REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 362 of 2004

(CORAM: LESIIT, MAKHANDIA, JJ.)

SIMON NGUGI MBURU……..……...A P P E L L A N T
V E R S U S
REPUBLIC…….…….……..……..……RESPONDENT

(From Original Conviction and Sentence in Criminal Case Number 3867 of 2003 of the Chief Magistrate's Court at Thika by Boaz N. Olao - C.M.)

J U D G M E N T

SIMON NGUGI MBURU, the Appellant, was tried and convicted on one Count of robbery with violence contrary to Section 2**96 (2)** of the **Penal Code**. Upon conviction he was sentenced to death being the only authorised sentence for this kind of offence. He now appeals to this court challenging both the conviction and sentence.

In his "***Amended Memorandum of grounds of appeal,"*** the Appellant faults his conviction by the learned magistrate on the grounds that his identification by recognition was not watertight, that the charge against him was not proved beyond reasonable doubts and finally that the learned magistrate erred in law in rejecting his defence without considering that the same was not displaced by the prosecution.

The prosecution case was briefly as follows: -

P.W.1 and P.W.3 were on the material day, 29th May, 2003 asleep in their house when at about 1.00 a.m. they heard the door being broken and then three people entered. On entering the house the intruders started beating P.W.1 while demanding money as allegedly they had seen her in the bank during the day. The intruders then took Ksh.2,000/=, a wrist watch and radio and then disappeared. P.W.1 followed them on their way out but they again beat her up and neighbours who heard her scream came to her aid by calling the police. P.W.1 was then taken to Hospital and later recorded her statement with the police and gave the Appellant's name as one of those who robbed her. She said that she had been able to recognise the Appellant during the robbery as there was electricity light in the house. The Appellant was in fact a former employee of P.W.1. He had worked for her for 5 months. P.W.1 later on led P.W.4 and **P.C. Njenga** to arrest the Appellant. It was then that he was charged.

Put on his defence, the Appellant in unsworn statement stated that on 30th May, 2003 he left home for work where he remained until about 12.30 p.m. when he returned home. On the way and as he was going to collect his dues from the Complainant (P.W.1) he met some people who arrested him and beat him up.

He was then taken to the local chief. His house was searched but nothing was found. He was then taken to Kirwara Police Station and was later charged with the instant offence.

In support of the appeal, the Appellant tendered written submissions which we have carefully considered. The state through **Miss Gateru**, learned State Counsel, opposed the appeal. Counsel submitted that contrary to the allegations by the Appellant that the language of the court and that used by the witnesses as they testified, was not indicated in the trial court's record, the original record does however clearly indicate the language used during the trial. Counsel also submitted that the charge preferred was proved beyond reasonable doubts. That the ingredients of robbery with violence as set out in **Section 296 (2)** of the **Penal Code** were met as in committing the offence, the Appellant was in the company of two others and visited violence on the Complainant.

With regard to identification, counsel submitted that the identification by recognition was safe and free from possibility of error. Counsel submitted that P.W.1 had testified that she was able to identify the Appellant as he was a person previously known to her, the Appellant having been her employee for 5 months. P.W.1's evidence was corroborated in material particulars by the evidence of P.W.3 who was also present at the scene and who also recognised the Appellant during the robbery. With regard to the Appellant's defence, Counsel submitted that the same was considered by the trial magistrate and was found to have no merit.

We have analysed and evaluated a fresh the evidence adduced before the trial court. The Appellant's conviction was predicated upon the evidence of recognition against him by the Complainant P.W.1 and P.W.3. The learned trial magistrate found that the recognition of the Appellant was enabled by the electricity light. The learned magistrate further found that both P.W.1 and P.W.3 knew the Appellant before. For P.W.1, the Appellant was her former employee. Indeed he had worked for her close to five months. The two were therefore not strangers to each other. As for P.W.3 she also knew the Appellant. She knew the Appellant as he used to assist the Complainant in picking Avocadoes and had been with the Complainant earlier in the morning. The two witnesses claim to have seen the Appellant in the course of the robbery.

