REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Criminal Appeal No. 14 of 2002

JADIEL BUNDI NCHEBERE …….……. APPELLANT

AND

REPUBLIC …….…….. RESPONDENT

(Being an appeal against conviction and sentence in Criminal case No. 1274 of 2000 at Maua (Hon. Principal Magistrate M.r N. Kimani dated 1.2.2002))

JUDGMENT OF THE COURT

The appellant herein, Jadiel Bundi Nchebere, was charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that **on the 24th day of November 1999 at Michi-Mikuru sub-location in Meru North District within the Eastern Province jointly with others not before court, being armed with dangerous or offensive weapons namely pangas, bows and arrows robbed John Mithika Makero one Great Wall TV set, one twenty, litre hand spray pump, two pairs of leather shoes, three long shirts, one jacket, one gray coat, three pairs of long trousers, utensils of unknown value all items valued at Kshs. 29,600/= and at or immediately before or immediately after the time of the robbery used actual violence to the said JOHN MITHIKA MAKERO.**

Being dissatisfied with the judgment of the learned trial magistrate, the appellant appealed against both conviction and sentence.

Briefly, the facts of the case are that on the 24.11.99 at about midnight, John Mithika Makero, (PWI) was asleep in his house. PWI and the appellant are neighbours as their homes are close to each other. At the material time, PWI who was in the house with his family heard the door to his house being banged with stones and shortly thereafter people entered the house. PWI went to the ceiling from where he started screaming. The people ordered him to stop screaming lest they should shoot him. PWI obeyed. The people then damaged the ceiling and PWI fell to the floor whereupon the gang started beating him, cutting him on the back and face. The gang asked PWI for Kshs. 100,000/= but PWI told them he had no money. The gang then started ransacking the house and in the course of that PWI was able to identify the appellant with the help of moonlight which came in through the open door which had earlier been broken down by the gang. PWI alleged he was seeing the gangsters as the latter removed things from PWI's house. Apart from the appellant PWI also said he identified one AKWALU. The gangsters stole a TV, spray pump, coat, jacket, three shirts, axe, 2 fork jembes, 48 plates and 48 cups. On leaving the gangster locked PWI's house from outside. PWI then continued screaming whereupon neighbours came and

opened the door for him.

The matter was reported to Mikinduri Police Station. PWI mentioned the names of the gangsters to the police. PWI then went for treatment at Miathene Hospital and had a P3 form filled.

In response to the questions put to him by the appellant, PWI said that though he was afraid when the robbers struck, he still shouted for help and that out of the many robbers, he clearly identified the appellant as one of the robbers form a distance of about three metres. PWI also said that he mentioned the appellant's name when he made the report to police.

The prosecution also called PW2, a minor named Boniface Murungi who was found to be intelligent but gave unswworn evidence. PW2's evidence was that on the material night, he was asleep in his father's house at about 3.00am when robbers broke into the house and he then heard his father (PWI) screaming. The robbers beat PWI as they demanded money. The robbers stole items from the house after they had cut PWI on the head and ribs.

PW2, in answer to questions put to him during cross-examination stated that he knew the appellant before as one who used to pluck tea in their (PW2's) shamba. That more than six people, wearing black clothes broke into the house. PW2 denied a suggestion by the appellant that he had been coached in what to tell the court and confirmed that he saw the appellant in the house and also saw one Akwalu.

PW3, Antony Kaberia's evidence was that on the material night he was asleep in a house different from the house where PWI slept at about 3pm (we suppose he meant 3.00am) when thieves broke into the house where PWI was sleeping. On hearing the screams by his father, PW3 woke up but discovered his house was locked from outside. He saw many people outside the house among whom was the appellant whom PW3 alleged he was able to identify. He did not go out of the house following a warning by the robbers.

In answer to questions from the appellant, PW3 stated that he knew the appellant well as a circumciser of boys and that he was able to identify the appellant through the window with the help of moonlight and that he (PW3) mentioned the appellant's name to the police.

