REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 67 OF 2015

ELVIS WILLAIM TETE......APPELLANT

VERSUS

REPUBLIC....................RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate Court at Mombasa Criminal Case No. 3992 of 2010 by Hon. J. Gandani (SPM) dated 27th February 2013)

Coram: Justice R. Nyakundi

Mr. Muthomi for the Respondent

Appellant in person

JUDGMENT

The Appellant together with a co-accused were charged with robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on 6th November 2010 at Bombolulu Sports in Mombasa District within Coast Province, jointly with others not before court while armed with dangerous weapons namely iron bars robbed Vincent Gakure Gathu of Ksh.900/-, National identity Card, 4 ATM cards and a Samsung mobile phone model GT-C 3010S valued at Ksh. 4,999/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Vincent Gakure Gathu.

At the end of the trial, the Appellant was convicted and sentenced to death. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following amended grounds:

1. That the learned trial Magistrate erred in law and fact by finding my conviction and sentence in support of dock identification evidence tendered in court by a single witness PW1 without proper finding the same was flawed when given the facts that: -

a. There is no suggestion that he had mentioned me the Appellant or even given my description to the people who went to his rescue immediately after the alleged attack.

b. The source of light at the alleged scene of crime and the duration under observation was not brought within measurable margins to be safely depended by a court of *law to sustain a conviction in a case of this magnitude.*

2. That the learned trial Magistrate erred in law and fact by connecting my arrest with this matter in question without proper finding the same was not fair when given other facts that: -

a. I was arrested with nothing incriminate to link me with this matter.

b. The neighbours whom PW1 claimed that I told them I was a suspect in this case of robbery were not called to testify as witnesses to corroborate the complainants allegations.

3. That the learned Honourable trial court Magistrate erred in law and fact by adequately rejecting my defence without giving any reason as to why it could not stand against the fabrication of prosecution case which lacked nor any corroboration.

4. That the learned Honourable trial Magistrate erred in law and fact by failing to find but that death sentence has been declared unconstitutional by the Supreme Court.

5. That the learned Honourable trial court Magistrate erred in law and fact by not considering the period spent in remand prior to conviction and sentence as provided for under section 333(2) of the Criminal Procedure Code.

Background

PW1 Vincent Gakure Gatu, the victim stated that on the 6th November 2010 at around 9:30pm as he was heading home when he met three people near his home who gave him way. That due to the security lights from his house he was able to see the three people. He recognized the Appellant who he described looked of Somali origin and whom he saw in the area every evening. He also described the Appellant's co-accused as tall, slim and who was limping on one leg. Further, he described the third person as a thin with and of slightly light complexion.

That as he neared his house he turned to and saw that the said people were following him. He found a corner facing the door but lost consciousness. He regained consciousness the following day at Pandya Hospital. He was informed that he had been found in a pool of blood and that he had an injury and bruises at the back left side of his head. He was also informed that his wallet which contained, 4 ATM cards and Ksh. 900/- plus his Samsung phone worth Ksh. 5,000/- were missing.

PW1 told the court that he was discharged from hospital after a week and proceeded to record his statement He said that his sister and wife **PW2** had reported the matter at Nyali Police Station. That on 25th December 2010 he was summoned to Urban Police Station for an identification parade where he picked out the Appellant's co-accused.

PW1 told the court that he informed the police that the Appellant slept at a kiosk near his house and on one night the police came asked for the description of the kiosk. He later learnt that the Appellant had been arrested.

In cross-examination, PW1 stated that he used to see the Appellant in the neighbourhood and that he slept in a barber's kiosk owned by Charo. He said that he was attacked next to his house and that the three people are the ones who hit him. PW1 admitted that he never saw a weapon with any of the three people.

PW2, Lucy Warwira the victim's wife, told the court that on 6th November 2010 at around 10:00pm her neighbour, mama Naomi, informed her on a call that she had heard PW1 calling her name outside the house in a low voice and asked her go and check. As she rushed out she heard her mother-in-law, PW3, saying that thieves had killed her son. PW2 stated that she found PW1 lying down facing upwards and he was bleeding from deep cuts on the left side, nose and mouth.

PW2 took a taxi and rushed PW1 to Pandya Hospital where he was admitted for one week. She then reported matter at Nyali Police Station. She further stated that after PW1 was discharged he recorded his statement at Nyali Police Station. That on a later date they were recalled to the police station where PW1 identified his phone that had been recovered.

PW2 stated that she knew the Appellant as he slept in a kiosk near her house and that she had any difference with him.

PW3 Agnes Njeri Gatu, PW1's mother stated that on the 6th November 2011 as she was preparing to sleep she heard PW1 calling PW2 softly from outside the house. She rushed outside and found PW1 lying down in a pool of blood from his head, mouth and ears. She stated that PW2 and her rushed out and called for a taxi and took him to Pandya Hospital where he was admitted for five days. PW3 told the court that she knew the Appellant as he slept in a kiosk near the house.

