REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 33 OF 2018

GODFREY MUGAMBI WANGUI alias KAMINWA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Nyeri

Chief Magistrates Court Criminal Case No. 1002 of 2016

(Hon. Ruth Kefa, Senior Resident Magistrate) on 23 August 2018)

JUDGMENT

The appellant was initially charged in the magistrates' court with the offence of grievous harm contrary to section 234 of the Penal Code, cap. 63 Laws of Kenya; the charge was later substituted with that of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The particulars were that on the 1st day of October 2016 at Mbiriri Kabari location within Nyeri County jointly with another not before court, the appellant robbed Charles Maina Kiboi Kshs. 7950/= and immediately before or immediately after the time of such robbery wounded the said Charles Maina Kiboi.

He pleaded not guilty to the charge but he was eventually convicted and sentenced to death. He has now appealed against both the conviction and sentence. In the supplementary petition of appeal dated 29 August 2019 and filed on 30 August 2019, the appellant raised the following grounds against the decision of the trial court:

> 1. The learned trial magistrate erred in law and in fact in failing to test with the greatest care the evidence of the single identification witness or warn herself of the danger of relying on such evidence.
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> 2. The learned trial magistrate erred in law and in fact in finding that the appellant was guilty of the offence of robbery with violence contrary to section to section 296(2) of the Penal Code when there was no sufficient evidence adduced against him.
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> 3. The learned trial magistrate erred in law and in fact by relying on the prosecution evidence which was not cogent enough to establish a case against the appellant beyond reasonable doubt.
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> 4. The learned magistrate erred in law and in fact by failing to find that none of the stolen items or weapons used during the alleged attack were recovered from the appellant

At the hearing of the appeal, Ms. Maina, the learned counsel for the appellant urged that although the complainant was attacked by people known to him, it was not apparent how long the attack took place and whether it was enough time for him to have recognised or identified them. She urged further that although the complainant stated that there was moonlight on the night of the attack, those who came to his rescue testified that they could only see him with the help of a torch. No distinct feature concerning the appellant was given and no description of him was given when the complainant reported the matter, so the learned counsel urged. She urged that it is only after the recovery of the exhibits that the complainant said that they belonged to the appellant. The evidence of the complainant was uncorroborated and was also inconsistent with that of the second and third prosecution witnesses.

Again none of the stolen items was recovered from the appellant and neither was the weapon used in the attack.

As far as the sentence is concerned, counsel submitted it was harsh considering the Supreme Court decision in **Petition No. 15 of 2015, Francis Karioko Muruatetu & Another versus Republic (2017) eKLR.**

Ms Ndungu, the learned counsel for the state opposed the appeal and submitted that the appellant was recognised rather than identified. As far as the conditions for recognition are concerned, the learned counsel submitted that there was moonlight sufficient enough for the complainant to identify the appellant. She also urged that items belonging to the appellant were found at the scene. The alibi offered by the appellant was weak and could not displace the evidence of the complainant.

As the first appellate court, this honourable court has the duty to interrogate the evidence on record and evaluate it afresh at the end of which it must come to its own conclusions which may or may not be consistent with those reached by the trial court. However, whichever conclusions the court reaches, it must always bear in mind that the trial court saw and heard the witnesses, an advantage that this court does not have. The oft-cited case on this point is in **Okeno versus Republic (1972) EA32** where the Court of Appeal stated as follows: -

> ***An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. (See page 36).***

The complainant **Charles Maina Kiboi (PW1)** testified that on 1 October 2016 at about 9:00PM, he arrived at his home from the nearby shops where he had gone to buy maize flour. He was accosted by two people whom he found in his compound. He was able to recognise them as people who came from his village; one of them was the appellant who was also called 'Kaminwa' and the other was one Martin. Although it was at night, he testified that it was not so dark and there was moonlight too. He approached them and asked them what they wanted. The appellant respondent and told him that they were looking for him.

The appellant then hit him on the head while Martin pushed him to the ground and started strangling him. As the appellant frisked his pockets and removed money from his trouser pocket, Martin told him "Geoffrey we are going to kill this person right now". They robbed the appellant of his Kshs. 7950/=. After the robbery, the appellant escaped first followed by Martin.

The complainant screamed for help; he then went to David Nderitu's house for help. He was bleeding and Nderitu's son noticed that he had a tooth missing. They went back to the scene together with Grace Muthoni. They found a shoe at the scene. They were able to see it because there was enough moonlight. Besides the shoe, they also recovered a jacket and a shirt; the shirt was stained with blood. Two teeth were also recovered from the scene.

