REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.122 OF 2009

BENSON LETIKO …………..……………… APPELLANT

VERSUS

REPUBLIC ……………………...……………. RESPONDENT

(An Appeal from original conviction and sentence in Nakuru C.M.CR.C. No.4969 of 2008 by Hon. W. Kagendo, Senior Resident Magistrate dated 30th April, 2009)

JUDGMENT

BENSON LETIKO (the appellant) was convicted on a charge of robbery with violence contrary to **section 296(2) Penal Code** and sentenced to death.

The charge stated that on 4th September 2008 at KIPTANGWANY TRADING CENTRE in Nakuru District within the Rift Valley Province, jointly with another person not before the court, while armed with a dangerous weapon (a gun) the appellant robbed SOLOMON MUGO, cash Kshs.5960/- and a mobile phone NOKIA 2626 valued at Kshs.4700/- all to the total value of Kshs.10,660/= and at or immediately before or immediately after such robbery, used actual violence to the said SOLOMON MUGO.

Appellant denied the charge, and prosecution called a total of four witnesses to prove its case whilst appellant was the only defence witness.

SOLOMON MUGO KIRIA (PW1) told the trial court that on 4/9/2008, at 10.00 p.m., he was from Nakuru town going to his home in Kianjoya using a bicycle. He was moving slowly and upon reaching near Elementaita police station, his bicycle developed a problem because the chain got cut. He begun pushing the bicycle and as he approached JOGOO area, he saw torches from the shops facing the road to KIPTANGWANYI. He wasn't bothered much and continued with his journey, but upon getting on to the road that leads to KIPTANGWANYI, he heard someone say **"STOP"** and he was called to the side of the road by one whom he did not know. He suspected it was the watchman to the shop so he did not go near, as he had no business with him.

The people demanded to know why he wasn't heeding instructions but appellant urged them to draw near to him. One person stepped forward, he was in police uniform and had a gun which the witness describes as a big type. The person asked PW1 why he was abusing them – PW1 apologized saying he did not

know they were policemen and explained that his bicycle had broken down. They refused to listen to him and alleged that PW1 was a thief cum member of MUNGIKI. He was interrogated for a while regarding his identity and he identified appellant as the person who interrogated him. His evidence was:

"Accused pointed at himself with his torch. The light was on. He said "see, here is my uniform and gun to prove I am an officer."

After a lot of questioning by the thugs and much pleading by the victim, he was asked for *"kitu kidogo"* which he understood to mean a bribe.

PW1 was then led along the road to Kiptangwanyi on pretext that he was being taken to police camp – all this time it was the appellant who was doing the talking and eventually the appellant said they did not even want his money. Suddenly they began beating him until he fell down and two sat on him while the appellant stepped on his head with his shoes. They then emptied his pockets – relieving him of Kshs.5960/= which was in his trouser pocket, and his mobile phone make Nokia 2626 valued at Kshs.4700/= and his shoes. After they left, appellant got up and walked backwards to the shops at Jogoo and he eventually reached home at 3.00 a.m. He reported the incident to police near the Anti Stock Theft Unit on the next day. When he was going to make a report there he met two police officers and he immediately recognized one as the one who had beaten him. He demanded to see the officer in charge of the unit, and as he was explaining about the incident he was asked whether he could identify his attacker and upon confirming, the officer-in-charge summoned all the officers who were on duty then and added one who was not present. PW1 pointed out the appellant as the person who had assaulted him. The Officer-in-charge then described the other officer who was off duty as being tall and heavy built, but PW1 said that he could not have been in the group of his attackers as his attacker's companion was short and small built.

He further told the trial court:

"I was able to pick out the accused person. I had seen a gap in his tooth. This was the time we were talking as he asked for the kitu kidogo. . . There was no one else among the other officers who had the same build like that person among the officers. I had seen the two using the light of their torches. . . ."

