REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.287 &288 OF 2011

(An Appeal arising out of the conviction and sentence of Hon. B.J. Ndenda – CM delivered on 20th November 2013 in Thika CM. CR. Case No.4339 "A" of 2010)

SAMUEL MUHIA KURIA……1ST APPELLANT

STEPHEN WAWERU NJEMA……..……...……2ND APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

JUDGMENT

Samuel Muhia Kuria (1st Appellant) and Stephen Waweru Njema (2nd Appellant) were charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 4th September 2009 at Gatundu Township in Kiambu County, the Appellants jointly, while armed with a dangerous weapon namely an iron bar robbed Joseph Mucheru Ndutire of Kshs.2,950/- and after the time of such robbery wounded the said Joseph Mucheru Ndutire (hereinafter referred to as the complainant). When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, they were found guilty as charged. The Appellants were aggrieved by their conviction and sentence. They filed an appeal to this court.

Their first appeal was heard by Riika and Mbaru JJ. Their conviction and sentence was upheld. They appealed against the said decision to the Court of Appeal. Their respective appeals to that court was allowed essentially on the ground that the Learned Judges who heard the appeal did not have jurisdiction to hear the appeals on account of the fact that they had been appointed respectively to the Environment and Land Court and the Employment and Labour Relations Court. The court ordered their appeals to be heard afresh before this court.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal. They faulted the trial magistrate for finding them guilty on the basis of the evidence of identification which was made in circumstances that was not conducive for positive identification. The Appellants were aggrieved that the trial magistrate failed to take into consideration the fact that the circumstances of their arrest negated the finding that they had been identified by the complainant. They took issue with the fact that their respective defences were not taken into consideration before the trial court reached the impugned decision finding them guilty as charged. They faulted the trial magistrate for failing to properly evaluate the evidence adduced in its entirety and therefore erroneously reached the verdict that the prosecution had established its case to the required standard of proof beyond any reasonable doubt. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the sentence that was imposed on them.

During the hearing of the appeal, this court heard oral submission made by Mr. Swaka for the Appellants and Ms. Akunja for the State. Mr. Swaka submitted that the Appellants were convicted on the sole basis of the evidence of identification made by a single identifying witness. He doubted that the circumstance under which the complainant was robbed was conducive for positive identification. In support of his submission, Learned counsel submitted that when the complainant made the first report, he indicated to the police that he had been assaulted by unknown persons. He took issue with the manner in which the identification parade was conducted. He was of the view that the same was irregularly conducted since the police did not have the basis to compare the identification with the description of the assailants made in the first report to the police.

Learned counsel explained that the trial court failed to take into consideration the fact that the evidence of identification was that of a sole identifying witness made in difficult circumstances. He submitted that the trial court failed to take into account that the circumstances under which the Appellants were arrested negated the complainant's evidence that he had identified them during the robbery. The complainant was in hospital when the Appellants were arrested. He was not therefore at the scene to identify the Appellants to the members of the public who apprehended them. Learned counsel took issue with the trial court's failure to take into consideration the Appellants' respective defences, which in his view, exonerated the Appellants from the charge. He urged the court to allow the appeals.

Ms. Akunja for the State conceded to the appeal. He submitted that the evidence of identification was not satisfactory. Further, the circumstances in which the Appellants were arrested raised doubt that they were the ones that committed the offence. The Appellants were apprehended by members of the public who handed them over to the police. The complainant was not at the scene at the time. The critical link between the robbery incident and the Appellants' arrest was therefore missing. The trial court did not warn itself of the dangers of convicting the Appellants on the basis of the evidence of a single identifying witness. Crucial witnesses were not called to testify in the case. In particular, members of the public who apprehended the Appellants were not called to testify. It was on that basis that Learned State Counsel conceded to the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".***

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellants on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

There was no doubt that the Appellants were convicted on the basis of the evidence of identification. It was only the complainant who testified on that evidence of identification. According to his testimony, on 9th September 2009 between 9.00 p.m. and 10.00 p.m., he was accosted by a gang of robbers as he was walking from a bar within Gatundu Township towards the bus stage situate behind the bar. He told the court that they held him and robbed him of Kshs.2,950/-. In the course of a struggle, he was hit on the head with an object. He started bleeding. The complainant testified that he was able to identify his assailants as the Appellants as there was sufficient light at the scene of the robbery. As he was being robbed, he raised alarm by shouting to the members of the public to assist him. His assailants ran away. He walked to the bus stage where he met PW2 Kennedy Gitau, a taxi driver.

