REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 267 & 262 OF 2008

MICHAEL NJOROGE WAITHERA……..…….1ST APPELLANT

MICHAEL IRUNGU JOSHUA…….…… 2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 2893 of 2007 in the Senior Principal Magistrate's Court at Limuru – Mrs. M. Murage (SPM) on 23rd July 2008)

JUDGMENT

Introduction

1. The two appellants herein, were convicted for the offence of Robbery with violence contrary to **Section 296(2)** of the **Penal Code** and sentenced to suffer death in accordance with the law. The facts of the charge for which they were convicted were that on 31st day of August 2007 at Juakali area within Limuru township in Kiambu West district in Central Province they robbed Henry Muthumbi Kariuki of cash Kshs.1,800/= and a phone make Nokia 1110 valued at Kshs.2,800/= and immediately before such robbery they wounded the said Henry Muthumbi Kariuki.

Grounds of Appeal

2. Both appellants filed appeals which were consolidated at the hearing. The 1st appellant raised nine amended grounds which in essence attacked the credibility and weight of the evidence adduced against him and in particular the evidence of visual identification. He also complained of the manner in which all the evidence was assessed and in particular that the burden of proof was shifted upon him. In his submissions he relied on the cases of:

i. **Anjononi v Republic [1980] KLR 59 at page 60** – on recognition.

ii. **David Masinde Simiyu & Ano Cr. App Nos. 33 & 34 of 2004** on the caution to be accorded the evidence of single

witness.

iii. **Choge vs Republic (1985) KLR 1 & Dishon Litwaka**

Libambula vs Republic Cr. App No. 140 of 2003 (KSM)

Vol. 35 (C.A.) pg 62 on how to treat evidence of voice

recognition,

iv. **Abdalla Bin Wendo v Republic 20 E.A.C.A. 166 pg 168**

on evidence of identification.

v. **Ru Kabogo s/o Wagunyu 23(1) KLR 50,** failure of

the complainant to mention his attackers.

vi. **Mutonyi v Republic (1982) KLR 2003** on corroboration

of evidence

vii. **RU Manilal Ishwerlal Purohit (1942) 9E.A.C.A 58, 61**

on corroboration of evidence.

3. The 2nd appellant also raised ten grounds respectively and replicated the in complaints raised by the 1st appellant. In addition he faulted the evidence of recognition and stated that there was no such evidence, since **PW1** did not give his name to the police when he reported the case. In his submissions he relied on several cases including the cases of:

i. **Karani v Republic (1985) KLR 290 and Peter Kimaru Maina v Republic C.A. No. 11 2003 Nyeri** on when the court may base its conviction on the evidence of identification in difficult circumstances.

ii. **Mohammed Bin Allui (1942) E.A.C.A. 72 Tekerali s/o Korongozi and four others v Republic (1952) 19 E.A.C.A.** on the evidence of first report made to the police.

iii. **Maghenda v Republic (1986) KLR 255** on how to treat the evidence of voice recognition.

iv. **Musa and anor v Republic (2005) 1 KLR 192** on the caution required of the court while evaluating evidence of visual identification.

Grounds of Opposition

4. Learned state counsel Miss Maina opposed the appeal on grounds that there was sufficient evidence on record to sustain the conviction and that it was in evidence that **PW1** positively identified the assailants who were his neighbours, because there was a combination of moonlight and electric lighting during the attack. To fortify her contention that **PW1** had identified his assailants, Miss Maina submitted that **PW1** did name the two appellants in his report to the area chief immediately after the attack and also informed the doctor who attended to him that he knew his assailants.

5. Miss Maina also submitted that the testimony of **PW1** that he was assaulted during the robbery was corroborated by the police and medical witness. On the basis of the foregoing she urged the court to uphold both conviction and sentence.

Summary of The Case

6. A synopsis of the prosecution case is that on 31st August 2007 at 10 p.m. **PW1** was within Limuru town where he had gone to escort friends. He was in the company of **PW5**. As they walked back home, six men came running from behind and surrounded them and attacked them. **PW1** struggled with them and in the process they fractured his thumb, stabbed him near his right eye and hit him on both legs. The robbers took a mobile phone and Kshs.1,800/= from him and disappeared. On 5th September 2007, the appellants were arrested by the Assistant Chief and later charged.