PW7 Dr. Lawrence Ngone, was a medical officer of Health at Coast General Hospital who filled the P3 form. He stated that PW1 had a fracture of the left paral bone and an ACT scan revealed he had a epidural hemorrhage. He stated that the injury was caused by a blunt object such as a metal bar and classified the injury as maim. He produced the P3 form as P. Exhibit 1.

PW8 No. 59921 Senior Sergeant Bosco Kisaa previously attached to Urban Division, Mombasa was the investigating officer. He told the court that he met the complainant and took his statement where he PW1 informed him that he knew one of his attackers who he described and stated that the attacker hanged around a den near his house. He stated that on 26th December 2010 he received information that on the attacker had been spotted near the victim's house. That at midnight together with Corporal Hassan and Corporal Bosia they found the Appellant hiding at a kiosk and that he fitted the description by the victim.

The investigating officer stated that he did not recover anything from the Appellant. He further stated that PW1 mobile was linked to the Appellant's co-accused. The other part of his evidence related to the co-accused.

In cross-examination, PW8 stated that dangerous weapons were used during the attack but were never recovered. He further stated that PW1 described the Appellant as having Somali looks and it was easy to identify him. He further stated that when he arrested the Appellant he knew he was the one as he looked like a Somali. He admitted that he never carried out an identification parade. PW8 also stated that he visited the scene of crime and stated that it was a corner towards the house and that here were electrical security lights.

The evidence of PW4, PW5 and PW6 all related to the recovered mobile phone which was not linked to the Appellant while the evidence of PW9 related to the identification parade of the Appellant's co-accused.

At the close of the prosecution case, the Appellant was placed on his defence and gave a sworn statement. He stated that he was a guard at

barber shop kiosk. That on the 24th December 2010 at around 9:00pm he heard a knock and when he opened the door he was ordered to lie down and was arrested. That the police officer searched the shop but did not find anything. He was remanded at Central Police Station and was later charged before court.

In cross-examination, the Appellant stated that the kiosk was near PW1's house and he used to seem him pass near the kiosk and that he had never quarrelled with him

Submissions

Appellant's written submissions

On appeal, the Appellant relied on his written submissions filed on the 9th March 2020. The Appellant submitted that the circumstances of his identification on the night of the attack were not ascertained such as the intensity, size and position of the light and how long the victim observed his attacker. He relied on **Kipkenei arap Musonik vs Republic (1930) KLR 153** and **Maitanyi vs Rep.**

He also submitted that the victim never identified him PW2 or PW3 when they found him outside the house and that he was unconscious and did not see his attackers creating a possibility that PW1 was mistaken. He cited the case of **Regina vs Turnbull (1976) 3 ALL ER 547.**

Additionally, he submitted that the victim formed an opinion that he was not a good person, a nuisance in the community and that mentioning him was an afterthought meant to remove him from society.

The Appellant faulted the prosecution for failing to call witness which weakened its case. He relied on the case of **Olivia vs Rep (1965) EACA 144.**

On the sentence, the Appellant submitted that it was unconstitutional following the ruling of the Supreme Court in the Muruatetu case and prayed that the court substitute it with a lenient sentence. He quoted the case of **Pascal Nyamai Mulu & Another bs Rep HC CR APP. 15 and 16 of 2018 at Mombasa**. Lastly, the Appellant prayed that the court should consider that time he spent in remand in line with section 333(2) of the CPC.

Respondent's submissions

The Respondent relied on its written submissions dated 12th March 2020 and filed on the 24th March 2020 in opposition of the appeal. The Respondent submitted that the prosecution required to prove any of the ingredients of robbery with violence to base a conviction as held in **Oluoch vs Republic (1985) KLR 549.**

It was submitted that the victim recognised the Appellant as he used to see him hanging around the kiosk near his house. Further the Appellant admitted that he guarded the kiosk and that at the day of the arrest was found inside the said kiosk. It was submitted that the Appellant was properly identified by recognition which the court in **Ajononi & Others vs Republic (1980) KLR 54** stated that recognition of an assailant is more satisfactory, more assuming and reliable than identification of a stranger as it depended on personal knowledge.

The Respondent submitted that the Appellant was in the company of other people when he attacked PW1 as stated in evidence on record and the fact that an identification parade was carried out to identify the other assailant. Additionally, it was submitted that PW1 was wounded as established by the medical evidence.

On sentence, the Respondent cited the decision of the court in **Criminal Appeal No. 51 of 2016; Anthony Mutua Nzuki v Republic [2018] eKLR** where the court set out principles to consider during a sentence re-hearing.

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

I have considered the grounds of appeal, the respective submissions, and the record and the issue for determination is whether the Appellant was properly identified and whether the sentence was excessive.

The facts of the case are quite clear as laid out in this judgment, there is no contention that PW1 was violently robbed of mobile phone and his wallet which contained Ksh 900/- and 4 ATM cards his on the night of 6th November 2010. The only issue of dispute is whether the Appellant was positively identified.

