REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 52 of 2003

JULIUS BARIU MUNORU………………………….………..APPELLANT

VERSUS

REPUBLIC……………………………...…………………..RESPONDENT

(FROM ORIGINAL CONVICTION AND SENTENCE IN MAUA CRIMINAL CASE NO. 655 OF 2002)

J U D G M E N T

This is a first appeal against conviction of the appellant for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. It had been alleged in a charge laid before the Maua Principal Magistrate that the appellant did on 29th August 2000 at about 11 pm at Amaku Sub-Location Kiengu Location in Meru, jointly with another before the court, rob John Mutua MÉkotha of cash Kshs. 50,000/= and at or immediately before or immediately after such robbery used actual violence on the said John Mutua M'Ekotha. Upon his conviction the appellant was sentenced to death, the only lawful sentence for the offence. Being aggrieved he has preferred this appeal on four grounds, which can, be summarized as follows;

(i) that there was no evidence of identification

(ii) that the prosecution evidence was contradictory and full of discrepancies

(iii) that the prosecution failed to prove the case against the appellant to the required standard

(iv) that the appellant's alibi defence was rejected without reasons.

The duty imposed on this court by law as the first appellate count is to carefully examine and analyze afresh the evidence on record and to come to its own independent conclusion and this has been held to be a mandatory duty in a long line of authorities but the oft-cited leading one is **Okeno V Republic** (1972) EA 32 in which it was stated that;

"The first appellant court must itself weigh conflicting evidence and draw its conclusions (Shantilala M. Ruwala) V R (1975) EA 57) **It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions.**

Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearings and

seeing the witnesses"

In line with this cardinal duty, the facts giving rise to this appeal may briefly be stated as follows;-

The complainant, who trades in miraa and also runs an hotel business at Keungu market was walking home from the market on 29th August 2000 at about 11 pm when he was accosted by two assailants who he identified, with the aid of a torch light, as the appellant and one Kadosi. The latter ordered him to stop and while the witness was directing the torch light at them kadosi asked him to produce money. The appellant then hit the complainant on the head with an iron bar sending him sprawling to the ground. The appellant also held a panga on the complainant's neck. The assailants ran away after taking Kshs. 50,000/= from the complainant who raised an alarm, immediately attracting Pw2 Stephen Maroo Mungania (Mungania) and Pw3 Samuel Njiru Kibui – (Kibui). Both confirmed that they saw and identified those who attacked and robbed the complainant with the help of the light from their (Munganina's and Kibui's) torches before the attackers ran away. The same night the complainant made a report to Pw5, P.C. Ronald Mukangai at Maua Police Station and provided the names of the appellant and that of John Gitonga. After nearly 1 ½ years, on 16th March 2002, the appellant was arrested by Pw4, A.P.C. Fred Kithure who in turn handed him over to Pw6, PC. Timothy Mbitiwe. The complainant was examined and treated at Maua Methodist Hospital by Pw7, Paul Muranga who assessed the degree of injury as harm, caused by a blunt object.

The trial court was informed that one John Gitonga who was alleged to have been in the company of the appellant was also subsequently arrested and his trial at the time this matter was concluded was still going on.

The appellant in a brief unsworn statement merely explained how he was arrested on 15th March 2002. He did not say anything regarding the events of 29th August 2000 when it was alleged that he had robbed the complainant.

We take the unsworn statement as having raised an alibi defence because the appellant in effect denied being at the scene on the material date and time.

Learned counsel for the respondent supported the conviction and sentence arguing that the appellant was clearly recognized by the complainant and Mungania as well as Kibui. The complainant gave the names of his assailants to the police when he went to report the incident. Counsel added that the appellant's disappearance after this incident was conduct not consistent with his innocence. He urged us to reject the appellant's defence as it lacked merit.

We have duly considered these matters as well as the appellant's detailed written submissions and several useful authorities cited by him and we take the following view; no doubt, the complainant was attacked on the night of 29th August 2000 and in the process he was robbed of Kshs. 50,000/= and also sustained injuries. The only issue which falls for our consideration is whether the attack and robbery of the complainant was perpetrated by the appellant and another as alleged.