PW4, No. 53777 PC Evans Chetoi's evidence was that on 25.11.99 at about 7.45am, he and PC Wachira and another went on patrol. They spotted the appellant and arrested him, took him to the police station where he was later charged. PW5, No. 56869 PC Peter Nyala Odhiambo also gave evidence. He stated that at about 8.00am on 24.11.99, while at Mikinduri Police Station he received a report from PWI about a robbery at his house during the night. PW5 visited the scene in the company of Inspector Musau. That PWI mentioned the name of one Bundi as one of the robbers. He recovered a stone that was used to break down PW1's door. Accused was later arrested and charged. PW5 also testified that at PWI's house, he saw blood stains on a coffee table.

In response to questions put to him by the appellant, PW5 stated that he was investigating officer but that later the CID Maua took over the investigations. He also stated that the complainant (PWI) mentioned appellant's name.

PW6 Dr. Jackson Nthanga produced a PW3 form filled on 25.11.99 by one Linus Muturi a clinical officer, who had examined PWI and found PWI to have had a stab wound on the forehead, a bruised and swollen forehead tender chest wall, tender left wrist bruise on left hip and both knees. The injuries were estimated to be 12 hours old and opined to have been caused by both blunt and sharp objects. The P3 form was tendered in evidence.

The appellant gave unsworn evidence. He told the court that the case against him is a fabrication by PWI who had wanted him (appellant) to be a witness against one Kamuru. That on 14.11.99, PWI saw the appellant with Kamuru and that is when PWI swore that he would ensure the appellant was jailed. The appellant denied the charge against him. He did not call any witnesses.

When the learned trial magistrate considered both the prosecution and defence evidence, he came to the conclusion that a robbery was perpetrated against the complainant on the material day and that the appellant was one of the robbers. The learned trial magistrate also came to the conclusion that the appellant was clearly identified by both PWI and PW2 using moonlight and that both PWI and PW2 knew the appellant before. The learned trial magistrate concluded that the circumstances obtaining at the time of the robbery lent themselves to positive identification of the appellant by PWI, PW2 and also PW3; that the identification was by recognition since all the witnesses knew the appellant before.

The learned trial magistrate also found that PWI had taken the earliest opportunity to inform PW5 – PC Peter Nyala Odhiambo of the appellant as one of the robbers. The learned trial magistrate followed the decision in JOHN BOSCO KALUME V. R. Cr. Appeal No. 41 of 1998.

The learned trial magistrate also concluded that the offence under section 296(2) of the Penal Code had been proved against the appellant. He dismissed the appellant's defence as being totally unmeritorious. He said of the appellants defence:-

"I have given the same anxious consideration not in isolation but in totality of the entire evidence on record. Case of OKETHI OKALE V R (1965) EA 555. Case against accused person is proved by sound, cogent and over-whelming evidence. I find him guilty as charged and I accordingly convict him."

It is our duty as the first appellate court to re-evaluate and reconsider the entire evidence before us and to draw our own independent conclusions. First, the following are the grounds of appeal by the appellant, which we shall consider in detail one before making our own independent conclusion at to whether or not the learned trial magistrates findings were sound:-

1. That the learned trial magistrate erred in law in not finding that the charge is incurably defective.

2. That the learned trial magistrate erred in law and fact in finding that there was proper identification of the appellant.

3. That the prosecution evidence could not establish a prima facie case and it was wanting in nature.

4. That the learned trial magistrate erred in law and fact in not finding that the prosecution evidence was contradictory.

5. That the learned trial magistrate erred in law and fact in failing to put the defence evidence into consideration.

In a nutshell, what the appellant is contending in the five grounds of appeal is that (1) He was not properly identified (2) The prosecution did not prove its case beyond any reasonable doubt and (3) the charge as framed was incurably defective.

