REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 62 OF 2010

(from the original conviction and sentence in the Chief Magistrate's Court at Makadara in Criminal Case No. 2547 of 2006 – T. Ngugi)

MARTIN LUKE MANG'SO ……..…… APPELANT

VERSUS

REPUBLIC ……. REPUBLIC

JUDGEMENT OF THE COURT

Ms Ikol – state Counsel

Mr. Nyaanga G. M. for the Appellant

1. Martin Luke Mang'so (the appellant) was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on 14/4/06 at about 3.00a.m the Complainant, Paul Muchemi (PW1)while asleep with his family in their house in Donholm Nairobi, robbers gained entry to their house and robbed him of his motor vehicle KAG 228A Toyota G Touring, electronic goods, mobile phones, kshs.3000/= and clothes. In the process of the robbery, PW1 and his family members were injured with PW1 being placed at the ICU for 2 days. The appellant was arrested on the basis that he was the night guard at Donholm Estate and was charged together with another person who got sick while in custody and died before trial could commence. The hearing was conducted by Hon. Karani and Hon. T. Ngugi took over at the defence hearing stage and upon complying with the provisions of section 200 of the Criminal procedure Code (CPC), the appellant opted to proceed with the evidence on record. After the full trial, the appellant was found guilty as charged and sentenced to death.

The charge

I. Martin Luke Mang'so
II. Mutua Maluku:

on 14th day of April 2006 at Donholm estate Nairobi within Nairobi area jointly with others not before court while armed with dangerous weapons namely pangas robbed one Paul Muchemi of tow TVs sets, four mobile phones and cash Kshs.3000/= all valued at Kshs.116, 000/= and at or immediately before or immediately after the time of such robbery used actual violence to he said Paul Muchemi.

Grounds of Appeal

2. On 5/2/10, the appellant filed his grounds of appeal and on 20/7/2010, through his Advocates, filed an Amended Petition of Appeal that consolidated grounds raised in the earlier memoranda to include 21 grounds in total. At the hearing of the appeal, counsel for the appellant consolidated these grounds to the following issues that the learned trial magistrate erred in law and in fact in failing to sufficiently address the following;

i. *Identification was not sufficient to warrant the conviction*
ii. *Voice recognition was sufficient to find a conviction on*
iii. *The learned magistrate had no chance to hear the witnesses and hence the decision was arbitrary with evidence below the required standard as section 200 CPC was not followed*
iv. *Placing the burden on the appellant to explain the robbery and taking circumstantial evidence without adhering to the governing principles hence being speculative*
v. *There was no proof of injuries or property stolen and no exhibit was produced and there were no investigations*
vi. *There was no recall of PW1 and PW2 are applied for by the appellant as the evidence was contradictory, witnesses were couched, and the court was biased and the arrest was on suspicion only*

3.At the hearing, counsel for the appellant made his oral submissions and Ms. Ikol, State Counsel opposed the appeal.

Submissions

4. On identification, Counsel for appellant submitted that the evidence used was solely on the basis of voice identification where PW1 recognised the voice that spoke to him and the hand that touched him as he knew the voice of the appellant who used to open their gate and his hand since he used to greet him in the morning and occasionally would give him a lift in his car. That during the robbery PW1 heard the appellant say "leave him now" and this was a voice he knew and that he was touched on the chest by a hand he knew as the appellant used to greet him in the morning and evening. That this kind of evidence goes to the credibility of the witness, it was the only evidence relied on to find a conviction, that the appellant had been identified. PW1 in his evidence stated that he was in and out of consciousness, and hence may have been mistaken in his voice and hand recognition of the appellant. He relied on the decision in the case of ***Huka and others versus Republic [2004] 2 EA 77*** and the case of ***Roria versus Republic [1960] EA 174*** where the complaint had fallen down and may have not been able to clearly identify his assailants.

5. Counsel further submitted that there was witness couching particularly with regard to PW1 evidence that he recognised the hand that touched his chest whereas in his report he recorded and noted that he suspected the guards to have robbed him but never said he recognised them. His wife, PW2 gave evidence that the children bicycles were always getting lost while the appellant guarded their gate, all these indication that the case against the appellant was based on suspicion. There lacked corroboration in the identification of the appellant. That there were no investigations in this case, two witnesses in this regard PW4 said he was called while at Buru Buru police Station to go and arrest a suspect while PW5 was the investigating Officer but said he never conducted the identification parade since PW1 knew the appellant and that there was no need to do a parade. Nothing was recovered from the appellant or finger prints taken to link him to the crime and thus raises doubts. The weapons used are stated in the charge sheet to be pangas, but no doctor testified to confirm the injuries and hence no evidence of violence and PW1 and PW2 did not identify which dangerous weapons were used and in the absence of a doctor to give a date and nature of injuries, there was no link to the charge.

