REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.67 OF 2019

(An Appeal arising out of the conviction and sentence of Hon. Stephen Jalang'o (SRM)

delivered on 16th November 2018 in Makadara Criminal Case No.2236 of 2015)

JOSHUA KANINA NDUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Joshua Kanina Ndungu, was charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 28th July 2010 at Kariobangi North Estate within Nairobi County, the Appellant, jointly with others not before court, while armed with dangerous weapons namely knives, robbed Josphat Munyoki Kiara of cash Ksh.800/- and a cell phone make Nokia 3310 all valued at Ksh.5,800/-, and the time of such robbery, used actual violence on the said Josphat Munyoki Kiara. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted as charged and sentenced to serve thirty (30) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved by his conviction stating that the prosecution failed to establish its case against him to the required standard of proof beyond any reasonable doubt. He took issue with the fact that the prosecution failed to avail crucial witnesses necessary to adduce evidence to prove its case before the trial court. He was further aggrieved by his conviction stating that the same was based on circumstantial evidence which was insufficient to sustain a conviction. He faulted the trial court for improperly shifting the burden of proof to the defence. In the premises, the Appellant urged this court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged this court to allow his appeal. In addition, this court heard oral submissions from Ms. Kibathi for the State, who opposed the Appellant's appeal. Ms. Kibathi made oral submission to the effect that the prosecution had established its case against the Appellant to the required standard of proof beyond any reasonable doubt. She submitted that the evidence adduced by PW1 established that the Appellant, in the company of others, accosted him and robbed him of his phone and cash. PW1 told the court that the Appellant who was armed with a knife which he used to stab him in the eye.

Learned State Counsel averred that PW2, on the material day, was on his way to work when he saw PW1 on the ground bleeding from a wound on his eye. A large crowd had gathered around him. She submitted that the Appellant was positively identified as the assailant by PW1. The Appellant was known to PW1 prior to the incident. The evidence of identification was therefore by recognition. She asserted that ingredients of the offence of robbery with violence were established by the prosecution. With regard to sentence, Learned State Counsel submitted that the Appellant's custodial sentence was harsh. She proposed that the same be reduced to ten (10) years imprisonment. She therefore urged the court to dismiss the Appellant's appeal on conviction.

The facts of the case according to the prosecution are as follows: PW1, Josphat Munyoki, was the complainant. At the material time, he worked as a taxi driver at Kariobangi. On 28th July 2010, at about 5.50 a.m., he was on his way to pick the vehicle that he used for work. It was raining. He met three men on his way to the bus stop. They attacked him. One of the men stabbed him in the eye and took his phone and Ksh.200/. A crowd gathered at the scene. He was taken to the hospital. He reported the robbery incident to the police. PW1 told the court that the man who stabbed him in the eye was the Appellant. He stated that he was able to identify the Appellant since he was well known to him prior to the robbery incident. The Appellant worked as a tout at Kariobangi. He further testified that there was sufficient light at the

scene which enabled him identify the Appellant. When he reported the incident to the police, the Appellant could not be traced. Sometime in 2015, PW1 saw the Appellant. He informed the police. The OCS Kariobangi Police Station instructed two police officers to accompany him to effect the Appellant's arrest. He was able to identify the Appellant to the police officers who thereafter arrested him.

PW2, Samson Mwinde, is PW1's cousin. It was his testimony that on the material day of 28th July 2010, he was on his way to work when he saw a large crowd gathered at the bus stop. PW1 was lying on the ground. He was bleeding from a wound on his eye. PW1 told him that three men had attacked him and robbed him. He further told him that he was able to identify one of the men. He rushed PW1 to the hospital where he received first aid. They later went to the police station and reported the incident. PW2 stated that he did not know the Appellant.

The Appellant was put on his defence. He gave an unsworn statement. He testified that he had been a resident of Huruma since 2000. He worked as a matatu tout. He stated that he was arrested in year 2015. He denied attacking and robbing the complainant. He told the court that he knew the complainant and that he used to give the complainant some jobs on the weekends. The complainant was however gunning for his job, and wanted the Appellant to be sacked. He asserted that the complainant framed him of the present charges and took over his job after he was arrested. He denied the charges against him.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses (See **Okeno vs Republic [1972] EA 32).** 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.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal. It was evident from the facts of the case that the prosecution relied on the direct evidence of identification to secure the conviction of the Appellant. This court has a duty to thoroughly examine the evidence on identification before confirming a conviction based on the same. In the case of **Wamunga vs Republic [1989] eKLR 426** the Court of Appeal stated as under;-

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

Further, in the case of **Paul Etole & Another vs Republic [2001] eKLR** the Court of Appeal stated the following with regard to identification through recognition. -

> ***"Evidence of visual identification can bring about a miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness on one or more identifications of the accused, the court should warn itself of the need for caution before convicting the accused.***
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> ***Secondly, it ought to examine closely the circumstances in which the identification by each of the witness came to be made.***
>
> ***Finally, it should remind itself of the specific weaknesses which had appeared in the identification evidence.***
>
> ***It is true that recognition may be more reliable than identification of a stranger – but even when a witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence."***

In the present appeal, the complainant was the only identifying witness. According to the complainant, the robbery took place at about 5.50 am. It was raining. He was on his way to the bus stop when he was accosted by three men. One of the men stabbed him on the eye. They took his phone and cash Ksh.200/-. The complainant told the court that he was able to identify the Appellant as the man who stabbed him on his eye. He stated that the Appellant worked as a tout and was well known to him prior to the incident. He further stated that there was sufficient light at the scene which enabled him identify the Appellant. The court was not informed as to the nature and source of light in order to determine whether the same favoured a positive identification.

This court is not convinced that the complainant positively identified his assailants. The circumstances favouring a positive identification to be made were difficult in the present appeal. The robbery took place at about 5.50 a.m. The complainant stated that it was also raining. He stated that there was sufficient light at the scene, but failed to inform the court the nature and source of the said light. He was attacked by three men. One of them stabbed him in the eye before taking his phone and cash. It cannot be ruled out that in the hectic circumstances of the robbery, the complainant could have been confused that he had identified the Appellant as the robber.

It should also be noted that the court was also not informed of the details of the first report made by the complainant to the police. Neither the two arresting police officers nor the investigating officer were called to adduce evidence before the trial court. These witnesses were crucial to prove the prosecution's case as they would have informed the court if the complainant had indeed identified the Appellant as one of his assailants in the first report that he made to the police. This was especially important since the Appellant was arrested five years after the offence was alleged to have been committed. The evidence of the said witnesses was necessary to establish the formal arrest of the appellant and his arraignment in court after the prerequisite investigations have been conducted. Failure to call the arresting and/or investigating officer to testify, especially in such a case where identification of the appellant person is in doubt, weakened the prosecution's case against the Appellant. There was no other evidence that was adduced to directly connect the Appellant to the robbery. None of the robbed items were recovered in his possession.

The upshot of the above reasons is that material doubt was raised by the Appellant with regard to the prosecution's case against him, which ought to be resolved in the Appellant's favour. From the aforegoing, the evidence of identification, taken into totality, is not watertight and free of the possibility of error to support the conviction of the Appellant. Since there was no other evidence adduced to connect the Appellant with the robbery, the Appellant's appeal has merit and is hereby allowed. The Appellant's conviction is quashed. The sentence meted by the trial court is set aside. He is acquitted of the charge. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF MAY 2020

L. KIMARU

JUDGE