REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Criminal Appeal 2 of 2009

KYALO MUINDE …….……APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(Being an appeal from the original conviction and sentencein MachakosChief Magistrate's Court Criminal case No. 246/07 by Hon. S.A. Okato on 20/6/2007)

JUDGEMENT

The Appellant, **Benard Wambua** and one, **Kyalo Muinde** were charged before the Chief Magistrate's Court, Machakos with robbery with violence contrary to section 296 (2) of the Penal Code particulars being that on the 21st January, 2007 at Kosovo estate Athi River Location in Machakos District within Eastern Province, jointly with another not before court and being armed with dangerous weapon namely a panga, they robbed **Wasua Munyao** of a wallet containing cash Kshs. 2500/=, one mobile phone make Motorola C168, a cap and one pair of shoes all valued at Kshs. 10,000/= and at or immediately before or immediately after the time of such robbery they used actual violence to the said **Waswa Munyao**. The Appellant and his Co-accused denied the charge and they were tried in the fullness of time.

The prosecution called a total of four witnesses. Its case briefly stated was that, **PW1 Wasua Munyao** "*the complainant"* on 20th January 2007 at about 5.00 am was on his way home within Kosovo slums after watching football at Makadara Estate when he met three men among them, the appellant and his co-accused whom he knew by their nicknames as **Kamangemange** and **Karai** respectively. The appellant's co-accused ordered him to stop and lie down. He stopped and both the appellant and co-accused held him and a struggle ensued. The appellant wrestled him to the ground and reached for a panga from his jacket with which he hit him on his left thumb and on the right hand. The co-accused hit him with a stone. The appellant then lay on top of him as the co-accused, robbed him of his mobile phone make motorolla C168, a wallet which contained cash Kshs. 2500/=, cap and a pair shoes. He screamed and the appellant and the other accomplice who was not arrested and charged ran away as he held onto the appellant's co-accused. One **Godfrey Mwiso**, responded to the complainant's distress call and helped him to subdue the appellant's co-accused whom they escorted to Athi River Police Station where he reported the incident and handed over the co-accused. Subsequently, he proceeded to the estate where he resided and informed his friends about the incident and the names of the suspects. The friends among them PW2, **Charles Ndonga** and PW3**, Paul Nzuki Mwendwa** mobilized themselves and started looking for the appellant, alias **Karai.** At about 3.00pm they flashed the appellant from his hideout at a sewerage pipe, arrested him and escorted him to Athi River Police Station. The two were then handed over to PW4, **PC**

Johnstone Makokha. He booked the report and placed them in the cells. He then issued the complainant with a P3 form. The complainant sought treatment at Makadara Health Centre. The P3 form was subsequently filled by **Dr. Mutunga** on 6th February, 2007 who assessed the degree of injuries sustained by the complainant as harm. The appellant and co-accused were subsequently charged for the offence.

Put on his defence, the appellant gave unsworn statement and called no witnesses(s). He stated that on 21st January, 2007 he was watching television when he was arrested by two people who escorted him to the police station because he did not have Kshs. 10,000/= that the people who arrested him demanded for his freedom.

The learned magistrate in his judgment rendered himself thus;

"As to who robbed him of the goods above, he (PW1) told the court that accused persons jointly with another not before court robbed him but before they all escaped he managed to cling on accused 1, screamed and a member of public helped him to arrest him. He knew both accused persons well for they are residents of the same slum called Kosovo where he too resides. He even knew them by their respective nick names-Kimangemange and Karai. There was security light at the scene of the attack which enabled him to recognize the accused persons clearly. He struggled with the accused persons before accused 2 wrestled him down and had sufficient time to see them even more clearer. After clinging onto accused 1 and arresting him he immediately informed Charles Ndonga (PW2) and later in the day he also informed Paul Nzuki Mwendwa (PW3) that the accused persons were the ones who attacked and robbed him and PW2 and PW3 mounted a search for accused 2 whom they arrested from his hideout on the same day.

The above evidence is evidence of recognition. In the case of <u>Anjoni</u> (sic) <u>& Others vs R [1980] KLR 59</u> the Court Appeal said;-

This was however a case of recognition, not identification of the assailants, recognition of an assailant is more satisfactory, more assuming (sic) and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some from (sic) or other"

***The evidence of the complainant considered together with the evidence of arrest and the above quotation of the burst (sic) of Appeal leaves me with no doubt in my mind that the accused persons jointly with another not before court are the ones who attacked the complaint and robbed* him of the property complained of and I so find".**

With the conviction of the appellant complete, what was left of the learned magistrate was to impose the sentence. The sentence for capital robbery is well known; death. It is the sentence that was imposed.

