THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 25 OF 2017

BETHWEL MAINA JUMA.....1ST APPELLANT

JAMES NDEGWA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENTS

(Being an Appeal against the judgement delivered by the Learned Trial Magistrate Hon' C.N Sindani SRM in case no. 66 of 2016 on the 20th of July 2017)

JUDGEMENT

1. The Appellants were charged with the offence of robbery contrary to section 296(1) of the Penal Code. The Particulars of the offence allege that **James Ndegwa** and **Bethwell Maina Juma**, on the 30th day of March 2017 at 2130hrs in Majembeni village of Mpeketoni Lamu County, jointly robbed **George Gitonga** of Kshs. 27 000/- and at the time of such robbery, they visited violence on the complainant.

2. After a full trial had been conducted, the honourable trial court in its judgement found the Appellants guilty of the offence of robbery after which they were convicted and sentenced to serve seven years imprisonment. Having been aggrieved and dissatisfied by both the conviction and sentence imposed upon them, the Appellants timeously brought the instant appeal challenging the findings of the trial court.

3. The appeal is premised upon four grounds which are couched as follows:

> ***a) That the Learned Trial Magistrate in law and in fact by not considering that the evidence on record doesn't not support the present charge.***
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> ***b) That the Learned Trial Magistrate did not consider that there was no evidence to show that Kshs. 27,000/- was stolen from the victim.***
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> ***c) That the Learned Trial Magistrate did not consider that the Appellants' defense was reliance to award them a benefit of doubt.***
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> ***d) That the Learned Trial Magistrate did not consider that the case at hand was not investigated in a well manner hence the same constitutes breach of section 109 of the Evidence of the Act.***

4. The prosecution called a total of five witness in support of its case. PW1; **George Kilonga Wachira,** the complainant testified he knew the Appellants before the material day. He went to some restaurant at around 21:30hrs to get himself some food and as left the restaurant; about 200 meters away from it he heard footsteps and saw two men approaching where him from the bushes. It was his testimony that they grabbed him and one of them hit him which made him to fall down and the other sat on him and that one of the assailants took away the money he had amounting to Kshs. 27,000/- his ATM card, ID Card, NHIF card that were contained in his wallet.

5. He then stood up and saw the assailants as they go and he managed to recognize them since they were known to him. He searched for his phone at the crime scene and found it, called his father informing him of the unfortunate ordeal. When he arrived at home, the assailants came at his father's place and the Appellant claimed that the complainant had his wife at the club. PW1 was then accompanied by his father to the police to the police where they left the matter in the hands of the police and proceeded to the hospital for treatment. He produced the treatment notes herein marked as MFI- P1. He was also given a copy of the P3 form which he produced before the trial court and marked as MFI-P2.

6. The assailant **(Ndegwa)** was arrested the following day by KPR officers who handed him over to the police station. The complainant was called to the police station to identify the assailant which he did positively. The other assailant was arrested at night on the same day and the complainant visited the police station the following morning to identify him.

7. Upon cross examination by the Appellants, the complainant stated that he was able to clearly see the assailants properly and that the 2nd Appellant was wearing the T-shirt he was wearing in court. On re-examination the complainant stated that he recognized him well having been flashed by the vehicle's lights. He also stated that he had previously met the assailant **(Ndegwa)** at the restaurant the same day and he bought him a drink.

8. **PW2: Daniel Mwenda** the complainant's father testified that the Appellants are his neighbors and on the material date at about 10 pm, they went to a bar and he left his son there. His son later called to tell him of the robbery. He visited the Appellants and asked them why they had attacked his son and they told him that he had his wife at the bar. He then took to the police and to the hospital thereafter. He confirmed the treatment notes and the P3 form.

9. **PW3; Joseph Ngotho Kivuvi**, he learnt of the robbery and visited one of the assailants **(Maina)** the following morning. Him and his colleagues arrested him and he went back to Majembeni were he was monitoring the other assailant. He learnt that the assailant was sleeping at his cousin's house **(Kamau).** He assembled with his colleagues and proceeded to **Kamau's** house where they found the assailant and arrested him. He stated that when arresting him, the appellant was armed and he caused a scene and even attempted to run but he was helped by neighbors to subdue him.