All the prosecution witnesses who were at the scene of the robbery were in agreement that the incident took place at about 11 pm. It was also their evidence that they were able to identify the robbers with the help of their torches, obviously because it was dark. They further confirmed that the appellant and one John Kadosi were persons known to them prior to this occasion.

The appellant on his part, has denied involvement in the robbery. In **Cleophas Otieno Wamunga V R** Cr.Appeal No. KSM of 1989 (unreported) it was held that;

"**Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance of the correctness of the identification"**

The witnesses having stated categorically that the appellant was known to them prior to the day in question, then their identification of the appellant was by recognition. The way to approach evidence of visual recognition was well stated by Lord Widgery C.J. in the case cited to us by the appellant, **R V Turnbull** (1956) 3 All ER 549 at 552;

"**Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made"**

Bearing all these strictures in mind, we are nonetheless satisfied that although the robbery took place at night, the complainant, Mungania and Kibui could not all have been mistaken as to the identity of the appellant. In the first place the complaint shone his torch on the robbers and recognized two of them before Kadosi ordered him to stop. The complainant's evidence, in part, is that;

"**Kadosi told me to produce money from close quarters …………… Accused had an iron rod which he hit me with on the head and I fell. Accused put a panga on my neck."**

The complainant added,

"**I knew accused before as I see him at Kiengu market".**

In cross –examination he confirmed that he even knew the appellant's house. We can only conclude in this regard that the appellant came into close encounter with the complainant and was able to positively recognize him.

Mungania and Kibui both had torches which they directed to where the complainant was being robbed. They straight-away recognized the appellant and John (Kadosi). Mungania was familiar with the appellant as the latter was a frequent customer in the hotel he worked in. He was emphatic in cross-examination. He said "**I knew you before quite well**"

Kibui also knew the appellant well as they hailed from the same area. A few hours after the robbery the complainant furnished the police with the names of those who robbed him and this first report was well corroborated by PW5.

We have no doubt in our mind that the appellant was one of those who robbed the complainant on the night of 29th August 2000. He was clearly identified and placed at the scene by prosecution evidence which was unchallenged.

There is no basis in his defence as it does not say where he was on 29th August 2000 but instead concentrates only on the day of his arrest. He was clearly identified and placed at the scene by prosecution witness. Z `He has challenged the evidence as full of inconsistencies. He has however identified only one, namely that the date and time when the offence is alleged to have occurred are different.

We see no inconsistency in that regard ourselves. The evidence being challenged is that of Pw5, P.C. Mukangai and that of the Clinical Officer, Paul Murunga. The former stated that it was reported to him that the complainant was robbed at 9 pm while the latter told the court that he was given a history of the complainant having been attacked at 12.30 pm.

We have looked at the Medical Examination Report (P3) produced at the trial by the Clinical Officer in which the time of the alleged assault is given as 11 pm on 29th August 2000. Regarding the evidence of P.C. Mukangai, it is not clear to us where he got 9 pm as the time the complainant was assaulted. In fact he also stated that the person in the company of the appellant was John Gitonga. It has not been explained whether John Gitonga is one and the same person as John Kadosi.

For us, these are inevitable mix-ups which are expected in any criminal trial. The discrepancies noted

here are not of such a nature as to interfere with our finding in this matter. As Tunoi, Lakha and Bosire, JJA held in **Joseph Maina Mwangi V R,** Cr.Appl. No. 73 of 1993.

"**In any trial there are bound to be discrepancies. An appellant court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence".**

Similar sentiments were expressed in **Njuki & 4 others V R**, (2002) KLR 1 as follows:

"**In certain criminal cases, particularly those which involve many witnesses, discrepancies are, in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt a to the guilt of the accused. If so them the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However where discrepancies in the evidence do not effect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused".**

The inconsistencies were not material and do not affect the strength of the evidence against the appellant, and we so hold.

We say no more, except that the prosecution case against the appellant was proved beyond any reasonable doubt and we find no merit in this appeal which we entirely dismiss.

DATED AND DELIVERED AT MERU THIS 11TH DAY OF JULY 2007

ISAAC LENAOLA

JUDGE

WILLIAM OUKO

JUDGE