REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL 216 OF 2009

ROBERT MURIITHI GITHINJI …..…….....……..APPELLANT

VERSUS

REPUBLIC …….....…….…….....……PROSECUTOR

(From original conviction and sentence in Cr. case No. 300 of 2008 at the Senior Principal Magistrate's Court at Kerugoya)

J U D G M E N T

The appellant ROBERT MURIITHI GITHINJI was charged with two other accused persons with one count of **robbery with violence** contrary to section **296 (2)** of the penal code. The particulars of the charge were as follows;

ROBERT MURIITHI GITHINJI: On 2nd day of March 2008 at Kibingo village in Kirinyaga District of the Central Province the accused men jointly with others not before court while armed with dangerous weapons namely iron bar robbed MOSES MWANGI MUNENE a numberless motor bike valued at ksh.71,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said MOSES MWANGI MUNENE.

The appellant\'s co-accused faced an alternative count of **Handling Stolen Property** contrary to section **322(2)** of the penal code.

The appellant was convicted alone on the main count and sentenced to death. He has now appealed against the conviction and sentence of the lower court.

The appellant relies on his amended grounds of appeal in which he has raised four grounds as follows;

1.That the learned trial magistrate erred in both law and facts and misdirected himself by basing the appellant\'s conviction on reliance to P.W.5\'s evidence of identification by recognition of his attackers as a person he knew by name(s) whereas evidence is too apparent to effect that immediately after the attack P.W.5 reported the matter to the police BUT NEVER disclosed who his attackers were and so did P.W.4 and Mithamo who gave him a lift to town after the alleged incident.

2.That the learned trial magistrate erred in both law and fact and misdirected himself by relying on the sole identifying witness by recognition in failing to rule out altogether the existence of the possibility of an error or mistake of P.W.5.'s Identification evidence more so in view of the prevailing circumstances of the crime scene at the time of attack.

3.That both P.W.4 and P.W.5 evidence on cross-examination when considered vis -a-vis their evidence in chief reveals it was untrustworthy witnesses.

4.That the circumstances surrounding arrest was unsatisfactory nor does it prove my participation in the commission of the offence charged and the entire case for the prosecution was not proved beyond reasonable doubt.

The appellant in his written submissions challenged his conviction on the basis of the evidence of P.W.5, a single identifying witness. The appellant urged that even though the trial court appreciated that the identification was by recognition, he did not apply to that evidence the required principles. In that he did not take extra care, neither did he warn himself of the need to take caution. He submitted that the identification was by brake lights of a motor cycle and urged that such light formed a blurred vision and so was unsafe as a basis of illumination for purposes of identification. The appellant further urged that the identifying witness, P.W.5 did not tell the police that he could identify any of his attackers. He relied on the case of **JOHN NGANGA KINUU AND 2 OTHERS -V- REPUBLIC C.A. 514 OF 2005** for the proposition that in cases where the attackers are known by the complainant it is mandatory for the complainant to mention their names and any other descriptions to the relevant authorities at the earliest opportunity.

The State was represented by Ms Esther Macharia, learned State Counsel. Counsel did not oppose the appeal. The learned State Counsel urged that there was only one identifying witness in the case, P.W.5, and that there was therefore a need for the trial magistrate to caution himself before convicting on such evidence. Learned State Counsel submitted that the learned trial magistrate did not warn himself of the danger of convicting on the evidence of one identifying witness. Counsel relied on the case of **MWENDA -VS- REPUBLIC [1989] e KLR**, for the proposition that mistakes of close relatives and friends are often made and therefore the need for caution. The learned State Counsel urged us to find that the evidence of P.W.5 was not sufficient to convict the appellant and grant her the benefit of doubt.

The brief facts of this case are that P.W.5 was hired by a person on 2nd March 2008 to be taken to Kirogo Primary School. He said that he took him there but upon dropping down, the person turned against him joined two others who emerged from nearby to attack him. P.W.5 said he was attacked but managed to escape to a nearby home. PW5 said that the three men rode off in his motor vehicle. He said he identified the appellant as among them.

