injury as alleged and neither could it be said with any certainty who, amongst the alleged robbers, attacked the complainant. The state counsel also said that there was no evidence that the any of the appellants was injured.

With respect to the learned counsel, we disagree with her position on this issue; while it may have been worthwhile to demonstrate injuries or assaults were occasioned during the robbery, such a proof is not a requirement under **Section 296(2) of the Penal Code**. All that the prosecution needed to prove under this section was that either the appellants or any of them was armed with any weapon or instrument that may deemed to be dangerous or offensive; or the appellant was in the company of one or more persons; or immediately before or immediately after the time of the robbery, the accused wounded, beat up, struck or used violence to any person. It is also immaterial as to who between the four robbers may have attacked the complainant as long as it is proved that the four of them had a common design; in execution of this design each of them was responsible for the natural consequences that ensued regardless of who between them was the actual perpetrator.

The state counsel also conceded to the appeal on the basis that there were contradictions on the evidence on the recoveries made in the course of investigations. As far as we could gather, the police officers who arrested the 1st appellant on the dawn of 8th October, 2011, that is, Kevin Kiptarus (PW7) and Corporal Joseph Omondi (PW8) testified that they recovered the pangas and a slasher from the 1st appellant's house. The fertilizer and the cowpeas were recovered from the house of Euphrate Igoki Nyaga. The complainant, while being cross-examined by the 1st appellant initially said that no recoveries had been made at the 1st appellant's house but later said, "2 pangas and a slasher were recovered from your place. They were availed at Siakago police station". The "place" he was referring to here was the 1st appellant's house.

While we agree that there is inconsistency in the complainant's evidence as to where the pangas and the slashers were recovered there is no dispute as to where the cow peas and the fertilizer were recovered and that these goods belonged to the complainant. They were pertinent components in the particulars of the charge against the appellants so that even if the pangas and the slasher were to be out of the picture, the evidence that the complainant was robbed of cow peas and fertilizer was not displaced. In our view the discrepancy as to where some of the exhibits were recovered was not so material as to prejudice the defence case.

The last issue that the learned state counsel raised was the identification of the 1st appellant. We have noted earlier in this judgment that the 1st appellant was recognised rather than identified because he was known to the complainant before and since there was sufficient moonlight, the conditions for identification were what could be described as favourable. The complainant testified that he even called out the 1st appellant's name. His father, Stephen Njeru Ireri (PW3) to whom he ran immediately after the attack and one of the police officers who arrested the 1st appellant, Kevin Kiptarus (PW7) corroborated the evidence that there was moonlight on the material night.

A vital corroboration on this issue of recognition is the evidence of Patrick Muchangi Mugo (PW4). This is the witness who received the stolen fertilizer and cow peas from the 1st appellant on the fateful night. In answer to his enquiry on who was calling his cousin outside her house on the night of the robbery, the 1st appellant is said to have identified himself by name. It is only then that this witness opened the door and saw the 1st appellant together with one Jimmy who is alleged to have escaped arrest. This witness confirmed that he not only knew the 1st appellant before, though for a short while, but that he also saw and recognised him because there was sufficient moonlight on the night in issue. We have not found any reason on record to doubt the credibility of the testimony of the complainant and that of Patrick Muchangi Mugo (PW4) on this issue of recognition.

In the final analysis we opine that the learned magistrate properly held that the offence of robbery with violence had been established and that it was beyond doubt that the appellants were directly behind it. In the circumstances we have not found any merit in any of the grounds of appeal by the appellants.

In particular there is nothing on record to suggest that the learned magistrate did not consider that the appellants had pleaded not guilty to the charge against them; the conviction and sentence were arrived at after a full trial of the case against the appellants.

The argument that the learned magistrate relied on hearsay evidence or on the evidence of a single witness to convict and sentence does not seem to be consistent with the record; the evidence of identification of the 1st Appellant by another witness besides the complainant; the evidence on the recovery of fertilizer and cowpeas and finally the expert evidence on the DNA analysis were core to the prosecution case as much as the evidence of the complainant himself. It was direct evidence and proffered by different witnesses.

In any case, the evidence of a single identification witness is not always fatal to a conviction as has been demonstrated in decision of the Court of Appeal in the case of **Ogeto versus Republic (2004) KLR 19 (supra).**

There is also no evidence, as contended by the appellants, that the learned magistrate relied on a confession to convict the appellants. All we can see from the record is that the learned magistrate found that the prosecution had proved its case beyond reasonable doubt.

While it is true that there was inconsistency in the evidence of the complainant on whether the slasher and the two pangas were found in the 1st appellant's house, the evidence of where the rest of the stolen goods were recovered was not rebutted; having asked Patrick Muchangi Mugo (PW4) to keep the goods for him, the 1st appellant, though not in physical possession of the goods, laid claim over them.

The record shows that the learned magistrate duly considered the appellant's defence but found it unbelievable. The learned magistrate was particular and we have not seen anything to the contrary, that there was no evidence of a land dispute between the 1st appellant and the complainant. In arriving at the decision he did, the learned magistrate duly considered the evidence in its entirety, identified the issues and determined each one of them. He duly complied with **section 169(1)** the **Criminal Procedure Code**.

For the foregoing reasons, we agree with the learned magistrate's verdict and uphold the conviction and sentence. The appellants appeal is dismissed.

Signed, dated and delivered in open court at Embu this 24th day of December 2013

_____ _____

H.I. Ong'udi Ngaah Jairus

JUDGE **JUDGE**