REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 49 OF 2019

JAMES NGATIA WAMUYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate Hon. N. Kariuki

dated 09/08/2019 in Nyeri CMCR Criminal Case No. 315 of 2018.)

JUDGMENT

1. **James Ngatia Wamuyu** the Appellant was charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code.

The particulars being that the Appellant on the 8th day of January 2018 at Nyeri township in Nyeri county within the Republic of Kenya, with another not before court being armed with a dangerous weapon namely a knife robbed **Sammy Mugambi Mburugu** of his mobile phone make L.G valued at Kshs.70,000/= and cash Kshs.4,000/= and immediately before the time of such robbery wounded the said **Sammy Mugambi Mburugu**.

2. He denied the charge and the matter proceeded to full hearing with the prosecution calling five (5) witnesses while the Appellant gave a sworn defence. Later the learned trial Magistrate found the Appellant guilty, convicted and sentenced him to fourteen (14) years imprisonment.

3. Being dissatisfied with the judgment, he filed this appeal raising the following grounds:

a) **That,** the trial Magistrate erred in law and facts while basing his conviction in reliance with identification and recognition by the complainant, single identifying witness and failed to warn herself with the danger of relying with the same not forgetting the source of light at the scene of crime was not given by the witness.

b) **That,** the trial Magistrate erred in law and fact by relying with the purported identification by the victim without considering when the matter was reported, no evidence that description with features or clothes of the assailant were given while also the victim was in conditions of influence of alcohol when the robbery took place.

c) **That,** the trial Magistrate lost direction in evidence after being much impressed with the mode of his arrest without considering though arrested he was not recovered with any of the proceeds of the alleged robbery and failed to consider the attack was sudden and unexpected being the complainant was been attacked from behind.

d) **That,** the learned trial Magistrate lost direction in medical evidence of Pw2 who testified on behalf of his colleague who examined the victim while the prosecution failed their burden of duty to comply with section 33 as read with section 77 of the Evidence Act cap 80 Laws of Kenya as the records reveals.

e) **That,** the learned trial Magistrate erred in law and fact by rejecting the Appellant's defence which same was not displaced by the prosecution side a foregoing with the evidence adduced thus section 212 of the Criminal Procedure Code Cap 75 Laws of Kenya was not met also section 169(2) of the C.P.C.

4. **Pw1 Sammy Mugambi** was the complainant, an attendant at Kobil petrol station. He testified that on 8th January 2018 at about 10:00 pm

he left Viceroy club and decided to take a taxi home. He was however ambushed by thugs on the way. One of them grabbed him from the back. This was at the Equity bank/Safaricom building place. There was a second person who had a knife and a metal bar which he used to hit him on his teeth. He also used the knife to pierce the bottom of his chin. The assailants continued to hit him severally on the sides of his body, mouth and his four teeth broke.

5. They in the process took his Kshs.4,000/= and phone make L.G valued Kshs.170,000/= from his pocket. They then left him there unconscious. By the time he got some strength to wake up, it was almost morning. He went and reported at the police station then went to Nyeri provincial general hospital where he was attended to over the several injuries he had.

6. A month later after leaving the A.P canteen he saw a man he recognized as one of the assailants. He recalled his face because he had seen him well using the street light. He followed him slowly and saw him enter Jubilee bar. He called the police and the person was arrested by A.P Mesaka and A.P Oscar. He identified the person arrested as the Appellant who pierced his chin with the knife.

7. In cross-examination he said he had taken alcohol at Viceroy club upto about 9:45 pm and he waited for a taxi for about fifteen (15) minutes before deciding to walk. The person who attacked him was the one at the front. He further said the one who hit him with an object on the mouth and stabbed his chin with a knife was the Appellant's accomplice. He did not know his assailants prior to the incident. He admitted having been drunk that night. He however recognized the Appellant by his height, his small beard, mustache and goatee. He did not however report or record the description of his attackers to the police.

