REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 195 of 2004

***(From original conviction and sentence in Criminal Case No.3587 of 2003 of the Senior Resident Magistrate's court at MOLO – R. KIRUI, SRM*)**

PETER MUTURI KAMAU…….....…….APPELLANT

VERSUS

REPUBLIC…….....……RESPONDENT

JUDGMENT OF THE COURT

The appellant was charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on the 26th day of December 2003 at Kaloleni Estate, Elburgon in Nakuru District jointly with others not before court the appellant robbed **John Macharia Kamau** of Kshs.6,800/-, a cap and a jacket all valued at Kshs.7,350/- and at or immediately before or immediately after the time of such robbery used actual violence to the said John Macharia Kamau.

The prosecution case can be summarised as follows:- **John Macharia Kamau** hereinafter referred to as **PW1** was residing at Elburgon. On 26th December 2003 at about 8.45 p.m. he was walking home when he met the appellant and five others. He said that he knew all of them very well as they were his neighbours. The appellant had a piece of metal and he greeted PW1. The appellant suddenly hit PW1 on his face near the left eye with the piece of metal that he was holding. The appellant's accomplices also beat him up and ransacked his pockets. They stole from him Kshs.6,800/-, a jacket and a cap. PW1 chased his assailants and managed to get hold of the appellant when he fell down. He shouted for help and several neighbours came to his assistance. The rest of the robbers escaped but PW1 said that he knew all of them and said that one of them was a University student.

In cross examination by the appellant, PW1 said that he was able to recognize the appellants because there was sufficient light in the place where the robbery took place. He further stated that the neighbours who came to his rescue when he was attacked also knew the appellant.

Jackson Mburu (PW2) heard someone shouting and when he went out to check what was happening, saw a number of people running away. He later met PW1 who informed him that he had been beaten and robbed by some people from the village, one of them being the appellant. PW2 said that he knew the appellant. PW2 did not witness the robbery incident.

Zacharia Ochieng (PW3) testified that on the material day and time he heard PW1 calling out asking someone to give him back his money. He went to the place where PW1 was and he found him with the appellant. PW1 informed PW3 that the appellant and three others had robbed him of Kshs.6,800/-, a wrist

watch, a jacket and a cap and that he had chased his attackers and managed to apprehend the appellant whom he was holding. PW3 assisted PW1 to take the appellant to the police station. He testified that he knew the appellant well.

In cross examination, PW3 said that he found the appellant having been arrested by PW1. He found just the two of them. He said that they recovered nothing from the appellant because his accomplices had disappeared with the stolen items.

Police constable Bernard Githinji, PW5, attached to Elburgon police station testified that the appellant was brought to the police station by PW1 and another person on 26th December 2003. They reported that the appellant had robbed PW1 of cash Kshs.6,800/-, a wrist watch, a jacket and a cap. PW1 further reported that at the time of the attack, he raised an alarm and members of the public went to his rescue. Later PW5 proceeded to the scene of the robbery and recorded statements from several witnesses.

In his sworn defence, the appellant testified that he was working in Elburgon with Timsales Company Ltd and on 26th December 2003 he left work at 3.00 p.m. and went to his house. Later in the evening he went to Elburgon Town for a drink. While he was in the bar, PW1 went and greeted him and he requested the appellant to buy him a beer but the appellant said that he did not have money. At about 8.00 p.m., he left to go back to his house. On the way he met PW1 holding a torch and a piece of timber. PW1 told the appellant that he wanted the appellant to be his witness in a case in which he had been beaten by the appellant's friends. The appellant declined since he had not witnessed the said incident and PW1 told the appellant that he would carry the cross on behalf of his friends since he had refused to co-operate. They proceeded to Elburgon Police station where PW1 recorded his statement. The appellant said that on the material night, he was fairly drunk and therefore did not know what he recorded. He denied any knowledge of the alleged robbery.

In its judgment, the trial court held that there was sufficient evidence that the appellant and his accomplices had robbed PW1. The court dismissed the appellant's defence as an afterthought. It convicted the appellant and sentenced him to death.

The appellant was aggrieved by the said conviction and sentence and preferred an appeal to this court. His grounds of appeal can be summarized as follows:-

1. That the learned trial magistrate erred in law and fact by putting much reliance on the evidence of PW1 which was unreliable.

2. That the charge sheet was defective in that it did not state the particular weapon that the appellant and the others were alleged to have used at the time of the robbery.

3. That the learned trial magistrate did not comply with the provisions of **Section 211** of the **Criminal Procedure Code.**

4. That the trial court did not give any due regard to the appellant's defence.

As the first appellate court, we are aware that we must submit the entire evidence that was tendered before the trial court to a fresh scrutiny, evaluate the same and reach our own independent conclusion on the matter. We wish to do so by first considering the evidence of PW1. He testified that he knew all his assailants as they were his neighbours. However, when they went to report the matter to the police he did not state so. He ought to have named all of them or give appropriate description of each one of them so that the police could arrest them and conduct independent investigations. He even knew that one of his assailants was a University student who had gone to Nairobi but he did not state so to the police. In his evidence he did not state that he was robbed of a wrist watch as he had told PW3 and PW5. PW1 told the court that he raised an alarm when he was attacked and robbed and members of the public came to his assistance. However, none of those members of the public were called as witnesses. When PW3 went to the scene he found PW1 and the appellant only. PW5 said that he recorded statements from several witnesses. The only witnesses who were called did not tell the court that they had witnessed the robbery

or participated in the arrest of the appellant.

In our view the trial court convicted the appellant on uncorroborated evidence of a single witness, PW1. It should have warned itself of the dangers of doing so. It also had a legal obligation to test such evidence with the greatest care so as to avoid miscarriage of justice. While we are aware that the conviction of the appellant was not based on evidence of identification, the legal principle that was stated in ***ABDULA BIN WENDO VS R (1953)20 EACA 166*** holds true even in a matter of this nature.

Considering the serious discrepancies that we have pointed out regarding the evidence of PW1 the appellant's, defence, seemed credible. We also agree with the appellant that the trial court did not comply with the mandatory provisions of **Section 211** of the **Criminal Procedure Code**. If it did so that was not recorded. Failure to comply with mandatory provisions of the law particularly when it comes to the rights of an accused person is not acceptable. In ***NDEGWA VS REPUBLIC [1985] KLR 534*** the Court of Appeal held as follows***:-***

"No rule of natural justice, statutory protection, evidence or of common sense should be sacrified, violated or abandoned when it comes to protecting the liberty of a subject since he is the most sacrosanct individual in the system of our legal administration".

All in all, we are of the view that the appellant's conviction was unsafe. We therefore allow the appeal, quash the conviction and set aside the sentence that was pronounced by the trial court. The appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED at Nakuru this 12th day of October 2006.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE

Judgment of the court delivered in open court in the presence of the appellant and N/A for Attorney General.

D. MUSINGA

JUDGE