REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 60 OF 2009

(An appeal arising from the conviction and sentence of [W. M. KABERIA,] SRM, in Kajiado SRM Criminal Case No. 1070 of 2007 – Republic v Paul Kimani)

PAUL KIMANI...APPELLANT

V E R S U S

REPUBLIC..RESPONDENT

J U D G M E N T

The appellant, Paul Kimani, was charged with two offences. He was charged with the offence of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on 26th August, 2007 at about midnight in Namanga Township, the appellant, while armed with a screw driver robbed Nanana Lethiria of a mobile phone make Nokia 1112 valued at KShs.4000/= and at or immediately before or immediately after the time of such robbery attempted to stab the said Nanana Lethiria. The appellant was further charged with **escaping from lawful custody** contrary to **Section 123** of the **Penal Code**. The particulars of the offence were that on 26th August, 2007 at 2.40 p.m. at Namanga Township, being in lawful custody of Namanga Police Station, after arrest for the offence of robbery with violence, escaped from such lawful custody. The appellant pleaded not guilty to both charges. The prosecution called four witnesses in a bid to prove its case against the appellant. The appellant adduced unsworn statement in his defence. After the close of both the prosecution and the defence case, the trial magistrate found that the prosecution had established its case on the first charge of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code**. The appellant was convicted and sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the appellant raised several grounds of appeal challenging his conviction by the trial court. He was aggrieved that he had been convicted on the basis of the sole evidence of a single identifying witness in regard to identification that was made under difficult circumstances that were not

conducive for positive identification. He faulted the trial magistrate for convicting him based on evidence adduced by the prosecution that did not establish his guilt to the required standard of proof beyond any reasonable doubt. He faulted the trial magistrate for failing to consider his defence before he arrived at the decision to convict him on the charge facing him. He urged the court to allow his appeal and thereafter acquit him.

At the hearing of the appeal the appellant presented to the court written submissions in support of his appeal. He urged the court to consider the said written submissions and find that his appeal has merit and allow the same. He further made oral submissions urging the court to find that the prosecution had failed to establish the charge of robbery with violence to the required standard of the law. On its part, the State through Mr. Gitonga, learned State Counsel opposed the appeal. He made oral submissions urging the court to find that the prosecution had established its case on the charge of **robbery with violence** contrary to section **296 (2)** of the **Penal Code** to the required standard of proof. He submitted that apart from the appellant being positively identified by the complainant, the stolen mobile phone was recovered in his possession. He submitted that in the circumstances the appeal did not have merit and should be dismissed.

Before giving reasons for our decision it is imperative that we set out the brief facts of this case. The complainant in this case, Nanana Lethiria (PW1) worked as cashier in a bar known as Babito Bar in Namanga Tanzania. The said bar is situate near the Kenya-Tanzania border. Customers from both Kenya and Tanzania patronize the said bar. According to the complainant, one of the customers from Kenya who used to patronise the bar was the appellant. The complainant testified that she knew the appellant by name prior to the robbery incident. On the material night of 26th August 2007, the complainant completed work at about midnight. She had a rendezvous with her boyfriend on the Kenyan side of the border. She stated that as she was walking across the no man’s land between the Kenya and Tanzania border, she was accosted by the appellant who robbed her of her mobile phone. She was emphatic that she was able to identify the appellant as the person who robbed her because the scene of the robbery was sufficiently lit by electric light from both the Kenyan and the Tanzanian side of the border. In the course of the robbery, the appellant threatened to stab the complainant with a screw driver. After the robbery incident, the complainant made a report to the police at Namanga Police Station on the Tanzanian side. She told the police that she had been robbed by the appellant. She identified the appellant by name. She described the clothes that the appellant wore at the time he robbed her of her mobile phone.

