REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 208 of 2005

JOHN KIMITI MAINA……..……..…...…APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(Form original Conviction and Sentence of the Senior Resident Magistrate's Court at

Nanyuki in Criminal Case No.1607 of 2004 by R.N. MURIUKI – SRM)

J U D G M E N T

John Kimiti Maina was after trial convicted of attempted robbery with violence contrary to *section 297 (2)* of the Penal Code and sentenced to death. The charge against him was that on the night of 29th October, 2004 at Nanyuki Township in Laikipia district within Rift Valley Province jointly with others not before court attempted to rob David Masila and immediately before or immediately after such robbery used actual violence to the said David Masila.

The appellant was aggrieved by the conviction and sentence, hence he preferred this appeal. In his amended grounds of appeal to be found in his written submissions, the appellant faults his conviction on the evidence of identification, evidence that was deeply mired in inconsistency, doubt and contradictions and finally erroneous rejection of his defence.

The facts relied upon by the prosecution may be briefly stated thus. The complainant David Masila (PW1) was passing by Lentile Shop in Nanyuki town at about 7 p.m. He was from ACK Emmanuel Church. He came across four men who on seeing him bid each other goodbye. Two of the men crossed to his side and one of them removed a panga and ordered him not to scream. He was then hit on his hand by a blunt object. The man with the panga also cut him on the shoulder, hand and small left hand finger. He ran away screaming but the two men chased him. His screams attracted prison officers nearby who came to the scene and managed to chase and apprehend one of the men who had attacked him. That person is the appellant. PW1 testified further that he identified the appellant by the clothes he was wearing and that he could see clearly since it was not yet dark and it was during the month of October. That the appellant was wearing a white and blue T-shirt and blue jeans.

The appellant was arrested as aforesaid by Corporal Joshua Maingi (PW3) who was attracted to the scene by the screams of PW1. On reaching the scene he saw four people who dispersed in different directions but he elected to pursue the appellant whom he apprehended after a chasing him for about 100 metres. Following the arrest the appellant was taken to Nanyuki police station where he was re-arrested by P.C. Martin Mwenda (PW4) who also doubled as the investigation officer in the case. He also issued PW1

with a P3 form which was duly completed by Daniel Okiro Okoth, PW2, a Clinical Officer at Nanyuki District Hospital. Upon examining PW1, he assessed the degree of injury as grievious harm. The appellant was then charged with the instant offence.

Put on his defence, the appellant in unsworn statement of defence stated that on 29th October, 2004 he went to Timau in a lorry in which he was a turnboy and returned to Nanyuki at 8 p.m. Having parked the lorry he proceeded home. On his way and near sunset bar he bumped into some people who stopped him. One of them was PW3. He was asked for his identity card. He was then seriously assaulted on the basis that he had robbed PW1. Police were called and he was arrested and later charged.

In support of the appeal, the appellant who was unrepresented presented to us his written submissions which we have carefully read and pondered over. Mr. Orinda, learned Principal State Counsel appeared for the state. He supported the conviction of the appellant. However he was of the view that another offence other than the one charged was disclosed by the evidence on record. He did not however tell us the offence disclosed by the evidence on record. Instead he elected to leave the matter to court.

It is required of a first appellate court such as this one to consider all the live issues in the case before the trial court and the appeal as a whole and reach its own decision or conclusion on such issues. In so doing it must however give allowance to the fact that it neither saw nor heard the witnesses as they testified unlike the trial court. **(**Okeno V Republic (1972) EA.32).

The conviction of the appellant largely turned on the evidence of identification by a single witness (PW1). On this issue we can do no more than refer to the well known case of Abdalla Bin Wendo and another V.R(1953) 20 EACA 166 at P.168 in which the predecessor to our current court of appeal had this to say:-

"….subject to certain 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 be accepted as free from possibility of error….."

The learned Magistrate in convicting the appellant bore these propositions of law in mind. For he stated in his judgment;

"……I have carefully considered this evidence by the complainant. He was apparently all alone when he was attacked. It was 7 p.m. This is therefore a case of identification by a single witness. I have warned myself of the dangers of relying on the evidence of the complainant who was the only sole witness at the time he was attacked. I have also tested his evidence with utmost care….."

From that stand point, the learned Magistrate then delved in the evaluation and analysis of the evidence of identification and reached a conclusion that

"The circumstances prevailing were not difficult as to have hindered a positive identification of the accused without any mistake by the complainant….."

We have no reason to depart from this conclusion. Yes the offence was allegedly committed at 7 p.m. PW1 testified that he could see clearly because it had not yet become dark. This evidence was not challenged at all by the appellant either in his defence or in cross-examination of the appellant. Indeed from his cross-examination of PW1 he seems to suggest that much as he was at the scene, he was a mere passerby and therefore a victim of mistaken identity. Further PW1 testified that at 7pm. It had not become dark since it was the month of October. This testimony would seem to suggest that during the month of October in this part of the world, the sun does not set early and or darkness similarly does not set in early. Accordingly PW1 at that time could easily have seen those that attacked him. Again this

