REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISC. CRIMINAL APPEAL. NO.3 OF 2018

SAMWEL KIBET KERING.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 2682 of 2016 (Hon. B. R. Kipyegon (SRM) dated 21st July 2017)

JUDGMENT

1. This is a criminal appeal erroneous registered as a Miscellaneous Criminal Application. The appellant has appealed against his conviction and sentence in Criminal Case No. 2682 of 2016 in which he was charged and convicted of the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code.

2. The charge against the appellant stated that on the 1st day of July 2016 at about 1900 hours at Chebangoror village, Chebtuiyet Sub-location in Sigowet-sion Sub-county within Kericho County jointly with another not before court, while armed with a dangerous weapon, namely a knife, robbed one Joel Kipkemoi Ruto of Kshs.850/- and at the time of such robbery, wounded the said Joel Kipkemoi Ruto.

3. The appellant pleaded not guilty to the offence and was tried before the Chief Magistrate's Court in Kericho, Hon. B. R. Kipyegon, (SRM). He was found guilty and convicted under section 296 (2) of the Penal Code. He was sentenced to death on 4th August 2017.

4. Dissatisfied with both his conviction and sentence, the appellant filed a petition of appeal in which he raised six grounds of appeal. He contends, first, that the trial court erred in convicting him as this was a case based on recognition of the appellant by the prosecution witnesses, yet no first report was made. His second and third ground relate to the evidence tabled. He contends that the court erred in convicting him, yet the prosecution did not avail exhibits or table crucial evidence in court. His fourth ground is that the court erred in not observing that the prosecution evidence lacked merit, that the case was poorly investigated and the evidence shoddy, and that the court erred in rejecting his defence.

5. This is a first appeal. Accordingly, I am under a duty to re-evaluate the evidence tendered before the trial court, bearing in mind that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing – see **Okeno vs R (1972) EA 32**.

6. The prosecution evidence, which was presented through 6 witnesses, was as follows. The complainant, Joel Kipkemoi Ruto (PW1, Joel) was walking from Cheptuiyet to the shopping centre at about 7.00 p.m. He met the appellant, Samuel Kibet Kering, and one David Tunoi coming from the opposite direction. He could see them as it was about 7.00 p.m. and there was still some daylight. They were known to him as they were his neighbours. The appellant rushed towards him and asked him if he had money so that they could go to drink. The appellant then held his arms while Tunoi held his legs and they wrestled him to the ground. The appellant then stabbed Joel in the left eye and on the forehead. He also took from an inner pocket of his jacket Kshs.850/-.

7. While the appellant was robbing Joel, two children who witnessed the offence screamed and Joel heard one say 'they have killed Joel.' The appellant threatened to stab Joel on the other eye, then the appellant and Tunoi left the scene and Joel walked home. Joel told his son Eric that Samuel Kering and David Tonui had attacked him. He also informed the area chief. He was taken to a clinic by his son, and then later to Kericho District Hospital where his eyeball was removed and his eye stitched. He later made a report on 25th July 2016 and the appellant was arrested. He confirmed in cross-examination by the appellant that he knew him and had seen him and David Tonui during the attack.

8. DC (PW3 a 14 year old child, had been on the way to the shop to buy sugar on 1st July 2016 at about 7.00 p.m. She was with one SC. She had seen Samuel, whom she pointed at in the dock, stab Joel in the eye with a knife. The appellant was with David while Joel was on the ground when the appellant stabbed him in the eye. DC and SC screamed when they saw the appellant stab Joel. The incident had happened at 7.00 p.m. so it was not so dark so she could see well, and she saw Samuel, whom she knew before as a neighbour, stab Joel. She confirmed in cross-examination that she had seen the appellant remove the knife and stab Joel.

9. The evidence of DC was supported by that of SC, (PW4). SC was going to the shop with DC when she saw the appellant stab Joel. Samuel was with David whom S also knew. She had seen Joel thrown to the ground and stabbed. When SC and DC screamed, the appellant and David left the scene. In cross-examination, S maintained that the appellant had a knife in a skin pouch, and she had seen Joel being stabbed. The time was 7.00 p.m. and it was not so dark.