Upon identifying the appellant, the officer-in-charge of the camp wondered how the appellant could have robbed PW1 yet all his officers were asleep at the camp, but when the appellant was asked where his room mate had been the previous night, he could not answer.

It was also the evidence of PW1 that during the incident, he had injured one tooth, head, left leg and arm. He was subsequently provided with a P3 form, then the appellant was charged.

PW1 was examined by Dr. Daniel Wainaina (PW2) who confirmed the injuries and filled the P3 form produced as exhibit.

On cross-examination PW1 stated that while being questioned by the appellant at the scene, a motor vehicle appeared and appellant tried to stop it in vain – that motor vehicle headlights also provided sufficient light to enable PW1 identify the appellant. To prove that he owned a phone PW1 produced a receipt which he showed the witness and further explained that the money he was robbed off was part of his salary as he earns 5900/= per day from his job as pastor. He also confirmed that he initially reported the matter to KABIAMET police post but could not get help there, so he reported at ELEMENTAITA police station, then to the Anti Stock Theft Unit (ASTU).

Ag. Inspector VICTOR NYONGESA (PW3) of ELEMENTATIA police station confirmed receiving a report about the incident from PW1 and that he had initially made his report to KIBIAMET Police Station who referred him to Elementaita police station and indeed PW3 referred him to Anti Stock Theft Unit.

Later on PW1 informed him that he had seen the suspect at ASTU and he learnt that the matter had been

referred to the Commander ASTU Gilgil, and he caused the appellant to be charged. He also got to learn that the appellant was subsequently dismissed from the forces.

Sgt. STANLEY NZIOKA (PW4) confirmed receiving a report from PW1 regarding the incident and when he called the officers under his command, PW1 identified the appellant. His evidence was that the appellant was not on night guard and he was not able to establish what time the appellant left the camp. Meanwhile the appellant on being questioned had offered to get his accomplice so as to return to PW1 his property, but he never returned, so that is how he was arrested and charged.

On cross-examination he stated that PW1 had said he could identify the person who had attacked him by his physical features plus accent – the physical features being a gap in the teeth, size and accent. However the witness did not request for the attacker to speak.

He also explained that what he conducted was not the regular identification parade, but only his way of confirming whether any of his officers were involved in the incident and the complainant immediately picked out the appellant. PW4 also clarified that he was not carrying out investigations as he is fully aware that an identification parade ought to be carried out by an officer holding the rank of inspector. What he did was using his initiative to establish the allegations made by complainant. He also explained that since the complainant had already identified appellant by the size and gap so there was no need to ask appellant to speak for complainant to also comment on his accent.

In his unsworn defence, the appellant stated that while on duty in Kongoi he saw PW4 come to the unit while accompanied by a stranger. He heard PW4 say:

“These are my officers, look at them and see if you can see the one you are saying among them.”

The man then pointed at the appellant while saying:

“He looks like this one.”

That is when PW4 informed him about the claims PW1 was making about the previous night’s incident. PW4 advised the man to check with other units such as GSU, KWS and ASTU since the man claimed that one of the attackers had been dressed in a purple green jacket.

Later the appellant learnt that the man had returned insisting that the appellant was the culprit. Two days later, the appellant was called by the Unit Commander and told that a complaint had been made by a member of the public from hotline at the ASTU headquarters and he was informed of his dismissal from the forces. He was then arrested and placed in cells, and six days later PW1 went to the cells and looked at him, then recorded a statement.

The trial magistrate noted that the incident was said to have taken place at about 8.00 p.m. in the night and that prior to that date, the appellant and PW1 were not known to each other. She considered the possibility of a mistaken identity, especially on the strength of a single identifying witness. However she was persuaded that PW4 had established that the appellant absconded from duty on the very day that PW1 made his claims, and after identifying him and the defence that he had asked for permission to be away from duty was not true.

She also noted the time that the victim spent with the assailant, saying it was well over two hours, during which they had a conversation.

