REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 305 Of 2004

HASSAN GALGALO IBRAHIM…......................………..……..APPELLANT

VERSUS

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

JUDGMENT

The appellant, Hassan Galgalo Ibrahim was charged with the offence of **robbery with violence contrary to Section 296(1) of the Penal Code**. The particulars of the offence were that on the 5th of December 2003 at Mambo Leo Estate Nyahururu, the appellant jointly with others not before court robbed Charles Wanjau Wamugunda of his mobile phone and Kshs 10,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Charles Wanjau Wamugunda. The appellant pleaded not guilty to the charge and after a full trial was convicted. He was sentenced to serve five years imprisonment. Being aggrieved by his conviction and sentence, the appellant appealed to this court.

In his petition of appeal, the appellant raised several grounds of appeal challenging his conviction by the trial magistrate. He was aggrieved that he had been convicted based on the evidence of a single and uncorroborated identifying witness. He faulted the trial magistrate for convicting him whereas the evidence of the key prosecution witnesses were contradictory. He was aggrieved that no exhibits had been produced to connect him with the said robbery. He finally faulted the trial magistrate for sentencing him to serve a term in prison which in his view was excessive and harsh in the circumstances.

At the hearing of the appeal, the appellant presented to this court written submissions in support of his appeal. He further added that the magistrate who convicted him had taken over the conduct of the proceedings from another magistrate who took a substantial part of the evidence without informing him of his right to recall witnesses for re-examination as provided for under **Section 200 of the Criminal Procedure Code**. He further submitted that no receipts had been produced to establish that indeed the complainant had a mobile phone which was robbed from him. He urged this court to allow the appeal. Mr Gumo for the State submitted that the prosecution had adduced overwhelming evidence to support the charge of robbery against the appellant. He submitted that the complainant was known to the appellant prior to the robbery incident and was able to identify him during the robbery incident. He further submitted that a few days after the robbery, the appellant was seen having the mobile phone in question by a witness who was familiar with the said phone. He urged this court to dismiss the appeal.

Before giving the reasons for the decision of this court, I will set out the facts of this case, albeit briefly. On the 5th of December 2003 at about 8.00 p.m. the complainant Charles Wanjau alighted from a taxi at Mambo Leo Estate, Nyahururu town. As he was walking to his house, he was confronted by three people who robbed him of his Motorola mobile phone. They also robbed him of his new shoes and cash Kshs 10,000/=. He told the court that he was able to identify one of the robbers. He said the robber was familiar to him. The complainant didn’t scream when he was attacked. He said he was able to identify one of the said attackers by the moonlight. The complainant went home and on the following day reported the incident at Karangi Police Patrol Base.

On the 9th of December 2003 the complainant accompanied PC Robert Waibochi (PW3) went to Nyahururu town where he pointed out the appellant as the person who had robbed him. The appellant was arrested and escorted to his house where the police conducted a search. Nothing incriminating was however recovered. PW2 Samuel Karanja Mwamuko, a barber at Nyahururu town testified that the

complainant was a customer at his business premise and used to charge his mobile phone for a fee of Kshs 20/=. He testified that on 8th of December 2003 at about 5.30 p.m., the appellant went to his business premises and charged a mobile phone which according to him was "*similar*" to that of the complainant. The appellant pointed this fact out to the complainant. He identified the appellant.

When he was put on his defence, the appellant denied that he had robbed the complainant of his mobile phone. He testified that at the material time he was employed at Total Nyahururu Garage. He told the court that on the 9th of December 2003 he was arrested by police officers who were accompanied by a civilian who the appellant did not know. He testified that the police interrogated him and later escorted him to his house where a search was conducted. Nothing was recovered from his house that could have connected him to the robbery. He denied any knowledge of the robbery.

This being a first appeal this court is mandated to reconsider and to re-evaluate the evidence adduced by the witnesses before the trial magistrate's court so as to reach its own independent decision whether or not to uphold the conviction of the appellant by the trial magistrate. In reaching its determination, this court is required to put into mind that it neither saw nor heard the witnesses as they testified (*See* **Njoroge –vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case against the appellant on the charge of robbery to the required standard of proof beyond reasonable doubt. I have carefully considered the submissions made before me and also reevaluated the evidence that was adduced by the prosecution witnesses before the trial magistrate's court.

The evidence that the prosecution relied on to secure the conviction of the appellant was that of the complainant. He testified that he was robbed at night by three men. He testified that he was able to identify one of the robbers by the moonlight. The appellant didn't scream or raise alarm to alert the members of the public. Although he said that one of the person who had attacked him was familiar, he did not describe him when he made the first report to the police. The appellant being of cushitic stock, nothing would have been simpler than for the complainant to say so. Upon re-evaluation of the evidence, it is clear that the alleged identification of the appellant by the complainant was very doubtful. Secondly, the appellant testified that a Motorola mobile phone was stolen from him. He did not tell the court the particulars of the said mobile phone neither did he give its serial numbers. No evidence was adduced to establish that the complainant actually owned a motorola mobile phone.

The evidence of PW2 in this regard was very unhelpful. He said that he saw the appellant having a mobile phone that was "*similar*" to that of the complainant. He did not give a description of the said mobile phone to the court. When the appellant was arrested, the police went to his house and undertook a search. Nothing was recovered in the said house that could connect the appellant to the robbery. In the circumstances of this case it is clear that the prosecution did not discharge the onus of proof placed upon them to prove the case against the appellant to the required standard of proof beyond reasonable doubt. The evidence adduced by the three prosecution witnesses does not exclude the possibility that the appellant could have been mistakenly identified by the complainant as being one of the persons who robbed him. The doubts raised in this case will have to be resolved in favour of the appellant. The evidence adduced by the appellant in his defence that he was not involved in the robbery could well be the truth.

Another aspect of the appeal filed by the appellant is as regard the manner in which the convicting magistrate took over the proceedings from the magistrate who first heard the crucial witnesses in this case. The proceedings in respect of which this appeal arose were first conducted by L. K. Mutai Senior Resident Magistrate before the said proceedings were taken over by T. M. Mwangi, Senior Resident Magistrate. It is the second magistrate who convicted the appellant. This court has perused the proceedings and noted that the second magistrate did not tell the appellant of his right as provided for by **Section 200** of the **Criminal Procedure Code**. As was held in the case of **Ndegwa –vs- Republic [1985] KLR 534**, at page 537, by the Court of Appeal:

"***It could be also argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of the witnesses. It has been and will be so in the other cases that will follow. In this case however the***

second magistrate did not himself see or hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case in our opinion. The succeeding magistrate was as helpful as he could possibly make himself. He acted in an attempt to dispatch justice speedily. We appreciate his motive very much. The sweetness of justice lies in the sweet completion of litigation. For the reasons we have stated in our view the trial was unsatisfactory".

In the instant case, the convicting magistrate was denied the opportunity of seeing and assessing the demeanour of the witnesses who testified in the case. The appellant was therefore prejudiced when he was not given an opportunity to have the said witnesses recalled so that the convicting magistrate could have assessed their demeanours.

The upshot of the above reasons is that the appeal filed herein is allowed. The conviction of the appellant is quashed. The sentence imposed set aside. The appellant is consequently acquitted of the charge of robbery. He is ordered released from prison and set at liberty unless otherwise lawfully held.

DATED at NAKURU this 1st day of March 2006.

L. KIMARU

JUDGE