They went to report to a community policing elder who referred them to the police; they proceeded to Tagwa Police Station where the complainant lodged his complaint and was issued with a P3 form. He went to Mitero dispensary for treatment. In his report to the police and the community policing elder he named the appellant and Martin as the people who attacked him. He also demonstrated the dental gap showing that he had lost some teeth in the course of the attack.

Upon cross-examination, the complainant testified that he had been with the appellant and Martin at the shopping center at about 6:00 PM on the evening he was attacked; besides, both the appellant and the complainant were neighbours and that the appellant was a person he knew very well. He recalled that the appellant was wearing one of the shoes that was recovered at the scene of crime and exhibited in court. The appellant was chewing khat when he met him earlier. He reiterated that the appellant had told him that they were looking for him immediately before they attacked him and that Martin even called him by his name. The appellant had also been wearing the jacket that was recovered at the scene and which had khat in it.

David Nderitu Muthui (PW2) the neighbour that the complainant referred to in his evidence testified that he was at the shopping center on 1 October 2016 at about 9:00P.M. when the complainant came and bought a half kilogram of flour. He had a one-thousand-shilling note. He identified the complainant as his neighbour. The complainant left him at the shop. After about three minutes, his wife, whom he identified as Susan Maina, called him and informed him that there was someone screaming near their home. He did not go to the scene immediately for fear of being attacked. He later went there together with one Charles Kariuki. He found the complainant at his home; he had been injured; he was bleeding from the forehead and mouth and four of his upper teeth were missing. The complainant told him that he had been attacked by the appellant.

At the scene they recovered a shoe of 'akala' type. They also found a black leather jacket and a black polythene paper containing khat. Besides these items, they also found a white bloodstained shirt and two teeth at the scene.

The third prosecution witness was **Charles Irumbi (PW3)** who testified that he chaired the local community policing and that on 1 October 2016 at about 10:00 P.M. the appellant together with persons he identified as Baba Esther and Maina Mugethi went to his house to report an incident. The appellant was bleeding from the nose, mouth and had sustained an injury on the head. He told him that he had been attacked by two people he knew very well. He accompanied them to Tagwa police station to report the robbery.

The complainant handed him sandal and a jacket that had been recovered from the scene of crime. There was khat in the jacket's pocket. The appellant was arrested and taken to Tagwa police station.

Rebecca Wamathai (PW4) was a sub county clinical officer at Kieni East sub-county hospital at the material time. She filled and signed the complainant's P3 form on 7 October 2016 though the complainant had been to the hospital much earlier for treatment. Upon examination, she established that the complainant had healing scars on the head and the posterior part of both arms. He had lost four teeth on the anterior part of the mouth. He had irregular bruises on the right and the small finger was tender. The approximate age of the injuries was six days. The injuries were caused by a blunt object. The degree of injury was assessed as grievous harm.

Joyce Maina (PW5) testified that she was one of the complainant's neighbours and that on 1 October 2016 at about 8.30 P.M., the complainant had been to her house before he left to go and buy flour. At about 9:00 P.M. she heard a man shouting for help. She went to the

scene together with David Nderitu and found the appellant had been assaulted. He was bleeding from the forehead and his front teeth had been removed. He had also been injured on the head. They recovered a shoe, a jacket and a shirt at the scene. There was also flour scattered on the ground. They went to the headman who referred them to the police station. The complainant told them that he had been attacked by people he knew and that one of them was the appellant. Apart from seeing the appellant with the shoe exhibited in court she had also seen him wearing the jacket that was recovered at the scene. She knew the particular shoe because of its peculiar design and had a red mark. The jacket had khat wrapped in a polythene bag.

Police Constable Patrick Juma (PW6) testified that he picked the appellant from Tagwa police post and took him to Kiganjo police station on 4 October 2016. He recorded his statement on the following day 5 October2016. As the investigator, he also recorded statements of other witnesses. The complainant handed him a leather jacket and which he told the officer that it belonged to the appellant. He produced the teeth that had been recovered from the scene. He also testified in cross-examination that the complainant told him that the jacket belonged to Martin and not the appellant.

The appellant opted to give sworn evidence when he was put on his defence. He testified that he only learnt of the charges against him in court. He worked as a mason and had rented premises at Chaka. On 1 October 2016 he went to Mberere near Kabaru to buy sugar and bread. While there three men approached him and told him they wanted to talk to him. They told him that they would arrest him because of a stolen jacket. He was arrested and taken to Kiganjo police station. Although the complainant testified that he knew him, he denied knowing the complainant. It was also his evidence that only his mother lives at Mberere but he himself lived at Chaka and that he occasionally visited his mother. He was not at Mberere on 1 October 2010 but was at Chaka. He denied being related to Joyce Muthoni (PW5) or having lived with her step –daughter; instead he testified that he had wife, Catherine Mwende and two children. He disowned a shoe produced in court and alleged to be his. He also denied owning either the leather jacket or the white shirt. He stated that he did not know who Martin, his alleged accomplice was. He summed his testimony by saying that he had been framed.