evidence regarding the month of October was not at all challenged by the appellant either in his testimony or in cross-examination of prosecution witnesses. The testimony of PW1 on record suggests that he saw his attackers long before they attacked him. He saw that they were in a group of 4 who on seeing him pretended to be bidding each other goodbye. It would appear that PW1 was very alert and very observant. He was afterall a military officer based at Laikipia Air Base. As he came along, he noted that two of those people came over to his side. The evidence on record does not suggest that the two approached him from behind. Since he was able to say in evidence that he saw them as they came over to him, we can surmise that they approached him from the front which act enabled him to comfortably see and observe the appellant sufficiently to enable him identify the appellant. He even noted that the appellant was wearing a white and blue T-shirt and blue jeans. Again this evidence was not at all challenged. In his submissions, the appellant claims that attack on PW1 was sudden causing him to go into trepidation. As a result he could not have been able to identify any of the assailants. We do not agree with these submissions. As already stated, PW1 had observed the appellant and his cohorts long before the attack. Much as he may have been frightened by the subsequent brutal attack on him by the appellant and his accomplices, we do not think that, that attack accompanied with subsequent fear was sufficient to erase in the mind of PW1, his observation of the appellant before then.

Apart from the evidence of identification by PW1, there is also the other circumstantial evidence of PW3 who chased and finally arrested the appellant. It is the evidence of PW3 that upon hearing screams opposite the public works whilst in his house in the prison quarters, he went out and saw four people struggling. On approaching the scene the four ran in different directions. He pursued one of them whom he arrested. That person is the appellant. There is no suggestion in evidence that in the process of chasing the appellant, PW3 ever lost sight of him. It is noted that the chase was for about 100 metres, a short distance. There is also no suggestion on the evidence on record that there were other people in the direction that the appellant was being chased such as would have interfered with or inhibited PW3's ability to focus on the appellant as he chased him.

The appellant claims that he was an innocent passerby. If he was innocent as he claims, then why did he run away on seeing PW3. It would appear to be the contention of the appellant that PW3 caused his arrest because of the past differences he had with him whilst he was serving prison term. That he had been beaten by PW3 whilst he was in prison custody. We do not understand how the beating of the appellant by PW3 whilst in prison could be a source of grudge between the appellant and PW3. If at all there was a grudge, we would imagine that the appellant would be the one holding a grudge against PW3 and not vice versa. We do not think that there was a grudge at all between PW3 and the appellant. We are of the view that the defence of a grudge between the appellant and PW3 was and is not plausible. It is an afterthought.

The appellant was chased and arrested hardly 100 metres from the scene of crime. PW1 immediately identified him as person who had been among those who assaulted him. This was so soon after the incident that it is difficult to imagine that PW1 would have easily forgotten the appearance of those who a short while ago had attacked him. The evidence of the chase and subsequent arrest of the suspect is good evidence which a court of law can act on provided that the chase was not interrupted and that in the process the chaser never lost sight of the suspect. This is what happened in the circumstances of this case. To our mind therefore the evidence of PW1 together with that of PW3 places the appellant squarely at the scene of crime.

The appellant raised the issue of contradictions in the prosecution evidence. He alludes to the number of the assailants who attacked PW1, whether they were four or two, whether he was armed with a panga, prison officers who came to the scene e.t.c.

True, there is no consistence on the sequence of events as narrated by PW1 and PW3. However, in any trial, witnesses invariably, differ on certain matters of detail. The court has to consider whether the variance in the evidence is fundamental or minor. If fundamental, then the court has to give the benefit of any doubt arising therefrom to the accused. If, however, the variance relates to inconsequential aspects or that it does not affect the credibility of the witnesses concerned, and can easily be cured by *section 382* of the Criminal Procedure Code, then the court is free to act on the evidence and base a conviction on it. We

do not find the contradictions alleged material or fundamental. They were inconsequential and the learned Magistrate was right in treating them as such more so, because the appellant was arrested at the scene of crime.

Finally, the appellant complained that his defence was not sufficiently considered. It was his submission that the trial court overlooked the evidence he tendered in support of his defence. His defence was that he was a mere passerby and therefore a victim of mistaken identity. Secondly, that the case was framed against him by PW3 because of a previous grudge. However we have already discounted these defences. The complainant was PW1. There is evidence that he was seriously injured in the process. Indeed PW2 classified the injuries sustained as grievous harm. It has not been suggested that PW1 colluded with PW3 to sustain the injuries alleged so as to frame the appellant. The appellant was positively identified by PW1. He was chased and arrested by PW3 immediately after the incident. The evidence against the appellant was overwhelming and it outweighed the defence advanced.

The only issue left for us to determine is whether the attack on PW1 was in furtherance of robbery, attempted or otherwise. There is no doubt whatsoever that the assault on PW1 was in furtherance of an offence. However it cannot be said with any degree of certainity that the attack was connected with robbery. The assailants did into demand anything from PW1. They only ordered him to keep quite. PW1 himself did not testify as to anything he had in his possession that was capable of being robbed off him. In the circumstances, we think, that it is unsafe to uphold the conviction of the charge of attempted robbery with violence contrary to *section 297 (2)* of the Penal Code. We therefore quash it.

As the offence of grievous harm has been proved to have been committed by the appellant, we hereby convict the appellant of grievous harm contrary to *section 234* of the Penal Code and sentence him to seven (7) years imprisonment to run from the date of conviction by the trial court.

Dated and delivered at Nyeri this 29th day of May, 2008.

MARY KASANGO

JUDGE

M.S.A.MAKHANDIA

JUDGE