REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Criminal Appeal 12 of 2010

PETER MUTIA MAITHYA…….APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

(Being an appeal from the original conviction and sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 685/2007 by Hon H.M. Nyaberi ,SRM on 28/1/2010)

JUDGMENT

1. The two Appellants – Peter Mutia Maithya (*1st Appellant*) and David Makumbi Mumo (2nd Appellant)—were charged in the Court below with robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that, on 19/06/2007 at Mwingi Township, Mwingi location in Mwingi District within Eastern Province, the two Appellants jointly robbed Morris Muthengi Kshs. 2,500/= and a mobile phone make Nokia worth Kshs. 7,000/= and at, or immediately before or immediately after the time of such robbery used actual violence to the said Morris Muthengi. They each denied the charge. The Learned H.M. Nyaberi convicted them both after a fully fledged trial and sentenced them to death. They have appealed against both conviction and sentence.

2. During the trial the following evidence was adduced. PW1 was the Complainant. He testified that on 19/06/2007, at around 8:00 p.m. he had gone to visit his friends who sell fish near Vario-Tech Bookshop in Mwingi town. As he was chatting with his friends, he felt someone attempt to pickpocket him. He held the hand of the pickpocket, who soon enough turned out to be an assailant. As the Complainant struggled with this assailant, a second assailant emerged. This second assailant hit him severally – on the chest and on his private parts – and, in the process, stole from him his cell phone worth Kshs. 7,000/= and cash in the amount of Kshs. 2,500/=.

3. According to PW1, when his friends attempted to come to his rescue, they were repulsed by the two assailants who then fled the scene on foot. PW1 duly reported the incident to the Police and sought treatment for his injuries. He was later given a P3 which was filled and tendered in evidence by Fredrick Mutua, who testified as PW4.

4. PW1 testified that he clearly recognized his assailants and he reported as such to the Police. He testified that he was able to recognize them with the help of the security light from the bookshop and a tin lamp on the table of a stall on the road. He testified that the security light was "*very bright*" and that it was just 6 metres away from the scene of robbery. On cross-examination, PW1 stated that he had known both assailants for at least a year and that he gave out the names of both of them to the Police and they

were recorded in the Occurrence Book. According to him, the two assailants were the 1st and 2nd Appellants. Throughout his testimony, PW1 insisted that he gave their names to the Police.

5. Nine days after the robbery, PW1 saw 1st Appellant walking the streets of Mwingi. At the time, PW1 was at his place of work at Mwingi Famous Petrol Station. He followed the 1st Appellant and alerted a Police Officer. That is how the 1st Appellant was arrested. Upon questioning, he apparently volunteered information to the effect that he had sold the phone he had robbed to Peter Mwangi Kumeka, who testified as PW2. PW2 confirmed the story. He testified that on 19th June, 2007, the two Appellants, who were known to him, approached him and offered to sell him a cell phone. They claimed, testified PW2, that it belonged to the aunt of the 1st Appellant who had authorized them to sell it. PW2 bought the phone for Kshs. 1,100/=.

6. The 2nd Appellant was never arrested until about a year later. He was initially arrested on a separate charge of touting – but the arresting officer recalled that he was wanted in connection with the robbery of the Complainant in this case and duly charged him accordingly.

7. The Prosecution relied on two theories to connect the Appellants to the offence. The first one is the straightforward evidence of identification by recognition provided by the Complainant. The second one is the evidence connecting the stolen and recovered phone with the Appellants.

8. On the strength of this evidence, the Learned Trial Magistrate convicted the Appellants. In his summary of the evidence, the Learned Trial Magistrate wrote thus:

I have considered the evidence of the complainant and I am satisfied that the light that was emanating from the bookshop was sufficient to have enabled him to identify his attackers being the accused. The complainant had known the accused for a long period and the contention by the 1st accused that he had mistaken him cannot stand.

Immediately after the accused had robbed the complainant, they sold the mobile phone exhibit 2 to Peter Mwangangi Kumeka (PW2). The accused in cross examination failed to discredit this evidence. They did not, in their defence, deny the fact that they never sold (**sic**) to him any phone. I have treated the evidence of PW2 with a lot of caution. However, I find his evidence reliable [,] safe and worth of believing. The 1st accused, after his arrest and on being interrogated [is] said to have sold the phone to PW2. When PW2 was arrested, he produced the phone exhibit 2. To this extent, I am satisfied that the accused are well connected [with] the offence.

9. The two appellants are dissatisfied with the ultimate verdict and sentence. They each appealed. When the case came before us for hearing on 6th March, 2012, both Appellants and Mr. Mukofu, Learned Counsel for the State each agreed to the consolidation of the two appeals.

10.In opposing the appeal, Mr. Mukofu argued that the evidence of identification by recognition as recorded by the Trial Magistrate was watertight and supported the conviction. He also argued that there was evidence of recent possession which supported the conviction. We note, however, that the "*recent possession"* Mr, Mukofu was talking about was, in fact, possession by PW2 and not the Appellants.