The question that arises is whether the conditions under which the Appellant was identified were conducive for positive identification. It has been held that for visual recognition, such evidence must be watertight to justify a conviction. In the case of **KIARIE V REPUBLIC [1984] K L R 39**, the Court of Appeal said that where the evidence relied on to implicate an accused person is entirely that of identification that evidence should be watertight to justify a conviction. In the same case, the court stated that it is possible for a witness to be honest but mistaken and a number of witnesses to be all mistaken. The court must therefore have regard to the circumstances under which the recognition was made. The Complainant and P.W.3 all talk of there being electricity light. However, they never described the intensity of the said light and its source in relation to the Appellant. Similarly, they did not talk of the time they kept the Appellant under observation as to be able to positively recognise him. However we note from the record that P.W.1 was able to see the Appellant twice. First when he entered the house and two when she followed the Appellant and his accomplices outside as they left. According to P.W.1, there was electricity light inside as well as outside the house. It was noteworthy that immediately after the robbery P.W.1 gave the name of the Appellant to the police in her first report. Indeed, she even led the police to the arrest of the Appellant soon thereafter. The Appellant was a former employee of P.W.1. He had worked for her close to 5 months. The Appellant does not dispute that fact.

In fact, in his own statement of defence he alludes to the fact that he was headed for the house of the Complainant to demand his dues when he was arrested. From the foregoing it is quite clear that the Appellant was well known to P.W.1. Although the inquiries we have referred to ought to have been made, we are nonetheless satisfied just like the learned magistrate and given the circumstances that the conditions obtaining during the robbery were favourable for a positive identification. There is no suggestion whatsoever from the record that the Appellant and his accomplices were disguised in such a manner as to make it impossible for them to be identified and or recognised. There is nothing on record to suggests that during the robbery, the Appellant took any steps to ensure that he is not seen. The electricity remained on throughout the episode. The Appellant and his accomplices even talked to P.W.1

as they demanded money claiming that they knew she had money as she had been seen earlier in the bank. This statement suggest that the robbers knew the movements of the Complainant and that would only have come from someone familiar with the Complainant. It is clear from the record that the Appellant had been with the Complainant on 25th, 26th and 28th May, 2003 respectively as they went about buying avocadoes.

The evidence of recognition by P.W.1 was further boosted by the evidence of P.W.3. The evidence of P.W.3 on that aspect of the matter corroborated the evidence of P.W.1 in material particulars. According to P.W.3 she "***....recognised one of the robbers during the incident. I had seen him before assisting the Complainant in picking avocadoes. He is the accused in the dock. I saw him during the robbery and I had also seen him the morning the robbery……"*** This witness further testified that she told police that she had recognised one of the robbers. She further testified that she had seen the Appellant with P.W.1 in the morning in a discussion. Having seen the Appellant in the morning, it is unlikely that this witness would easily have forgotten his appearance as to be unable to identify him subsequently during the robbery. Finally there is also the evidence of P.W.2. He is the Clinical Officer who attended to P.W.1 soon after the attack. According to the witness, when P.W.1 was presented to him, she stated that she had been assaulted on 29th May, 2003 by ***"known person".*** The same information was repeated by P.W.1 to P.W.4, the police officer who arrested the Appellant. It would appear therefore, that P.W.1 was consistent with regard to the Appellant as having been among those who robbed and assaulted her. Clearly she must have seen and recognised him during the robbery. In the case of **MUNYUA MUCHERU VS REPUBLIC, CRIMINAL APPEAL NUMBER 63 OF 1987**, the court of appeal observed: -

*"……**In matters of identification the first report to the police should be put in evidence so as to check whether or not a witness thinks he can identify a suspect and by what means."***

We think that this obligation was discharged in the circumstances of this case.

Commenting on the credibility of P.W.1 and P.W.3, the learned magistrate expressed himself thus: -

*"….**The Complainant and his (sic) witness, impressed me as reliable witnesses and I am satisfied that they spoke the truth about the incident of the night of robbery……..."***

This is a finding by the learned magistrate on the demeanour and credibility of witnesses. This is a finding that cannot be upset by this court as it did not have the opportunity that the trial court had of seeing and listening to the witnesses as they testified. Unless it can be shown that the trial magistrate erred in evaluating the demeanour of the witnesses or his evaluation was such that no reasonable tribunal would have come to such conclusion or assessment, then an appellate court would not interfere. See **OGOL V MURITHI [1985] KLR 359**. In the circumstances of this case we have no grounds upon which we can fault the learned magistrate in his assessment of the demeanour of the two witnesses.