On the following morning, the complainant was accompanied by PW2 Cpl Gideon Nkwawa, a Tanzanian police officer based at Namanga Police Station, Tanzania to the bus stage on the Kenyan side of the border. The complainant pointed out the appellant to PW2. It is instructive that the appellant was wearing the same clothes that the complainant had described to the police when she made the first report of the robbery. The appellant was arrested. While being escorted to Namanga Police Station Kenya, he attempted to escape from lawful custody. PW4 Cpl Peterson Amimo, a police officer based at Namanga Police Station, Kenya was forced to fire in the air in order to secure the rearrest of the appellant. The appellant then escorted the police in the company of the complainant to a house of one Wacuka who was said to be related to the appellant. The mobile phone which was robbed from the complainant was recovered from the said house. The said mobile phone was positively identified by the complainant. It was produced as an exhibit in evidence by the prosecution. It was on the basis of the evidence of identification by the complainant and the evidence of the recovery of the mobile phone in the constructive possession of the appellant soon after the said robbery that the appellant was convicted.

In his defence, while admitting that he was in the vicinity of the scene of the robbery at the time the robbery took place, the appellant denied that he had robbed the complainant. He told the court that he was a taxi operator in Namanga Township. On the material night he was on duty in the same area up to 2.00 a.m. when he closed shop and went home to sleep. He was surprised when he was arrested on the following day on allegation that he had robbed the complainant. He denied knowing the complainant prior to the robbery incident. It was his defence that he had been falsely accused and thereafter charged of committing the offence of robbery with violence.

This is a first appeal. The duty of the first appellate court is to reconsider and reevaluate the evidence adduced by the prosecution witnesses so as to arrive at its own independent determination whether or not to uphold the conviction of the appellant. Of course, the court will take into consideration the grounds put

forward by the appellant in support of his petition of appeal **(see Okeno v Republic [1972] EA 32).** In the present appeal, it is alleged the appellant was convicted on the basis of the sole evidence of a single identifying witness. The principles to be considered by this court in determining whether the evidence of a single identifying witness should be upheld were set out in the case of **Maitanyi v Republic [1986] KLR 198**. At page 200, the Court of Appeal had this to say:-

"Although the lower courts did not refer to the well known authorities ***Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166*** *followed* ***in Roria vs Republic [1967] EA 583****, It may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-*

"Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but 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. 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 accpted as free from the possibility of error. "

In the present appeal, upon analysis of the evidence adduced before the trial court, it was clear that the complainant indeed identified the appellant. The circumstances upon which the robbery took place were conducive for positive identification. Although it was at night, there was sufficient light at the scene of the robbery to enable the complainant positively identify the appellant as the person who robbed her. While it is conceded that the evidence of the complainant was that of a single identifying witness, it was apparent that the complainant knew the appellant prior to the robbery incident. The complainant was able to identify the appellant by name. The complainant's identification of the appellant was that of recognition. In **Anjononi v Republic [1980] KLR 59** at page 60 the Court of Appeal held as follows:-

"...Recognition of an assailant is more satisfactory, more assuring, and reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in one form or other. We drew attention to the distinction between recognition and identification in ***Siro Ole Giteya v Republic*** *(unreported)".*

The complainant described in sufficient detail the clothes that were worn by the appellant at the time of the robbery incident. It was instructive that the appellant was wearing the same clothes that the complainant described to the police at the time she made the first report. If there was any doubt that the complainant had identified the appellant, that doubt was removed when the appellant led the police to the house of his acquaintance where the mobile phone that was robbed from the complainant was recovered. The trial court properly applied the doctrine of recent possession to convict the appellant. The mobile phone that was robbed from the complainant was recovered a few hours later in the constructive possession of the appellant.
One of the ingredients of **robbery with violence** as defined by **Section 295** of the **Penal Code** was established by the prosecution to the required standard of proof beyond reasonable doubt. The appellant, who was armed with a dangerous weapon, namely a screw driver, accosted the complainant, threatened her with physical harm, and then robbed her of her mobile phone. The defence offered by the appellant did not dent the otherwise strong evidence adduced by the prosecution in support of its case on the charge of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code**. Upon evaluating the said defence, we formed the opinion that the same did not at all challenge the cogent evidence that was adduced by the prosecution that indeed established that the appellant robbed the complainant.

We find no merit with this appeal. We proceed to dismiss it. The conviction and sentence of the trial magistrate is hereby upheld. It is so ordered

DATED DELIVERED AT MACHAKOS THIS 23RD DAY OF MAY 2011

P.K. KARIUKI

J U D GE

L. KIMARU

J U D GE