We shall deal with each of the three major grounds separately. First is the issue of identification. It will be noted from the facts that the offence took place between 12 midnight and 3.00am, PWI said the time was 12 midnight while PW2 and PW3 said the time was 3.00am. When PWI heard the door being broken, he climbed into the ceiling from where he started screaming. When the ceiling was broken he fell down onto the floor and immediately he fell down, the robbers started beating him on the back and on the face. He lay on his face. PWI said he was able to identify the appellant because there was moonlight. PW2 said that he was not able to identify the thieves who entered the house, but he stated in cross-examination that he knew the appellant before and that he saw him in the house that night. PW2 was a minor aged about 11 years. PW3 who was asleep in a different house did not come out of the house after the thieves had warned him not to. He however said he was able to identify the thieves through the window which he had opened on hearing the commotion outside.

It is trite law that the trial court had to properly analyse the evidence before it before deciding whether, indeed, the appellant was properly identified on the night of the robbery. He could only convict the

appellant on being thus satisfied that the appellant had been properly and positively identified. Authorities abound that whether a court is dealing with a case of recognition as PWI, PW2 and PW3 all seemed to imply in this case, the court has also to examine the evidence of visual identification in a criminal case very carefully to ensure that any possibility of error is eliminated. See **AHMED DIMA HUKA & 2 OTHERS V REPUBLIC** – Criminal Appeal No. 117, 135 and 114 of 2003 – Court of Appeal at Nyeri – unreported.

As the first appellate court we are also under a duty to reconsider and evaluate the evidence on record afresh and to come to our own independent conclusion that the learned trial magistrate's findings on identification which led to the conviction of the appellant of the charge of robbing the complainant (PWI) in this case were soundly made. **See OKENO V REPUBLIC (1972) EA 32.**

In order to be able to reconsider and evaluate the evidence afresh with a view to making our own independent findings, we set out the law as stated by the Court of Appeal in the case of **CLEOPHAS OTIENO WAMUNGA V REPUBLIC – Criminal Appeal No. 20 of 1989 at Kisumu –** and which case was applied in the case of **AHMED DIMA HUKA & 2 OTHERS V REPUBLIC** (above) where the Court of Appeal expressed itself as follows:-

"**We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 & 2 charging him with the robbery of Indakwa (PWI) and Lilian Adhiambo Wagude (PW13). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them …… What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. 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 on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well known case of R V TURNBULL (1976) 3 ALL ER 549 at page 552 where he said:-**

"**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."**

As we have already stated earlier it is our duty as the first appellate court to analyse the evidence that is before us, evaluate the same and draw our own conclusions, of course without the advantage that the trial court had of seeing the demeanor of the witnesses who gave evidence before the said court.

In this case, the robbery is alleged to have taken place either at 12 midnight or 3.00am. PWI – John Mithika Makero – said the time was 12 midnight while both PW2 and PW3 spoke of 3.00am. According to both PWI and PW3, they were able to identify the appellant with the help of moonlight. PWI stated:-

"**They started ransacking my house and I identified the accused in the dock. There was moonlight and the door to my house was open. I was seeing them as they were taking items from my house. I also identified Akwalu."**

Before this PWI stated that on hearing the door being banged, he went into the ceiling. He fell onto the floor when the robbers broke the ceiling and as soon as he fell onto the floor, the robbers started beating him on the back as he lay on his face. PW3 did not come out of the house which was separate from the house where the robbery took place, but he said he was able to identify the appellant with the help of moonlight through the window and before the robbers ordered him to close the window and remain inside the house lest they should shoot him. The learned trial magistrate was satisfied that the conditions as described above favoured a proper and error-free identification of the appellant.

