REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL 138 OF 2007

CHARLES NDEGWA NJERI..……...……..…… APPELLANT

VERSUS

REPUBLIC…….…….RESPONDENT

(From the conviction and sentence by B.A. OJOO Ag. Senior Resident Magistrate at Baricho in Criminal Case No. 870 of 2007 on 28th September 2007)

J U D G M E N T

The Appellant was charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were as follows:-

CHARLES NDEGWA NJERI: ***On the 12th day of the July 2006 at Kiangai village in Kirinyaga District within Central Province, jointly with others not before court, while armed with offensive weapon namely knife robbed GABRIEL MIGWI KIBUGI of his mobile make Motorolla CD 930 valued at KShs.5,000/= one kilograme of meat KShs.150, and at or immediately before or immediately after the time of such robbery used actual violence against the said GABRIEL MIGWI KIBUGI.***

The appellant was tried, found guilty and convicted of the offence charged and sentenced to death. He was aggrieved by the conviction and sentence and therefore filed this appeal. The appellant raised five grounds of appeal in his amended grounds filed together with his written submissions. These are:-

1.That the learned trial magistrate erred in both law and facts by relying on the allegations by PW1 that he recognized one of his attackers yet evidence is too apparent to effect that this was a fabricated case colluded with the sole identifying witness(PW1), through the influence of the APs and Assistant Chief (PW2) hence the trial court ought to have warned itself as to the potentiality of bad blood perpetuation by the witnesses.

2.That the learned trial magistrate erred in both law and facts by relying on the sole evidence of identification by a single witness without first of all excluding the possibility for the existence of an error or mistake on the part of PW1 more so in view of the prevailing circumstances of the crime of scene by the time of attack.

3.That the learned trial magistrate erred in both law and facts by failing to approach PW1's allegations on the strength of Section 13 of the Penal Code thereby arriving at an erroneous conclusions.

4.That the learned trial magistrate erred in both law and facts in failing to note and acknowledge

that crucial witnesses in the instant matter were never called for a just decision to be reached.

5.That the learned trial magistrate erred in both law and facts by convicting the appellant in total disregard to the glaring contradictions and gapes evident in the prosecution case.

In brief the appellant challenges the conviction on basis of identification by a single witness. The appellant urges that even though the learned trial Magistrate appreciated that the identification was by a single witness, she did not have in mind the correct principle applicable in cases of this nature because she failed to put into account that before a conviction is entered in reliance to such evidence, there was an absolute need for the trial Magistrate to examine the said evidence with extra care in order to exclude any existence |sic) of a possibility of error or mistake.

The appellant urged that the learned trial Magistrate did not warn herself as required and that she failed to take into account the witness was drunk at the time the alleged identification was made. The appellant challenged the evidence of PW1 who said that he knew all four young men who attacked him, yet he did not give the appellant's name to PW2, the bar maid attendant and AP's he allegedly reported to. The appellant relied on the case of**John Nganga & 2 Others Vs Republic Hcccra No. 514, 515 And 516**for proposition that in cases where the attackers are unknown to the complainant, it is mandatory they mention the names and any descriptions at the earliest opportunity.

The appellant also relied on the case of **Kiarie Vs Republic [1984] KLR 739 And Wekesa Vs Republic Hccr No. 114 Of 1995**for the preposition mistakes in identification are often made even of close relatives, it is necessary to test the evidence of identification carefully. The appellant also raises issue with failure by the Prosecution and the Court to call the barmaid who gave first aid to the complainant.

The state was represented by Ms. Esther Macharia, learned State counsel in this appeal. The learned Stated Counsel opposed the appeal and urged the Court to dismiss it in its entirety. Ms. Macharia urged that the offence was committed in broad daylight being around 5 p.m. Counsel urged that the complainant had known the appellant for two years and that he identified the appellant as one of his assailants in name and facial identification. Learned Counsel urged that PW1 was able to say the role played by the appellant during the robbery.

Counsel also urged that after the incident the complainant reported to the Assistant Chief, PW2, and gave him the names of the assailants. The complainant also led police to where the appellant was and identified him to them for his arrest.

The brief facts of the Prosecution case are that the complainant went to a bar and drunk three bottles of beer. He then went to a butchery and bought a kilo of meat. He then went to help himself in the urinals. Before he could finish, the appellant and four others attacked him. The appellant whom he knew before held him by the throat so that he could not raise alarm.

His companions then frisked his pockets, stole his mobile phone and a kilo of meat. When they released him, he shouted for help and a bar maid found him and gave him first aid. He then reported to the Administration Police Chief's Camp. The next day the appellant was arrested after the complainant alerted them of where to find him. His accomplices led. The complainant said that nothing was recovered.

