REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.91 OF 2019

(An Appeal arising out of the conviction and sentence of Hon. H.M. Nyaga (CM) delivered on 3rd April 2019 in Makadara Criminal Case No.5655 of 2014)

JOHN OMONDI ONYANGO.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

The Appellant, John Omondi Onyango was charged with another, with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 25th November 2014 at Mathare North within Nairobi County, the Appellant, jointly with another not before court, while armed with dangerous weapons namely knives, robbed Daniel Omari Obiri of his mobile phone make Sony Xperia valued at Kshs.30,000/- and cash Kshs.8,500/- and immediately after the time of such robbery threatened to use actual violence to the said Daniel Omari Obiri (the complainant). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged. He was sentenced to serve seven (7) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted in the absence of evidence to support the charge and against the weight of evidence that had been presented in court. He faulted the trial magistrate for relying on the evidence of identification which in his view, did not establish that the Appellant had indeed committed the offence. He was aggrieved that he had been sentenced to serve a custodial term in prison that was harsh and excessive in the circumstances. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Kabata for the Appellant and by Ms. Akunja for the State. Whereas Mr. Kabata urged the court to find that the Appellant could not have been convicted on the evidence of identification, which in his view fell short of the required standard, Ms. Akunja on her part submitted that the evidence of identification was watertight and established the Appellant as the person who was a member of the gang that robbed the complainant. This court shall revert to the arguments made on this appeal after briefly setting out the facts of the case.

On 25th November 2014 at about 11.40 a.m., the complainant accompanied by his wife PW2 Halima Kadiro took his son to Drive-In Primary School to play. While he was at the field, he received a call from his former wife called Viham who wanted to see her child. The complainant told her to meet them at the field. She went to the field. Shortly thereafter, the complainant and PW2 testified that a group of three men confronted them and demanded to be given their phones and any cash that was in their possession. They threatened them with a knife. The complainant, his wife and ex-wife complied. They were robbed of their mobile phones and cash. After the robbery, the complainant's ex-wife followed the gang and requested them to give her back her SIM card. They gave her the SIM card. During the robbery, PW1 and PW2 told the court that they were able to identify the Appellant and his accomplices. However, in the first report that they made to the police, they did not tell the police the features that could enable them to identify their assailants if they saw them again. Indeed, the evidence adduced by PW3 AP Cpl. Geoffrey Oketch and PC James Kiremi in regard to how the complainant identified the Appellant was contradictory. Whereas PW3 told the court that the complainant had told him that he had been robbed by three men including one ***"Troon",*** PW4 testified that the complainant told him that he would identify his assailants if he spotted them again. The Appellant was arrested two days later when the complainant saw him at a dump site. He called PW3 who went to the scene and arrested him. The Appellant explained that he was at the specific scene at the time because that was his place of work. The Appellant earned his living by collecting garbage from residential houses under a *'youth programme'* and then dump it at the site that he was arrested. He asserted that he was a victim of mistaken identity. He urged the court to acquit him.

This being a first appeal, this Court is mandated to re-evaluate the evidence presented before the trial court afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge –vs- Republic [1987] eKLR** stated this on the duty of the first Appellate court:

> ***"It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this."***

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

From the evidence adduced before the trial court, and the submission made before this court, it was clear that the prosecution's case was predicated upon the evidence of identification since none of the robbed items were recovered in the Appellant's possession. Indeed, no other evidence was adduced by the prosecution to support their case other than the evidence of identification. The trial court in its judgment, was aware of the dangers of relying on the sole evidence of identification to convict the Appellant. Indeed, the trial court cited the case of **John Nduati Ngure vs. Republic Criminal Appeal No. 121 of 2014** where the court held thus:

> ***"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 more identifications 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."***

In **Maitanyi –Vs- Republic [1986] KLR 198 at P.200**, the Court of Appeal while considering the question of how a trial court should evaluate and consider the evidence of identification, held thus:

> ***"Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-***
>
> > ***"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with 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 present appeal, it was clear to this court that the complainant did not identify the Appellant as the robber in a manner that would give confidence to the court that his identification was free from the possibility of error or mistaken identity. It was apparent from the complainant's testimony and that of his wife (PW2) that they had not met or known the Appellant prior to the fateful date of the robbery. In the first report that they made to the police, they did not give the description of their assailants. Indeed, matters were muddled when PW3, the arresting officer told the trial court that the complainant had told him that among the robbers was one ***"Troon"*** who presumably is the Appellant.

This court is not satisfied that with such unsatisfactory evidence of identification, the prosecution sought to secure the conviction of the Appellant. In the first report made to the police, the complainant should have at least given the description of the physical features of the assailant. A description of the clothes that the assailants wore at the time of the robbery would have assisted in giving confidence to the court that indeed the complainant and his wife had positively identified the Appellant as being a member of the gang that robbed them. This court is not satisfied that the evidence of identification adduced by the prosecution is watertight as to exclude the possibility of error on the part of the complainant. Since there was no other evidence connecting the Appellant to the robbery, this court had no option but to find that the prosecution failed to establish its case to the required standard of proof beyond any reasonable doubt.

It was in that regard that after hearing the appeal on 11th March 2020, this court allowed the appeal and quashed the conviction of the Appellant. The court ordered the Appellant to be set at liberty forthwith and released from prison unless otherwise lawfully held. The reasons for that determination are now contained in this judgment that is being delivered today. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF APRIL 2020

L. KIMARU

JUDGE