REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CR. APPEAL NO. 95 OF 2010

PAUL KYALO NYIMO *ALIAS* SAFARI……..APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(An Appeal from the conviction and sentence in Criminal Case No. 738/2009 in the PrincipalMagistrate's Court at Kangundo (Hon. C. Obulutsa, PM))

Judgment

1. The Appellant, Paul Kyalo Nyimo ("Appellant") together with two others, was arraigned before the Principal Magistrate's Court at Kangundo charged with a single count of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence, as per the charge sheet, read:

1. *PAUL KYALO NYIMO ALIA SAFARI 2.) KENNEDY MULI 3.) BENARD MUTUA MUANGE ALIAS KAUNGA*

> *On the 12th day of December, 2009, at Tala Township in Matungulu District within Eastern Province, jointly robbed NGINA NZOLE her handbag containing four mobile phones make Nokia 1200; Aoroda C500; Samsung E882; Phoda Phone; ATM Card; ID Card; an umbrella and Kshs. 4,600 all valued at Kshs. 43,600 and at the time of such robbery threatened to use actual violence to the said NGINA NZOLE.*

2. Following a brief but fully-fledged trial, the Appellant and Bernard Mutua Muange ("Muange") were each convicted of a single count of the reduced charge of theft from person under section 279(a) of the Penal Code. The Learned Trial Magistrate did so under the power granted to a Trial Court by section 179 of the Criminal Procedure Code. Having found the Appellant and Muange guilty of the lesser charge, the Court imposed a sentence of ten years and seven years between the Appellant and Muange.
3. The Appellant is dissatisfied with the conviction and sentence and has appealed to this Court. When the matter was called for hearing of the appeal on 3rd June, 2013, the Learned State Counsel, Mrs. Gakobo duly cautioned the Appellant that if he persisted on the appeal, the State would insist on a conviction on the more serious charge of robbery with violence. Even the Court informed the Appellant of the repercussions of his decision to pursue the appeal since it meant that his sentence could be enhanced by this Court. However, the Appellant was quite clear, even after these warnings that he wanted to argue his appeal.
4. The facts of the case can be stated quite easily. Ngina Nzole ("Ngina") was walking home from Tala market on 12th December, 2009. It was about 7:00 pm. She met her brother, John Nzole

("John") and they chatted for a little bit before they went their separate ways in opposite directions. Shortly afterwards, Ngina was confronted by four young men – two in front; and two behind her. Ngina says that she immediately recognized two of the young men: the Appellant whom she had known for a long time; and Muange whom she had known for about three months. It was not very dark outside and there was illumination from the nearby Jimmy's Corner Hotel.

5. The assailants grabbed Ngina's handbag and fled on foot as Ngina raised alarm. John was among the first to come to her aid. The now distraught Ngina testified that she immediately told her brother that she had recognized the Appellant and Muange as among her assailants. John also remember meeting the four young men and recognized the Appellant and Muange just after parting with her sister on the material day. In any event, John accompanied Ngina to the Police Station where they reported the matter.
6. The following morning, Ngina saw the Appellant and Muange at Tala and she immediately alerted the Police. That led to the arrest of the Appellant and two other people – including Muange and a third person on suspicion of stealing from Ngina. John's testimony corroborates that of Ngina in material effects. The other Prosecution witnesses were Police Officers who participated in the arrest of the Appellant.
7. The Appellant gave an unsworn statement in which he generally denied any involvement with the crime. He admits he knows Ngina as a neighbor but says that on 13th December, 2009 he was arrested while watching a football match at a local field. He testified that the Police just arrived, handcuffed him and bundled him into a police vehicle. He said that he had never met any of his co-accused.
8. The Learned Trial Advocate considered the evidence adduced at trial and concluded that Ngina was, indeed, robbed on 12th December, 2009; and that the Appellant and Muange were positively identified as some of Ngina's assailants. Although the Learned Trial Magistrate was sure that the Appellant and Muange had participated in the crime, he was hesitant to find that the offence committed was robbery with violence. This is what the Learned Trial Magistrate had to say on that issue:

> ***In her testimony, Ngina said the two accused pulled her bag from her possession. She never said she was threatened with violence or that violence was used on her. There is nothing to show that violence was used on her or a threat of violence made as alleged in the particulars of the charge sheet. Since the circumstances do not fit the definition of robbery, the charge of robbery with violence under section 296(2) of the Penal Code does not arise.***

9. We begin by observing that as a first appellate court, we have an obligation to re-evaluate all the evidence given at trial and come to our own independent conclusions. We are not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, we must be acutely aware that we never saw nor heard the witnesses as they testified and, therefore, we must make an allowance for that. See ***Okeno v R*** **[1972] EA 32 and** ***Kariuki Karanja v R*** **[1986] KLR 190.**
10. Before reviewing the evidence, we wish to dispose of the argument by the Learned Trial Magistrate reproduced above by agreeing with the Learned State Counsel that the Learned Trial Magistrate misdirected himself in law on this issue. Our case is law is, by now, quite emphatic that the crime of robbery with violence is committed in one of three ways:
    a. The offender is armed with any offensive weapon or instrument; or
    b. The offender is in the company of one or more other persons; or
    c. At or immediately before and or immediately after the robbery, the offender beat, struck or used any other form of personal violence against the victims of the robbery. See, for example, ***Ganzi & 2 others versus Republic (2005) 1KLR 52***
11. In this case, it would have been sufficient for the Prosecution to prove that there was more than one assailant.
12. The main issue raised by the Appellant on appeal is the identification evidence. The Appellant argues that the circumstances were not ideal for positive identification. He also argues that the identification evidence should be treated with skepticism because both Ngina and John did not describe her assailants to the Police immediately after the incident.