On 12th March 2008 the 1st and 2nd accused in the trial court took the same motor cycle to P.W.1\'s workshop for repair of the seat. P.W.1 gave his worker P.W.2 to fix it. The two together with the 2nd accused were arrested. 22 days later P.W.1 and 2 are released. P.W.3 was the arresting officer of the 3 and explained he acted on a tip off.

The owner of the motorbike was P.W.4. He had employed P.W.5 to do business with it. He received the report of the robbery. P.W.4 said he knew the appellant before and that the two had grudges against each other.

We are the first appellate court. We have therefore subjected the entire evidence adduced before the trial court to a fresh analysis and evaluation while giving due allowance for reason we did not see or hear any of the witnesses. We are guided by the case of **OKENO V. REPUBLIC [1972] EA 32**. Where the role of a first appellate Court is given as follows:

"**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.)"

This appeal is not opposed. As observed by both the appellant and the learned State Counsel, the only evidence against the appellant was that of P.W.5. Since P.W.5 claims he knew the appellant before, and the appellant also admitted that they knew each other before, the evidence of identity by P.W.5 was therefore that of recognition. In the case of **Cleaphas Otieno Wamunga Vrs. Republic 1989 KLR 424**, the Court of Appeal stated as follows:

"The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succincily stated by Lord Widgery CJ. in the well known case of R. VS Turnbull 1976 (3) All E.R. 549 at pg 552 where he said:

'Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.' **"**

The evidence of identification must be both considered and tested carefully in order to reduce the possibility of a mistake or error occurring in identification. The first question a court should answer is the conditions under which the identification was made, the lighting conditions, the distance between the light and the person identified or recognized and the length of time the person identified was observed by the witness.

In the instant case P.W.5 the key and only identifying witness gave contradictory evidence regarding all the factors I have set out herein above.

Regarding the time of the incident, P.W.5 started by saying he was hired by a customer who wanted to be taken to a 20 minutes distance by motor cycle. He said he was hired at 3pm in broad daylight. He then changed and said that he was hired at 8pm, and that it took him 20 minutes to reach destination.

Regarding the conditions of light at the scene of incident, P.W.5, changed from broad daylight to nigh time, 8pm. From the account of P.W.5, the area the attack took place was a rural setting and there was no mention of any light, whether street lights or security lights at the scene. P.W.5 said he identified the appellant by the red brake lights at the rear of the motor bike he had. P.W.5 was not clear about the appellant\'s position at the time he identified him. There was another contradiction in P.W.5\'s evidence. He at one time said it was the appellant who hired his services. He changed later and said that the appellant was one of two people who emerged at the scene of attack.

We have considered the evidence of P.W.5 and found it was controversial and full of inconsistency. We have the impression that this witness was dishonest or untrustworthy. In the Court of Appeal case of **NDUNGU KIMANYI –V- REPUBLIC [1979] KLR 283**, MADAN, MILLER and POTTER JJA held:

"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

It is dangerous to rely on such evidence unless there is other material evidence implicating the applicant with the offence. We found that there was no other evidence implicating the appellant with the offence charged.

We have come to the conclusion that the evidence of P.W.5 could not be relied upon and certainly it could not found a conviction. In this case we agree with the learned State Counsel that P.W.5 was an unreliable witness. The conviction was based solely on his evidence. That evidence was inadequate to found a conviction. Accordingly we do allow this appeal, quash the conviction and set aside the sentence.

We order that the appellant should be set at liberty forthwith unless he is otherwise held.

DATED AT EMBU THIS 27th DAY OF JULY 2012.

LESIIT J.

J U D G E

H.I. ONG'UDI

J U D G E

READ, SIGNED AND DELIVERED,

In the presence of:-

……for State

……Appellant

……..Court Clerk