She found that PW1 was able to identify the appellant when the latter pointed at himself with his torch while asking the witness to see his uniform and firearm to prove that he was a police officer – thus when he went to make the report at the ASTU camp, PW1 easily recognized the appellant. She held that this was not a case of mistaken identity but that of a police officer gone rogue.

Appellant challenged the findings of the trial court on grounds that:

1. The trial magistrate relied on the evidence of a single identifying witness.

2. The conditions prevailing at the scene were such that positive identification could not have been possible.

3. The trial magistrate disregarded evidence of the camp officer who stated that on the night in question, the appellant was at the camp.

4. PW3 admitted that he did not carry out any investigations.

5. His defence was rejected without any cogent reasons.

6. The prosecution failed to discharge its burden of proof.

At the hearing of this appeal, Mr. OGOLA appeared on behalf of the appellant while Mr. NYAKUNDI represented the State.

Mr. Ogola submitted that there was no other independent witness to corroborate the testimony of the complainant and there was inadequate evidence regarding the nature of light available to enable positive identification as no evidence was led regarding the intensity of the torch light the appellant was alleged to have used to spot himself. Furthermore that no detailed description of the assailant's clothing was given, simply being said that he was dressed in police uniform. Mr. Ogola further argues that there was even no evidence as to which part of the assailant's body PW1 saw.

It was counsel's contention that the conditions and circumstances prevailing were not conducive for positive identification. In any event, he points out, that the circumstances were stressful since one of the assailants was armed with a gun and the complainant's state of mind could not have enabled him to positively identify the assailant. He also faults the identification which took place at the camp saying it was not a proper identification parade as:

(a) It only had five members.

(b) Before the parade, appellant had already talked to witness who then called the in-charge.

Mr. Ogola argues that there was need for evidence to corroborate the complainant's evidence especially because appellant was attached to ASTU camp which according to PW4 was guarded and none of the officers on night guard duties were called to testify whether appellant left the camp on that night.

Mr. Ogola wonders why appellant's room mate who was referred to in the proceedings was never called to confirm whether the appellant left the camp on that night. He urged us to be guided by the decision in **TOM PIEMO OMBURA & ANOTHER V R** CR. APP. NO.9 of 1999992 and **ALPHONCE MODI KAIMA V R** CR. APPEAL NO.576 of 2000. It is argued that the trial magistrate ignored the evidence of PW4 regarding appellant's movement.

It is also Mr. Ogogla's contention that the incident was reported five days after it occurred and no investigations were carried out. The investigating officer PW3 elected to simply rely on the evidence of the complainant and PW4.

He faults the trial magistrate for directing that the evidence of PW4 be recorded, saying that the court took over the role of investigation, which was prejudicial to the appellant.

The appeal is opposed, and Mr. Nyakundi submits that complainant was able to positively identify the appellant with the aid of torch light – and the court ought to take into account the fact that indeed the appellant was a police officer and wanted the complainant to confirm that by self spot lighting.

He also points out that the complainant was close to the appellant, so he was able to see him clearly, and

in any event, the incident lasted two hours. The flawed identification parade the next day, did not change the fact that complainant was able to recognize appellant.

He also points out to appellant's conduct after the report had been made – that he disappeared from the camp until he was subsequently arrested and dismissed from the forces.

With regard to failure to call some officers from the camp as witnesses, Mr. Nyakundi argues that under provision of **section 143** of the **Evidence Act**, there is no specified number of witnesses required to prove an act unless specified by statute, and the court was right to believe PW1 because the ordeal lasted 2 hours, the close proximity of PW1 to appellant and the light conditions. With regard to the court ordering for PW4 to record his statement, Mr. Nyakundi drew our attention to the provision of **section151 Civil Procedure Code** which recognizes that if during proceedings, the trial court is convinced that there is need to summon a witness so as to enable the court to make an impartial decision, then the court has a duty to do so. Further, that even without the evidence of PW4, the evidence of PW1 was sufficient to sustain a conviction.

