REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 529 OF 2010

(An Appeal arising out of the conviction and sentence of B.A. OWINO - SRM delivered on 14th May 2010 in Thika CMC. CR. Case No.1096 of 2009)

PIUS GATHUNDIA KAMAU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Pius Gathundia Kamau *alias* Maguku, 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 8th March 2009 at Witeithie market in Thika District, the Appellant, jointly with others not before court, while armed with a dangerous weapon namely an explosive device robed Joseph Kimata Mwangi of one television set, one radio cassette and cash Kshs.16,000/- and immediately after the said robbery used actual violence to the said Joseph Kimata Mwangi. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. The prosecution called six (6) witnesses in its bid to establish the case against the Appellant. After the close of the prosecution's case, the trial court ruled that the Appellant had a case to answer. The Appellant gave unsworn evidence in his defence. He did not call any witness in his defence. The trial court, upon considering the evidence adduced found that the prosecution had established its case on the charge of **Robbery with Violence** to the required standard of proof. It convicted the Appellant and sentenced him to death as is mandatorily prescribed by the law. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal which was later amended at the hearing, the Appellant raised several grounds of appeal essentially touching on the evidence adduced by the prosecution witnesses touching on identification. The Appellant was aggrieved that the trial court had relied on the evidence of identification to convict him whereas the said identification was made in circumstances that were not conducive for positive identification. The Appellant was aggrieved that the trial magistrate had relied on insufficient, contradictory, inconsistent and incredible evidence of prosecution witnesses to convict him. He faulted the trial court for failing to consider the totality of the evidence adduced, including his defence, before arriving at the decision to convict him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

At the hearing of the appeal, the Appellant presented to the court written submission urging the court to allow his appeal. It was his case that he had been framed for the offence by the complainant who was his neighbour. Miss Matiru for the State conceded to the appeal. She submitted that the evidence of identification was inconsistent and raised reasonable doubt as regards whether the prosecution witnesses actually identified the Appellant. This court shall consider aspects of the submission made after briefly setting out the facts of the case.

The complainant in this case, Joseph Kimata Mwangi is a businessman and a resident of Witeithie market. According to his testimony, on 8th March 2009 at about 2.00 a.m. while he was returning home with his wife PW2 Esther Wairimu Kang'ethe (this was after he had escorted his uncle to his house) he was accosted by a man within his compound. He told the court that when he entered the compound, he saw a man carrying a radio cassette. He inquired from him where he was coming from. The man hit him on the face with the radio cassette. He staggered but was able to regain his footing. He kicked the man. The man responded by hitting him with a metal on his arm. He fractured his arm. In the process, the man dropped the radio and ran away. The complainant testified that he was able to recognize his assailant (the Appellant) because the man was his neighbour. He said that he was able to identify the assailant by the security light which had been by the time been switched on. The complainant gave contradictory evidence in regard to the manner of dressing of the assailant. Whereas in his examination in chief he testified that the assailant was wearing a marvin, in his latter evidence he testified that the assailant was wearing a hooded jacket. He testified that when he was hit with the radio on the mouth, he broke a tooth.

In regard to the evidence of identification, the complainant's testimony was corroborated by PW2 who testified that when they returned to their home, she saw a man emerge from their house while holding a radio cassette. She was shocked but managed to scream **"Ngai! Mwizi!".** She testified that the man approached the complainant and hit him with the radio. He then hit him with a metal object. She testified that she was able to identify the Appellant as the assailant because there was sufficient light from the security light at the entrance. She recalled that after the attack, the man ran away. It was then that they discovered that the television set and a sum of Kshs.16,000/- had been stolen from their house. In regard to the manner of dressing, PW2 did not corroborate the testimony of the complainant as to whether the assailant wore a marvin or a hooded jacket. PW2 was categorical that she was able to identify the assailant as one **"Maguku",** which is the nickname of the Appellant.

Immediately after the incident, the complainant was rushed to hospital. He was admitted at Thika District Hospital. He was treated and later discharged. According to the P3 form which was filled by PW3 George Maingi, a Clinical Officer attached to the said hospital, the complainant had sustained a fracture of the humerus. He had also sustained two broken teeth. A nail which had been embedded in his arm was surgically removed. He classified the injuries sustained by the complainant as grievous harm.

PW5 APC Ibrahim Mohamed was at the material time based at Witeithie AP Camp. He received a report from PW2 of the robbery. The report was made at 8.00 a.m. on 8th March 2009. He testified that:

> ***"The report of the incident was brought in by one Esther Njeri,wife to Joseph Kimata. She was confused and hysterical. She made the report and told us her husband was injured and had been rushed to Thika District hospital. The lady also said that she was able to identify one of the assailants."***

Later in his testimony, he stated thus:

> ***"She (PW2) said she could identify one assailant whose face she saw by the aid of a security light. Esther did not give any names of the suspect. She said the suspect had a wound or scar on the side of the face. She did not accompany us at the time of the arrest."***

PW5 testified that it was PW2 who pointed out the house of the Appellant. He was accompanied by other officers where they were able to arrest the Appellant and two others. Nothing that was robbed from the complainant's house was recovered in the Appellant's house.