The offence of robbery is defined in section 295 of the Penal Code; that section reads as follows:

Section 295 of the Penal Code states;

> ***295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***

Section **296 (2)** prescribes the penalty when robbery is committed in circumstances contemplated in that section; it states as follows:

> ***296 (2). 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 robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.***

Thus under this section, robbery is not just a felony but it is a felony that attracts the sentence of death if the offence was committed in any of the prescribed circumstances. In short, for one to be convicted of the offence of robbery with violence, the prosecution must prove that at the time of the robbery the accused was armed with any weapon or instrument that may deemed to be dangerous or offensive; or that he was in the company of one or more persons; or, immediately before or immediately after the time of the robbery, the accused wounded, beat up, struck or used violence to any person.

Based on the evidence on record, I have no reason to doubt that the complainant was robbed in at least two of the three prescribed circumstances; his assailant was in the company of one person and, either immediately before or immediately after the robbery the robbers used actual violence against his person and wounded him in the process. His evidence that the robbers stole his money was not controverted and the evidence that he was assaulted in the course of the robbery to the extent that he lost his teeth was sufficiently corroborated. Maina (PW2) and Muthoni (PW5) were consistent in the evidence that the appellant not only screamed for help when he was attacked but also that when they responded, they found him injured; bleeding from the mouth, nose and the head. He had also lost teeth some of which were recovered from the scene of the attack. Irumbi (PW3) also noticed the same injuries when the complainant accompanied by Maina and Muthoni proceeded to his house to report the robbery. The clinical officer Wamathai (PW4) produced medical evidence confirming that the complainant had been injured as alleged. She went further to testify that the weapon used must have been a blunt object and thereby implying that the complainant's attackers must have been armed with some weapon.

The evidence that the complainant lost money in the process was also not displaced or controverted. It was his evidence that the robbers robbed him of his Kshs. 7950/=. This evidence that the complainant must have been carrying some money was corroborated by PW2 that the complainant had a one-thousand-shilling note when he bought a half-kilogram of flour from his shop.

I am satisfied, as the learned magistrate was, that the complainant was robbed in circumstances contemplated under section 296 (2) of the Penal Code.

The major question in this appeal which also was the main bone of contention in the magistrates' court is whether the appellant was one of the two people who perpetrated this crime.

In answering this question, the main issue that emerges is whether the appellant was properly identified or recognised and to this end the evidence of the complainant was crucial; he was the only person who testified as having seen his attackers. His evidence must thus be weighed against the law of what is normally referred to as single identification witness and to this extent I can do no better that cite some of the Court Appeal pronouncements on this question.

In **Wamunga versus Republic (1989) KLR 424** the Court of Appeal spoke of the evidence of identification generally in the following

terms:

> ***It is trite law that where the only evidence against a defendant is evidence on 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 a conviction.***

But on the specific issue of the evidence of a single identification witness, the same court acknowledged in O**geto versus Republic (2004) KLR 19** that a fact can be proved by a single identification witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult; it noted as follows: -

> ***"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken."***

The Court of Appeal for East Africa discussed the danger of relying on such evidence without warning in **Roria versus Republic (1967) EA 583 at page 584**. It stated:

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness…***
>
> ***That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."***

The court also cited its own decision in **Abdala bin Wendo & Another versus Republic (1953), 20 EACA 166** where it held:

> ***Subject to certain 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 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 the 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.***

The need for the trial court to warn itself of the dangers of relying on the evidence of visual identification by a single witness is an issue that was taken up in the Court of Appeal in **Kisumu Criminal Appeal No. 20 of 1989, Cleophas Otieno Wamunga versus Republic** where it noted that evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimise this danger. The court proceeded to state further that whenever the case against a defendant depends wholly or to a great extent on the correctness of one or 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 based on the evidence of the identification.

Again, in **Criminal Appeal No. 24 of 2000 Paul Etole& Reuben Ombima versus Republic**, the Court of Appeal reiterated the need for caution. It stated as follows;

> ***"The appeal of the 2nd appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.***
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> ***All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case the danger of mistaken identification is lessened, but the poorer the quality the greater the danger. In the present case, neither of the two courts below demonstrated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. There was no enquiry as to the nature of the alleged moonlight or its brightness or whether it was a full moon or not or its intensity. It was essential that there should have been an enquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size and its position the vis-à-vis the accused would be relevant."***

Turning to the appellant's case, the conditions for a positive identification or recognition cannot be said to have been all that ideal or favourable; the robbery took place at night, at about 9:00 P.M. to be precise. However, the complainant and Maina were consistent in their evidence that there was moonlight; according to the complainant, it was bright enough for him to recognise his attackers.