However in reply Mr. Ogola submits that there is no proof that the appellant had offered to return the stolen items – which evidence is in fact inadmissible as it amounts to a confession and this did not meet the standards set out in **section 26** of the **Evidence Act**.

Also claims about appellant's disappearance from the camp are not supported by any record.

The only evidence against appellant with regard to what took place at the scene is that of PW1, and certainly that kind of evidence must be treated with the greatest care and pay due regard to the conditions prevailing. In **RORIA V R** (1967) EA 583 it was stated:

"A conviction resting entirely on identity invariably causes a degree of uneasiness. . . . The danger is of course greater when the only evidence against the accused person is identification by one witness and a conviction based on such identification should never be upheld, it is the duty of this court to satisfy itself in all circumstances, that it is safe to act on such identification."

The fact that the complainant was the only witness does not make his evidence any less to uphold a conviction, but it must be tested in terms of the

prevailing circumstances. What was the opportunity available for identification – it is said to have been torch light. The light intensity or the size of the torch was not described. When the attacker shone the light on himself to enable the complainant see his uniform and firearm to confirm that he was a police officer – which part of his body was the torch light illuminating? It is not described – but the most reasonable inference to draw is that he shone the torch on his body covered by the police uniform and on his hand or arm which held the firearm.

What was the size of the torch and its light intensity? Was its surface so big as to cover the attacker's face if he held it say against his chest, just below his neck or around the arm? How long did the appellant hold the torch towards the witness so as to enable him to see the attacker's the dental formula? And which part of the jaw was the gap on the dental formula – was it on the upper jaw or the lower jaw? See **CHARLES O. MAITANYI V R** (1980) KLR. The opportunity for identification was not exhaustively examined, and our finding is that the prevailing conditions were not adequate for positive identification giving possibility for mistake on identity.

In this instance the evidence of the complainant so as to rule out the possibility of mistake required to be tested against evidence of other individuals mentioned such as his room mate who is alleged to have said that he had left the camp some time in the night and returned later in the night – that room mate's name was never disclosed nor was he called as a witness.

Then there are the friends who were said to be on night duty since the camp is a protected area – what was so difficult in calling them to come and clarify the movement of the appellant? Perhaps if the room

mate or the night guards had been called, they would probably give evidence stating different movement regarding the appellant. In this regard we draw from the case of **BUKENYA AND 5 OTHERS V UGANDA** Cr. App No.68 of 1972 EACA 549 which held:

1. The prosecution must make available all witnesses to establish truth, even if their evidence may be inconsistent.

2. When the evidence called is inadequate, the court may infer that the evidence of uncalled witnesses would tend to be adverse to prosecution.

We therefore find that in this instance that the prosecution's failure to call the named witnesses was prejudicial to the appellant and indeed it was unsafe to rely on the evidence of a single witness.

There is also the purported confession, which we have no hesitation in finding that the same cannot be given any weight as it does not meet the threshold contemplated by **section 26** of the **Evidence Act** regarding confessions and how they are to be taken.

As regards claims that the appellant disappeared from the camp after the complainant had made a report, again there is no single document presented to support that, nor has any other officers who may have been on duty on that day been called to confirm that appellant was away without official leave – and it remains at best speculation.

We think blame cannot be visited on PW4 for lining up his officers so that complainant could point out his purported attackers because he has clearly explained that:

(a) He was not an investigating officer.

(b) He did not even think one of his officers could be the culprit because as far as he was concerned the camp was a protected area and all his officers had been within the camp on that night.

(c) This was just an administrative action upon receiving certain allegations against his officers.

(d) Certainly this was not the standard identification parade.

In any event this identification cannot now be of much significance considering our earlier observations regarding opportunity and the prevailing conditions thereto.

The upshot then is that the conviction was unsafe and we quash it. The sentence is thus set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 21st day of February, 2012 at Nakuru.

W. OUKO **W. OUKO**

JUDGE **JUDGE**