REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CRIMINAL APPEAL NO.2 OF 2010

EDWIN OGWANE ERATUT…….....…..APPELLANT
VERSUS
REPUBLIC…….RESPONDENT

(From the conviction and sentence of G. Sogomo, SRM in Bungoma Chief Magistrate Court Criminal Case No.704 of 2009)

J U D G M E N T

The appellant, Edwin Ogwane Eratut, was originally charged with offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code. He was, after a full trial, convicted of the charge and sentenced to death. He appealed against the conviction and sentence.

A summary of the prosecution facts is as follows – that the complainant who gave evidence as PW1, Leonard Omosugu, was a Busaa bar tender. He closed his bar at about 8.30p.m. on 29.3.2009 and started a short journey to his employers house. He carried with him the day's sales proceeds amounting to Kshs.7885/- which he was taking to his employer. On the way, he was brutally attacked by several people, with pangas and knives. The attackers stripped him almost naked, stole from him the money and his Nokia mobile phone. He bled profusely but during the attack he managed to recognize the appellant as one of the two attackers who remained beating him as others ran away. He used a flash light which was aimed at his face by one of his remaining attackers but the same which incidentally fell on the other attacker's face. He painstakingly pushed himself up and crawled to his employer's house where he met the employer's children but immediately became unconscious until early hours of the morning when he found himself in hospital. He learnt that his employer took him to hospital when he later arrived home and found him seriously injured.

It was his further evidence that he recognized the appellant as one of the attackers because he had worked with him in the same bar in 2008 – 2009 for a period of about two months. He claimed he gave the name of the appellant to the employer and to the police the same night of attack and that that led to appellant's arrest. The arrest itself was stated to have been during a police raid which in all, had led to six other people being arrested. Other witnesses who were police officers claimed that they were given information as to the where about of appellant's home by an informer and using the information, they proceeded there and arrested the appellant.

PW2, Simon Peter Itaere, was the complainant's employer. He on the material day, i.e. the 29.3.2009, arrived at his home at 10.00p.m. He found the complainant on the floor of his son's house. He was naked except for a badly torn long trouser. He found the complainant conscious and the latter told him he had been attacked and robbed of the money and his mobile phone by over six people. That he managed to recognize the appellant as one of the attacker's using a flash light of one of the robbers which light had fallen accidentally on the appellant's face which itself was not covered. The employer called the police who came and took the complainant to Teso hospital and from where he was transferred to Bungoma General hospital, the next day.

The complainant remained in hospital for two weeks after which he was discharged. He then obtained a P3 form which was filled and which was produced in evidence by Boaz Atieno, PW4 who was the clinician at Teso hospital. The latter filled it, although he was not the person who had first attended the complainant on the night of the attack of 29.3.2009. PW4 found that serious multiple injuries had been inflicted on him at various parts, including the head, the hands and the abdomen. The complainant's various bones were broken and he carried a plaster of paris. The injuries, noted the witness, amounted to maim.

PW5, Cpl Lilian Onsongo, was on duty at Malaba Police Station on4.4.2009 when the complainant, PW1, reported the robbery. He complained of having been robbed at 8.30p.m. on 29.3.2009. PW5 being a duty officer on 5.4.2009, led a team to arrest the appellant, having been informed of his whereabout by an informer. They arrested him with six others. PW5, however never mentioned the complainant's name in his police station OB in respect of the arrest which he personally recorded on 15.4.2009. PW4 also stated that he could not understand why the other six suspects were not charged with the same offence.

PC David Tebes of the same police station, who were in the company of Cpl Kingori, Cpl Seda, PC Ngweno, PC Muthuri, PC Ngunyiri and PC Murungi also testified. He said that on the following day on 6.4.2009, they arrested the appellant at his home at 5.30a.m. for a robbery with violence suspicion relating to one Leonard Omusugu, which had occurred on 29.3.2009. They did not say that they arrested the appellant in company of six others.

On the other hand PW6, Cpl Martin Rundu Owuor who was the Investigating Officer in this case, was on 6.4.2009 assigned the case by DCIO of Malaba. He was then stationed at Teso Police Station. He then at Malaba Police Station, met the complainant Leonard Omusugu who told him that on 29.3.2009 he was attacked by four people who robbed him of Kshs.7885/-, a mobile phone and his shirt. That the complainant recognized the appellant, Edwin Otwane Erata, with the aid of light coming from one of the attackers torch. That he knew him before because they worked together. That the robbers hacked him with pangas and clubs, all over the body. That he later picked himself up and reached his employer's house where he mentioned the appellant's name as one of the attackers before he was taken to hospital. This witness then issued the complainant with a P3 which was later filled at Teso hospital and was produced in court as evidence. PW6 did not disclose how the appellant was arrested although he visited the crime scene which he found to be 200 metres from the Busaa Club where the complainant worked.

In his defence, the appellant gave a sworn statement denying committing the offence. He stated that he could not remember exactly where he was during the robbery time. He said that he indeed knew the complainant well because they indeed had worked together at the same bar. He however, said that he did not, with others, rob the complainant. He said that PW2 had dismissed him from his job in January 2009 stating that someone would take his job.

When this appeal came for prosecution, the State, through M/s Letting conceded to it. She said instead she sought a retrial since the offence was recent and witnesses are available. She further indicated that the trial court appeared to deny the appellant the right to be represented by an advocate of choice. She also said that the court refused the appellant's advocate a chance to recall three main witnesses who had already testified and who were material. For those reasons a retrial would be proper, she urged.