10. Upon cross-examination, by 1st Appellant, the witness denied having assaulted him and the neighbors wanted to burn him but the witness and his colleagues protected him. By the 2nd Appellant, he stated that the 2nd Appellant wanted to settle the issue there but it was beyond them and that they didn't recover anything from him. The spear they recovered was not before court.

11. The testimony of PW4; No. 96583 **PC. Philip Otuama** the investigating officer in this mater, is that one of the Appellants was in the cells when he was assigned to investigate the instant case. He then summoned the complainant to record a statement on the matter. He established that on the material date the complainant had met the Appellant at Caro Bar and they had been introduced to each other by the complainant's father. He also confirmed that the complainant had been injured and the monies stolen were never recovered. He produced the treatment notes herein marked as MFI-P1 and he also issued him with a P3 form herein marked as MFI-P2. He established that the complainant was a scrap metal dealer and the money stolen were of his business. He did not charge them with robbery with violence because they didn't recover the weapon used.

12. The 5th prosecution witness, **Musyoki Muzilu,** the clinical officer who attended to the complainant testified that on the material date complainant went to the hospital on the allegations that violence had been visited upon him, thus he had been robbed and assaulted. He testified that PW1 had injuries on his face and arms. He produced the treatment notes and the P3 form that he filled. Upon cross examination by the Appellants he stated that the complainant was treated by his colleague, he was not stitched for the injuries, it was also in history that he was from drinking.

13. After having through the above evidence and exhibits produced before it, the learned trial magistrate was satisfied that the prosecution had made out a prima facie case against the Appellants and accordingly placed each of them on their defence under section 211 of the Criminal Procedure Code Cap 75 Laws of Kenya.

14. The defence is premised on a total of two witness, to wit, the Appellants herein. The 1st Appellant; DW1 testified that he went to Marara farm with his brother to prepare it for farming. After having failed to finish the work they decided to sleep and finish the following morning. He heard the door being kicked, his mother woke up first and she was dragged outside. He woke up to find out only to meet people who started beating him. He was informed that he was being beaten for stealing. He was later charged with strange charges.

15. DW2; denied the charges leveled against him. He was visited by the police officers at his home, he inquired on what they were looking for and they arrested him. They went to his house, searched it and recovered nothing. They took him to the police station were the complainant came and said that the person who robbed him was wearing a similar shirt as the one he was putting on. He was then charged with the present offence.

16. As this is a first Appeal, I'm obliged to subject the evidence on record to my own evaluation and assessment and come up with an independent decision on the issues raised before me. I shall also give due regard to the findings and determinations arrived at by the Learned Trial Magistrate who had the added advantage of physically seeing and listening to the witnesses testify before him. **(See OKENO V R (1972) EA 32).**

Findings, Analysis and Determination.

17. I have gone through the evidence on record, the grounds of appeal and the appellants' submissions, in my view the main issue of determination in this case is whether or not the prosecution proved the offence of robbery to the standard required by the law; proof beyond reasonable doubt.

18. I wish to make a quick comment before I proceed to dealing with the ingredients of the offence of robbery, regarding the charges preferred against the Appellants herein. The Appellants herein were charged with an offence of robbery contrary to section 296(1) of the Penal Code. The same reads as follows:

> ***"Any person who commits the felony of robbery is liable to imprisonment for fourteen years."***

19. The particulars of the offence as per the charge sheet herein stipulates that:

> ***"on the 30th day of March 2017 at 2130hrs in Majembeni village of Mpeketoni Division in Lamu County, jointly robbed George***

Gitonga of Kshs. 27,000/- and at the time of such robbery used actual violence to the said…."

20. The above-cited provision of law is couched in singular form. It clearly shows that the offence of robbery can only be committed by a single person who steals anything capable of being stolen through the application of actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.