10. PW2, Cosmas Kemboi, a son of Joel, had been called and informed that his father had been stabbed in the eye. He went home and took his father to a clinic. His father told him that the appellant and David had robbed him. He had taken his father to a private clinic but the doctor could not treat him and he was taken after 4 days to Kericho District Hospital where his eye was removed.

11. No. 73181 PC David Kamuren, the investigating officer (PW5) had arrested the appellant and taken witness statements.

12. The medical evidence on the injury sustained by the appellant was produced by Michael Cheruiyot Kimutai (PW6), a clinical officer at the Kericho District Hospital. He had treated Joel when he was admitted at the hospital. His testimony was that Joel was taken to theatre as his left eye ball was ruptured, that it was completely destroyed and was removed.

13. When placed on his defence, the appellant gave an unsworn statement and called one witness. DW1, Ngeno Kipsang Frederick testified that the appellant, who was his uncle, had asked him to go and help him harvest maize on 1st July 2016. He had done so, and had helped the appellant to bring maize from the farm till evening. They had had tea at the appellant's home at about 7.00 p.m., and then he had gone home. He stated in cross-examination that he had been with the appellant and his uncle's sons, from 8.00-9.00 a.m. till 6.30 to 7.00 p.m. when he left and went to his home.

14. In his unsworn statement, the appellant stated that he had harvested maize all day with Fredrick (DW1). They had then taken tea at his home at 7.30 p.m., then he had gone to sleep. He denied that he had robbed Joel.

15. From the grounds of appeal set out in the petition of appeal which I have made an attempt to summarise above as they are not very clear, it appears to me that the appellant challenges his conviction and sentence on essentially two grounds: the nature of the prosecution evidence against him and the manner in which the trial court dealt with his defence.

16. The evidence before the trial court that was central to his conviction was that of Joel (PW1), DC (PW3) and SC (PW4). The evidence of PW6, the clinical officer, showed the extent of the injuries sustained by Joel.

17. Joel, DC and SC were consistent in their evidence that the people who attacked Joel were neighbours, the appellant and one David Tonui whom the investigating officer indicated disappeared completely. They were clear about the time of day that the offence took place, the three testifying that it was about 7.00 p.m., when it was not yet dark and there was therefore enough light to see who attacked Joel. The attackers were neighbours of the complainant and the witnesses to the offence, and Joel, SC and DC recognized them. This was a case of recognition, not identification – See **Anjononi vs R (1980) KLR**.

18. The appellant contends that relying on the evidence of recognition was unsafe as the complainant had not made a first report. I note, however, that the complainant testified that he informed his son and the area chief who had attacked him. The two girls who witnessed the event were also clear about the persons who attacked the complainant, both of whom were their neighbours.

19. In my view, the prosecution evidence against the appellant was clear, consistent and cogent, and the trial court rightly found it so.

20. The appellant complains that the trial court failed to consider his defence. I note that the appellant raised an alibi defence, which he did, for the first time, at the defence stage. The law is that a person wishing to rely on an alibi defence must do so at the earliest stage in the proceedings – **See Karanja vs R (1983) KLR 501** in which the Court of Appeal held that:

> ***"…in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought."***

21. I agree with the trial court that the appellant raised the alibi defence too late in the day, and it was clearly an afterthought. Weighed against the prosecution evidence in which three witnesses recognised the appellant as the person who, with his accomplice Tunoi, attacked the complainant, it does not assist the appellant.

22. I fully agree with the decision reached by the trial court in this matter, and I see no reason to fault it. The prosecution evidence was clear, consistent and credible. The appellant was seen by the complainant and the two witnesses, PW3 and PW4, attack the complainant with a knife and rob him. The attack was so vicious that it led to the complainant losing his left eye and his means of making a living, as a driver, therefore impacted forever.

23. I find no reason to interfere with either the conviction or sentence by the trial court which are both upheld and the appeal dismissed.

Dated Delivered and Signed at Kericho this 6th day of February 2019

MUMBI NGUGI

JUDGE