REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 538 OF 2010

(An Appeal arising out of the conviction and sentence of J. KASERA – SRM and D. ONYANGO – SRM delivered on 28th September 2010 in Kibera CMC. CR. Case No.3600 of 2009)

PAUL MACHARIA MWANGI *alias* MUHU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Paul Macharia Mwangi *alias* Muhu 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 6th November 2008 along Ngina Road Riruta Nairobi, the Appellant, jointly with others not before court, while armed with offensive weapons namely pangas, robbed Nicholas Nzunga Mulwa of a mobile phone make Nokia 1100 and cash Kshs.1,500/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Nicholas Nzunga Mulwa. The Appellant was further charged with **Causing Grievous Harm** contrary to **Section 234** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the Appellant jointly with others not before court, unlawfully did grievous harm to Nicholas Nzunga Mulwa. After full trial, the Appellant was convicted of both counts. He was sentenced to suffer death on the first count of **Robbery with Violence**. The sentence in respect of the second count was held in abeyance. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence of identification that did not meet the legal standard. He took issue with the fact that the trial magistrate had convicted him on the basis of a defective charge. He faulted the trial magistrate for failing to take any consideration that the evidence regarding the circumstances of his arrest was riddled with doubts that was not enough to sustain a conviction. He was aggrieved that the trial court had failed to fairly evaluate the evidence adduced before it and thereby reached the erroneous decision to convict him. He was aggrieved that the evidence adduced by the prosecution witnesses had not established his guilt to the required standard of proof. He accused the trial court of failing to take into consideration his defence before arriving at the decision to convict him. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

At the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He further made oral submission urging the court to allow his appeal. Mr. Karuri for the State opposed the appeal. He submitted that the prosecution had established its case on the charge of **Robbery with Violence** against the Appellant to the required standard of proof. He urged the court to dismiss the appeal.

Before giving reasons for our decision, it is imperative that we set out the facts of the case. Nicholas Nzunga Mulwa (the complainant) told the court that on 6th November 2008 he was attacked by a gang of three men as he was walking home along Ngina Road in Riruta area. He told the court that the three men accosted him, stabbed him, before robbing him of his Nokia 1100 mobile phone and Kshs.1,500/-. The complainant told the court that after he had been robbed, the Appellant, who was armed with a panga cut off his right hand. He explained that prior to the robbery, he had known the Appellant because he had seen him within the area. He did not know him by name but knew him facially. After the robbery, the complainant reported the incident to Riruta Police Station after which he was rushed to Kenyatta National Hospital where he was admitted. PW3 Parminas Mugo Muchira testified that on the said 6th November 2008 at about 9.00 p.m. while he was at his house along Ngina Road, he heard someone raise alarm. He went to investigate. He saw the complainant being beaten. He identified two of the people who were beating the complainant. He knew the two men by appearance. One of them is the Appellant whom he referred to as Muhu (the nickname of the Appellant) in the report that he made to the police. He testified that after the attack, the complainant's right hand was severed. His attackers escaped. PW3 assisted the complainant to make a report to the police and later assisted him to be admitted at Kenyatta National Hospital. PW3 was emphatic that it was the Appellant who had attacked the complainant because he saw him on the particular night of the robbery.

On 14th August 2009, the complainant was examined by Dr. Z. Kamau. He prepared a P3 form. He noted that the complainant had sustained a severed amputation of the right wrist. He was of the opinion that the injury was caused by a sharp object. The degree of injury was grievous harm. PW2 Josephine Mulwa testified that on 12th August 2009, she heard alarm raised to the effect that the Appellant had been arrested. She escorted the Appellant to Riruta Police Station. She knew the Appellant by the name **"Muhu"**. She told the court that after the attack, the complainant had told her that it was the Appellant who had cut his hand. PW5 Chief Inspector James Kilonzo then based at Riruta Police Station conducted an identification parade on 18th August 2009 where the complainant was able to identify the Appellant in an identification parade. PW6 PC Mark Ngariuku was at the Report Office at Riruta Police Station on 18th August 2009 when the Appellant was brought to the police station. The Appellant was accused of stealing clothes and shoes from another complainant. It was after his arrest, that it was realized that he had previously been reported to have robbed the complainant. The complainant in the other case withdrew the complaint against the Appellant. PW7 PC Isaac Kihara was the investigating officer in the case. He was the one was at the police station on 6th November 2008 when the complainant made the report of the robbery. After concluding his investigation, he reached the decision to charge the Appellant.

When the Appellant was put on his defence, he denied committing the offence. He told the court that he was arrested for another offence and taken to Riruta Police Station. He was able to resolve the case with the other complainant. He was surprised when he was charged with the present offence which he did not understand. He denied robbing the complainant.

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 Appellant on the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

We have carefully re-evaluated the evidence adduced before the trial court. We have also considered the grounds of appeal put forward by the Appellant. We have considered the submission both written and oral made before us. The Appellant was convicted on the basis of the evidence of identification. According to the complainant, he was attacked on the night of 6th November 2008. He told the court that he was able to identify the Appellant as being a member of the gang of three men who robbed and cut off his right hand. The robbery took place about 9.00 p.m. at night. PW3 testified that he saw the Appellant attack the complainant and rob him. The robbery took place outside his house. Both the complainant and PW3 testified that they knew the Appellant facially before the robbery incident. It was not clear from their evidence how they were able to be positive that they had identified the Appellant because they did not tell the court the source of light that enabled them to identify the Appellant. PW3 referred the Appellant by a nickname **"Muhu"**. PW2 the sister of the complainant reported to the police when the Appellant was arrested on 12th August 2009 that the Appellant was the person who had robbed and injured the complainant. There was no other evidence that connected the Appellant to the robbery. None of the items robbed from the complainant was found in possession of the Appellant. The Appellant was arrested ten (10) months after the robbery incident.

Upon evaluating the evidence of identification, we are unable to find, with certainty that indeed that evidence of identification was watertight. The circumstance under which the said identification was made was not conducive for positive identification. It was at night. The source of light was not disclosed. It is not clear from the prosecution's evidence whether the complainant gave the description of his assailant in the first report he made to the police. It will not do for a complainant to tell the police that he would know the assailant if he saw him. He must give a physical description of the assailant. Where the circumstances permit, he must also state the clothes that the assailant wore at the material time of the robbery. In **Republic –Vs- Kabogo s/o Waguyu 23 1KLR 50**, the court held thus:

> ***"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by the person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given. "***

In the present appeal, it was clear that the complainant and PW3 did not give the description of the persons who robbed the complainant in the first report that was made to the police. If indeed the Appellant was a resident of the area, *why did it take more than ten (10) months before he was arrested? Why was the present charge made against him when he was arrested for committing another offence?* There are many gaps in the prosecution's case that leads this court to find that the evidence of identification put forward by the prosecution was not sufficient to convict the Appellant. The identification parade that was conducted by the police after the arrest of the Appellant was useless in the absence of the first report made to the police giving the description of the person who is alleged to have committed the offence.

The Appellant's appeal has merit. It is allowed. His conviction on both charges of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** and **Causing Grievous Harm** contrary to **Section 234** of the **Penal Code** is hereby quashed. The Appellant is acquitted of both charges. He is ordered set at liberty and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF DECEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE