REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT EMBU

CRIMINAL APPEAL CASE NO. 18 OF 2013

ANTHONY NDWIGA……..…..…..1ST APPELLANT

JOSEPHAT MURIITHI NDWIGA..……..……..2ND APPELLANT

-VERSUS-

REPUBLIC……...……RESPONDENT

(AS CONSOLIDATED WITH CRIMINAL APPEAL NO. 17 OF 2013

JOSEPHAT MURIITHI NDWIGA VERSUS REPUBLIC)

(Being an appeal against conviction and sentence in a judgment delivered in Embu Senior Resident Magistrate's Court Criminal Case No. 811 of 2012 (Hon. P. Biwott) on 24th May, 2013)

JUDGMENT

The appellants were jointly charged with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code, Chapter 63 Laws of Kenya.** According to the particulars of offence, on the 26th day of September, 2011 at Mufu Village in Embu County, while armed with dangerous weapons namely pangas, iron bars and clubs, the appellants robbed Anthony Njiru Obadia of his Kshs. 15,000/=, chicken wire, mattresses, two mobiles make nokia 1160 and 3210 of unknown serial numbers, two hoes and a panga all valued at Kshs 28, 150/= and at immediately before or immediately after the time of such robbery used actual violence to the said Anthony Njiru Obadia.

The appellants denied the charge and so the learned magistrate duly entered a plea of not guilty; upon hearing the prosecution and the defence case the learned magistrate was satisfied that the prosecution had proved its case against the appellants beyond reasonable doubt. Accordingly, the appellants were convicted and sentenced to death on 24th May, 2013.

The appellants were not satisfied with the decision of the learned magistrate; they have faulted it on several aspects which have been reduced into the appellants' grounds of appeal. Since they were charged together, the appellants had no issue with their appeals being consolidated when they came up for hearing before us on 6th November, 2013. As far as we can gather, the consolidated appeal is based on the following grounds of appeal:-

1. The learned magistrate erred both in law and facts when she failed to consider that the appellants pleaded not guilty to the charge ;

2. The learned magistrate erred in law by failing to consider that the 2nd appellant's constitutional

rights under section 72 (3) of the constitution had been violated since he was held in custody for more than 24 hours;

3. The learned magistrate erred both in fact and law when she failed to note that no report was made to the police with the names and the description of the appellants;

4. The learned magistrate erred both in law and fact when he failed to consider that none of the appellants had been found in possession of the exhibits;

5. The learned magistrate erred both in law and in fact when he failed to consider that the prosecution case was based on inconsistencies and uncorroborated evidence;

6. The learned magistrate erred in both facts and law when he failed to consider that the charge sheet was defective;

7. The learned magistrate erred both in law and in fact when he relied on the evidence of a single eye witness in convicting the appellants;

8. The learned magistrate disregarded the appellants' defence and therefore did not comply with **section 169(1)** of the Criminal Procedure Code; and

9. The conduct of the identification parade violated the police force standing orders on identification parades.

The appellants filed written submissions in which they merged their grounds of appeal; they urged the court to consider these submissions in their entirety in support of their appeal.

Mr Wanyonyi for the state opposed the appeal and urged the court to uphold the conviction and sentence meted out against the appellants. According to the learned state counsel the elements for the offence of robbery had been proved by the prosecution and the appellants had been properly identified as the perpetrators of the crime. Their conviction was proper and the sentence imposed by the learned magistrate was legal and lawful.

In order to appreciate the appellants' appeal and more particularly, the grounds upon which it is based, it is necessary, and indeed it is our legal obligation as the first appellate court, to reconsider the evidence on record, evaluate it afresh and come to our own conclusions; in undertaking this task, we are conscious that the trial court had the benefit of seeing and hearing the witnesses first hand, an advantage this court, in its appellate capacity, does not enjoy. The Court of Appeal's decision in the case of **Okeno versus Republic (1972) EA 32** has consistently been followed in this regard. In its pertinent part, the court of appeal was of the view that:-

"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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 page 36).

The initial evidence in the trial court, more particularly the evidence of the first three prosecution witnesses, was taken before Honourable Lucy Mbugua; however, on 9th November, 2012, the appellants asked the court to start the matter *denovo* apparently because a new magistrate, Honourable Paul Biwott had taken over the conduct of the case from Honourable Mbugua, who appears to have taken a transfer to a different station. The restart of a case in such circumstances is a right available to any accused person under **section 200(3)** of the **Criminal Procedure Code**. Nothing turned on this issue and therefore we shall not dwell on it any further.

