REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 137 OF 2012

(An Appeal arising out of the conviction and sentence of B.J. NDEDA - PM delivered on 10th May 2012 in Thika CMC. CR. Case No.1183 of 2011)

B G K.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, B G K was charged with another person (who was also convicted but being a minor was sentenced to serve a sentence as provided under **Section 191** of the **Children Act** with three counts of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 3rd March 2011 at Uncle George Academy in Murang'a County, the Appellant, jointly with others not before court, while armed with offensive weapons namely pangas and rungus robbed Margaret Mukami Kimani, Eunice Njeri Kariuki and Raphael Mungai Miringu (the complainants) of various amounts of cash, mobile phones and clothing as listed in the charge sheet and immediately before or after the time of such robbery either threatened to use actual violence or infact used actual violence to the said complainants. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. The prosecution called four (4) witnesses in a bid to prove the charges against the Appellant. The Appellant gave unsworn evidence in his defence. After the conclusion of the case, the trial court found that the prosecution had proved its case to the required standard of proof beyond any reasonable doubt on two of the three counts of the charge of **Robbery with Violence**. The Appellant was sentenced to death as is mandatorily provided 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, the Appellant raised several grounds challenging his conviction and sentence. He was aggrieved that the trial magistrate had failed to take into consideration the defence of the Appellant before arriving at the decision to convict him. The Appellant was aggrieved that he had been convicted in proceedings that were conducted in a language that he did not understand. He took issues to the fact that the trial court had failed to evaluate the evidence of identification which in actual fact did not establish that he had been identified at the scene of the robbery. He faulted the trial magistrate for failing to take into consideration that the fact that the alleged stolen items which were recovered in his possession were not actually positively identified by the complainants. He was aggrieved that the trial magistrate had failed to consider the totality of the evidence adduced which if properly analyzed by the said court would have actually established that the prosecution had failed to prove that the Appellant had committed the offence. In the premises therefore, the Appellant urged the court to allow his appeal, quash his 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 in support of his

appeal. He urged the court to consider the written submission and reach an appropriate decision acquitting him of the charges. Mr. Karuri for the State submitted that the prosecution had established that it was the Appellant who was among the gang of robbers that robbed the two victims. The Appellant was recognized by the victims of the robbery during the robbery incident. He urged the court to dismiss the appeal.

This court shall consider the submission made by the parties to this appeal after briefly setting out the facts of this case. According to the complainants (PW1 Margaret Mukami Kimani and PW3 Raphael Munga Mureithi), on the night of 3rd June 2011 as they were asleep in their respective houses at Gaichanjiru, they were woken up by bangs on their doors. Robbers gained entry into their respective houses after breaking the doors. PW1 testified that she realized there were two men in her bedroom. They shone the light of a torch on her and demanded that she hands over the money that was in her possession. She gave the robbers Kshs.3,000/- and her Nokia 3310 phone. She described one of the persons who robbed her as a tall man who had big eyes. This description fitted the Appellant. She testified that she was able to identify the Appellant by the security lights that had been switched on after the robbery.

On his part, PW3 testified that the robbers broke into the house of PW1 after they had robbed them. The robbers threatened him with a panga. The panga was placed on his neck by the Appellant who demanded that he gives him money. He gave the Appellant Kshs.1,800/-. The robbers also robbed him of a navy blue trouser, a white shirt and three underwears. PW3 testified that he was able to recognize the Appellant because the Appellant worked as a gardener in the school where he taught. After a report was made to the police, the police went to the house of the Appellant where they were able to recover the items of clothing which were stolen from the house of PW3. The case was investigated by Cpl. Ronald Kimosop (PW4). He told the court that during his investigations he recorded statements from the complainants. The complainants told him that they had recognized one of the persons who had robbed them. He also went to the house of the Appellant and recovered the items of clothing which were robbed from PW3.

When the Appellant was put on his defence, he did not comment on the evidence adduced by the prosecution witnesses other than narrate the circumstances of his arrest on 7th March 2011. He denied committing the offences that he was charged. He attributed his tribulations to a grudge that existed between him and one of the prosecution witnesses.

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 reconsidered and re-evaluated the evidence adduced by the prosecution witnesses. We have also considered the defence of the Appellant. We have also taken into consideration the grounds of appeal put forward by the Appellant and the submission made by the Appellant and by Mr. Karuri on behalf of the State. The Appellant was convicted essentially on two pieces of evidence: The first piece of evidence was evidence of identification. PW1 testified that she was able to identify the Appellant by his physical appearance. Although the robbery took place at night, she was able to identify the Appellant by security lights. On his part, PW3 testified that he recognized the Appellant during the course of the robbery. The Appellant was known to PW3 because he was employed as a gardener in the school where PW3 worked.

The evidence of identification of PW1 may not, on its own, stand up to legal scrutiny. However, taken together with the evidence of PW3 who recognized the Appellant during the course of the robbery, it was clear that the prosecution established by evidence of recognition that indeed it was the Appellant who was among the gang who robbed the complainants. The evidence of recognition, although made at night, was sufficient to secure the conviction of the Appellant. The Court of Appeal in **Anjononi –Vs- Republic [1980] KLR 54 at P.60** held thus:

> ***"Being night time the conditions for identification of robbers in this case were not favourable. This was however a case of recognition not identification of assailants; recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because he depends upon personal knowledge of the assailant in some form or other."***

If there was any doubt that the Appellant participated in the robbery of PW3, that doubt was cleared when the items of clothing which were robbed from PW3 were recovered in the Appellant's house when the police conducted a search in his house four (4) days after the robbery incident. Although the Appellant disputes that the clothes actually belonged to the said complainant, having re-evaluated the evidence adduced in that regard, it was clear to this court that indeed PW3 positively identified the clothes that were recovered from the house of Appellant. The said clothes were recovered in the house of Appellant so soon after the robbery. The Appellant did not give an explanation of how he came to be in possession of the said items of clothing that had been stolen from the house of PW3. The doctrine of recent possession applies in this case. As was held by Bosire J (as he then was) in **Malingi –Vs- Republic [1989] KLR 225 at P.227**:

> "***By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."***

In the present appeal, it was clear that the Appellant was found with the stolen items of clothing belonging to PW3 in circumstances that obviously pointed out to the fact that he participated in the robbery that resulted in PW3 being deprived of the said items of clothing.

We therefore hold that the prosecution did prove to the required standard of proof beyond any reasonable doubt the two counts of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The prosecution proved the two counts by evidence of recognition and by the application of the doctrine of recent possession. The prosecution proved the essential ingredients of the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**: the Appellant was in company of others; he was armed with a dangerous or offensive weapon (a panga); he used the panga to threaten the complainants with actual violence; and finally, he robbed the complainants of their properties. The defence of the Appellant did not dent the strong evidence that was adduced against him by the prosecution.

In the premises therefore, the appeal lodged by the Appellant lacks merit and is hereby dismissed. The conviction by the trial court is hereby upheld. The sentence imposed on the Appellant was legal. It too is similarly confirmed. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF DECEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE