



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.149 OF 2014**

*(An Appeal arising out of the conviction and sentence of Hon. J.Karanja – PM*

*delivered on 1<sup>st</sup> October 2014 in Nairobi CMC. CR. Case No.1596 of 2012)*

MOSES OMURUNGA.....APPELLANT

**VERSUS**

REPUBLIC.....RESPONDENT

**JUDGMENT**

The Appellant, Moses Omurunga was 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 8<sup>th</sup> September 2012 at Spine Road, Kayole within Nairobi County, the Appellant, jointly with others not before court, while armed with a dangerous weapon namely a pistol robbed James Wathini Kimundia of his motor vehicle Registration No.KBM 785R make Toyota Succeed valued at Kshs.700,000/-, a mobile phone and Kshs.2,700/- and at or immediately before or immediately after the time of such robbery used actual violence to the said James Wathini Kimundia (the complainant). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged. He was sentenced to death. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court challenging his conviction and sentence.

In his petition of appeal, the Appellant raised several grounds of appeal. He was aggrieved that he had been convicted on the basis of the evidence of a single identifying witness who made the alleged identification in circumstances that did not favour positive identification. He faulted the trial magistrate for failing to warn himself of the dangers of relying on such evidence to convict him. The Appellant took issue in the manner in which the police identification parade was conducted. He was of the view that the same was conducted in contravention of the rules thereby prejudicing him. He faulted the trial magistrate for failing to take into consideration the inherent contradictions in the prosecution's case which would have led him to reach a finding that the prosecution had failed to establish its case to the required standard of proof. He was aggrieved that his defence was not taken into account before the trial court reached the impugned decision. He was of the view that the trial court exhibited partiality in the trial and thus infringed his right to fair trial. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

Prior to the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He further made oral submission urging the court to allow his appeal. The thrust of the Appellant's appeal is that the evidence of identification that was adduced by the prosecution witnesses was not sufficient to secure his conviction. The circumstances under which the robbery took place were not favourable for positive identification. The Appellant complained that the description given by the complainant to the police was vague and could not form a basis for a subsequent identification in an identification parade that was later mounted by the police. The Appellant submitted that the first report made by the complainant to the police did not support the complainant's evidence that he had identified his assailants during the robbery. He was of the view that the evidence of identification that was adduced by the prosecution was so weak that it could not form a basis for his conviction. The Appellant submitted that the trial court erred in reaching the finding of guilty without taking into consideration his defence. In particular, the Appellant pleaded innocence and denied involvement in the robbery. He explained that the circumstances of his arrest clearly pointed out that he was a random victim of police arrest. There was no evidence to connect him to the robbery. In the premises therefore, he urged the court to allow the appeal.

Ms. Sigei for the State opposed the appeal. She submitted that the prosecution witnesses who adduced evidence before the trial court established the charge brought against the Appellant on the charge of **robbery with violence** to the required standard of proof. She explained that the evidence of identification that was adduced by the complainant and PW4, his friend, was watertight. The Appellant interacted with the two in a well-lit area before he hired the complainant's taxi to take him to Kayole. During this interaction, the complainant and PW4

were able to record his physical features. They described the said features to the police. When the Appellant was arrested, the complainant's initial identification was confirmed in a police identification parade that was held by the police. Learned State Counsel reiterated that the circumstance favouring positive identification was present during the robbery. She urged the court to find that the prosecution's evidence of identification was consistent, reliable and corroborated. She urged the court not to find favour with the Appellant's assertion that his defence was not taken into account before his conviction. She asserted that the defence was taken into account and found to be without merit. In the premises therefore, she urged the court to disallow 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 Appellant. 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 Appellant 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.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal, both oral and written. It was clear from the evidence adduced that the prosecution relied on the evidence of identification to secure the Appellant's conviction before the trial court. Before a court can convict on the evidence of identification, especially an identification made by a stranger who had interacted for the first time with the assailant, the court must take into account certain principles that have guided courts when assessing such evidence. This is more so where the identification is made by a single identifying witness or several witnesses in circumstances that can be said to be difficult and not conducive for positive identification. As was held by the Court of Appeal 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:-***

***“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 complainant testified that on 8<sup>th</sup> September 2012 at about 8.00 p.m., he was outside the Ambassador Hotel waiting for his fare. The complainant was a taxi driver employed by PW2 Anne Nduta. The taxi was a Toyota Succeed Registration No.KBM 785R. The complainant recalled that on the material night, a man came to where he had parked the vehicle and requested to be taken to Kayole. They negotiated the price for about five minutes before they agreed on the fare of Kshs.1,200/-. The complainant was with PW4 Michael Kiminda Njoku, a fellow taxi driver. After they had agreed on the fare, he asked PW4 to accompany him. The man demurred. He feared that he would be robbed. The complainant told PW4 to get out of the motor vehicle. Both the complainant and PW4 testified that there was sufficient light at the scene when they were negotiating the fare. The area was well-lit by street lights. In their interaction, they were able to positively record the facial and physical features of the man.