PW2 corroborated the complainant's evidence that he reported the incident to him and also said he could identify those who robbed him. PW2 also corroborated the complainant's evidence that the complainant went to the station at around 4 p.m. next day and reported he had spotted his assailants and disclosed their location. PW2 said he went to the location and arrested the appellant. PW2 handed the appellant over to PW4 the investigating officer of this case.

PW5 confirmed treating the complainant for a human bite on his anterior aspect of right hand, swelling, pain and tenderness of the neck and a shallow laceration on the left supra orbital region. Injuries were

classified as harm. The appellant gave submissions after close of Prosecution case raising some issues he raised in this appeal.

The appellant gave an unsworn defence. In his statement he said he spent the day of 13th July, 2006 at the farm. He started the day at 6 a.m. when he milked cows. He then went to the plantation and picked tea. He then left the farm at 12 p.m. and went to take the tea to the Collection Centre. The appellant said that he then went to Kiangai centre to meet friends at a Darts Centre. He said that people started running away but he remained put. That is when he was arrested. He denied the charge.

We are the first appellate Court and as expected of us we have subjected the entire evidence adduced before the lower court to a fresh evaluation and analysis. We have also borne in mind that we neither saw nor heard any of the witnesses, and have given the necessary allowances for same. We are guided by the Court of Appeal Case of **Otieno Vs Republic [1972] EA 32** where it was held:

"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

The learned trial magistrate had this to say about the issues of identification:

"This was a case where complainant (PW1) was attacked while he was alone. He was the only identifying witness in the circumstances. According to PW1, the incident took place round about 5 p.m. He had gone to the bar at about 2 p.m. He categorically stated that he had just ordered for a fourth beer and was not drunk. He said that he clearly identified accused as he was the one in front of the pack of men who attacked him. PW1 candidly explained accused a person well known to him both physically and by his names 'CHARLES NDEGWA'… I am satisfied that PW1positively identified the accused… "

The prosecution evidence against the appellant was that of the complainant, PW1. The incident took place at 5pm therefore in broad day light. The appellant has challenged the evidence of PW1 on the basis he was drunk. There was no evidence to show that the complainant was drunk. He had taken three beers and according to him, he was not drunk. PW2 saw him immediately after the attack and did not mention that the complainant appeared drunk to him. This was the only person who saw the complainant soon after he was robbed who testified in this case.

The appellant questioned the complainant about his sobriety orlack of it in cross examination. The complainant denied that fact and said he was not drunk. The appellant did not put that question to PW2. The learned trial magistrate did consider the amount of beers the complainant had taken and did not think it was significant. It is our view that alcohol affects different people in different ways. Some are affected by less amount of alcohol than others. We are of the view that the complainant was not drunk because the arresting officer who saw him on the day of incident did not make any such observation. We do not think that issue is of any material importance. Significantly we do not think it could have affected the complainant's ability to identify his assailants.

The complainant described how he was attacked. He said that as he relieved himself at the urinals he heard people enter and he looked back and saw people walk in led by the appellant whom he knew before by name and physically. It was broad day light. The complainant said he saw the appellant clearly before they attacked him. He gave the appellants name to a person in authority on the first opportunity he had. In the case of **Terekali & Another –vs- Republic [1952] E.A…..** it was held:

"Evidence of first report by the complaint to a person in authority is important as it often provides a good test by which the truth and accuracy of sub-sequent statement may be ganged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others……"

We are satisfied that in view of the complainant's clear evidence of identification by recognition, and in view of the evidence of first report to PW2 an Admin. Police Officer, we find that the prosecution adduced strong evidence against the appellant. The appellant denied committing the offence. However we agree with the learned trial magistrate that the evidence against the appellant was overwhelming.

The appellant raised issue with the prosecution's failure to call the barmaid who helped the complainant. The doctrine of adverse inference can only be applied if the prosecution fails to call material witnesses and where those called can hardly prove their case. In **BUKENYA & OTHERS Vs. UGANDA 1972 EA**, LUTTA Ag. VICE PRESIDENT held:

"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

The bar maid was not a material witness. The complainant said in his evidence that she went to help long after the robbers had gone. The inference cannot be made in the circumstances.

We have carefully considered this appeal and have come to the conclusion that the same has no merit. We accordingly dismiss this appeal, uphold the conviction and confirm the sentence.

Those are our orders.

DATED AT EMBU THIS 27TH DAY OF JULY, 2012.

LESIIT, J.
JUDGE

H.I. ONG'UDI
JUDGE

READ, SIGNED AND DELIVERED,

In the presence of:-

……for State

……Appellant

……..Court Clerk