REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 32 OF 2019

NIVERT JAMES MUGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. Nivert James Muga, the appellant herein, was convicted for the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code.

2. The particulars in count one were that on the 30th April, 2018 at Nyakwatha, Rachuonyo Sub county within Homa Bay County, jointly with others not before court while armed with a pistol robbed Mouris Owino Okech of a motor vehicle registration number KCG 017L valued at Kshs.3.7 million the property of George Odhiambo Ogada and at or immediately before or immediately after the time of such robbery used actual violence to the said Mouris Owino Okech.

3. The appellant was convicted and sentenced to 20 years imprisonment. He was dissatisfied and appealed against both conviction and sentence. He raised three grounds of appeal as follows:

a) The learned trial magistrate erroneously relied on the evidence of a single identifying witness.

b) The learned trial magistrate erred in law and in fact by convicting him on insufficient evidence.

c) The learned trial magistrate erred in failing to appreciate his defence.

4. The appeal was opposed by the state but no grounds or submissions filed.

5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of Okeno vs. Republic [1972] EA 32.

6. It is trite law that conviction can be based on the evidence of a single witness. However great care must be taken before such a conviction. In the case of **Abdullah Bin Wendo vs. Rex 20 EACA 166** the Court of Appeal emphasized the need for such care in the following words:

> **Subject to certain well-known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.**

In the instant case, the complainant driver did not describe how the assailant looked like to the police at the first opportunity thus raising the question as to the reasons that made him claim to have identified him at the identification parade.

7. The prosecution at the trial did not elicit any evidence as to his (complainant's) reasons for purporting to identify the appellant as the person who robbed him. From the evidence the complainant driver met the person who subsequently robbed him at 6.45 p.m. when ordinarily the lighting at that time is not favourable for positive identification. The more reason the court ought to have heeded the directions by Lord Widgery C.J. in the case of **R. vs. Turnbull and Others [1976] 3 All ER 549** where he stated as follows:

> **Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness**

came to be make.How long did the witness have the accused under observation?At what distance?In what light?Was the observation impeded in any way, as for example by passing traffic or a press of people?Had the witness ever seen the accused before?How often?If only occasionally, had he any special reason for remembering the accused?How long elapsed between the original observation and the subsequent identification to the police?Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given.In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them.Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.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 relative and friends are sometimes made.

8. The first description of a suspect to the police is what informs the investigating officer while conducting an identification parade. In order for the evidence of identification to have some probative value, the identification parade must comply with the laid down procedure. The Court of Appeal in **David Mwita Wanja & 2 others vs. Republic [2007] eKLR** emphasized on the importance of a properly conducted identification parade and expressed itself as follows:

The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia vs. R [1986] KLR 422 where the court stated at page 424: -

It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.

9. The correct procedure of conducting an identification parade is provided for under chapter 42 paragraph 7 of the National Police Service Standing Orders. I will therefore endeavour to find whether the identification parades in respect of the complainant adhered to the laid down procedure. Paragraph 7 (5) (d) & (e) of the same provides:

(**d) the accused or suspected person shall be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as him or her;**

(e) where the accused or suspected person is suffering from any disfigurement, steps shall be taken to ensure that it is not specially apparent;

This parade was flawed. The appellant had a conspicuous injury and a black mark on the forehead.

10. The appellant was allegedly connected to the offence by the call logs allegedly made by him to other numbers according corporal Mark Lipale (PW4). Some belonged to witnesses in the Probox Theft case. This evidence was worthless for the calls were made on 22nd & 23rd February 2018 whereas the robbery for which the appellant was tried was on 30th April, 2018. No attempt was made to link the said calls to the complained of robbery.

11. Section 296 (2) of the Penal Code provides:

If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

This therefore means that the learned trial magistrate meted out an illegal sentence; there was only one legal sentence for the offence without an alternative.

12. After the analysis of the evidence on record, I arrive at the conclusion that there was no evidence on which to base the conviction of the appellant. I quash the conviction and set aside the sentence. The appellant is at liberty unless if lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 8TH DAY OF JUNE, 2021

KIARIE WAWERU KIARIE

JUDGE