7. Each of the two appellants gave unsworn testimony in which they denied the charges. Each narrated to the court what transpired on 5th September 2007 when they were arrested for changaa related offences and later charged with the present offence but said nothing about 31st August 2007 which is the date of the offence. They called no witnesses.

Analysis of the Evidence

8. This being the first appeal we analysed and re-considered the evidence adduced by witnesses to arrive at our own independent decision whether or not to uphold the conviction of the appellants as is our mandate. In drawing our own inferences and in reaching our conclusions we bore in mind that we neither saw nor heard the witnesses as they testified. ***(see OKENO VS. REPUBLIC 1972 E.A. Pg. 32.***

9. We considered the ground advanced by the 2nd appellant on the unconstitutionality of the death sentence on its own, but we combined all the remaining grounds and considered them together, since they concern the weight of the evidence and the manner in which the evidence as a whole was evaluated by the trial court.

10. On the credibility of the evidence adduced and the manner in which it was evaluated by the trial court, we note that the case rested on the evidence of **PW1** as the single identifying witness. Although **PW1** was with **PW5** when they were attacked, **PW5** testified that he was too drunk to identify those who attacked them.

11. It is trite law that a fact may be proved by the testimony of a single witness. There is however, 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.

12. In testing the evidence of the single witness, we made a careful inquiry into the nature of the light available, conditions prevailing and whether the witness was able to make a true impression and description. We warned ourselves of the danger of relying on the evidence of a single identifying witness. See the decision of Nyarangi, Platt, and Gachuhi JJA in the case of **Maitanyi v Republic Cr. App No. 60 of 1986 [1986] KLR pg 198.**

13. We considered the failure of the trial court to warn itself on the dangers of placing reliance on the evidence of a single identifying witness in light of the holding in the case of **ANTHONY KANGETHE MWANGI VS. REPUBLIC CR. APP. 81 of 2008,** which is only of persuasive value. The High court held that failure of the trial magistrate to warn herself of the dangers of convicting an accused person on the evidence of a single identifying witness is not fatal if that accused person is convicted on sound evidence. We therefore tested the evidence in the case before us to establish whether it was sound.

14. **PW1** stated that he knew his assailants and further, that there was moonlight and security light from Bata Shoe Company nearby, which enabled him to identify the appellants. We note that **PW1** also stated that he knew the two appellants as his neighbours and that he knew the 1st appellant's voice and his home, to which he led the chief in an attempt to arrest him: that he knew

the 2nd appellant although he did not give his name to the police. He testified that:

> **"There was moonlight and there was security light from Bata. The two I knew them because they are my neighbours Michael Njoroge and Irungu."**

On cross examination by the 1st appellant he stated that the 1st appellant also goes by the name of Muturi.

15. **PW2,** the Assistant Chief confirmed that at 11.30 p.m. on the date of the nefarious act, he was watching T.V. at home when **PW1** called him on phone. In his testimony he stated that:

> **"He said he had been attacked and robbed. He said he knew Irungu and Njoroge (accused persons) among them."**

From the testimony of the Assistant Chief it is evident that **PW1** disclosed the names of those whom he had identified during the robbery. **PW1** did lead the Assistant Chief to the house of the 1st appellant but was not present when the Assistant Chief returned there and made the arrest.

16. The Clinical officer who filled the P3 form on behalf of the victim testified as **PW4**. He stated that **PW1** had been assaulted by persons known to him. The medical evidence confirmed that the complainant presented with an injury on the right hand, cut wounds on the face and both legs. The P3 form indicates that on the 1st September 2007 when it was filled, **PW1** had a scar near the right eye and a scar on the legs. The date of 1st June 2007 appearing in the evidence of **PW4** is attributable to error on the part of the trial court, since the P3 form itself reads 1st September 2007.
17. It was urged that the P3 form should have been filled by a doctor and that the clinical officer was not qualified to fill it. The challenge touching on the clinical officer's qualification is in our view taken care of by a scrutiny of the Act governing the affairs of clinical officers bearing in mind that the appellant did not lay any factual basis for his allegation in the first place. See **Raphael Kavoi Kiilu v. Republic,** the **Court of Appeal at Nairobi, Criminal Appeal 198 of 2008**; **[2010] eKLR.**