The case against appellants was traced to a robbery which took place at the wee hours of the 26th day of September, 2011. On the material day, at around 3.00 am, **Anthony Njiru Obadia (PW1)** was in his stall. According to his evidence, he heard knocks both at the rear and the front of the stall; the people who were knocking demanded money. The complainant heard them say in Swahili language "lete pesa". These people finally forced their way into his stall by breaking its front door. The complainant was hit and injured on the head. Both his legs and hands were tied and a panga was held on his throat and warned against raising any alarm. One of the attackers guarded him while the rest looted his stall. At some point he managed to free himself and escaped into a nearby coffee farm from where he could see the gang taking away his property. After this gang left, a watchman came and advised the complainant to report the robbery to the police; he indeed proceeded and reported the matter to the police at Githimu police station at 5.00 am the same morning.

The complainant testified his property worth about Kshs 50,000/= was stolen; this property comprised Kshs 15,000/= in cash, two cell phones, a mattress, clothes, shoes, forked jembe and a panga. None of these items was recovered.

The complainant said that, at the time of the robbery, he was able to identify the two appellants because the security lights on the nearby bar premises were bright enough to shine as far as the area where his stall was located; it was about 20 meters away from the bar and there was no barrier between them.

According to the complainant, he saw the 1st appellant enter his stall; it is the 1st appellant who hit him on the head with a rod. It was the complainant's evidence that he had known the 1st appellant for more than a year because he used to patronise the bar next to his stall. The complainant had also known the 2nd appellant for almost the same period; he was able to recognise him that morning because he is the person who had held his panga on the complainant's throat and was the one tasked with guarding the complainant as the rest of the attackers carted away his property; occasionally he could join them and it is on one of these occasions that the complainant managed to escape. The entire episode, according to the complainant, took about one hour.

On cross-examination, the complaint told the court that he had known the 1st appellant since his youth while he had known the 2nd appellant for two years; his evidence was that after the robbery, the 1st appellant could not be found despite the fact that he took the police to the 1st appellant's home on four different occasions. He was finally arrested on 11th November, 2011, more than a mother later, when he allegedly destroyed his father's property. His arrest was, therefore, instigated not by the robbery report which had been made by the complainant but by the 1st appellant's father's complaint that his son had destroyed his property. According to the officer who arrested him, Douglas Kinoti (PW3) he was not aware that at the time of the arrest, there was any other crime report or complaint that had been made against the 1st appellant.

The 2nd appellant was arrested in a beer club on 31st December, 2011; this was more than three months after the complainant of the robbery had been made. Although his arrest was made allegedly on the basis of the complainant's complaint against him, there does not appear to be any explanation on record as to why it took more than three months after the robbery report had been made to the police before the 2nd appellant was arrested and arraigned in court.

The circumstances under which the appellants are said to have been identified and arrested are twin issues which, in our view, are central to the determination of this appeal as they ought to have been in the trial against appellants in the subordinate court. Apart from what the complainant himself told the court, the only other evidence that would be crucial in this regard would be that of the investigations officer. The officer, constable John Serem (PW6) from Runyenjes police station confirmed that the complainant had made a report to the police of a robbery at his house on 26th September, 2011. According to the complainant's report four robbers entered his house while others, whose number he could not tell, remained outside. When the report was made, the complainant did not have the suspect's names but he said that he could identify them. The complainant told the investigating officer that one of them was

called “Ndwiga”.

The officer testified that on the 10th November, 2011 he received another report that a suspect had been brought to Runyenjes police station by administration police officers from Mbuvure Administration Police camp on allegations that he had damaged his father’s property. The suspect who turned out to be the 1st appellant was charged with the offence of malicious damage to property. While the 1st appellant was still in custody the complainant came and told the investigations officer that “his (the complainant’s) suspect was under arrest”. The suspect was the 1st appellant and allegedly known to the complainant by one name only- “Ndwiga”.

According to the investigations officer, the officer in charge of station at Runyenjes police station Inspector George Wangombe (PW4) decided to conduct an identification parade ostensibly to identify the suspect that complainant had in mind; it is out of this parade that the 1st appellant was identified by the complainant. This “identification” informed the investigating officer’s decision to charge the appellant with the offence for which he was convicted and sentenced. Inspector George Wangombe said that the complainant did not know the 1st appellant except the face he saw during the robbery, hence the need for the parade.