8. **Pw2 Dr. William Muriuki** testified on behalf of Dr. Chege with the consent of the defence counsel. He said Pw1 suffered grievous harm as he had a fracture of two teeth No. 11 and 12. The P3 (EXB1) and treatment notes (EXB2) were produced by the witness.

9. **No. 88201 PC Oscar Kipkorir Kosgey** received a call from Pw1 in respect to a person who had robbed him. This was on 12th March 2018 while he was on patrol within town. He went to the place with another officer and arrested the suspect called James Ngatia whom they placed in cells. They booked him for the offence of robbery with violence which had been booked under O.B No. 48 of 9th January 2018.

10. He said the said O.B report by P.C Fatuma's investigation diary states that an assault report was made by Pw1. It also states that Pw1 did not recognize any of the assailants.

11. **Pw4 Ibrahim Kinyua** stated that on 9th January 2018 he was on his way to work at Nyeri provincial general hospital on motorbike registration number KMCT 473B when he met Pw1 who had blood on his clothes. This was near Consolata cathedral church near Nyeri central police station. He told him thugs had attacked him. Pw4 took him to Nyeri provincial hospital. He alerted his wife Anne Wangui and picked her from Nyeri technical college where she worked. He confirmed that Pw1 had several injuries.

12. **Pw5 P.C Immaculate Okongo** was the investigating officer in this matter. She said pw1 came to the station on 9th January 2018 at 6:15 am and reported a case of robbery with violence vide O.B No. 48. She referred him to Nyeri provisional general hospital. Later he brought treatment notes and he was issued with a P3 form. He said he was robbed of a phone valued at Kshs.70,000/= and a wallet with Kshs.4,000/=. Later Pw1 saw the Appellant whom he identified as one of those who robbed him. They were unable to trace the phone.

13. In cross examination she said that the first report was taken by officers at the report desk. He confirmed that the OB report indicates that the reportee could not identify his assailants.

14. In his sworn defence the Appellant said he sells clothes at Gakere road Nyeri town. On 8th January 2018 6:00 am, he went to Nairobi to pick a clothes consignment and returned at 6:00 pm. He went home and slept as he was tired. He denied knowing Pw1 prior to this case. He denied the charges saying Pw1 was confusing him with somebody else.

15. On the date of arrest (12/03/2018), he was to take a trench coat to a customer at a club called Jubilee. He missed the client and decided to take a black current soda. As he partook of it, he heard somebody say they should all get out. They were three guys present. They were all placed inside a Kenya police land cruiser and taken to the cells.

16. In cross examination he said he used to get clothes from Wambua of Githurai Nairobi. He sells clothes at different places as he can't afford the county government fees of the day.

17. The appeal was disposed of by written submissions. Learned counsel M/s Kimunyo for the Appellant did submit that Pw1 was a single identifying witness and his evidence ought to have been carefully examined to ensure there was no possibility of error. He referred to the cases of **Nzaro –vs- Republic (1991) KAR 212 and Wamunga –vs- Republic (1989) KLR 424** to support the submission. Justice Mativo in **Donald Atemia Sipendi –vs- Republic (2019) eKLR** had this to say about relying on the evidence of a single identifying witness:

> "*I am also alive to the fact that it is necessary to test the evidence of a single witness respecting to identification and take great care and caution on whether the surrounding circumstances were favourable to facilitate proper identification.*"

18. Counsel further submits that being a single identifying witness, Pw1's evidence had to be airtight. That he failed to give any description of any specific or unique physical features of the perpetrator. Further that he was drunk at the time. His purported identification was two (2) months after the incident. She also submits that the trial court failed to treat the identification evidence with the caution it deserved, and there was no corroborating evidence to that of Pw1. She referred to the case of **Maitanyi –vs- Republic (1986) KLR 196** where the Court of Appeal stated:

> "*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."