The appellant was not satisfied with his conviction and has lodged this appeal. He relied on five grounds in his home-drawn petition of appeal to wit; that the evidence of visual identification relied on by the learned magistrate to convict him was not free from possibility of error or mistake, he was convicted on the evidence of a single identifying witness but the court did not warn itself of the dangers of convicting on such evidence, essential witnesses were not called to testify, section 77(1) (b & f) & (i) of the repealed constitution was not complied with and finally, his defence was not given due consideration.

The appeal was placed before us for hearing on 2nd May, 2012 when it transpired that the appellant's co-accused and whom they were convicted and sentenced together passed on sometimes in 2009 as he waited the execution of the sentence imposed. The appellant nonetheless elected to prosecute his appeal by way of written submissions which he tendered with our permission. We have carefully read and considered them.

Mr. Mukofu, learned State Counsel supported the conviction and sentence. According to him the appellant was positively identified at the scene of crime. Conditions obtaining were favourable for such positive identification. The appellant wrestled the complainant to the ground. This gave the complainant sufficient time to see the appellant owing to close proximity. There were security lights at the locus in quo

which enabled the complainant to see the appellant. Indeed this was a case of recognition as opposed to mere visual identification. Finally, he submitted that the court had noted that the complainant was alone at the time of robbery but found his testimony to be consistent and truthful. On the basis of all the foregoing, counsel urged us to dismiss the appeal.

This is a first appeal, and as such this court has a duty of re-considering and re-evaluating the evidence adduced in the trial court in order for it to form its own opinion if that evidence can sustain the appellant's conviction, giving due allowance that this court had no opportunity to see and hear the witnesses testify as the trial court did. See **Okeno vs Republic [1972] E.A 32** and **Mwita vs Republic [2003] KLR 301**. We have recounted the evidence advanced before the trial court to enable us reach an informed decision in terms above.

It is not in dispute that the complainant was violently robbed of the items set out in the charge sheet. The appellant admits that much in his written submissions. His point of departure is alleged involvement. The trial court on the evidence on record found as a fact that indeed the appellant was involved. Is there any basis upon which that finding can be faulted? We do not think so.

It was the evidence of the complainant that he was accosted by 3 people while on his way home from watching football, attacked and robbed. The time of the attack was at about 5 a.m. During the attack he was able to recognize the appellant among the robbers. The robbery was along a railway line and there were security lights. Infact it was the appellant who wrestled him to the ground and reached for a panga from his jacket and hit him on the left thumb and right hand. The appellant held on him and his co-accused reached for his mobile phone make motorolla C168 and wallet which contained Kshs. 2500/= from the pocket. He also took his blue cap and a pair of shoes. The complainant screamed and held on the co-accused until assistance arrived in the person of one, **Geofrey Mwiso.** However, the appellant managed to escape.

Going by this evidence, the appellant contends that the attack was at night and dark. Therefore the complainant could not have had clear vision of him. He goes on to submit that though there were security lights, their location, intensity of the light they emitted, the time taken for the complainant to observe him as to be able to recognize him was not considered by the learned magistrate before concluding that the purported visual identification was free from possibility of error.

We appreciate that this was a case of identification, nay recognition by a single witness at night. It is recognized that evidence of visual identification in criminal cases can bring about a miscarriage of justice it if is not carefully tested. In **Kiarie vs Republic [1984] KLR 739**, the court of appeal observed that where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction. In the same case, the court stated that it is possible for a witness to be honest but mistaken and a number of witnesses to be all mistaken. The case of **Maitanyi vs Republic [1986] KLR, 198** sets out the sort of inquiries to be made by the court that may help in testing the evidence of identification with greatest care. However, to our mind, this was a case of recognition as opposed to visual identification of the appellant. Though recognition is more reliable than identification of a stranger, such evidence of recognition should be carefully tested seeing and knowing that mistaken recognition of close relatives and friends are sometimes made (See **Anjononi** and **Others vs Republic [1980] KLR** and **Wamanga vs Republic [1980] KLR 424.**