As the decisions I have cited would show, it does not always follow that one cannot be identified or recognised even in difficult conditions or, as it is in the present case, cannot be identified or recognised in such conditions by a single identification witness. Whenever it is alleged that an accused has been recognised or identified, all that is required is for the trial court to satisfy itself that in all circumstances it is safe to act on such identification. The court has to test such evidence with care and in doing so it may also consider other evidence that point to the guilt of the accused; this evidence may either be direct or indirect. At the end of it all the trial court must be satisfied that the recognition or identification was free from the possibility of error.

Now the appellant was no stranger to the complainant. It was the complainant's evidence that his attackers, the appellant in particular, came from the same village he hailed from. In answer to questions put to him by the appellant in cross-examination he stated as follows:

> ***"It was around 9:30 PM, I saw you, there was moonlight and we were with you at 6:00 PM at the shopping centre and I talked to you and asked you if I was the one you were looking for. You live near me, you are my neighbour, I know you. I met you at 6:00 PM with Martin. You were wearing this shoe and you were chewing khat. When I saw you at my compound, the two of you, I identified you as the same people I met at 6:00 PM."***

So if there was moonlight and the appellant was the complainant's neighbour whom he not only recognised but he had a conversation with before the attack, the complainant cannot be said to have been mistaken as to the appellant's identity. These facts point to the conclusion that he could recognise the appellant without much difficulty.

If there was any other indirect evidence that was required, the evidence that the shoe or sandal recovered at the scene was the appellant's shoe was not displaced; the appellant had not only been seen wearing that kind of shoe or sandal but Muthoni (PW5) who testified that the appellant lived with her step-daughter for a while said that she had known the appellant to wear that type of sandal. It was unique and had a red mark on it. The appellant himself did not challenge this evidence in cross-examination.

It is also worth noting that the complainant was clear from the very beginning that the people who attacked him were the appellant and one Martin; he informed Maina who came to his rescue that the appellant was one of the two people who attacked and robbed him; this is the same information he gave to Irumbi (PW3) from whom he sought assistance; Muthoni (PW5) who also went to his rescue and constable Juma (PW6) who recorded his statement when he made his report to the police were also given the same information. Thus, the complainant was consistent all along in his statement that he was not under any illusion as to who attacked him.

Although the appellant denied in his defence that he did not live at Mbiriri and that only his mother lived there, at least four prosecution witnesses testified that they shared the same neighbourhood with the appellant and the complainant; these witnesses were the complainant himself who was categorical that the appellant was his neighbour; Nderitu (PW2) testified that he was a neighbour to both the appellant and the complainant and that he knew them both; the community policing elder also testified that he knew the appellant and that he was arrested in the same Mbiriri sub location where he lived. Muthoni who lived in the same sub location of Mbiriri testified that he had known the appellant for two years besides the fact that he lived with her step-daughter at some point in time. The appellant never questioned any of these witnesses in cross-examination on this aspect of their evidence. He never challenged Muthoni on her evidence that apart from sharing the same sub location with her, he lived with her step daughter. To deny that he lived at Mbiriri and therefore he could not possibly have been at the locus in quo was an afterthought on the part of the appellant.

The learned magistrate was right in dismissing the appellant's alibi because it had no factual basis; there was simply no evidence to support it. The appellant was bound to raise the defence at the time he pleaded so that the prosecution would have time to test and check it but having been raised for the first time at his defence the best the trial court could do was to weigh it against the prosecution evidence and in my humble view it did. On this point the learned magistrate properly directed herself on the law and applied the decision of **Ganzi & 2 Others versus Republic (2005) eKLR where** it was stated:

> ***"The trial magistrate considered the case of each appellant separately. She weighed the defence of alibi of each appellant against the weight of prosecution evidence. This is the correct approach where the defence of alibi is first raised in the appellant's defence and not when he pleaded to the charge. See Wangombe versus Republic (1980) KLR 149."***

I am satisfied that in coming to the conclusion that the appellant was one of the two people who attacked and robbed the complainant the learned magistrate properly directed herself on the facts and the law. It follows that I do not find any merit in the appellant's appeal. It is hereby dismissed.

Signed, dated and delivered on 2 October 2020

Ngaah Jairus

JUDGE