The complainant narrated how when they reached Kayole near a place called Nyama Villa Club, the man told him to turn off to a side road. When he drove to the side road, he realized that there were no houses in the area. He came to the realization that he was in danger. He tried to reverse the vehicle but felt something cold placed on his neck. Three men entered the vehicle. He was removed from the driver's seat. The vehicle was driven towards Kangundo Road. His limbs were bound before he was thrown off the vehicle along Kangundo Road. He managed to untie himself and make the report to Kayole Police Station. It was evident that although the complainant and PW4 testified that they had given the description of the robber in the first report made to the police, it was clear that such description was never given to the police. Indeed, PW4 testified that he told the police that he could identify the robber if he saw him again. On the other hand, the complainant described the robber in generic terms. He said the robber was dark in complexion and of medium height. The motor vehicle was never recovered.

PW5 Cpl. James Kitum then attached to CID Nairobi Area, testified that on 13<sup>th</sup> October 2012, while on normal patrol duties, he received information that a motor vehicle Registration No. KBW 665F Toyota Fielder Silver in colour had been robbed from the owner the previous night. The motor vehicle had been spotted being driven towards the Mwea direction. He was assigned to follow up the lead. They drove to Mwea where they found the motor vehicle parked in a garage in Mwea. They inquired from the garage owners the person who had driven the motor vehicle to the garage. He was informed that the person and his friends were having lunch in a nearby restaurant. They went to the restaurant and managed to arrest the Appellant among others. They brought the Appellant to Nairobi. In the course of his investigations, PW6 PC Joseph Ratemo noted that there was uncanny similarity in the manner in which the motor vehicle that was recovered was robbed from the owner. The robbers had applied the same *modus operandi* in robbing the vehicle. He requested the complainant to attend a police identification parade on 15<sup>th</sup> October 2012. The identification was conducted by PW3 CIP Moses Mwangi. The identification parade was conducted at the Provincial CID Office in Nairobi. In the parade, the complainant identified the Appellant as the person who had robbed him about a month earlier. It was then that a decision was made to charge the Appellant with the offence for which he was convicted.

In his defence, the Appellant denied involvement in the robbery. He told the court that he was arrested at Mwea where he used to conduct his business of selling cereals. He told the court that he was innocent of the charge and was not involved in the robbery. He testified that he was charged with several offences arising from robberies which occurred at the time yet he was an innocent person. He had no ties with his co-accused in the other cases neither was any of the robbed items recovered in his possession.

As stated earlier in this judgment, the Appellant was convicted on the basis of the evidence of identification. It was clear to this court that the circumstances under which the identification is said to have been made was not conducive for positive identification. The complainant and PW4 interacted with the man who wanted to hire the taxi for about five minutes. Although they claim that there was sufficient light at the scene, the period of five minutes was not sufficient to enable the complainant and PW4 identify the man as the Appellant unless the man had distinctive physical or facial features. This court is not persuaded that in that period the complainant and PW4 were able to register the identity of the robber. While in the vehicle, there was no evidence to suggest that the complainant saw the facial features of the robber. This court would have been convinced that the complainant and PW4 identified the robber if in the first report to the police they gave a detailed description of the robber.

The complainant told the police that the robber was dark and of medium height. PW4 told the police that he would identify the robber if he saw him again. This is not a description that can give confidence to the court that the complainant identified the Appellant as the robber during the robbery incident. This court is aware that in such circumstances, the likelihood that there can be mistaken identity cannot be ruled out. The subsequent identification parade that was held could not therefore be of assistance to the prosecution in the absence of a description given in the first report made to the police. This court is not certain that the complainant would have been able to point out the Appellant as the robber in an identification parade a month later only after interacting with him face to face for five minutes. This court agrees with the Appellant that such evidence of identification cannot form a basis for conviction. Since there was no other evidence connecting the Appellant with the robbery, this court finds merit with the Appellant's appeal.

In the premises therefore, the Appellant's appeal is allowed. His conviction is quashed. He is acquitted of the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF APRIL 2019**

**L. KIMARU**

**JUDGE**