It does appear though that there may have been some dispute regarding some payments due to the Appellant. According to P.W.1 she had instructed his manager to pay the Appellant his dues on 28th May, 2003. It is not clear whether the instructions were observed. Yet according to the Appellant, he was arrested as he was on his way to the Complainant's house to claim his money, sometimes after 12.30 p.m. on 30th May, 2003. From what we have seen on record, we take the view that the Appellant was being economical with the truth. The record shows that the Appellant was arrested on the same night and not the following day after 12.30 p.m. He was arrested by P.W.4 in the company of **P.C. Njenga**. He had been pointed out to them by the Complainant. There was no crowd of people involved in the arrest of the Appellant. Further, we doubt very much whether P.W.1, P.W.2, P.W.3 and P.W.4 would all gang up to falsely accuse the Appellant.

All said and done, we are satisfied that the Appellant was positively recognised at the scene of crime by P.W.1 and P.W.3. His conviction on that basis cannot be faulted in anyway. The Appellant has also faulted the trial court for convicting him when the language in which the trial was conducted was not disclosed in the record. According to the Appellant he was thereby prejudiced. The Appellant in making

this submission must have had in mind the recent court of appeal decision in **SWAHIBU SIMIYU SIMBAUNI AND ANOTHER VS. REPUBLIC, CRIMINAL APPEAL NUMBER 243 OF 2005** in which the court held that where the record does not show the language in which the proceedings were conducted and whether the proceedings were interpreted to the accused, such proceedings were a nullity. We do not think that the Appellant's submission in this regard has any merit. We have carefully scrutinized the typed proceedings against the original record and we are satisfied that though the typed proceedings do not indicate the language used by the court and witnesses, the original record clearly shows the language of the proceedings and that indeed there was interpretation.

With regard to the Appellant's defence not being given due consideration by the learned magistrate, we also find this submission to be without merit. The defence was given due consideration but at the end of the day was found wanting. The learned magistrate stated and we quote: -

*"……**The accused's participation in the robbery therefore, seems to be supported by overwhelming and credible evidence. He says he knows nothing about this robbery but looking at the evidence on both sides, I am afraid I see no merit in his denial……."***

In our view the learned magistrate was right in reaching the aforesaid conclusion. He cannot be accused of not evaluating the Appellant's defence in all fairness.

As to whether the offence of robbery with violence was proved or not, we are convinced on the evidence on record that indeed the offence was proved. First and foremost P.W.2 examined the Complainant after the robbery and noted injuries sustained as follows: -

*"**Missing left lower canine tooth and a loose lower incisor tooth and fractured mandible. Soft tissue injuries on face and neck and fractured right hand."***

He assessed the injuries as grievous harm. He filled the P3 which was admitted in evidence as an exhibit. These injuries were sustained during the robbery thereby establishing that violence was visited upon the Complainant by the robbers. Violence is one of the ingredients of the offence of robbery with violence. Further there was evidence that in committing the crime, the robbers were more than one. In fact, they were three. This is yet another ingredient of robbery with violence, which the prosecution were able to successfully prove. In the result we find that the Appellant's complaint that the offence was not proved to be as already stated without merit.

We find that the evidence of recognition given by P.W.1 and P.W.3 in this case was watertight and free from error and mistake. The Appellant's conviction was thus safe and sound and should not be disturbed. Accordingly, we dismiss the appeal and confirm the sentence.

Dated at Nairobi this 8th day of March 2007.

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J. W. LESIIT

JUDGE

…….**……..**

M. S. A. MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Miss Gateru for the Respondent

CC: Tabitha/Erick

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J. W. LESIIT

JUDGE

……**……..**

M. S. A. MAKHANDIA

JUDGE