REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 356 of 2008

NICODEMUS MUTUA MAKAU……APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 136 of 2007 in the Chief Magistrate's Court at Makadara – Mrs. Ominde (PM) on 9/10/2008)

JUDGMENT

1. **Nicodemus Mutua Makau,** the appellant herein was tried and convicted for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** in **counts I** to **III** by the learned Principal Magistrate at Makadara law courts.

2. The chief facts were that on the 31st day of December 2006, at Soweto Village in Nairobi within Nairobi Province, jointly with others not before court, while armed with offensive weapons namely, Pangas robbed Catherine Wairimu John of one radio cassette set make Sony, valued at Kshs.1,000 and cash Kshs.23,000/= making a total of Kshs. 24,000 and at or immediately before or immediately after the time of such robbery – threatened to use personal violence to the said Catherine Wairimu John.

3. In **count II** He is alleged to have robbed Elijah Kariuki Maina of Kshs.400 in cash while in **count III** he is alleged to have robbed Mwangi Karanja of a Siemens mobile phone valued at Kshs.6, 200.

4. Upon conviction he was sentenced to suffer death in **count II** and **III** while in **count I** he was acquitted under **Section 215** of the **Criminal Procedure Code**. Being aggrieved by the conviction and sentence, the appellant filed an appeal whose grounds we have compressed as follows:

(i) The visual identification was not free from error and mistake as it was made under difficult circumstances, was not tested by a properly conducted identification parade and came from a single identifying witness.

(ii) The learned trial Magistrate did not warn himself of the inherent dangers in convicting the Appellant on evidence of a single witness made under difficult circumstances.

(iii) The appellant was convicted on circumstantial evidence.

5. The learned state counsel Miss Wangele, opposed the appeal on behalf of the state. She however did not file her written submissions even though we afforded her ample time to do so.

6. We have analysed and re-evaluated the evidence on record afresh bearing in mind the decision in **Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR.** In the said case the court of Appeal held that:

"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

7. The appellant was convicted on the evidence of visual identification. In re-evaluating the evidence we bore in mind the Court of Appeal decision in **Karanja & Another vs. Republic [2004] 2 KLR pg 140**, which held inter alia that:

"1. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.

2. Whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification".

8. **PW1** the complainant testified that on the night of 31st December 2006 at about 12.30 a.m. robbers stormed her house at Kayole next to GG bar where she worked. They smashed her door with a big stone and gained entry. They were two in number and were armed with a panga and metal rod respectively. They ordered her back to the bar, where they demanded money and phones. She gave them Kshs. 14,000, one Siemens phone and one Samsung phone that belonged to a customer. The customers who were in the bar had been made to lie down.

9. After giving them the money, the two accomplices whose faces were covered in hoods began to argue between themselves over the money. In the process, the woollen hood that the appellant was wearing over his face got caught on a wire and came off. It was then that **PW1** saw the appellant's face and immediately recognized him as one of her customers at the bar whom she had known for over a period of one year.

10. The robbers ordered **PW1** to take them back to her house where they robbed her of 3 skirts and 4 blouses after demanding for a TV and battery which she did not have. They then took her back to the bar and ordered her to lie down before they left. **PW1** identified the appellant the following day as he walked past her bar after 4 p.m. She raised an alarm and civilians helped her to arrest him.

11. **PW2,** who was in the bar at the time the assailants attacked, testified that he was in a group of three at the bar when the door of the bar was smashed open with a big stone. That three people entered the bar demanding for money and phones. There was light from a pressure lamp which enabled him to see the assailants clearly. **PW2** was able to identify the face of one of the assailants who was bearded. He recognised him as someone he knew and whom he used to see at a place called Soweto. That although he did not know him by name he had known him for a period of two months. During cross examination of **PW2** by the Appellant, **PW2** affirmed thus that it was the Appellant he had seen:

"Not true I am mistaken about you. Even now I remember you as I knew your face…..I knew you as we used to meet at the bar. You would sit within."

12. **PW3** recalled that on the 31st December 2006, she was at Kayole at about 1.00 p.m. with **PW1** her employee who had called her to inform her of the robbery at her bar, when she heard screams outside the bar. On checking she saw members of the public holding the appellant whom they were accusing of carrying out the robbery that had taken place the previous day. She prevented the members of the public from lynching him. **PW3** too recognized the suspect as one of her customers at the bar, whom she had known for a period of about three months.

13. **PW4** testified that hewas asleep in his house at the material time, when three people dressed in black suits and masks entered his house. They first hit his door with a stone, and demanded that he opens for them alleging that they were policemen. He switched on the light and opened the door. According to **PW4** he instantly recognized the first person that he saw as the appellant who immediately ordered him around before he switched off the light. He identified his features although he did not say what these features were. He described him as wearing a tracksuit and a face mask which was lifted up enabling him to identify him.