18. Under **Section 2** of the **Clinical Officer Act** (Training, Registration and Licensing Act Cap 260 (LoK) a clinical officer means:-

> **"a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act. ……"**

Section 7(4) of the Act states:-

> **"A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette."**

The Act goes further to provide that such officers may engage in private practice **"in the practice of medicine, dentistry or health work for a fee."** It follows therefore, that the clinical officer who testified in this case did so in his area of competence.

19. It is not clear why **Section 150** and **169** of the **Criminal Procedure Code** were cited in the grounds of appeal. **Section 169** of **Criminal Procedure Code** is with regard to the manner of writing judgments. We have considered the judgment of the lower court and we do not believe that this ground has any merit. The court set out the charge facing the appellant, the evidence presented before her by both the prosecution and the defence, her analysis of it, albeit brief, and her decision and sentence.

20. **Section 150** of **Criminal Procedure Code** empowers the court to summon a witness or examine any witness at any stage. In **High Court Criminal Appeal Number 54 of 2011 Martin Ochieng Opiyo vs The Republic**, the court had this to say:

> **"As the practice is, the prosecution is always at liberty to call the witnesses they deem relevant to their case. Those witnesses called were able to establish the prosecution case."**

We agree with those views and find that they apply in the case before us.

21. The learned trial magistrate observed in her judgment, that in their defences the appellants did not give an account of themselves on the night of the robbery. Whereas we are alive to the fact that in a criminal trial the appellants were under no burden to explain themselves, we humbly agree with the views of the trial court that the evidence of the complainant was unchallenged by the defences advanced.

On the Death Sentence

22. From the evidence we have determined that the robbers numbered around six and did strike and wound **PW1** during the robbery. **Section 296 (2)** of the **Penal Code** provides that if the offender is armed with a dangerous or offensive weapon or instrument, or if at or immediately before or immediately after the time of the robbery he wounds or strikes or causes violence to any person, he shall be sentenced to death. The 2nd appellant argued that this provision was arbitrary and unconstitutional.

23. In **Godfrey Ngotho Mutiso v. Republic [2010] eKLR**, the Court of Appeal analyzed various authorities including **A.G V. Susan Kigula & 414 Others, Constitutional Appeal No. 63 of 2006**, in respect of which the Supreme Court of Uganda had stated:

> **"We therefore agree with the Constitutional Court that all those laws in the statute books in Uganda which provide for a mandatory death sentence are inconsistent with the constitution and therefore are void to the extent of that inconsistency. Such mandatory sentence can only be regarded as a maximum sentence."**

24. Although none of the parties so argued, we are aware that the **Mutiso case** was recently overturned by a five Judge bench of the Court of Appeal in the case of **Joseph Njuguna Mwaura & 2 Others v. R, Criminal Appeal No 5 of 2008**, delivered on 18th October, 2013. The court discussed the right to life under **Article 26** of the Constitution 2010, and concluded that no person may be deprived of their life intentionally, except as authorized by the Constitution or other written law. They held that the Penal Code was one such law. The court further held that:

> **"the decision in Godfrey Mutiso v. R to be per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences."**

The court finally decided that: **"the sentence of death shall continue to be imposed in case of conviction where the law provides."**

25. This court is bound by the above decision of **Joseph Njuguna Mwaura.** We therefore cannot exercise any discretion in respect of the sentence imposed by the learned trial Magistrate in this case, which was in accordance with the Penal Code. Accordingly, this ground of appeal cannot stand.

26. We therefore find that the appellants were properly convicted for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and were also properly sentenced.

The upshot of the foregoing is that the appeals are lacking in merit and are dismissed in their entirety.

DATED, SIGNED and **DELIVERED** at **Nairobi** in open court this **5th day** of **December 2013**.

……. **……..…….**

A. **MBOGHOLI MSAGHA** **L. A. ACHODE**

JUDGE **JUDGE**