PW2 rushed the complainant first to the police station before taking him to the hospital. According to PW2, he was told by one George Njoroge that it was the Appellants who had robbed and assaulted the complainant. The said George Njoroge was not, however, called to testify before the court. PW4 PC Ekiru Kirimoni, then based at Gatundu Police Station testified that on 4th September 2009 while he was on patrol near Gatundu bus stage, he found a suspect had been apprehended by members of the public. They told him that the suspect *i.e*. the 1st Appellant had robbed the complainant. He rearrested the 1st Appellant and escorted him to the police station where upon he detained him. Later that night, he went to a bar by the name Rythmns within Gatundu Township. He arrested the 2nd Appellant. He told the court that he did so on the basis of information that he had received from an informer. He had been told that the 2nd Appellant was a member of the gang that had robbed and injured the complainant earlier that night.

PW3 Peter Mukua, a Clinical Officer based at Gatundu District Hospital attended to the complainant when he went to the hospital for treatment. He observed that the complainant had blood stained clothes. He had cut injuries on his head and face. His right finger had a cut injury. He had an injury on his left shoulder. He formed the opinion that the injuries were caused by both blunt and sharp objects. The degree of injury was assessed as harm. He produced the P3 form as an exhibit in the case. The case was investigated by PW5 Sgt Benjamin Wambua. After concluding his investigation, including arranging for an identification parade to be conducted by PW6 Inspector Esther Mweu, he formed the opinion that a case had been made for the Appellants to be charge with the offence for which they were convicted.

When the Appellants were put on their defence, they denied committing the offence. They told the court that on the material night they were arrested, they were relaxing in a bar while having drinks. The police entered the bar and arrested them. They were shocked when they were later informed that their arrest was on the basis that they had robbed the complainant. They were emphatic that they were victims of mistaken identity. They were not involved in the robbery.

On re-evaluation of the evidence, it was clear to this court that, other than the evidence of identification, there was no other evidence that connected the Appellants with the robbery. As was held in **Maitanyi –Vs- Republic [1986] KLR 198 at P.200**:

> ***"Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-***
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> > ***"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".***

In the present appeal, the evidence of identification that was relied on by the prosecution to secure the conviction of the Appellants was that of a single identifying witness. It was clear from the circumstances that the complainant described when he was robbed that it was at night. Although the complainant claimed that there was sufficient light that enabled him identify the Appellants during the course of the robbery, he did not describe the source of light. It was not apparent from his evidence whether or not he knew the Appellants prior to the robbery

incident or whether he met the Appellants for the first time on the particular night. It cannot be ruled out that the complainant was intoxicated at the time that he was robbed. His recollection of the events that transpired cannot be vouchsafed. It was evident that in the first report that the complainant made to the police, he did not give the description of the persons that robbed him.

The subsequent identification parade held was therefore meaningless where a first report made by the identifying witness did not indicate the description of the assailants. In **John Njagi Kadogo & 2 Others –vs- Republic [2006] eKLR**, the Court (Lesiit, Makhandia JJ) held thus:

> ***"In the absence of a first report to the police by these witnesses giving a description of the Appellant, their subsequent identification of the Appellant on an identification parade cannot be said to be foolproof. It is trite law that an identification parade can only be said to be properly conducted where a witness has given a description of the attackers in the first report and then his alleged identification is tested by the subsequent identification parade. Failure to observe the foregoing renders the subsequent identification to be dock identification that adds little value to the prosecution case. In Kamau Njoroge –vs- Republic (1982 - 88) KLR, the Court of Appeal held:***
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> ***"…dock identification is worthless unless preceded by a properly conducted identification parade. The complainant should also be asked to give the description of the suspect, and the police should arrange for a fair identification parade.""***

From the prosecution's evidence, it was apparent that the Appellants were connected to the robbery by other persons who were not called to testify in the case. The 1st Appellant was apprehended by members of the public who handed him over to the police on allegation that he had robbed the complainant. The 2nd Appellant was arrested by the police upon placing reliance on information that he received from an informer. The evidence of the circumstances in which the Appellants were arrested cannot, by any stretch of imagination, be said to corroborate the evidence adduced by the complainant regarding his identification of the Appellants. The defence of the Appellants to the effect that they were victims of mistaken identity may well be true.

The upshot of the above reasons is that the appeals lodged by the Appellants have merit. They are hereby allowed. Their conviction is quashed. The sentence imposed upon them is set aside. They are acquitted of the charge. They are ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2019

L. KIMARU

JUDGE