REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 100 OF 2011

HUMPHREY MWANGI MORAGE .....1ST APPELLANT

FRANCIS CHEGE NGANGA……..…2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Honourable D. K. Mikoyan Senior Principal Magistrate in Nakuru Criminal Case No. 3655 of 2010)

JUDGMENT

1. The Appellants herein were charged before the Lower court with the offence of robbery with violence Contrary to section 296 (2) of the Penal Code.

2. The appellants were convicted and sentenced to death.

3.Aggrieved with both the conviction and sentence, the Appellants preferred separate appeals in this court which were consolidated. Their grounds of appeal in their petition of appeal were stated as follows:

A. **Grounds of Appeal**

1. That the evidence adduced by the prosecution was insufficient to sustain the charge
2. That the Learned Magistrate erred in law and fact when he failed to fully appreciate a proper identification and did not take caution in the circumstances of the identification
3. That the trial magistrate erred in denying the Appellants their right to mitigate
4. That the trial magistrate erred in convicting the Appellants on a charge that was defective

B. **Supplementary Grounds of Appeal**

1. That the learned Magistrate erred in Law and fact when he failed to fully appreciate a proper identification

2. That the intensity of the available light was not fully considered by the trial Magistrate

3. That the learned trial Magistrate erred in law and fact when he admitted contradictory evidence and further added evidence that was not there.

Facts

4. The prosecution's case was that on the night of 23/07/2010, PW1 was at cranes bar at Maili Kumi having a drink and watching the World Cup with his friend Leonard Njuguna Kiamungu. They drank from 9.00 pm to midnight when Leonard Njuguna left. PW1 left about 30 minutes later. As he was walking home, he saw two people walking about a kilometer behind him. When they caught up with him and PW1 was able to recognize them as persons who had been in the bar with him. He recognized the 2nd Accused in particular as he had been seeing him in the pub where he had been watching football for the past 2 weeks. He was able to see the 2 men properly as there was moonlight on the material night and security lights from a nearby building. The 2 Accused persons assaulted him and broke his 2 front incisor teeth (exhibit 2). They took his phone Nokia 1210, whose receipt was produced as exhibit 1 and Kshs. 3051. He did not raise any alarm during the attack and walked home which was about 500m away. On reaching home, he informed his daughters Monica and Eunice Wanjiku what had happened.

5.PW2 confirmed that on the material night at around 1.00 am, PW1 came home shouting claiming that he had been beaten and his phone stolen. He was bleeding from the mouth.

6.PW1, PW2 and Monica went back to the bar where they found the 1st Accused person. PW1 and PW2 both testified that they questioned the 1st Accused who indicated that he wanted to negotiate with them. The 2nd Accused was not present but later followed them as they were leaving the bar and offered to take them home using his motorbike. They refused and accompanied PW1 to Bahati Police Station where they reported the matter. PW1 was later treated at Bahati District Hospital.

7. PPC Abraham Tum No. 22402 from Bahati D.C's office, PW3 testified that he knew the 1st Accused (whom he referred to as Mirugi and also as Mwangi) as a watchman in the aforementioned bar and had known the 2nd Accused who used to operate a motor cycle for about 3 months. On the material night he saw the 2nd Accused come into the bar with the 1st Accused looking for customers. They both left with a customer (old man) and came back about an hour later. He confirmed having seen PW1 in the bar earlier that night and also seeing the 2nd Accused leaving the bar at around midnight, leaving the 1st Accused in the bar. He also saw PW1 when he came back, bleeding and accompanied by his daughters and pointed out the 1st Accused claiming that he together with the 2nd Accused had attacked and robbed him. He advised him to report the matter to the Police and went back to the AP Camp.

8.The following day, he also received a complaint from another man, Kahugu, that he had been robbed the previous night by the two accused persons. They recovered Kahugu's stolen phone from the 1st accused who in turn claimed that it had been sold to him by the 2nd Accused.

9.PW4 the investigating officer, testified that the robbery occurred on the Nakuru Nyahururu Road which has shops, flats and residential homes along it. He however did not visit the scene of the robbery. He also confirmed that none of the items that had been stolen from PW1 were recovered.

10. PW5, the Clinical Officer at Bahati Hospital confirmed that the complainant had his two upper teeth extracted and had soft tissue injuries on the right side of the chest. The injuries were caused by a blunt object and he classified them as grievous harm.

11. At the close of the prosecution's case, the trial Magistrate found that a prima facie case had been established and put both Accused persons on their defence. They both gave sworn testimonies and did not call any witnesses.

12.DW1 denied having committed the offence he had been charged with. He testified that he did not see PW1 on the night of the robbery and alleged that the complainant had colluded with the police to frame him.

