REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 82 OF 2008

SAMMY LINYULU KABELE…………APPELLANT

VERSUS

REPUBLIC……………………………RESPONDENT

JUDGMENT

Sammy Linyulu Kabele the appellant herein 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 22nd day of July 2005 at Pangani Estate in Nakuru District of the Rift Valley Province, jointly with others not before court, while armed with pangas robbed David Kiama Kabue of cash Kshs 200/=, mobile phone make motorola C115, a wallet containing ID Card, PSV card and a badge all valued at Kshs 6,000/= and at or immediately before or immediately after the time of such robbery wounded the said David Kiama Kabue.

Nakuru SRM's Court tried the appellant. He was found guilty and upon conviction he was sentenced to the mandatory death sentence. The appellant has appealed against the conviction and sentence. In addition to the petition of appeal he tendered written submissions, which we have taken into consideration. The appellant challenged the conviction, which was based on the evidence of a sole identifying witness when the alleged attack took place at night and the circumstances of positive identification were difficult. The quality and quantity of the evidence adduced by the prosecution's witnesses was also challenged which the appellant submitted fell short of proving the case against the appellant to the required standard. The judgment of the trial court was also faulted for failure to take into account the defence by the appellant which if considered was plausible and should have earned him an acquittal.

On the part of the State, Mr. Njogu left the matter to this court to consider for reasons that he had not read the record of appeal. As required of this court by law, we briefly 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 22nd July 2004, at about 8.45 p.m. **David Kabue [PW1]** who was also the complainant testified that he was walking from his grandmother's place when he was accosted by two men. They greeted him, immediately one of the men lifted him from behind. Other two men who demanded that he should surrender everything soon joined them. One of the assailants was armed with a panga.

They robbed the complainant a mobile phone, a PSV badge and a wallet. They also robbed him Kshs 200/= from the inner shorts. They cut him with a panga and pushed him on a trench. PW1 testified that

he was able to identify the appellant from the electricity light, which shone from a nearby building. Moreover he was able to recognise the appellant who was a fellow matatu conductor. He followed the assailants for about 100 metres and when they saw him they started shouting '*thief! Thief*'. According to PW1, the appellant had a bad eye and it was easy to recognise him.

This matter was reported to **PC Jackson [PW2]** on 23rd July 2005. It was reported that the complainant had spotted one of the robbers who had attacked him the previous day. According to PW2 the complainant described the assailant as **Mustafa** that was the nickname. PW2 accompanied the complainant to the stage and pointed out the appellant who attempted to run away but after a short chase he was arrested and charged with the present offence. The only other evidence in this case was by **Dr. Mwita** who examined the complainant on 25th July 2005 on request by the OCS Bondeni Police Station. The complainant had bruises on the neck; he also had a cut wound on the right hand side. The injuries were three days old. In the doctor's opinion, the injuries were inflicted with either a sharp or blunt object; he classified the degree of injury as harm.

It is on the basis of the above evidence that the trial magistrate found the prosecution was able to prove the case against the appellant to the required standard. Put on his defence the appellant gave unsworn statement of defence and denied having committed the offence. He testified that he had a disagreement with the complainant's brother who hit him with a metal rod and he reported the matter at Bondeni Police Station. This is the grudge that saw the appellant being threatened by the complainant that they would use money to have him incarcerated in custody. That is how the appellant says he was arrested when he was with other matatu touts and when the police confronted them he was not able to run because of the injury. He relied on the occurrence book to show that he had reported the injury.

The trial court warned itself of the dangers of relying on the evidence of a sole identifying witness to convict but after evaluating the evidence including the defence the trial magistrate was satisfied that the complainant was able to recognise the appellant who was mono-eyed. The trial court was also satisfied that there was sufficient lighting from the shops near the scene of robbery. The defence by the appellant was dismissed as lacking in credibility by the trial court.

We have considered this appeal with an anxious mind. Firstly the evidence before the trial court was by the complainant. The attack occurred at 8.45 p.m. Several assailants attacked the complainant although he testified that he was able to identify the appellant, no description was given to PW2 the Police Officer who arrested the appellant. PW2 testified that the complainant described his assailant as Mustafa when he made a first report. While testifying in court the complainant said he was able to identify his assailant through recognition as a fellow taut who was mono-eyed. This description was not given to PW2 when the complainant made the first report.

The principles to take into consideration while dealing with the evidence of a sole identifying witness as set out in the case of **Maitany Vs Republic [1986] KAR** 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 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."***

We find this conviction was solely based on the evidence of identification by way of recognition but the circumstances for a correct identification can be said to have been difficult based on the evidence before us. Firstly it was at night, although the complainant testified that there was electricity light from the nearby shops the intensity and the distance of that light was not evaluated by the trial court. Although the complainant claims that he was able to recognise the appellant as one of the assailants the description of the assailant, which he gave to the court, is at variance with the description, which he gave to the arresting officer. There is a long line of authorities on the principles to bring to bear when a court is dealing with

the evidence of identification through recognition. For example in 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.”***

This matter is further compounded by the fact that the appellant was not arrested with any of the items that were robbed from the complainant. We therefore find the sentence and conviction of the appellant not safe. There is doubt in our minds that the appellant was positively identified as one of the robbers who committed the offence. For those reasons we allow this appeal. The conviction is quashed and the death sentence imposed on the appellant is set aside. Unless the appellant is otherwise lawfully held he is to be set at liberty forthwith.

Judgment read and signed on 14th day of May 2009

M. KOOME

JUDGE

M. MUGO

JUDGE