



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CRIMINAL APPEAL NO. 18 OF 2016

ROBERT GATHOGO NGUNJIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Senior Resident Magistrate's Court, Nyeri (Hon.C.Wekesa) delivered on 14th March, 2016 in Criminal Case No. 35 of 2014)

JUDGMENT

FACTS

1. The appellant, **Robert Gathogo Ngunjiri** was charged with the offence of Robbery with Violence contrary to **Section 296(2)** of the **Penal Code**.
2. The particulars of the charge were that on the 31st day of December, 2013 at Chania Bridge within Nyeri County, the appellant jointly with others not before the court robbed **SAMUEL YAA BAYA** of two mobile phones Samsung Galaxy valued at Kshs.12,400/- LGL4 valued at Kshs.12,000/-, Nivea and vaseline jelly, ¼ meat and cash Kshs.2050/-; immediately before or immediately after such time of the robbery threatened to use personal violence to **SAMUEL YAA BAYA**.
3. The appellant was tried and was found guilty and was convicted and given the mandatory death sentence;
4. Being aggrieved by the conviction and sentence, the appellant proceeded to file his Petitions of Appeal; hereunder are the summarized grounds of appeal;
 - i. He was convicted on un-corroborated evidence of visual identification by recognition; **PW1's** evidence was not supported by that of **PW2**; the first report was made under difficult prevailing circumstances;
 - ii. The report officers evidence did not corroborate the evidence of **PW1's** evidence on the mode of arrest;
 - iii. The charge was not proved to the required standards so as to justify the death sentence;
 - iv. The trial court erred in rejecting the appellant's sworn defence;
5. At the hearing hereof the appellant was represented by Learned Counsel Mr.Kiboi and Prosecuting Counsel Mrs Gicheha represented the State; a brief summary of the rival submissions is as follows;

APPELLANTS SUBMISSIONS

6. The appellant submitted that his identification was flawed; **PW1** was a single identifying witness; he stated that he was in the company of his fellow prison officer when he was attacked; upon being hit by the assailants he lost consciousness and on regaining it he found that he was bleeding from the mouth and ears; instead of going to hospital to seek medical attention and then go to make a report to the police he opted to re-join his colleague **PW2** a fellow prison officer and both headed to Kingongo Prison; **PW2** was categorical in his evidence that he could not identify any of the assailants;
7. The evidence of **PW4** during cross-examination stated that no specific description was given by **PW1** when he made his first report on the identity of the assailants; the offence occurred at 4.00pm in broad daylight when conditions were favourable so if **PW1** had an exact description of the assailant he should have given it to the police; also no identification parade was conducted; the logical conclusion to be

drawn was that **PW1** could not identify the person who inflicted the injuries and robbed him;

8. The trial court erred in relying on the evidence of a single identifying witness which evidence was not sufficient to draw a conclusion that it was the appellant who had committed the offence; case-law relied on **Kariuki Njeru & 7 others vs Republic CR.APP 6 of 2001** wherein the Court of Appeal held that such identification must be positive and free from any possibility of error;

9. There was inconsistent evidence as to the description of the assailants; **PW1's** evidence was that the appellant had dreadlocks whereas **PW2** stated that the assailants had caps on; this inconsistency should be resolved in favour of the appellant and he ought to have been acquitted;

10. According to **PW1** the injuries he sustained were bleeding from the mouth and ears; and that his whole body was swollen; but **PW3** the medical officer on examining him found him to be in a fair condition and there was no bleeding from the frontal region; and **PW1** was found to have bruises on his left forearm and left leg; that there was inconsistent evidence on the injuries which had also been exaggerated by **PW1**; the trial court should have resolved the inconsistencies in favour of the appellant;

11. The last ground was that the trial court rejected the appellants alibi defence; the appellant called **DW2** who corroborated his defence; the prosecution did not call any evidence to rebut the appellants evidence;

12. The appellant prayed that his conviction be quashed and he be set at liberty.

RESPONDENTS SUBMISSIONS

13. In response prosecuting counsel submitted that the complainant was accosted at 4.00pm by the appellant who was with other youth; his testimony was that he negotiated with them for the return of his phone and money and the robbers refused; that he managed to chase and scare them away by hitting the ring leader who had rastas who fled but came back armed with sticks and iron bars; the appellant hit **PW1** and they continued hitting him till he lost consciousness; through all this **PW1** had time and was able to see the appellants physical features;

14. The evidence of **PW1** was that he described these features to an informer who then assisted him to look for the appellant; the appellant had a nickname and was someone known; the informer told **PW1** that the appellant had been arrested for another offence and was being held at Nyeri Police Station; upon the appellant's release, **PW1** in the company of the Investigating Officer met the appellant leaving the police station; **PW1** identified the appellant to the Investigating Officer who then proceeded to arrest him; that at the time of arrest the appellant did not have his rastas but he was able to identify him; that it was not a case of mistaken identity; **PW2** was passing by and did not spend much time at the scene to be able to identify the attackers or the appellant;