13.DW2 also denied committing the offence or having any knowledge of the events of the night when the robbery occurred. He was arrested on 4/07/2010 as he was waiting for passengers who wanted to be taken to Wanyororo. He also confirmed that there was another matter pending over the alleged robbery of PW1's friend.

14. The Respondent opposed the Appeal and urged the court to uphold the conviction of the trial court and confirm the sentence. The appeal was canvassed by way of oral submissions which we have duly considered.

ISSUES FOR DETERMINATION

15. Upon consideration of the submissions made by both Counsels, we find the following issues for determination:

1. Was the charge sheet defective?

2. Was the evidence sufficient to sustain the charge?

3. Identification/ Recognition

4. Sentence

ANALYSIS

16. The court notes that this being a first appeal, it is enjoined to re-evaluate the evidence and to arrive at an independent conclusion of facts, bearing in mind that it neither saw nor heard the witnesses. We are guided by the cases of **Ngui v Republic** (1984) KLR 729 **and Okeno v Republic** (1972) E.A 32

17. The first issue relates to whether the charge sheet was defective. Counsel for the Appellant argued that the charge sheet indicated that the robbery occurred on the night of 2nd and 3rd July, 2010 yet the evidence showed that the robbery occurred on one night of 3rd July, 2010.

18. We do not think there is any merit in the objection raised with regard to the irregularity in the charge sheet as it is clearly an error. At all events, we do not find in view of the provisions of ***section 382*** of the Criminal Procedure Code, that any prejudice was caused to the Appellants. The evidence on the date of the incident was clear and none of the Appellants allege that they were unable to answer to the charges against them on account of the error.

19. The second issue relates to whether the evidence was sufficient to sustain the charge.

Having reviewed the evidence, we find that the prosecution was able to prove that on the night of 3rd July,2010 0 PW1 was attacked by 2 men and during the attack, his phone and cash were stolen and violence was used against him by the attackers. We have no doubt therefore that PW1 was robbed violently and that the ingredients necessary to establish the offence of robbery with violence under Section 296 (2) and (3) of the Penal Code were satisfied.

20. None of the stolen items was recovered and the only evidence was upon which the Appellants was convicted was the testimony of the complainant that he was able to identify the Appellants. The question for the court to determine is whether the Accused persons were positively identified as the robbers.

21. The third issue relates to identification. The incident occurred at night and the test for identification under unfavorable conditions and circumstances is set down in the renowned case of **Republic v. Turnbull & others** (1976) 3ALL E.R 549

22. Counsel for the Appellant argued that the Appellants herein were not properly identified as the robbers. It was not clear how PW1 was able to identify the robbers who were coming behind him from a light that was 30 meters in front of him. There was no evidence on the intensity of the light and the investigating officer did not visit the site to clarify this. Counsel urged the court to bear in mind that the Appellant had been drinking from 9.00pm to midnight and therefore it was safe to assume that he was drunk.

23.This court is reminded that where the case rests on the identification by a single witness it should proceed with caution and only convict on this evidence if it is watertight and free of errors. See the case of **Odhiambo vs. R 1** [2002] KLR 241 where the court held at page 247 that:

> ***"The court should receive evidence on identification with the greatest circumspection particularly where circumstances were difficult and did not favour accurate identification. Where evidence of identification rests on a single witness, and the circumstances of identification are known to be difficult, what is needed is other evidence either direct or circumstantial, pointing to the guilt of the accused persons from which, the court may reasonably conclude that identification is accurate and free from the possibility of an error."***

The court of Appeal in **Kamau v Rep [1975] EA 139** was faced with a similar question and at pg 140 quoted from **Abdalla bin Wendo v R (1953) 20 EACA 166** thus

> ***"Subject to certain 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 with 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 such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence or identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."***

24. The test which is to be employed by the court when analysing this evidence was further laid out in the case of **Tetu Ole Sepha vs. Republic [2011] eKLR** where the court held that the court should be guided by and look at the lighting situations as well as the demeanor of the witness as he testifies on the identity of the accused person. It stated:-

> ***"There is no rule of thumb for all situations and in our view a proper guide is to look and judge the lighting situations intelligently so as to ascertain that the identification is safe. It is sufficient for the courts to be good listeners and observers of the witnesses as they tell their stories from the standpoint of those situations and first ascertain why they say they were able to identify or recognize people, the confidence they radiate when describing the identification or recognition and the reasons for the confidence. It is on this basis that the court is able to assess the credibility of a witness or whether there exists a reasonable doubt. As long as a reasonable and intelligent approach is adopted in assessing the lighting conditions, the courts should never shy away from doing justice on the basis of it."***

25. Similarly in **Maitanyi vs. Republic [1986] KLR 2000** the court also held that the primary test in identification is the impression received by the witness which is largely dependent on the lighting situation. It also laid out duty upon the trial court to inquire 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.

