REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 327 of 2004

(From original conviction and sentence of the Senior Resident Magistrate's Court at Molo in Criminal Case No. 524of 2004 [R. K. Kirui {R.M.})

ERIC MUGAYA YOBESS……..……..APPELLANT

VERSUS

REPUBLIC…….……RESPONDENT

JUDGMENT OF THE COURT

The appellant, Eric Mugaya Yobess was charged with the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence were that on the 8th August, 2003 at Kamwaura, Molo in Nakuru District, the appellant jointly with others not before court, and while armed with dangerous weapons namely knives and clubs robbed Dismas Kihanja Nyanguka of cash Ksh.2000/= and at or immediately before or immediately after the time of such robbery wounded the said Dismas Kihanja Nyanguka. The appellant pleaded not guilty when he was arraigned before the trial magistrate's court. After full trial, the appellant was convicted as charged and sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant raised several grounds challenging his conviction by the trial magistrate. He was aggrieved that he had been convicted based on the evidence of identification by a single witness which identification, in his view, was not free from error or mistake. He was further aggrieved that he had been convicted based on the evidence by the prosecution witnesses that were not sufficient to sustain a conviction on the charge. He faulted the trial magistrate for reaching a decision convicting him without putting into consideration the evidence that he had offered in his defence. At the hearing of the appeal, the appellant presented to the court written submissions in support of his appeal. He urged this court to consider his said submissions and allow the appeal. Mr. Mugambi for the State opposed the appeal. He submitted that the victim of the robbery was known to the appellant prior to the commission of the offence and therefore the conviction based on the evidence of identification was watertight and should not be disturbed by this court. He urged this court to dismiss the appeal.

We shall revert back the submissions made after briefly setting out the facts of this case. The appellant and the complainant, PW1 Dismas Kihanja Nyanguka were known to each other. On the 8th August 2003 at about 7.00 p.m., the two met at a drinking den at Kamwaura Farm. According to the complainant, the two of them took several drinks before he decided to go home. As his house was some distance from where they were partaking the traditional brew, when the appellant offered to accommodate the complainant for the night, he accepted the offer. According to the complainant, the appellant took him to his house and showed him a place to sleep. The appellant then told him that he was going outside the house for some errand. He locked the house from the outside. After a while, the appellant returned with

some people, entered the house and assaulted the complainant. They robbed the complainant of Ksh.2000/= that was in his coat pocket. The complainant was injured in the process.

According to the complainant, after he was assaulted and robbed, he managed to walk home and on the following day, went and made a report to Molo Police Station. He was issued with a P3 form and instructed to go to the hospital for treatment. The complainant went to hospital and was treated. The P3 form he was issued with by the police was duly filled by PW3 Kennedy Chepkonga, a clinical officer based at Molo Hospital. The said P3 form was produced as *prosecution's exhibit No.1*. According to PW3, upon examining the complainant, he noted that the complainant had sustained bruises and swelling on his head. He had tenderness on the abdomen and chest. His left hand was swollen with multiple bruises. His lower limb was tender and bruised. He formed the opinion that the injuries which were inflicted on the complainant were caused by a blunt object.

After the P3 form was returned to the police station, PW2 PC Bernard Munderi went to Kamwaura Trading Centre on the 12th August 2003 and arrested the appellant. The appellant was taken to the police station and later charged with the offence which he was convicted. The prosecution closed its case without calling the investigating officer because, according to the prosecutor, the said investigating officer died a week before the prosecution's case was closed. When the appellant was put on his defence he denied that he had robbed or assaulted the complainant. He did not contradict the evidence that was adduced by the complainant against him. He testified that nothing had been recovered from him that would establish that he had participated in the robbery of the complainant or connect him to the said robbery.

The duty of this court as the first appellate court was set out in **Okeno vs Republic [1972] E.A 32** at page 36 where it was held that;

"***An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (****Pandya vs Republic [1957] E.A 336****) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (****Shantilal M. Ruwala vs R.[1957] E.A 570****). 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; it must make its own findings and draw its own 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 had the advantage of hearing and seeing the witnesses, see*** Peters vs Sunday Post [1958] E.A 424***."***

In the present appeal, the issue for determination by this court is whether the prosecution established its case on the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond reasonable doubt.

The sole evidence that the prosecution relied on to secure the conviction of the appellant was the evidence of identification. The said identification was made by a single identifying witness. We are aware of the decision by the Court of Appeal in **Maitanyi vs Republic [1986] KLR 198** where it was held that a court should treat with caution the evidence of a single identifying witness before convicting an accused person, especially when the said identification was made in difficult circumstances. In the present appeal, the complainant testified that the appellant offered him accommodation for the night after which he assaulted him and robbed him of his Ksh.2000/=. At the time of the commission of the offence, the appellant was in the company of others who were however not charged with him.

We have re-evaluated this evidence of identification and we are satisfied that the appellant was properly identified by the complainant as being in a gang of robbers who assaulted him and robbed him of his money. The robbery incident took place in the house of the appellant. It was clear from the evidence of the complainant that the appellant lured the complainant to his house so that he could rob him. Although the robbery incident took place at night, it was clear that the complainant positively identified the appellant by his voice. The complainant recognised the appellant. The appellant was well known to the complainant before the said robbery incident. In fact, when the complainant testified in court he referred

to the appellant by his both names.

Although the appellant was under no obligation to say anything in connection to the charge facing him, when he offered his testimony in defence, he was at least under an obligation to give an explanation as to how the complainant was assaulted and robbed when he was in his house. The appellant did not address this aspect of the evidence that was adduced by the complainant. The trial magistrate had no doubt that the complainant was telling the truth when he testified before the court. We have no reason to disagree with his finding on the guilt of the appellant. The evidence of identification that was adduced by the complainant is that of recognition. In law, the evidence of recognition is stronger evidence of identification. In the circumstances of this case, we are satisfied that the appellant was properly identified.

All the ingredients of robbery with violence were established by the prosecution. The appellant, in company of others, assaulted the appellant using crude weapons and in the process robbed of Ksh.2000/=. The complainant was injured in the course of the said robbery. The P3 form which was produced in evidence by the prosecution attested to the fact that the complainant was injured. We have considered the grounds put forward by the appellant in support of his appeal and we find them to have no merit. We agree with the submissions made by Mr. Mugambi that the prosecution proved its case against the appellant on the charge of robbery with violence to the required standard of proof beyond reasonable doubt.

The appeal filed by the appellant is therefore unmeritorious. It is hereby dismissed. The conviction and sentence of the appellant by the trial magistrate is hereby confirmed.

It is so ordered.

DATED at NAKURU this 29th day of November 2007

M. KOOME

JUDGE

L. KIMARU

JUDGE