15. The evidence of the doctor left no doubt that **PW1** had been attacked; the doctor who was the expert was able to examine the nature of the injuries and noted that he had injuries on the head and on his arms; the hospital records show attack was on the 31/12/2013; despite the minor inconsistencies the fact was that **PW1** was robbed and injured during the robbery; the attack occurred and that it was carried out by the appellant and his friends;

16. The appellant gave his defence that the 31/12/2013 was the birthday of a friend's child; that he was at his friend's house from 1.00pm till 7.00pm; upon cross-examination he said birthday was on a Sunday; when it was scrutinized further it was discovered that the 31/12/2013 was on a Tuesday; when **DW2** testified he too insisted that the birthday fell on a Sunday and when asked when the child was born he stated the child was born on the 31/12/2010 whereas the appellant gave the date of birth as 31/12/2011;

17. There were also inconsistencies in the defence evidence; the defence is an afterthought and a sham and did not displace the prosecution's case and therefore there is no need for a rebuttal; that **DW2** is an accused person and is charged with murder; that they are birds of a feather which flock together;

18. Counsel urged the court to dismiss the appeal and to uphold the conviction and sentence.

ISSUES FOR DETERMINATION

19. After taking into consideration the foregoing submissions there is only one issue framed for determination;

- i. Whether the appellant was positively identified;

ANALYSIS

20. This being the first appellate court it is incumbent upon this court to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Refer to the case of **Okeno vs Rep (1972) EA**.

21. It is noted that the items that were stolen from **PW1** were never recovered; therefore the only evidence pointing to the appellant is that of identification; in the case of **Wamunga vs R [1989]KLR 424** the Court of Appeal held;

“Where the only evidence against an accused 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 was favourable and free from possibility of error it can safely make it the basis of a conviction”.

22. It is also trite law that a trial court can convict on the evidence of a single identifying witness provided it warns itself of the dangers of doing so and provided that it tests the evidence with the greatest of care especially when the circumstances are difficult; refer to the case of **Maitanyi vs Republic[1986] KLR**;

23. The evidence of **PW1** and **PW2** was that the attack occurred at 4.00pm in broad daylight; **PW1** stated he was confronted by ten youth; that while fighting the youth he had an opportunity to see and negotiate with their leader whom he described as sporting rastas; that he hit and inflicted a wound on the leader; that the gang retreated and then returned to the scene armed with hoe sticks and beat **PW1** until he lost consciousness; indeed it was the appellants contention that such conditions and circumstances were difficult and not favourable for positive identification; but the trial court in its judgment found **“that the surrounding circumstances were conducive for positive identification”**

24. The question that arises is how the appellant was identified before he was arrested; there is no evidence on record to show that **PW1** knew the appellant before the incident; through an informant he discovered that the appellant had a nickname **“Big Boy”** and the search for the appellant intensified; as for **PW2** his evidence was that he went to rescue his colleague from the mob but was unable to identify the assailants;

25. **PW1** in the company of a Police Officer by the name of Hassan and the informer proceeded to the Nyeri Police Station where they found the appellant had been taken in for committing another offence; he was spotted leaving the police station and **PW1** summoned **PW4** via a phone call who then arrested the appellant; the evidence of **PW4** who was the Investigating Officer was that no names or descriptions were given when the matter was reported to the police but **PW1** had indicated that he would be able to identify the assailants;

26. It is this courts considered view that once the informant had traced the appellant it was incumbent upon **PW1** to pass on this information to **PW4** who would have finalized his investigations and arranged for the appellant’s arrest and thereafter he would have conducted an identification parade;

27. *This court reiterates that there was no evidence to show that there was identification by recognition and the evidence on identification became flawed by **PW1**’s intermeddling as no identification parade was conducted to rule out the possibility of mistaken identity;*

28. This court finds that the trial court had not properly tested the prosecution evidence on identification otherwise it would have arrived at a different conclusion;

29. This court is satisfied that the identification of the appellant was flawed; and the identification did not meet the required test; this ground of appeal is found to be meritorious and is hereby allowed;

FINDINGS

30. For the forgoing reasons this court finds that the appellant’s identification was flawed and thus he was not positively identified; thus making the conviction unsafe;

DETERMINATION

31. The appeal is found to have merit and it is hereby allowed;

32. The conviction for the offence of robbery with violence contrary to Section 296(2) is hereby quashed;

33. The mandatory death sentence imposed on the appellant is hereby set aside;

34. The appellant to be set at liberty forthwith unless otherwise lawfully held.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 9th day of January, 2019.

HON. A MSHILA

JUDGE