REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 99/2008

EZEKIEL MURIGI...APPELLANT

=VERSUS=

REPUBLIC...PROSECUTOR

JUDGEMENT

Ezekiel Murigi, the appellant, 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 the appellant on the 16th day of October 2007 at about 3.00 p.m. at Jamvi in Wagavi village in Likoni location in Mombasa district of the Coast Province jointly with another not before the court robbed **Gideon Kenani** hereinafter **"the complainant"** of one mobile phone-make Nokia 3310, one wrist watch-make Seiko and a cash sum of Kshs 500/= - all valued at Kshs 3,500/= and at or immediately before or immediately after the time of such robbery used personal violence to the said complainant.

The appellant pleaded not guilty and after the trial, the learned trial magistrate found him guilty as charged and convicted him of the said offence. He was then sentenced to death. He was not satisfied with that decision and has appealed before us against both conviction and sentence.

In his grounds of appeal, the appellant raises the following issues: - unsatisfactory identification, insufficient and contradictory evidence, defective charge and failure by the trial magistrate to consider his defence.

During the hearing of the appeal, the appellant appeared in person and relied upon written submissions which he had previously filed with the leave of the court. The written submissions merely elaborated the issues identified above. The state was represented by **Mr. Onserio**, learned state counsel who opposed the appeal contending that the appeal had no merit. In counsel's view, the charge was not defective and on identification, he argued that the robbery happened in broad daylight and the complainant had ample opportunity to observe the appellant who was not disguised. On alleged insufficient and contradictory testimony, the learned state counsel argued that the appellant was convicted on sound evidence which was not inconsistent. In his view the offence of robbery with violence was proved to the required standard.

As the first appellate court, it is our duty to re-examine and re-evaluate the evidence upon which the appellant was convicted and reach our own independent conclusion bearing in mind that we neither saw nor heard the witnesses testify and should give allowance for that **(see Okeno –v- Republic [1972] E.A. 32).**

The facts giving rise to the charge against the appellant were as follows:- the complainant, P.W.1, was walking home on the material date at about 12.00 noon when he met his neighbour , **Cynthia**, with whom he picked up a conversation. As they conversed, the appellant and his accomplice, according to the

complainant, suddenly appeared and first attacked **Cynthia** and then turned on him robbing him of his watch, mobile phone, and a cash sum of Kshs 500/=. The robbers then ran away. **Cynthia** told the complainant that she knew the robbers. The duo then went to report the attack to the police who issued the complainant with a P.3 form which was duly completed by **Dr. Lawrence Ngone**, (P.W.4) who assessed the complainant's injuries as harm.

The appellant was arrested the same day by P.W.2, **Bakari Ali**, a member of the local community policing service and **P.C. Henry Ngani**, P.W.3, of Likoni police station. The appellant was then charged as already stated. In his unsworn statement, the appellant testified that on the material date, he went to work as usual where he stayed until 4.00 p.m. when he left for home. He passed through a refreshment joint and finally went home. He did not find his wife at home and when she arrived, they quarreled and she left the house, later returning with her brother and members of the local community policing – service who arrested him.

On the above facts, the learned Chief Magistrate, found that the offence of robbery with violence had been proved against the appellant as required by law and convicted him as already stated. In convicting the appellant, the learned Chief Magistrate found that the circumstances obtaining at the time of the robbery were conducive to a proper identification and that the complainant had positively identified the appellant.

We have re-evaluated the same testimony and note that the attack on the complainant and his neighbour indeed occurred in broad day light. But was the identification free from the possibility of error? The complainant did not say how long the attack took but he was categorical that the attack was sudden and he did not know the attackers prior to the attack. In his own words:

"As I was talking to her by the road, the accused in the dock and another suddenly appeared. They first attacked the neighbour then they set on me, beat me up robbed me ……………………my neighbour who was screaming told me she knew the robbers and we then went to report to the police station …"

We are rather puzzled that the complainant did not describe the attack in any detail at all. He alleged that his neighbour was first attacked but he did not explain how. Did the attackers use fists, slaps or kicks on her? With regard to the attack on himself he testified that the assailants set on him and beat him. He did not describe with what he was beaten and where. The injury he highlighted was the human bite on his ear.

We are in the circumstances not certain that a robbery with violence was indeed proved against the appellant. The complainant was a single identifying witness and a conviction could only be based on such evidence if it was water-tight and free from the possibility of error. The learned Chief Magistrate found that the complainant's testimony was in that category. With the greatest respect to the learned Chief Magistrate, we do not share the same certainty. The complainant did not know the appellant's name prior to the attack. It was his neighbour **Cynthia** who knew the name. The appellant was, prior to the attack, a stranger to the complainant whilst he was known by **Cynthia** prior to the incident. Unfortunately, **Cynthia** did not testify. In our view, the failure to call **Cynthia** dealt a fatal blow to the prosecution case because the identification of the appellant by the complainant remained dock identification which is generally considered worthless.

In the end, the doubt we entertain with respect to the identification of the appellant should be resolved in his favour. That being our view of this appeal, we do not have to consider the appellant's other complaints. This appeal succeeds. The appellant's conviction is quashed and the sentence of death imposed upon him set aside. The appellant should be released from prison forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF NOVEMBER, 2010.

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J.B.OJWANG

JUDGE

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F. AZANGALALA
JUDGE

Read in the presence of:-