14. The assailants had a metal bar and a sword. **PW4** testified that he had seen the Appellant many times before coming to the Pub although they did not talk to each other. The assailants took his money, phone make Siemens C25 and the trouser that he was wearing which had about Kshs.1, 800 in the pocket.

15. According to **PW4** the appellant whom he saw in the dock was the person he saw robbing him. That the appellant lifted the mask from his face as he robbed **PW4** and lowered it later. We cautioned ourselves in line with the holding of the Court of Appeal in **PETER KIMARU MAINA vs. REPUBLIC CA No. 111 of 2003**,where it wasstated thus: -

"…visual identification must be treated with greatest care and ordinarily dock identification alone should not be accepted unless the witness had in advance given description of the assailant and identified the suspect on a properly conducted parade…"

16. From the trial court record the appellant was arrested by members of the public who handed him over to the police. The complainant in **count I** screamed spontaneously and called out for help upon seeing the Appellant, saying that he had robbed her the previous day. An identification parade would therefore, not have served any purpose in these circumstances and in view of the fact that all the witnesses knew the appellant before. The trial magistrate was alive to this fact as is evinced from his remarks as set out below:

"In my considered opinion given the fact that the accused was well known to the witnesses who were all conscious that they immediately recognized the accused as someone they knew immediately they set their eyes upon him, an identification parade was not necessary"

EVIDENCE OF A SINGLE WITNESS

17. The Appellant submitted that the learned trial Magistrate erred in law and in fact in convicting the Appellant on the evidence of a single witness made under difficult circumstances without warning himself of the inherent dangers. We considered this ground in reference to the Court of Appeal decision in **Ogeto v Republic [2004] 2KLR** in which it held *inter alia* that:

"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken".

We note however from the court record that, in **count II** it was the evidence of **PW1** and **PW3** that they identified the appellant by his appearance since he uncovered his face at some point during the robbery.

18. As stated elsewhere in this judgment the appellant was acquitted in **count** no. **I**. The reason for the acquittal was the discrepancy that existed in the amount of cash stated to have been stolen in the charge and what the witness stated in evidence. In **count III**, we agree with the appellant that the circumstances of identification were difficult. The time was 1.00 a.m, the **PW4** who was the lone identifying witness, was woken from his sleep and the light was put out immediately after the robbers whose faces were masked entered the house.

19. It was also in evidence that the witness had been drinking before he retired to bed which he stated,

accounted, for the difference between the Kshs.2500/- paid to him by his employer and the Kshs.1800/- stolen by the robbers. There were three people who robbed him. This may have impaired his clarity of mind in recalling what happened. We find therefore that the evidence of identification in **count III** was not sound, enough to sustain a conviction.

20. **PW5** the arresting officer testified that he arrested and booked the Appellant on 1st January 2007 at Soweto Police Post after he had been brought there by members of the public on allegations that he had robbed them the previous day. He however did not investigate the case himself as this was done by another. The Prosecution did not call the investigating officer.

21. In this case therefore, there were more than two assailants and only one was arrested according to the witnesses. They were armed with pangas which they used to threaten the complainant and with stones which they used to break the door. However none of the complainants suffered any injury or was wounded from the robbery with violence.

22. In the case of **Johana Ndungu vs. Republic, Criminal Appeal No. 116 of 1995,** this Court stated in details what proof was necessary for conviction in cases of robbery with violence under **Section 296 (2)** of the **Penal Code**. It stated:-

"In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s. 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s. 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

1. If the offender is armed with any dangerous or offensive weapon or instrument, or

2. If he is in company with one or more other person or persons, or

3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

23. The appellant gave sworn testimony in his defence and called no witnesses. He explained how he met two people that he did not know on his way back home to Kayole Soweto, from work on 1st January 2007 at 4 p.m. The two stopped and asked him to identify himself and alleged that he was one of the people who had robbed them on the night of 31st December 2006. They took his ID card and beat him up. They took him to Soweto Police station and left him there with the 1st complainant who alleged that he had robbed her at the bar. He was subsequently charged with the offence of robbery with violence which he denied.

24. The appellant was well known to the two witnesses who recognised him immediately they set eyes upon him. The identification was therefore based on recognition and the two witnesses **PW1** and **PW3** corroborated each other on this fact. They also corroborated each other on the manner of lighting in the bar and what the robbers did once they got inside the bar. In sum, therefore we find that the evidence of **PW1** and **PW3** on record proved beyond reasonable doubt that the appellant was among the persons that robbed the 2nd complainant of cash using violence on 31st December 2006.

25. The appellant's testimony, besides lending credence to that of the prosecution that he resided within Kayole Soweto area where **PW1** and **PW3** said they had been seeing him, did not manage to debunk the prosecution's evidence against him.

We allow his appeal on the **3rd count** but dismiss the appeal on the **2nd count**, as lacking in merit.

It so ordered.

SIGNED DATED and **DELIVERED** in open court this ***27th*** day of ***February*** **2012.**

F. A. OCHIENG
JUDGE

L. A. ACHODE
JUDGE