We have carefully perused the trial record of the lower court. We notice that the advocate, Mr. Were, joined the trial after the first three witnesses had finished testifying. He indeed sought adjournment and also a recall of the three witnesses for further cross examination. The trial court, however, while allowing adjournment to enable the advocate study the already adduced evidence to prepare him for further trial, refused to recall the witnesses who had testified and gone away. The honourable Magistrate felt that three months since the witnesses testified was too long for recalling them. He agreed with the prosecution that it would be onerous and expensive to recall the witnesses and that appellant/accused, had given no reasons why he did not take the advocate earlier.

We have considered these reasons. We are of the view that in this particular case the trial magistrate properly exercised his discretion to refuse recalling the witnesses. The appellant gave no proper reasons

for a recall except saying that the appellant's advocate joined the trial late. It is not always that the application for recall must be allowed, especially where no good reasons are given.

Having come to the above conclusion, we find no good reasons for seeking a retrial by the State, especially because the appellant himself did not seek for it, although he did not oppose it either. We did not hear the appellant claim that his rights were indeed violated or that a proper process of trial was in any way abused. We accordingly find that there are no proper grounds for ordering a retrial.

It is our further finding that the State's concession to the appeal was misconceived and this court will, notwithstanding the same, consider the appeal on its legal merits taking into account the evidence on record and the law applicable.

We have carefully considered the evidence on the lower court record and how the trial court, treated it. First the conviction is based solely on the evidence of PW1, Leonard Omusugu, who was the complainant. His evidence is to the effect that he was attacked by more than four robbers who robbed him of Kshs.7885/-, a mobile phone and a shirt. It was dark but he said he managed to identify the face of the appellant using a torch light of one of the attackers. He claimed that he knew the appellant well because the two had worked together for about two months in PW2's Busaa bar, two months or so earlier.

We observe from his evidence however, that when he managed to arrive at PW2's son's house immediately after being badly assaulted, he collapsed and lost consciousness. He said so in his evidence and added that when he regained consciousness, he was in the hospital bed and it was early the next morning. However, this piece of evidence is immediately contradicted by himself when he also claimed that when PW3 arrived later and found him on the house floor bleeding, he was able to talk to the employer and mention the name of the appellant as one of his attackers. He also claimed that he talked to the police officers who were called by PW2 to the same house and that he also mentioned the appellant's name. We shall revert to this piece of evidence soon hereafter.

The second issue we should deal with is the conditions under which the appellant claimed to have recognized the appellant. There is no doubt that the attackers seriously assaulted the complainant. They cut him with a panga, a knife and probably hit him with a rungu as the evidence revealed. The appellant admitted that he profusely bled from various cuts on the head. He lay on the ground screaming as he attempted to avoid blows. It was dark and the conditions for recognition were conceivably poor and unfavourable. But the complainant claimed that he once saw the face of the appellant whom he knew before when a torch light flashed by one of the attacker's on the complainant's face, moved over the appellant's face.

That the torch light moved across the appellant's face might be true. But that the instant flash on the appellant face gave the complainant adequate opportunity to recognize the appellant is possible, but, in our view, very unlikely. Unlikely because the torch light, as the complainant positively states at page 4 (typed), was shone directly at himself. It is our view and logical that when in darkness a torch is shone at one's face, he cannot easily see through to recognize the face of the holder of the torch or the surroundings. In this case similarly, the complainant's testimony that the torch was shone at his fact but it incidentally whisked across the appellant's face was possible. But it was unlikely to give the complainant adequate time and opportunity to recognize the appellant's face and we so find.

The trial court, the prosecutor and the accused person, should also have investigated the circumstances under which the complainant stated that he recognized the appellant. Relevant questions would reveal the position of the complainant as against that of the attackers the kind and angle or situation of the light and other relevant factors which confirm or dispel the veracity of the complainant's evidence. This point was stressed in **Maitanyi vs Republic (1986) KLR, 198, at 201:-**

> **" That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in**

day light. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if one of these matters are unknown because they were not inquired into ……..”

Supposing we are wrong in our above conclusion, we nevertheless would still examine the manner the trial court treated and used the evidence before it to convict.

The complainant was the only one who claimed to have recognized the appellant. He was therefore a sole witness. However, it is trite law that a trial court can rely on the evidence of a sole witness to convict provided he warns himself sufficiently and is satisfied that the evidence is reliable and safe to rely on. This was stated by the Court of Appeal in the **Maitanyi** case, earlier cited at page 200, Supra as follows:-

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule 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. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error”.

In the case before us the evidence of identification is based only on the evidence of the complainant as earlier stated. Apart from the statement itself being conflicting, it was also contradicted by PW2 who stated that he found the complainant conscious before he mentioned the name of the appellant. There was no other independent evidence linking the appellant to the robbery as he was not found with possession of the stolen items. There was therefore serious need for the trial magistrate to caution and warn himself of the danger of convicting on the evidence of the single witness.

We however notice that the honourable magistrate failed to caution and warn himself as aforesaid, but however, proceeded to convict on the said evidence. We hold that he erred in law and fact to do so. That is despite the fact that he may have genuinely believed that the complainant was speaking what he believed was the truth, i.e that he saw the face of the appellant among the attackers. This is because in such circumstances genuine mistakes may be made where the evidence before the court is that of a single witness. This was properly stated in the case of **R v Turnbull (1967) 3 ALL E.R. 549** at page 552 where Lord Widgery, CJ put it thus:-

“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 Honourable trial magistrate appears to have failed to take the caution required to be taken in such cases. His conviction therefore is unsafe and cannot be left standing for the various reasons discussed hereinabove.

This appeal is accordingly allowed. The conviction is hereby quashed. The sentence of death is set aside. The appellant shall be set free from prison unless therein otherwise lawfully held.

Orders accordingly.

Dated and delivered at Bungoma this **26th** day of **MAY** 2011.

D.A. ONYANCHA
JUDGE

F.N. MUCHEMI
JUDGE