6.The trial magistrate was not the same as the magistrate who convicted the appellant and therefore could not be in a position to judge the demeanour of the appellant and went on to comment that "accused had a heavy Luhya accented talk…" hence a mark of prejudice and this was tantamount to a trial that was not fair.

7. Ms. Ikol, State Counsel in opposing the appeal submitted that PW1 evidence is not shown to have been

couched; he heard a voice that he knew well. On proof of injury, PW1 gave evidence that he was cut and injured he was in ICU and this was corroborated by PW5 who was called to rush him to hospital, he was called by PW2. That the trial magistrate relied on section 200 CPC after taking over proceedings and thus urged the court to uphold the sentence and in the alternative by invoking section 20(1) (b) of the Penal Code. That when the motor vehicle was stolen for it to leave the compound, it had to leave by the main gate where the appellant was supposed to be stationed the same place where he was supposed to be in the morning.

Determination of the Issues

8. The main issue for consideration first is that of identification. The learned trial magistrate in the lower court relied on the evidence that the appellant was identified by PW1 on the basis of voice recognition and by his hand that touched his chest. The investigating officer on the other hand decided not to carry out an identification parade on the reason that PW1 already knew the appellant. It is on record that PW1 was attacked and seriously injured, during the robbery he was in and out of consciousness, which caused him to be admitted to ICU for 2 days.

9. On this issue of identification, the evidence on record before this court is that of a single witness, PW1. The incident took place at night, there is no evidence to indicate there was any light and the robbery took place in PW1 house. They could convict on that evidence but extra caution is required before a conviction in such circumstances. In ***Abdalla bin Wendo and Another versus Republic 91953) 20 EACA 166***, where the East Africa Court of Appeal held that;

Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In the circumstances, what is needed is other evidence, whether be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of any error.

10. PW1 did not point out the appellant when PW5 arrested him; it was PW3 who pointed out to the appellant breaking the linkage to the alleged recognition by PW1. PW3 is not said to have been at the crime scene of the crime and to be found as the one who identified the appellant to the arresting officer, PW5 is a far-fetched goose chase. The alleged blouse recovered when the appellant was arrested was not produced or shown to belong to PW1, PW2 or any other witness. This is most unfortunate, that despite evidence of such severe injuries necessitating intensive care treatment of PW1, the investigating officer found it unnecessary to conduct proper investigations that would remove doubt with regard to the identification of the appellant. Further failing to call a doctor in evidence to produce a P3 record to confirm that the injuries sustained by PW1 were consistent with what was reported. This is what amounts to shoddy investigations that compromise the course of justice.

11. On further assessment and evaluation of the record, we find glaring defects to the charge sheet, it was alleged that a motor vehicle belonging to PW1 was stolen. At page 16, PW1 gave evidence that;

I later got to know that they stole my Toyota G Touring KAQ 228A …

On the other hand, Nelson Katuirwa Ndungu (PW3) at page 23, line 110 states

…I took her to Nairobi Hospital later called by police to identify my uncle's car Toyota G. Touring KAZ 228A…

12. Whether the registration numbers are by error or omission, this was not outlined in the charge sheet, creating doubts and further confirmation that there were no proper investigations in this case.

13.The totality of all the above is that, had the lower court analysed the evidence properly as was required

of the court, it should have been found that the evidence of identification fell short of the standard required and remained no more than dock identification which, in a case of this nature, cannot suffice for a conviction.

14. Ms. Okol in her submission that we find for an alternative charge under section 20(1) (b) of the Penal Code is most absurd based on the record, what would have saved face was to plainly concede this appeal. As we have come to the conclusion that this appeal must succeed and need not consider the other grounds raised in the appeal.

15. The appeal is allowed, conviction quashed and the sentence set aside. The appellant be set free unless otherwise lawfully held.

Dated and delivered at Nairobi this 20th Day of December 2013.

M. Mbaru **J. Rika**

Judge **Judge**