11.In support of the appeal, in summary, the 1st Appellant raised the following arguments. First, he contended that this was a case of mistaken identity and that the Learned Trial Magistrate had erred in failing to realize that. He, particularly, complained that the Learned Trial Magistrate had failed to warn himself of the dangers inherent in convicting on the evidence of a single identifying witness. The 1st Appellant also argued that it was an error for the Learned Trial Magistrate to convict him on a defective charge. His argument in this regard is that the charge sheet did not speak of "*offensive or dangerous weapons"* and was, therefore, fatally defective. Lastly, the 1st Appellant argued that the evidence tendered at the trial was so hopelessly contradictory and full of discrepancies to sustain a charge of robbery with violence.

12.The 2nd Appellant's arguments on appeal, generally, followed the same vein as the 1st appellant's except that, in addition, he wondered why PW2 was never charged with a crime yet he was arrested while in possession of the stolen cell phone.

13.We can begin by addressing the complaint about the charge sheet raised by the 1st Plaintiff. He argued that the charges over which he was convicted and sentenced were totally defective. The 1st Appellant complains that the charge sheet is incurably defective and cannot, therefore, sustain a conviction. Specifically, he complains that the charge sheet failed to indicate that the Appellant was armed with dangerous or offensive weapons. He relies on the Court of Appeal case *Daniel Morara Mose v R* (Crim. App. No. 86 of 2000) and High Court Case *Maulid Isaac v R* (MSA HC Cr. Appeal No. 337 of 1999). His complaint is that due to these omissions, the evidence tendered at the trial was at variance with the charge sheet. These two aspects of the charge sheet, argues the Appellant, go to the core of the charge and the missing words render the charge sheet incurably defective.

14.We do not acquiesce to this line of complaint. The purpose of a charge sheet is to inform a criminal defendant of the offence he will be facing so that he can fairly prepare for a trial. As our Brother, *Justice Luka Kimaru* concisely stated in *Sigilani v R* [2004] 2 KLR 480:

The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

15.In our view, a charge under section 296(2) of the Penal Code is complete and proper if it unambiguously alleges one of the following three elements:

a. That the offender was armed with a dangerous or offensive weapon; or

b. The offender was in the company of one or more other person(s); or

i. If at, or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes, or uses any other personal violence to any person.

16.In this case, the charge sheet read as follows:

1) PETER MUTIA MAITHYA (2) DAVID MAKUMBI MUMO:

On the 19th of June, 2007, at Mwingi Township, Mwingi Location in Mwingi District within Eastern Province jointly robbed MORIS MUTHENGI OF Kshs. 2,500/= and a mobile phone make NOKIA worth Kshs. 7,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said MORRIS MUTHENGI.

17.In our view, it is readily obvious from this charge that it incorporates at least two of the three alternative ingredients of the offence of robbery with violence. The charge alleges that the Appellant was in the company of at least one other person; it also charges that at or immediately before or immediately after the time of the robbery, the criminal defendants used personal violence on the complainant. In our view, therefore, this ground of appeal must fail. We hold that the charge was not defective.

18.Before we analyze whether the trial record supports the conviction and sentence, 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.

19.An exhaustive re-evaluation of the record yields the following results. It is beyond doubt that the complainant was, indeed, attacked on 19/06/2007 at Mwingi Township. He suffered injuries as a result of the attack. It is also beyond doubt that during that attack he was robbed of, among other things, a Nokia phone. It is, further, beyond doubt that the Nokia phone found with PW2 is the self-same phone which had been robbed from the complainant. Finally, it is beyond doubt that the two Appellants were arrested in the manner testified to by PW5, the investigating officer.

20.If these facts are taken as common ground, as they must, since they are uncontroverted, it appears there are only two substantive issues for determination. First, is the issue of identification: was there sufficient evidence of identification by recognition to warrant a conviction as the Learned Trial Magistrate held? In particular, were the circumstances prevailing during the attack ideal for positive identification? Second, does the Nokia phone found with PW2 provide nexus between the Appellants and the crime?

21.Both of these issues are intensely factual in nature but, for the first one, our case law has come up with very specific rules for analyzing when it is safe for a Trial Court to convict on identification evidence. Our case law calls for caution in receiving identification evidence because of the grave possibility of a miscarriage of justice occasioned by misidentification. The predecessor to the Court of Appeal plainly stated in *Roria v R* [1967] EA 583, that *"a conviction resting entirely on identity invariably causes a degree of uneasiness."* And, the Court of Appeal reminded us in *Kiarie v Republic* that "*it is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken."* Finally, 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.

22.To aid in the exercise of this "c*ircumspection*" our courts have adopted the guidelines for receiving and considering identification evidence set out in the famous English case of *Regina v Turnbull* [1976] 3WLR 445 which are considered very comprehensive. 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 anyway, 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?

23.In the instant case, we are ***not*** persuaded that after exercising circumspection, the evidence of recognition given by PW1 even as corroborated with the evidence of PW2 who was found with the stolen phone is sufficiently watertight to establish beyond reasonable doubt that it is the two Appellants who attacked the complainant on 19/06/2007.

