REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.46 OF 2017

COLONELIUS KIPLANGAT CHIRCHIR.....APPELLANT

-V E R S U S -

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of Hon. KIPYEGON (SRM)

in Kericho CMCC. No.314 of 2013 delivered on 15/12/2017)

J U D G M E N T

1. The Appellant ***CORNELIOUS KIPLANGAT CHIRCHIR*** was convicted with the offence of Robbery with Violence Contrary to Section 296 (2) of the Penal Code and he was sentenced to death on 15/12/2017 in ***Kericho CMCC Cr. Case No.314 of 2013.***

2. The particulars of the charge were that on 13/02/2013 at Mberere Area in Nandi County, the Appellant jointly with others not before court while armed with offensive weapons namely simis robbed ***ANDREW KIPKOECH MITEI alias MAEMBA*** of Motor Vehicle make Toyota Probox Registration No. KBQ 339 H, A Nokia 101 Phone and Cash kshs.3,000/= and at the time of such robbery used actual violence to the said ***ANDREW KIPKOECH MITEI alias MAEMBA***.

3. The Prosecution evidence in summary was that on the material day, the Complainant drove his Cousin's Motor Vehicle Registration ***No. KBQ 339H*** Toyota Probox as a Taxi business between ***KIPTERE and SONDU*** when he was asked to ferry a Gear Box from Chemelil by one ***SILA***.

4. The Complainant who testified as PW.1 told SILA that it was late but SILA insisted and told him that there was a Lorry that was stuck that required the Gear Box. PW.1 said he met the owner of the Lorry who was with the Appellant. The three people entered the Probox and when they reached Ahero, they gave him Kshs.2,000/= and he fueled the car.

5. PW.1 said 300 meters after fueling the car, the Appellant who was seated at the back seat of the car started strangling him. Sila took over the car and they pushed PW.1 to the back seat. They told him to drink a liquid which was in a soda bottle or they kill him. When he drunk the liquid he lost consciousness.

6. When PW.1 woke up, he found himself in the middle of a sugar plantation. His phone Nokia and Kshs.3,500/= had been taken. PW.1 said he kept walking until he found a man with a bicycle. He was later treated at Sigowet and a month later he identified the Appellant and ***Silas*** at an identification parade.

7. **Sila** was jointly charged with the Appellant with the offence of Robbery with Violence Contrary to Section 296 (2) of the Penal Code but he later died in another robbery at Nakuru when this case was still pending before the Trial Court.

8. PW.2 said he is the one who gave PW.1 the Car. PW.2 was an Employee of PW.3 (the owner of the Car). At the close of the prosecution case, the Court found that the Appellant had a case to answer and proceeded to put him on his defence.

9. The Appellant said in his defence that he knew nothing about the offence and that he did not know why he was charged. The Court found him guilty as charged and sentence him to death.

10. The Appellant has now appealed against both conviction and sentence to this court on the following grounds:-

(i) THAT the evidence of recognition/identification was not free from possibility of errors.

(ii) <u>THAT</u> the identification parade conducted by PW.1 and PW.5 was flawed.

(iii) <u>THAT</u> the Appellant's arrest had no nexus to the purported robbery.

11. The Appellant filed written submissions in which he stated that the evidence on recognition/identification was not free from possibilities of errors as the same was premised on PW1,PW5 and PW6 who were total strangers to the Appellant and who claimed to have seen him only once.

12. Further, the Appellant submitted that the identification parade conducted for PW1 and PW5c was flawed in that the two witnesses did not give initial description of the Appellant to the police and further that the arrest was done one month after the incident and it was doubtful whether the witnesses would remember the Appellant.

13. The Appellant also submitted that the arrest of the Appellant had no nexus to the purported robbery as PW5 alleged to have met the Appellant one month after the incident and he recalled that the Appellant was among the people who robbed the Complainant yet he was not at the scene of crime and further that the evidence on cell phone number 0719-365-400 was electronic evidence which was erroneously admitted without calling an expert from Safaricom.

14. The Respondent opposed the Appeal and submitted that the chronology of events as stated by the prosecution witnesses was reliable, corroborative, consistent and plausible and further that the Trial court rightly convicted the Appellant on the weight of evidence offered by the prosecution.

15. The Respondent also submitted that the identification of the Appellant was proper and further that the Appellant has not stated what provisions of Chapter 46 of the Police Standing orders were violated by the prosecution.

16. In the case of **Kiilu & Another v. Republic [2005]1 KLR 174** the Court stated as follows;

> **"1. An Appellant on a first appeal 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.**
>
> **2. 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 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."**

17. The issues for determination in this Appeal are as follows: -

(i) Whether the Appellant was properly identified.

(ii) Whether the prosecution proved the guilt of the Appellant to the required standard.

18. On the issue of identification, I find that although the prosecution relied on the evidence of a single witness, the offence was committed in broad daylight and the Complainant interacted with the Appellant and the others not before court in a manner that enable him to identify the appellant at the identification parade.

19. The Court of Appeal for Eastern Africa in **Abdala Wendo .V. R [1953] 20 E.A.C.A 166** held as follows;

> **"Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this 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."**

20. In the current case, I find that PW5 and PW6 who were approached by the Appellant prior to hiring the Complainant had an encounter with the Appellant who was in the company of two other people who told PW5 and PW6 that they wanted to hire a probox.

21. PW6 introduced them to PW5 and although the two were not at the scene of robbery, there is evidence that they interacted with the Appellant who told them that he wanted to hire a probox and they laernt later that the Appellant hired the Complainant.

22. There is evidence that it was PW5 who spotted the Appellant herein at Delta Petrol Station one month after the incident and he had the Appellant arrested and later identified by the Complainant at an identification parade.

23. I find that this was a case of recognition since PW1 and PW5 were able to recognize the Appellant due to the length of time they interacted. The circumstances were conducive for positive identification since the Appellant approached the witnesses in broad daylight.

24. I find that the prosecution discharged the onus of prove imposed by law and the conviction herein is safe and the sentence secure.

25. I find that this Appeal has no merit and I accordingly dismiss it and I uphold both the conviction and sentence.

Delivered and Signed at Kericho this 2nd day of December, 2020.

A.N. ONGERI

JUDGE