REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL 66 OF 2008

MAURICE MURIITHI NDWIGA…….....…..…… APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

(From the conviction and sentence by S.N. RIECHI Ag. Chief Magistrate at Embu in Criminal Case No. 1923 of 2006 on 6th March 2008)

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

"On the 1st June 1999 at Kiarangana village in Embu District jointly with others not before the Court, while armed with dangerous weapons namely axes and iron bars robbed Francis Thuranira Muchiri of 8 glasses, I jacket, 1 pair of shoes, 1 jug and 1 kettle all valued at Kshs.2,000/= and immediately before or immediately after the time of such robbery used actual violence to the said complainant."

The learned trail Magistrate found the appellant guilty of the charge convicted him and sentenced him to death. He has now filed this appeal to this Court challenging both the conviction and sentence.

The appellant has raised 8 grounds of appeal as follows:-

1. **That he pleaded not guilty to the charge.**

2. **That the learned trial magistrate erred in both law and fact by relying on evidence of identification by PW1, PW2 and PW3 whereas the lighting and other circumstances were not conclusive for a positive identification.**

3. **That the learned trial magistrate erred in both law and fact by misdirecting himself beyond some parts on the mode of arrest that reasons suspicious.**

4. **That the learned trial magistrate erred in both law and fact while he acted on uncolaborative evidence of key witnesses and on the recovery of the exhibit in question.**

5. **That the learned trial magistrate erred in both law and fact by not observing that the**

investigations were poorly conducted which was not airtight to meet the standard of conviction in capital offence.

6. **That the learned trial magistrate erred in both law and fact to base a conviction while relying on identification of a stranger whereas no identification parade was conducted in respect to PW1.**

7. **That the learned trial magistrate erred in both law and fact by not observing that none of the alleged exhibit was recovered from him since the exhibit were taken cater to police station.**

8. **That the learned trial magistrate erred in both law and fact by failing to consider my well detailed defence which explained when and why he was arrested without giving a cogent reason for so doing as stipulated under Section 169(1) of the CPC.**

The chief facts of the Prosecution case were that the complainant PW1 and his wife PW2 were asleep in their house on the night of 31st May 1999 when thugs broke into their sitting room, attacked and wounded PW1 with a sharp object on the chest. The complainant and his wife said that they were able to see and identify the appellant as the one who cut the complainant on the chest. The complainant was apprehended by PW4, the house servant of PW1, with help of 6 brothers of the complainant and other neighbours.

This is the first appellate court. Being the first appellate court we are mandated to subject the entire evidence adduced before the trial Court to a fresh analysis and evaluation while bearing in mind that we neither saw nor heard any of the witnesses and giving due allowance. We have done so. We have been guided by the Court of Appeal case of **OKENO VS REPUBLIC [1972] EA 32** where the Court 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 appellant relied on written submissions which he presented to the Court at the start of the hearing. We have considered them.

In brief the appellant's submissions were that the complainant was nor trustworthy because while claiming that he did not know the appellant before this incident, he purported to give his full names to the Court. The appellant challenged evidence of PW3 and the complainant said it was a hand axe while PW5 said it was an iron bar. The appellant also raised issue with recoveries made in the case and urged that while PW2, 3 and 4 alleged that the appellant was found with some weapon, PW5 the re-arresting officer who received the appellant from them the same night of the incident said he was not brought with any weapons.

The state was represented by Ms. Esther Macharia, learned State Counsel. Counsel did not oppose this appeal. In her oral submissions, counsel urged that various discrepancies in the Prosecution evidence. Ms. Macharia urged that the weapon recovered from the appellant was a sledge hammer and metal bar according to PW2, a sledge hammer according to PW3 and 4. Counsel urged that according to the complainant the appellant cut him with a hand axe while PW5, his wife said it was a metal bar. Ms. Macharia submitted that no metal bar was produced in evidence yet it was the weapon used in the robbery against the complainant according to PW3's evidence.

As we have already stated, we subjected the entire evidence adduced before the trial Court to a fresh analysis and evaluation. The conviction of the appellant was hinged on the evidence of identification and arrest. The learned trial Magistrate had this to say in regard to identification:-

"PW1 testified that after realizing that the people were outside he went to the sitting room where he met a person whom he was able to see well as there was light from the hurricane lamp. He however had not known him but was able to observe him before he cut the complainant. When he saw the person at the police station later he identified him as the one he had seen. PW5 MARY IBUNDU testified that she saw one person in the sitting room before he cut her husband on the chest. When a person was brought a few minutes later by members of the public she recognized him as the one."