When the investigations officer was cross-examined, he told the court that the complainant did not know where the 1st appellant lived and that he had “gone underground” apparently after the robbery. The investigations officer said that the complainant reported that he knew the people who had attacked him physically. At one point, this officer said that complainant did not give the suspects’ names when he reported the robbery but later said that only one name, Ndwiga, was given.

The investigations officer confirmed that his father had withdrawn the case of malicious damage to property for which the 1st appellant had previously been arrested and charged. The 1st appellant himself in his defence confirmed that on 10th November, 2011 he was arrested for damaging property but four days later, while he was still in custody, he was charged with the offence of robbery with violence.

Looking at the evidence on identification of the appellant, in its entirety, a number of issues emerge which, in our view, should have cast reasonable doubt on the prosecution case. In his evidence in chief, the complainant said he was able to identify the appellants when he was attacked because he had known both of them for more than one year before the alleged attack. When he was cross-examined, he varied his testimony to say that he had known the 1st appellant since his youth and that he had known the 2nd appellant for two years.

If it is true that the complainant had known the appellants for that long, then these are people that could properly be said to be well known to him such that it would not have been difficult for the complainant to recognise them in favourable circumstances. It would equally not have been difficult for the complainant to mention the appellants’ names to the police when he made the robbery report; the evidence by the investigations officer that the complainant did not provide the suspects’ names when he made his report cast doubt on the truthfulness of the complainant’s testimony. More importantly, if the complainant knew the appellants to the extent that he alleged, there would have been no need to conduct any identification parade as the suspects should have been deemed to have been identified by recognition.

In the recent Court of Appeal decision in **Criminal Appeal No. 389 of 2009, Peter Maina Mwangi versus Republic (2013) eKLR** an issue of identification of suspects arose. In that case the complainant testified that she was able to identify the appellant with the help of the security lights at a certain bar. She stated that she saw him clearly and at a close range while he was indecently assaulting her. The court noted that she had testified that while she tried to look up she was hit by the robbers. She also testified that the attack occurred suddenly. The court noted that the circumstances surrounding the incident were difficult and that she did not point out any special marks or description of the appellant. In answering the question whether the identification was proper and free from error the court referred to the case of **Maitanyi versus Republic (1986) KLR at page 198** where the Court of Appeal held:

"…There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made…if a witness receives a very strong impression of feature of an assailant; the witness will usually be able to give some description."

The court proceeded to address the appeal before it and stated:

"***In this case J admitted that she did not give the description of the 1st appellant before he was arrested and before she identified him when he was brought into the police station. We are of the considered view that J's evidence on identification ought to have been tested by her first recording her initial statement indicating whether she could identify her attackers and giving their descriptions."***

In the case before us the complainant never gave any description of any sort that could be used to identify and pick his assailant from an identification parade. Rather the complainant purportedly knew, without the invitation of the police that the person who had attacked him was at the station and that he even knew him by his name. In the premises, it is clear that there was no basis upon which an identification parade could validly be conducted.

It is also noted that while the complainant was firm that he knew the 1st appellant's home and that he went to that home on four different occasions accompanied with the police to arrest the appellant, the investigating officer testified that the complainant did not know the appellant's home. It is the same investigating officer who said that the complainant only knew his assailants physically "by face" contrary to the complainant's testimony that they were people he was familiar with.

In a nutshell there was no corroboration in prosecution evidence. We are bound to agree with the appellants that the prosecution case was based on inconsistencies and on uncorroborated evidence. The evidence on identification of the appellants was solely based on the evidence of the complainant which, in the face of its glaring inconsistencies can neither be said to be cogent nor creditworthy. In the case of **Wamunga versus Republic (1989) KLR 424** the court of appeal had held at page 426 that,

"…it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

In the case against the appellants, it cannot be said with any certainty that the circumstances of identification were favourable and free from error.

In conclusion we are of the view that the appellants' appeal is merited and should be allowed. We quash the conviction and set aside the sentence meted out against the appellants. They shall be set free forthwith unless they are lawfully held.

Dated, signed and delivered in the open court at Embu this 24th day of December, 2013

…….. **…….**

H.I. Ong'udi **Ngaah Jairus**

JUDGE **JUDGE**