19. She urged the court to note that the trial court did not take into account all the necessary considerations before relying on the identification of a single witness. See **Donald Atemia Sipendi** (supra)

20. She contends that Pw1's drunkenness affected of his mind and he could not have identified the Appellant and urged the court to allow the appeal. See **Titus Wambua –vs- Republic (2016) eKLR.**

21. The appeal is opposed by the Respondent through learned counsel M/s Wangari Mwaura. It's her submission that Pw1 in his evidence explained the attack and how the Appellant was the one in front of him. He therefore had a very good view of him as he is the one who inflicted injuries on him. That he gave a description of him at page 29 line 3-5 saying:

"…. I recall how the accused enjoying hurting me that day. I recalled perfectly his height and his facial features. He had a goatee and a line beard."

Counsel argues that the 3-15 minutes Pw1 spent with the assailant was sufficient time for him to enable him remember the person were he to meet him again. There was sufficient light at the scene and the prosecution evidence was not controverted by any evidence by the Appellant.

22. She too referred too referred to the case of **Donald Atemia Sipendi –vs- Republic** (supra) where the subject of identification was addressed and areas for consideration outlined by the learned Judge. It's her submission that the investigating officer (Pw5) also confirmed that the scene is properly lit. Further that the trial court which observed Pw1 found him to be credible and trustworthy. That the other ingredients for proof of a robbery with violence charge were established.

23. On grounds **3** and **4** she submits that the fact that nothing was recovered from the Appellant does not imply that he was innocent. He was arrested a few weeks after the incident. The production of the P3 complained of was executed upon the consent of the prosecution and counsel for the Appellant.

24. Counsel has submitted that the Appellant raised a last minute *alibi* defence in his sworn evidence and availed no witness or document to corroborate it. She referred to the case of **Athman Salim Athuman –vs- Republic (2016) eKLR** where the Court of Appeal stated that:

"The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. Way back in 1939 in ***Republic –vs-***

SUKHA SINGH S/O WAZIR SINGH & OTHERS (1939) 6 EACA 145*, the former Court of Appeal for Eastern Africa upheld the decision of the High Court in which it was stated:*

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."

She argues that the defence by the Appellant was an afterthought and did not displace the water tight prosecution evidence and so the trial court was right in not considering it.

Analysis and determination

25. This is the first appellate court and as such it is guided by the principles set out in the case of **David Njuguna Wairimu –vs- Republic (2010) eKLR** where the Court of Appeal stated:

"That the duty of the 1st appellate court is to analyze and re-evaluate evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

26. In a much earlier decision the Court of Appeal similarly held in **Okeno –vs- Republic (1972) E.A 32** that:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the

Magistrate's findings should 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 Peters Vs Sunday Post [1958] E.A 424."

27. Upon considering the evidence on record, grounds of appeal, submissions and the law, I find the issues for determination to be:

i. Whether the offence of robbery with violence contrary to section 296(2) of the Penal Code was proved.

ii. Whether the Appellant was identified as one of the robbers.

Issue No. (i) Whether the offence of robbery with violence contrary to section 296(2) Penal Code was proved.

28. The offence of robbery with violence is a creation of section 296(2) of the Penal Code. It is proved when first of all, theft is proved and further if any one of the following three ingredients is established:

a. The offender is armed with any dangerous or offensive weapon or instrument OR

b. The offender is in the company of one or more other person or persons, OR

c. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person. See ***Donald Atemia Sipendi –vs- Republic*** *(supra).*

29. In the instant case there is credible evidence that the assailants were in a group of more than one when they attacked Pw1 and hence executed a common intention. See section 21 of the Penal Code and **Njoroge –vs- Republic (1983) KLR 197**. Further one of the assailants had a knife and a metal bar which he used to assault and seriously injure Pw1 while the other assailant strongly held onto Pw1. The P3 form (EXB1) and treatment notes (EXB2) produced by Pw2 Dr. William Muriuki under section 33 and 77 of the Evidence Act with the consent of the defence confirmed the injuries. They also confirmed that Pw1 had been treated at Nyeri provincial general hospital.