26. In this case, PW1's testimony was that he was able to see the men who attacked him as the scene of the robbery was well lit from the security lights from a nearby building and moonlight. Although he had been drinking earlier in the night, we find that he was not incapacitated by reason of the drink and was still aware of the events.

27.Identification of the Appellants was by way of recognition. The complainant stated that he knew the Appellants prior to the incident in question as he had seen them on several occasions in the bar. On the material night they had been watching football together in the bar. This testimony was corroborated by PW3 who also knew the Appellants before the incident and saw them in the bar that night. The evidence of a witness on the identity of his assailants based on the recognition is more reliable and credible as opposed to an instance where the assailants were not known prior to the incident. This was so held in the case **of** ***Anjononi & Others vs. The Republic*** *[1980] KLR 59*, where the court stated thus:-

"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

28. We find after re-evaluating the evidence the complainant was able to see and recognize his attackers on the night of the robbery. The complainant was a credible and reliable witness. He was able to give the description of the Appellants to his daughters and the police and pointed out the 1st Appellant in the bar. In addition, when confronted by the complainant, the 1st Appellant did not deny having committed the offence but instead wanted to negotiate. This was confirmed by PW2 who was present during the confrontation. She also stated that the 2nd Accused on his return to the bar offered to take them home but they declined.

29. In the circumstances, we are satisfied that there was credible and overwhelming evidence to support the finding of the lower court that the complainant recognized the appellants as the robbers and no identification parade was necessary.

30. The Appellants claim that they were framed by the police in collusion with the complainant was not supported by any evidence. We therefore find that the conviction by the lower court was sound and was based on overwhelming evidence.

31. The last issue relates to the sentence imposed for the charge of robbery with violence contrary to section 296 (2) of the penal code. The Appellants herein appealed against the sentence on the ground that they were not allowed to mitigate before being sentenced.

32. After pronouncing judgment, the court has a duty under Section 329 of the Criminal Procedure Code to allow the Accused person a chance to mitigate before sentencing. In the case of **Geoffrey Ngotho Mutiso vs. Republic [2010] eKLR** the court held that although the section is couched in discretionary terms it is mandatory even where the accused person deserves a death sentence.

33. In Dorcas Jebet Ketter and another v. R. Criminal Appeal No. 10 of 2012 as cited with approval in Jacob Muthee & 8 Others v Republic [2013] Eklr it was held:

"The opportunity that is required to be given to accused persons to address the court in mitigation is not only to enable the court to consider an appropriate sentence in the circumstances of the case but also to have the mitigation on record in cases of any further appeal where the accused's conviction might be set aside and substituted by a conviction for a lesser offence, for example of manslaughter instead of murder. In such a case, it becomes easier for the appellate court to decide on the sentence if mitigating factors are in the record. Mitigation is also necessary in cases for example where clemency committee is considering a convict's case. We state that under no circumstances should a court dispense with mitigation for whatever reason."

34. Thus we find that the trial court erred in failing to record the Appellants' mitigation. However such failure is not fatal to a conviction or sentence passed as in the instant case, the Appellants were convicted of the offence of robbery with violence whose sentence is the mandatory death penalty prescribed by law. The Court of Appeal's holding in Godfrey Mutiso vs. R [2010] eKLR that the death penalty was not mandatory and the trial court could upon considering mitigation impose the sentence it deemed appropriate on the capital offence was declared not to be sound by the 5 Court of Appeal Judges' bench in Joseph Njuguna Mwaura & 2 Others vs. Republic [2013] eKLR (Criminal Appeal No. 5 of 2008) where it held:-

"we hold that the decision in Godfrey Mutiso vs. R to be per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences. Our reading of the law shows that

the offences of murder contrary to Section 203 as read with 204 of the Penal Code, treason contrary to section 40 of the Penal Code, robbery with violence contrary to section 296 (2) of the Penal Code and attempted robbery with violence contrary to section 297 (2) of the Penal code carry the mandatory death sentence."

FINDINGS

35. The trial Magistrate reached a correct finding that the appellants were positively identified by way of recognition.

We find the conviction on the basis of identification safe and uphold the conviction and confirm the death sentence passed by the lower court.

CONCLUSION

36. Both appeals are dismissed.

It is so ordered.

Dated, signed, and Delivered at Nakuru this 10th day of December 2013

ANYARA EMUKULE

JUDGE

L.N WAITHAKA

JUDGE

PRESENT

Humphrey Mwangi Morage for 1st Applicant

Francis Chege Nganga 2nd Applicant

Mr Marete for the state

N/A by Appellants Counsels

Emmanuel Maleo : Court Assistant

ANYARA EMUKULE

JUDGE

L N WAITHAKA

JUDGE