13. Our law is quite clear that identification witness especially that of a single identifying witness must be approached with great caution and circumspection. As the Court stated in ***Joseph Ngumbao Nzavo v. Republic*** **(1991) 2 K.A.R. 212:**

> ***Before accepting visual identification as a basis of conviction the Court had a duty to warn itself of the inherent dangers of such evidence. A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, was essential.***

14. Hence, the famous ***Charles Maitanyi v R*** **[1986] 1 KLR 198** admonished courts to exercise the greatest caution and circumspection before convicting on testimony of identification especially where the evidence is that of a single identifying witness.
15. To aid in the exercise of this "c*ircumspection*" our courts have adopted the comprehensive guidelines for receiving and considering identification evidence set out in the famous English case of ***Regina v Turnbull*** **[1976] 3WLR 445**. They are nine in number and they instruct a judicial officer who is considering evidence on identification to ask the following questions:
    a. How long did the witnesses have the accused under their observation?
    b. What was the distance between the witnesses and the accused person?
    c. What was the lighting situation?
    d. Was the observation impeded in any way, as for example, by passing traffic or press of the people?
    e. Had the witnesses ever seen the accused person?
    f. If the witnesses knew the accused prior to the current transaction, how often?
    g. If the witnesses had seen the accused only occasionally prior to the current transaction, did the witness have any specific reason for remembering the accused?
    h. How long elapsed between the original observation and the subsequent identification to the police?
    i. Was there any material discrepancy between the description of the accused given to the Police by the witnesses when first seen by them and his actual appearance?
16. In the instant case, even after administering to ourselves a heavy dose of the warning of the dangers of visual identification, after re-evaluating the entire record, we are unable to say that the Learned Trial Magistrate misapplied these principles or failed to render the correct analysis. We note that the Appellant has complained that there was insufficient light; and that Ngina did not immediately describe him to the Police. However, Ngina testified straightforwardly that it was about 7:00pm; therefore it was not too dark outside. In addition, she testified that the assault took place right outside Jimmy's Corner Hotel whose security lights were on.
17. Additionally, contrary to the Appellant's arguments on appeal, Ngina mentioned two of her attackers – the Appellant and Muange – to her brother shortly after the attack when he came to her aid. She also mentioned the two names at the Police Station even though she did not give a physical description. A physical description would have been unnecessary since Ngina knew the two assailants very well. It cannot be overemphasized that this was evidence of recognition not mere identification hence the dangers of misidentification are much less. Finally, the identification evidence by Ngina was corroborated by the independent testimony of John who had met both Ngina and the Appellant (and the other assailants) shortly before the incident. John knew the Appellant as well.
18. This leaves us with only one other argument raised by the Appellant which we need to deal with. He makes the legal argument that the trial was a nullity because the State was represented by an unqualified and an incompetent Prosecutor and in violation of section 85(2) of the Criminal Procedure Code. The factual basis for the Appellant's argument in this regard is that the State was represented by a Corporal Opondo when plea was taken on 17th December, 2009. The Appellant argues that since Corporal Opondo was, at the time, below the rank of an Assistant Inspector of Police, that rendered the whole trial a nullity.
19. This is a clever argument but which must ultimately fail. The Appellant is relying on a repealed section of the law. Before the Criminal Procedure Code was amended by Act no. 10 of 2007, section 85 thereof used to read as follows:

Power to appoint public prosecutors

(1) The Director of Public Prosecutions, by notice in the *Gazette*, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.

(2) The Director of Public Prosecutions, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service *not being a Police Officer below the rank of Assistant Inspector of police* to be a public prosecutor for the purposes of any case.

(3)Every public prosecutor shall be subject to the express directions of the Director of Public Prosecutions

21. However, Parliament amended section 85(2) vide Act no. 10 of 2007 to delete the words "not being a Police Officer below the rank of Assistant Inspector of Police." As such, there is no longer a requirement that a gazetted Police Prosecutor be above any particular rank.
22. Consequently, we dismiss the appeal as unmerited.
23. The Appellant was duly warned that should he proceed with the appeal, the State would seek conviction for the more serious charge of robbery with violence since he was with other people when he took the complainant's property. He did not heed that warning, and chose instead to pursue the appeal. He must now deal with the consequences of his choice. The evidence adduced is sufficient to satisfy the ingredients of robbery with violence and we therefore substitute the conviction for theft with a conviction for robbery with violence contrary to Section 296(2) of the Penal Code. This offence carries the mandatory death sentence. The Appellant is therefore sentenced to death.

DATED, SIGNED AND DELIVERED this 3rd day of December 2013.

JOEL M. NGUGI, Judge

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B. T. JADEN, Judge

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