30. Pw1 works as an attendant at Kobil petrol station Nyeri. He said he lost a phone given to him as a gift by a family friend valued at Kshs.70,000/= plus cash Kshs.4,000/=. These items were never recovered. It is therefore reasonable and believable that he lost his items in the attack and that constitutes theft. I therefore find that all the ingredients of the offence of robbery with violence were established.

Issue (ii) ***Whether the Appellant was identified as one of the robbers.***

31. It is not disputed that Pw1 was a single identifying witness and none of the stolen items was recovered from him. It is also not disputed that the attack was committed at night around 10:00 pm. It is further not disputed that Pw1 had been taking alcohol at Viceroy club and he was indeed drunk. Finally it is also a fact that none of the assailants was known to Pw1 prior to this incident and the Appellant was arrested about nine (9) weeks after the incident.

32. I now wish to analyse the evidence with the above facts in mind. In the case of **Francis Kariuki Njiru & 7 others –vs- Republic (2001) eKLR** the Court of Appeal stated that:

"*The law on identification is well settled and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all."*

33. Further in the case of **Simiyu & Another –vs- Republic (2005) I KLR 192** the Court of Appeal had this to say:

"***(2)*** *In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.*

(3) *The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attackers' identity".*

34. Pw1 and Pw5 have testified of there being light at the scene of incident. However inspite of Pw1's claims of having identified the Appellant, when he went to the police station the next morning the report in the O.B No. 48 of 9th January 2018, is that he had been attacked and he did not identify the robbers. The investigating officer (Pw5) testified that she sent Pw1 to the hospital on 9th January 2018 after he had made his report. Thereafter he brought the treatment notes (EXB2) and at that point she issued him with a P3 form (EXB1) and she recorded his statement where he said those who attacked him were physically known to him. He gave no descriptions.

35. The P3 (EXB1) was issued on 9th January 2018 as that's the date it bears. Pw1 said he was treated and was discharged. He did not therefore spend a night in hospital. It therefore follows that the statement was recorded on 9th January 2018. Pw1 while under cross examination said he did not report or record the description of the attackers. On 12th March 2018 he recorded a further statement and this must have been after the arrest of the Appellant.

36. In his further statement which he was cross-examined on, he said he described the attackers as the short one and the other one who was taller and strong see page 28 lines 4-9. The evidence Pw1 gave on court, deeply describing the Appellant and which the Respondent is relying on, is not supported by his reports to the police since at the station he only talked of two guys one of whom was taller than the other one. Being tall or short alone without any other features cannot be said to describe anyone.

37. Pw1 may have been in a lot of pain at the time he was reporting and could not have recalled much when he returned from hospital. Pw5 recorded a statement from him and he gave no description. No further statement was taken from him until 12th March 2018 after the Appellant's arrest. Even in that statement he gave no description of the Appellant. What he told the court about the Appellant's appearance is simply what he was observing in court which amounts to dock identification which is the poorest form of identification. See **Fredrick Ajode Ajode –vs- Republic (2004) eKLR**.

38. Pw1 insisted that it is the Appellant who hit him and injured him. However in cross examination at page 27 lines 5-7 he states:

> "*I can't tell if they were more than two guys. I am sure they were two people. The other guy hit me with a blunt object on the mouth and stabbed my chin with a knife."*

Who is this other guy who hit him, stabbed him when all along he gave the impression that it is the Appellant who had done all that?"

39. After doing the above analysis I do find that the identification evidence of Pw1 was too weak to sustain any conviction. This evidence could only have been relied on if it was backed by a report describing the assailants or a recovery of any of the stolen items on him. My conclusion is that the appeal has merit and is allowed. The conviction is quashed and sentence set aside.

40. The Appellant should be released forthwith unless lawfully held under a separate warrant.

Orders accordingly.

Dated and signed this 10th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge