REPUBLIC OF KENYA

SIMON MBUGUA MUKUNA……APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

JUDGMENT

The appellant herein Simon Mbugua Mukuna was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence state that on the 17th day of March 2007, at Lukalia Farm Elburgon in Nakuru District within Rift Valley Province the appellant with three others while armed with pangas, axes and rungus, jointly robbed FREDRICK MUDAKI BARANGA of one bicycle make Neelam, one Naiwa radio cassette, one mobile make C-117, one spear, one spotlight and cash Kshs 2,000/= all valued at Kshs 8,220/= and immediately before or immediately after the time of such robbery used actual violence on the said Fredrick Mudaki Baranga.

The appellant was charged with a second count of **stealing contrary to section 275 of the Penal code**. The particulars of the offence state that on the 24th day of March 2006 at Kiriku Farm Rongai in Nakuru district of the Rift Valley Province jointly stole 3 hens valued at Kshs 600/= the property of John Kamau Mwirigi.

The appellant was charged with **an alternative charge of handling stolen property contrary to section 322 (2) of the Penal Code.** The particulars of the alternative charge state that on the 30th day of March 2006, at Salgaa Trading Centre in Nakuru District of the Rift Valley Province otherwise than in the course of stealing jointly retained one bicycle make Neelam, a radio cassette make Naiwa and a spear knowingly or having reason to believe them to be stolen property.

After trial by the Senior Resident Magistrate's Court at Molo, the 2nd, 3rd and 4th accused persons were acquitted. The appellant was convicted of both the main count and the alternative count, he was sentenced to the mandatory death sentence. Being aggrieved by the conviction and sentence, he appealed and in the appeal, he has challenged the conviction which he contended was based on the evidence of identification by way of recognition under circumstances that were not favourable for positive identification. The trial court was also faulted for relying on evidence of corroboration by the co-accused persons which evidence required further verification. The defence by the appellant was not considered and in his opinion, that defence was credible and should have entitled him to an acquittal.

This appeal was opposed by the State, the learned State Counsel **Mr. Njogu** submitted that PW2 was able to recognise the 1st appellant and explained to PW3 immediately that he had recognised the assailants. When the matter was reported to the police, it was PW2 who led the Police to the house where the appellant used to live with his grandfather. There was also light through a powerful torch which PW2 had when the offence was committed. Besides this evidence of recognition, the items that were stolen during the robbery were recovered, it is the appellant who led the Police to the recovery of the stolen items. The persons who had the bicycle confirmed that it was the appellant who gave it to them. Counsel therefore urged the court to uphold the decision by the trial court.

This being a first appeal, we are mandated to re-evaluate the evidence and subject the judgment of the trial court to our own independent evaluation and arrive at our own decision on whether or not to uphold the conviction and sentence by the trial court. See the case of **Okeno vs. Republic**.

We now set out albeit in summary form the evidence that was before the trial court which led to the conviction and sentence of the appellant. On 17th March 2006, **Fredrick Mundari Barasa (PW1)** was in his house at Mutamahiu Farm with **Nicholas Lingoshi (PW2).** At about 1.30 a.m. PW2 was leaving for his quarters when they realised a big stone had been placed by the door. PW2 went round with a torch to find out who had placed the stone. That is when he came face to face with a gang of robbers. He was carrying a powerful torch which he flashed and saw the appellant whom he said he was able to recognise him as he used buy milk in that household. The appellant was armed with a panga, he confronted PW2, and he heard the appellant telling the other assailants to finish him. PW2 who was also armed with a panga decided to chase the two assailants. Immediately some other assailants emerged, and PW2 decided to retreat for fear of his life.

The robbers proceeded to break the door to PW1's house. While in PW1's house, they demanded to be given money. PW1 gave them Kshs 2,000/= they also took a bicycle belonging to PW1's son, PW1's spear and a mobile phone. PW1 was not able to identify the attackers, but he raised an alarm and his brother **Wilson Barasa Jeremiah (PW3)** responded. PW2 said that he was able to recognise one of the assailants and led the Police with PW3 to the house where the appellant was living with his grandfather. However they were informed the appellant had left for a place called Keringet the previous day.

PC Nelson Mwita (PW4) recorded the statements by the witnesses. On 20th March 2006, the appellant was caught in the neighbourhood it was alleged that he and others were trying to stage another robbery. An alarm was raised by the neighbours, that is when PW2 responded. PW2 found the appellant hiding under the store, he was able to identify him and with the help of the members of the public they escorted him to the Police Station at Mutamahiu Police Post.

The appellant was interrogated by PW4 and PC Patrick Muturi, at the police station. That is how he revealed the names of his accomplices and led the police to the recovery of the spear. He later led the Police to a house where he said he had left the bicycle. They however found the house locked but as they were searching around, they found the 2nd and 4th accused persons with the bicycle. At the Salgaa shopping centre they also recovered the radio but the mobile phone was never recovered.

When the appellant was placed on his defence he gave an unsworn statement. He testified that he left his home where he was staying with his grandfather on 10th March 2006 and returned to his grandfather's home on 28th March 2006 to visit his girlfriend at Mutamahiu Farm. He slept there until 6.00 a.m. but when he was leaving, the parents of the girl friend raised an alarm. Several people came and arrested him while alleging he had been involved in a robbery in the neighbourhood. He complained that he was beaten at the Salgaa Police Post and transferred to Mutamahiu Police Post and later transferred to Elburgon Police Station where he was joined by other people whom he did not know, those people were charged with him with the same offence.

After considering the above evidence the learned trial magistrate was satisfied that the prosecution proved its case against the appellant to the required standard. The defence by the appellant was dismissed as lacking in merit. The trial magistrate was satisfied that PW2 was able to recognise the appellant when he directed a powerful torch at close range and he heard the appellant ordering his accomplices to finish him. Moreover upon arrest the appellant led the Police to the recovery of the stolen items. The 2nd accused person confirmed in his evidence that it is the appellant who gave him the bicycle as security for money lent. The trial court was satisfied that the appellant failed to explain how he came into possession of the stolen items.

This appeal like in many charges of this nature raises the issue of whether the appellant was positively identified as one of the assailants who committed the offences herein. In this case PW2 who was with the complainant when the robbery took place testified that he was able to recognise the appellant when he

flashed a powerful torch on his face during the robbery. The appellant ordered his assailants to finish PW2. In self defence PW2 ran after two of the assailants. That is when the appellant and other assailants gained entry into the complainant's house and robbed him of the items stated in the charge sheet. Immediately after the robbery, PW2 informed **Wilson Barasa Jeremiah (PW3)** that he was able to recognise one of the robbers. They reported the matter to PW4 and PW5, from the testimony of these witnesses PW2 recognised the appellant because he led the Police to the house where the appellant used to stay.

It is evident that from the 1st report that was made to the Police, PW2 described the identity of the appellant. The appellant was arrested a few days later in the neighbours homestead by PW2 who with other members of the public escorted him to the Police Station. There is a long line of authorities which have given guidance on how the evidence of identification by way of recognition should be dealt with by the court. See the case of **Anjononi & others –vs- Republic [1980] KLR 59** the Court of Appeal held that:

"***Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

PW2 was categorical in his evidence that he knew the appellant because he used to buy milk from his employer. We have also considered the defence by the appellant that he was merely suspected to have been one of the robbers who robbed the complainant's household. This defence cannot stand in the face of the evidence especially the fact that PW2 recorded with the Police that he recognised the appellant on 17th March 2006 when the robbery took place and led the Police to the house where the appellant was staying with his grandfather. Thus the appellant could not merely have been arrested on suspicion.

We find the evidence of PW2 regarding the identification of the appellant by way of recognition consistent. The evidence by PW4 and PW5 that it is the appellant who led them to the recovery of stolen items is also credible and this is further evidence that directly pointed at the appellant as one of the people who committed the offence. The principles governing the evidence of identification especially by a sole identifying witness are well set out in the case of **Maitanyi Vs Republic [1986] KAR** where the Court of Appeal held that:

"***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 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 from the possession of error."***

In this case we find that the evidence of the sole identifying witness was supported by further evidence when the appellant led the Police to the recovery of stolen items which were positively identified by the complainant.

After re-evaluation of the evidence before the trial court, we do not find any reasonable grounds on which we can disagree with the findings reached by the trial court. This appeal is therefore dismissed. The conviction and sentence imposed by the trial court is hereby confirmed.

Judgment read and signed on 14th day of May 2009

M. KOOME

JUDGE