We have considered the learned trial Magistrate's finding. We think that the learned trial Magistrate did not take into account the evidence on identification. There was a pertinent issue which was overlooked by the trial Magistrate which is that of identification made under difficult circumstances. We rely on the celebrated case of **MAITANYI VS REPUBLIC 1985) 2 KAR 75** it was held:-

" **Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.**

When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision; it must do so when the evidence is being considered and before the decision is made.

Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction."

The two eye witnesses testified that they saw the appellant inside their sitting room and observed him clearly before he cut the complainant on the chest. The light which enabled them to identify the appellant was described as a hurricane lamp by the complainant and lantern lamp by his wife PW3. We do not wish to dwell on whether or not the two lamps described by both mean one and the same as the appellant urged us to do. This is because in our considered view, the most important aspects of that evidence is to determine the size and its intensity on the one hand and the position of that light in relation to the assailant on the other. Sadly and regrettably these aspects were not investigated or enquired into by the trial Magistrate. In the circumstances we are doubtful that the learned trial magistrate tested the evidence of identification with the greatest care as he was required to do.

The two eye witnesses PW1 and 3 did not know their attacker before. It was necessary for the police to organize identification parades where the two could have been called to identify the appellant. Before such parade were conducted they should have been required to give a description of the suspect they allege they could identify. The identification by the complainant and PW3 amounted to dock identification. The Court of Appeal case of **Peter Kimaru Maina vs Republic Nyeri CA No. 11 of 2003** held.

"**Before the court can base a conviction on the evidence of identification at night, such evidence should be absolutely watertight R. vs. Eria Sebwato [1960] EA 174; Kiarie v. Republic [1984] KLR 739. Further, visual identification must be treated with greatest care and ordinarily a dock identification alone should not be accepted unless the witness had in advance given description of the assailant and identified the suspect in a properly conduted parade** (Amolo v. Republic [1988-1993]"

We find that the evidence of PW1 and 3 could not be relied upon and could not found a conviction against the appellant.

The other grounds upon the conviction against the appellant is based is the evidence of the

appellant's arrest. The learned trial Magistrate stated as follows in that regard:-

"PW2 JOSEPH KIGUNDA AND PW4 MOSES GITUNGA chased the people who had attacked the complainant and were running away while others escaped to a different direction. They chased one whom they apprehended. These witnesses testified that at no time did they lose sight of the person whom they were chasing from the home of the complainant, until they apprehended him at the river. From him they recovered a sledge hammer and later on reaching daylight recovered the stolen items at the place where they had apprehended the accused and others along the way."

PW4's evidence was that he was the complainant's house servant and was in his quarters when thieves struck. He said that he saw two people near the complainant's main house and he chased and apprehended one near the neighbour's home. The issue is whether the river where PW2 apprehended the appellant is the same place as the neighbour's place where PW4 apprehended the same person. The other notable fact as learned State Counsel observed, is what PW2 said that the man he arrested had a metal bar and sledge hammer. PW4 said that the man he arrested had only a sledge hammer. Yet PW5 who received the appellant at Runyenjes Police Station did not receive any weapons and neither was he informed that the appellant was apprehended holding any.

We find that the evidence adduced against the appellant was controversial and that the controversies in the evidence were neither addressed nor resolved by the learned trial Magistrate.

Having carefully considered the evidence adduced in this case we have come to the conclusion that the evidence adduced in this case fell far too below the standard required in criminal cases. We find that on the grounds explained in this judgment the conviction against the appellant was unsafe and should not stand.

We accordingly allow the appeal, quash the conviction and set aside the sentence. The appellant should be set at liberty forthwith unless otherwise lawfully held.

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

LESIIT, J.
JUDGE

H.I. ONG'UDI
JUDGE
In the presence of:-
…….for State
……Appellant
……...Court Clerk

Read, signed and delivered in the presence of:-

……Appellant
…….for State
……Court Clerk

H. ONG'UDI
JUDGE