After carefully reconsidering that evidence and evaluating it afresh, we are unable to agree with the learned trial magistrate. Regarding PWI, we find that infact he had no chance whatsoever to see who the robbers were. When he fell from the ceiling he was immediately set upon by the robbers, beating him and as he lay on his face. Nowhere throughout his evidence does he say that he got up from the floor and either walked around with the robbers as they ransacked the house or stood watching them do so. The moonlight which he said enabled him to recognize the appellant is not described in detail as to its intensity and how much of it was filtering through the door into the house so that even if PWI had been on his feet, there was no evidence that the light was sufficient for the purpose of properly and positively identifying the appellant. PW3 also did not mention how bright the moonlight was and how much time he had to see the robbers through the window before they ordered him to shut it and how far the robbers were from the window from which he allegedly identified the appellant. PW2 said that he did not identify the robbers though while under cross-examination he said that he saw the appellant in the house. PW2's evidence does not offer corroboration to the evidence of PWI and PW3. We also noted a contradiction in the evidence of PWI and that of PW2. Whereas PWI talked only of moonlight, PW2 stated that the robbers had torches and they shone the torch light on him. It is not given in the evidence how many torches there were if any. This is what the learned trial magistrate said of the evidence of identification:-

"**There is the evidence of the complainant that there was moonlight. His door to the house was open. He saw accused person three metres away still inside the house, the door still open. He knew him before as they come from the same area. Even PW2 a child to the complainant also saw accused and one Akwalu. PW3 also another son of the complainant who lives in another separate house saw accused and recognized him through the window as the robbers had locked his house from outside. He also confirmed that there was moonlight. He also knew accused before. Evidence of PW2 a minor has been corroborated by the testimony of the complainant and also PW3. The state of the circumstances obtaining then in my considered judgment favoured possible identification. Indeed it was identification by recognition as accused was known to these witnesses before."**

If the learned trial magistrate had subjected that evidence to the kind of scrutiny and consideration that we have subjected it he would have found, as we have indeed found that the circumstances obtaining on the night of the robbery were such as would not have led him to believe as he did that identification of the appellant through recognition was free from possibility of error. He would therefore not have proceeded to convict the appellant of the charge of robbery.

Mr. Muteti for the respondent submitted that the fact that PWI was able to give the name of the appellant's middle name to the police within hours of the robbery was further evidence of the evidence of recognition. Our own assessment of the evidence is that there was possibility of mistake in view of the circumstances prevailing at the time of the robbery. PW4 PC Evans Cheboi who arrested the appellant stated that he and PC Wachira and another arrested appellant while the trio was on patrol. This was on 25.11.99 but the witness does not state why the appellant was arrested. PW5, PC Peter Nyala Odiambo stated he was the investigating officer but adds in answer to questions put to him by the appellant:-

"**I am the investigating officer in this case and the CID Maua took over."**

Our own reading of this evidence by PW5 is that the investigations in this case were not carried out to their logical conclusion. None of the CID officers from Maua who took over investigations from PW5 was called to confirm to the court whether the investigations revealed that the Bundi the complainant mentioned to the police was the appellant. There is no doubt that a robbery took place at the complainant's home, and possibly the appellant was one of the six or seven robbers, but the prosecution has fallen short on establishing the case against the appellant beyond any reasonable doubt. An identification parade was a must in this case.

Before we conclude this judgment we need to address the last ground of the appellant's petition of appeal and that is that the learned trial magistrate failed to put the defence evidence into consideration. What appears by way of consideration of the defence is the last portion of the last paragraph of the learned trial magistrate's three page judgment where he wrote thus:-

"…….. **Accused's defence is totally unmeritorious. I have given the same anxious consideration not in isolation but in totality of the entire evidence on record. Case of OKETH OKALE V REPUBLIC (1965) EA 555 followed."**

That is the only portion of the judgment that contains what is a semblance of consideration of the appellants defence. In our view, it is unfortunate that the learned trial magistrate postponed his consideration of the defence case right up to the tail end of the judgment when he had perhaps already made up his mind to convict the appellant and not giving it enough depth. This, in our view, caused prejudice to the appellant. Nonetheless, we have also re-evaluated the appellant's defence and have reached the conclusion that if the evidence by recognition had been water tight, that defence would not have had any effect on the prosecution's case against the appellant.

In the result and for the reasons given this appeal is allowed. The conviction is quashed and the sentence of death imposed upon the appellant is set aside. The appellant is set free forthwith unless he is otherwise lawfully held.

Dated and delivered at Meru this 16th day of March 2005.

D.A. ONYANCHA

JUDGE