24.Even while noting that the evidence in this case was one of recognition not just mere identification and

that in the case of identification by recognition, generally, evidence of recognition is more reliable; more satisfactory; and more assuring than identification of a mere stranger (see *Anjononi v R* [1980] KLR 59), we are uneasy about some aspects of identification in this case. First, we are unsure that the circumstances were ideal for positive identification. Second, we are concerned about some contradictions and discrepancies in the Prosecution case. Third, we are concerned that even though the complainant says he was in the company of two of his friends when the robbery occurred, none of them was called to testify presumably because they did not see or identify the assailants.

25.Before elaborating on these points further, we begin by pointing out that trial courts should ordinarily explicitly warn themselves of the dangers inherent in convicting on the identification evidence of a single witness. This did not happen here presumably because the Learned Trial Magistrate relied on evidence of the stolen phone as providing additional connection between the Appellants and the crime. Still, it is good practice to begin with an explicit caution because it seems to us that the two pieces of evidence (identification and the phone-connection) complemented each other and neither was sufficient to convict the Appellant.

26.To return to the evidence of identification, we are of the opinion that the circumstances for visual identification were not reasonably satisfactory here. We note that by PW1's own testimony, the incident was extremely brief giving PW1 very little chance to carefully observe his assailants. Further, given PW1's testimony about how the robbery occurred, it seems unlikely that he would have been able to see his assailants clearly. PW1 felt someone pick-pocketing him and then he turned quickly only to be confronted by a second assailant as he struggled with the first one. While he says the lighting conditions were ideal: a very bright security light from the book store and a tin candle on the table – we have reasons to impugn this description. If indeed the security light was that bright and that near (6 metres by PW1's description), it is unlikely that the fish hawkers would have needed the tin candle they were using.

27.In addition to the doubts elicited by these circumstances, we are uneasy about the contradictions in the evidence of PW1 and the Investigating Officer. PW1 was insistent that he recognized his assailants and mentioned them by name to the Police when he reported the incident. The Investigating Officer contradicted him testifying, instead, that PW1 only knew his assailants by appearance. Even then, the Investigating Officer conceded that PW1 did not provide any actual description when he reported the matter. The doubts triggered by this aspect of the case are accentuated by three other factors: first, it is curious that none of the people who were around when the robbery took place were called in evidence. By PW1's testimony was that, they came to his aid but were repulsed by the assailants. It follows, then, that they must have seen and identified the assailants at the scene. Why, then, were they not called to testify?

28.Second, it is curious that at first, the offence preferred against the 1st Appellant herein was one of simple robbery. The explanation given by the Investigating Officer is that since only one person had been arrested at that point, they could only charge for simple robbery. This explanation appears nonsensical: whether to prefer a charge of robbery with violence or not does not depend on whether the multiple parties who participated in the robbery have been arrested or not; it only depends on the number of assailants or whether they used force or not; or whether they were armed with offensive or dangerous weapons. There are countless examples of one suspect being charged with others not before the court.

29.Third, if it is indeed true that the complainant knew the Appellants, it is curious that the Police did not simply go out and arrest them from where they were working. It seems odd that it was left to the complainant to do amateur investigative work to find both Appellants so that they can be arrested. We are aware that there is some contradiction on the role PW1 played in the arrest of the 2nd Appellant.

30.It might have been possible to put these doubts to flight with corroborating evidence to supplement or reinforce the identification evidence. Unfortunately, however, the only other evidence available is not reassuring either. PW2 testified that he bought the Nokia phone from the two Appellants. The Learned Trial Magistrate concluded that this was sufficient connection between the stolen property and the two Appellants. In doing so, he believed the story of PW2. We are uneasy about that as well. This is because of the way the investigations seem to have proceeded here. It would seem that when the 1st Appellant was arrested, he was interrogated whereupon he volunteered information to the effect that they had sold the

phone to PW2. If these were true, one would have expected the Investigating Officer to follow the lead and trace PW2 to establish the veracity of the narrative. Instead, however, it is left to PW1 to do the investigative work. What adds to this curiosity is that when PW2 finally admitted he had the phone and produced it, he was immediately arrested and locked in a cell. It would appear that for a while the decision was to treat him as a suspect. This raises an important question: if the complainant knew exactly who had robbed him, what was the point of arresting PW2? By that time, it should have been obvious that PW2 had never participated in the robbery.

31.In a criminal case such as this one, whenever the criminal defendant enters a plea of not guilty, it puts in issue every element of the crime charged and it is incumbent upon the Prosecution to prove each element of the crime beyond a reasonable doubt. After looking at the entirety of the Prosecution case here and carefully considering all of the evidence tendered or lack of certain evidence as enumerated above, we cannot, unfortunately, state that we have an abiding faith that the two Appellants were the two people who assaulted the complainant in this case. Such lack of abiding faith is a definitional description of the existence of reasonable doubt. Since the evidence tendered leaves us less than fully satisfied that the two Appellants are guilty of the offence of robbery with violence, we will do the only legally permissible thing: we allow the appeal, quash the conviction, and set aside the sentence. We order that two Appellants shall be released forthwith unless otherwise lawfully held.

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

ASIKE-MAKHANDIA **J.M. NGUGI**

JUDGE **JUDGE**