In this case, there is no dispute that the appellant was known to the complainant. Indeed they resided in the same neighbourhood at lower Athi River. He knew the appellant by his nick name, **Karai.** The appellant did not at all contest this fact. At the scene of attack, there were security lights. It is common ground that security lights emit very powerful light. It has not been suggested that the appellant was in any manner disguised as to make his recognition well nigh impossible. The encounter between the appellant and the complainant must have taken a while considering that the appellant and his cohorts first ordered the complainant to stop and lie down. He resisted and they held him. He struggled with them until he was wrestled to the ground by the appellant. All these happened in the glare of the security lights. The act of the appellant wrestling the complainant to the ground confirms that the two were in close combat. Indeed they were too close in terms of proximity; and being a person the complainant was

familiar with, we cannot see how the complainant could have failed to see him sufficiently to be able to recognize him. We do not entertain the argument by the appellant that the attack was so sudden and vicious therefore the circumstances were difficult, and the complainant in the premises could not have been in a position to register reliable identification of the appellant. The complainant knew the appellant very well. He put up a spirited fight against him and his cohort. The encounter was close. This is not a person who was so frightened by the appellant and his team as to loose his sense of focus considering that he even held on one of them until help arrived. In our view therefore, much as the attack was at night, there was sufficient light emitted by the security light at the scene. The security lights emitted sufficient light which enabled the complainant to recognise the appellant among his attackers. The encounter took some time and in close proximity, considering that the complainant knew the appellant very well and was not disguised at all, his recognition could not have been that easier. There is no evidence of bad blood between the appellant and the complainant as would have led the complainant to falsely accuse the appellant.

Ofcourse the learned magistrate relied on the testimony of a sole identifying witness to convict the appellant. It is settled that whenever a trial court intends to rely on such evidence to convict, it must satisfy itself that such evidence is safe and warn itself of the dangers of acting on such evidence.

In the case of **Abdallah Bin Wendo vs Republic [1953] 20 EACA 166**, the court observed:

"A conviction resting entirely on identity invariably causes a degree of uneasiness.... The danger is ofcourse, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification…"

Yet again in the case of **Mburu Mbugua vs Republic [1980] KLR 23**, the court reiterated that;

"where a conviction depends upon the identification of the defendant by a single witness, the evidence of that witness must always be tested with greatest care and, on a first appeal in such a case, the court must satisfy itself that it was safe to act upon that evidence; whether it was safe is a question of mixed fact and law. Accordingly, where a trial judge had warned himself of the danger of convicting on the evidence of a single witness but had not correctly applied his warning to the evidence (which was neither fool proof nor cogent), the conviction was quashed…"

We have already stated that the appellant's conviction turned on evidence of recognition as opposed to visual identification of a stranger in which the above considerations could come into full play. In any event, the learned magistrate found the complainant **"**… ***consistent and truthful and I have no reason to doubt him…"*** So that much as he did not warn himself literally of the dangers of convicting the appellant on the evidence of the complainant only, that omission if at all, is compensated by the fact that he found the complainant a witness of truth, believed him and acted on his evidence. Above all, this was a case of recognition as opposed to visual identification.

We have considered and evaluated the defence advanced by the appellant at the trial. Just as the trial magistrate, we form the opinion that it did not at all challenge the cogent evidence that was adduced by the prosecution that indeed established that the appellant was among those who robbed the complainant.

On the question of alleged violation of the provisions of section 77 of the defunct constitution, nothing much really turns on this. Much as the appellant applied for the witness statements but was not supplied, he elected to proceed with the case nonetheless. It was within his right to insist on the statements being availed to him before the commencement of the hearing of the case. That he opted to proceed can only be taken that he waived that right. He cannot now turn around and blame the prosecution or the court.

Secondly, though the appellant complains that PW4 testified in English, which language was foreign to him, the record however shows that the appellant did cross examine the witness. How could he have cross-examined him if he did not understand what he had said in his evidence in chief. In any event, the

record shows that there was a court interpreter. The proceedings were therefore interpreted to him.

In the result we find no merit in this appeal and accordingly dismiss it.

JUDGEMENT DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **15TH** day of **JUNE 2012.**

ASIKE – MAKHANDIA **GEORGE DULU**

JUDGE **JUDGE**