The importance of identification of an accused in a case of robbery with violence was indicated by the Court of Appeal in the case of **Suleiman Kamau Nyambura v Republic [2015] eKLR** where it stated that: -

> "In addition, and what is crucial in a criminal trial is also the requirement to prove in addition to there being one of the set out

ingredient of robbery with violence is the need to positively identify the assailant/s in question."

In the present case, PW1 informed the court that he recognized the Appellant who used to hang around and sleep at a kiosk near his house. He went on to describe the Appellant looking like a Somali and that he wore a black t-shirt.

It is trite that identification by recognition is found to be more assuring than identification by a stranger as was held by the Court of Appeal in the case of **Reuben, Taabu Anjononi & 2 Others v Republic [1980] eKLR** where it held that: -

"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya vs. Republic (unreported)."

However even in instances where identification is by way of recognition, the court has where identification is by, it is paramount that the court warns itself on the dangers of relying on visual identification the Court of Appeal in **Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989 KLR 424** held 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 a conviction."".

In the celebrated case of **R v Turnbull and others (1976) 3 ALLE 2549** the court gave guidelines on circumstances of identification and stated that: -

"Secondly the Judge should direct the jury to examine closely the circumstances in which the identification by such witnesses came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance"

The court of appeal in **Shadrack Shuatani Omwaka v Republic [2020] eKLR** while discussing identification of an assailant at night cited with approval the decision of the Supreme Court of Uganda in **Abdulla Nabulere and another – v - Uganda Cr. Appeal No. 9 of 1978 (un reported)** where the court held as follows:

"….Apart from light during the incident, and familiarity of the assailant to the victim, other factors, such as distance between them, the length of time the victim had to observe and even the opportunity to hear the assailant are factors to look out for."….

"All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger. When the quality is good as for example, when the identification is made after a long period of observation, or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution."

Similarly, in **<u>Maitanyi -v- Republic</u>, (1986) KLR 198** the Court of Appeal pronounced itself thus: -

"As the strength of the light improves to great brightness, so the chances of a true impression being received improves. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and it (sic) position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into."

In the case before me, on identification of the Appellant PW1 stated that: -

"On reaching near my home, I met the 2 accused. They gave me way on the path. I recognized the 1st accused (the Appellant) and I see him in that area every evening with another person. They were with another person. I did not recognize the other two. I could see them clearly. The 1st accused had worn a black t-shirt and a pair...I know the 1st accused well as he looks like a Somali. The other one was tall and slim and was limping on one leg. He is accused two. The other one was thin but of slightly light complexion. He is not in court. I could see the accused as there was electrical security lights from my house. The security lights were about 12 to 15 meters away."

I have read the judgment of the trial court and note that it failed to evaluate the evidence of identification in regards to the Appellant. On the issue of lighting, the source of light was established to be electricity security lights. However, the size or intensity of the security lights was not stated. Were the security lights a simple bulb that illuminated a small area or were they of high voltage that could illuminate a wide area? This would have enabled the court to assess whether the light being 12-15 meters away was sufficient enough for the complainant to clearly

see his attackers.

Furthermore, on the position of the security lights PW1 explained that was heading to his house when he came across his purported attackers. This means that PW1 was facing the source of light while the source of light was behind the three men and not on their faces. There is no evidence that there were other sources of light in the area that illuminated upon them. I find it hard to believe that PW1 would have been able to identify the Appellant late at night while he was facing the source of light.

Additionally, the evidence of PW7, the investigating officer, was that there was a corner before PW1's house. He never explained the positioning of the security lights in relation to the path and the corner. He never produced a sketch of the scene of crime. The court is unable to ascertain whether the light indeed illuminated the path considering that there was a bend in the path.

Even if there is a possibility that there was some source of light, the time under which PW1 observed the Appellant was fleeting and no more than a passing glance. It is trite that a witness should give a description of an attackers features as was held in **Maitanyi -v- Republic, (Supra)** where the court held: -

> "If a witness receives a very strong impression of the features of an assailant; the witness will usually be able to give some description."

PW1 described the Appellant as looking to be of Somali origin which was reiterated by the investigating officer. The investigating officer was confident of this description and chose not to carry out an identification parade. The fact that a person's features resemble a certain tribe is to general a description to convict a person of a serious crime with a stiff penalty such as the case before me. If PW1 was able to observe the Appellant before the attack, he should have been able to give a description of which feature stood out. It is speculative at best to assume that the person he saw was the Appellant just because he looked to be of a certain tribe as it means that there could be no other person of Somali origin who could have been in the vicinity at that time.

From the foregoing there was no proper testing of the evidence of identification by the trial court. I find that the Appellants' conviction for the offence of robbery with violence was based on improper identification and is unsafe. I find that the appeal is merited and thereby quash the conviction and set aside the sentence of the trial court is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Judgment delivered, dated and signed at Malindi this 9th day of December, 2020.

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R. NYAKUNDI

JUDGE

In the presence of:

Appellant in person

Mwangeka for the Respondent