PW6 PC Erick Muli then attached to the CID Thika testified that he investigated the case. He told the court that when he interviewed the complainant immediately after the incident, the complainant told him that he was attacked by a robber whom he could be able to identify by his appearance. He did not give any physical description of the robber to PW5. When he interviewed PW2, PW2 told him that he had a suspect in mind. It was PW6's testimony that at that time, neither the complainant nor PW2 told him the name of the suspect. It was only later that PW2 named the suspect. PW6 testified that a device was found in the complainant's compound which was later established by PW4 IP Alex Mwandawiro as an

explosive device. PW4 is a ballistic expert. PW5 and PW6 told the court the circumstances of the arrest of the Appellant and his subsequent charge before the court for the offence for which he was convicted.

When the Appellant was put on his defence, he denied committing the offence. Other than narrating the circumstances of his arrest, he told the court that on the material day of 8th March 2009, he went to his usual place of business where he sold pineapples. He later returned home to sleep. He was surprised when on the following day he was arrested by administration police officers on allegation that he had robbed the complainant.

It was on the basis of the evidence, which was essentially evidence of identification, that the trial court convicted the Appellant. 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 of identification 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 re-evaluated the evidence adduced before the trial magistrate's court. We have also considered the submission made before us on this appeal. We have also considered the grounds of appeal put forward by the Appellant. As stated earlier in this judgment, the Appellant was convicted essentially on the evidence of identification. The identification was made at night when the circumstances favouring positive identification were absent. According to the complainant and his wife (PW2), they were able to identify the Appellant by the security light which had been switched on near the entrance to their house. The complainant and PW2 gave contradictory evidence in regard to the clothes that the assailant was alleged to have worn. Whereas the complainant testified that the assailant was wearing a marvin (some form of hood) or a hooded jacket, PW2 did not mention this critical fact. Whereas the complainant and PW2 testified that they were able to recognize the Appellant as the person who robbed them, in the first report that was made to PW5 (the administration police officer) and PW6 (the CID officer), the said witnesses did not tell the police that they had recognized the Appellant as the robber. In fact, both witnesses told the police in their first report that they would be able to recognize the assailant if they saw him. They did not initially give the description of the robber to the police. It was only later that PW2 told the police that the assailant had a scar on his face. It was much later that PW2 mentioned the Appellant by name.

It was clear from the evidence of the complainant and PW2 that their evidence of identification raised question as to whether they really identified the Appellant as the robber. The contradictory and inconsistent evidence regarding the circumstances of identification raises reasonable doubt that the said witnesses indeed identified the Appellant as the robber. It was clear from their evidence that the two witnesses were not sure that they had identified the Appellant as their assailant. The said witnesses did not tell the court the distance between the position they were standing and the source of light. They did not tell the court how many minutes they were exposed to the assailant to enable them be sure and positive that they had identified the Appellant as the robber. PW2 testified that she was in shock when she saw her husband (the complainant) being attacked. PW5 testified that PW2 appeared confused and hysterical when she made the report to him. It cannot be ruled out that in the hectic circumstance of the robbery PW2 may have been honestly but mistaken that she had identified the Appellant as the person

who robbed them. There are too many gaps in the evidence of identification by the two witnesses that this court cannot in the circumstances reach the conclusion that the Appellant was actually identified by the two witnesses. The circumstances of the identification were not conducive for positive identification.

This court would have been minded to confirm the conviction if the prosecution adduced other evidence to support the evidence of identification. As stated earlier in this judgment, none of the robbed items were recovered in the Appellant's possession. In fact, one of the items, the radio cassette was abandoned at the scene of the robbery. The evidence of the complainant and his wife was that of a single identifying witness made in difficult circumstances. As was held in **Maitanyi –Vs- Republic [1986] KLR 198 at P.200**:

> ***"Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-***
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> > ***"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 with 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 of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".***

In the present appeal, it was clear that other than the evidence of identification which was made in difficult circumstances that were not conducive for positive identification, there was no other evidence linking the Appellant to the commission of the crime. The State, in our considered view, was right to concede the appeal. We hold that the prosecution did not establish, to the required standard of proof beyond any reasonable doubt, that indeed the Appellant was positively identified as one of the assailants who robbed and injured the complainant.

In the premises therefore, the Appellant's appeal has merit and is hereby allowed. His conviction on the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** is hereby quashed. The Appellant is ordered set at liberty forthwith 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