21. Looking at the particulars of the offence cited above, it is clear the offence they best support is robbery with violence. This is because the complainant alleged that the Appellants where in a gang (thus two or more persons), they visited actual violence on the complainant, and they used the said violence to obtain a thing capable of being stolen, that is the Kshs. 27,000/- and other personal properties the appellant claims to have been forcibly taken away from him. The only element that is missing is that of being armed without a dangerous weapon. It must be noted that the elements of the offence are ready separately and not conjunctively.

22. That means if a single element is proved beyond reasonable doubt, it suffices to sustain conviction for the offence of robbery with violence. In the premises, the appellants were lucky to have escaped a charge of robbery with violence contrary to section 296(2) of the Penal Code.

23. However, the facts of this particular case may still support the offence of robbery. Under section 295, robbery is defined as follows:

"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery".

Further, ***Section 296(1)*** of the ***Penal Code*** states as follows:

"(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

24. The above provisions create a felony termed robbery by setting out the elements of that offence. Section 296(1) penalizes the offence of robbery and provides its sentence. The ingredients of the offence of robbery are as following:

a) proof of theft and

b) proof of application of actual violence or threat to use it on any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, at or immediately before or immediately after the time of stealing

c) Positive identification of the assailant.

25. I shall begin with proof of the use or threat to use actual violence on the complainant in order to obtain the thing stolen or to prevent or overcome resistance to its being or retained, at or immediately before or immediately after the time of stealing. The complainant in his testimony alleged that violence was visited on his person by the assailants as they take his personal properties. This evidence was corroborated by the PW5, the clinical officer who testified that upon physical examination of the complainant, he had injuries on his face and arms. The same is indicated in the treatment notes and the P3 form which was produced by the prosecution witnesses before the trial court, marked as exhibit P1 and P2. In the premises this court finds that the prosecution proved this limb beyond reasonable doubt.

26. Owing to the uniqueness of the circumstances of this case, I shall combine the ingredient of identification and that of theft. The burden of proving that the alleged robbery was committed by the Appellants and that the appellant stole some items from the complainant resides with the prosecution. And the standard of proof is beyond reasonable doubt.

27. On whether the Appellant were positively identified as the perpetrators of the alleged offence, the evidence of identification herein was given by a single person, that is, the complainant alone. The law is now well settled and that is that a fact may be proved by the testimony of a single witness but there is need in law for the court to exercise utmost caution before convicting on such evidence particularly if the circumstances obtaining were not favorable for proper identification or recognition.

28. In the case of ***ABDHALLAH BIN WENDO V R (1953) 20 EACA 166 at page 1688***. The predecessor to this Court stated as follows: -

"Subject to certain 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 the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favoring 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 a single witness, can safely be accepted as free from possibility of error"

29. I also wish to remind myself of the guidelines set out in **Wamunga vs. Republic [1989] KLR 424** the court of appeal called for special caution in use of visual identification. It stated thus: -

"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification…"

30. It was also the Court of Appeal's position in the case of **ANJONONI & OTHERS VS REPUBLIC, (1976-1980) KLR 1566,** ***it was held that when it comes to identification, the recognition of assailant is satisfactory, more assuring and more reliable that identification of a stranger because it depends upon personal knowledge of the assailant in some form or other.***

31. This being a case were the complainant claims to have known the Assailants before the occurrence of the alleged robbery, it is therefore a case of recognition as opposed to identification of a stranger. This renders the risk of mistaken identity very minimal. Even though that is the case, the court is still required to be cautious in examining the evidence tendered before it because evidence of identification or recognition at night or under difficult circumstances cannot be said to be completely free of risk of mistaken identity. In that respect I wholly associate myself with the case of ***R V Turnbull, [1977] QB 224,*** provides useful guidelines in so far as identification is concerned. The court stated: -

> ***"If the quality [of the identification evidence] is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment 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 relative, a neighbor, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution […..]***
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> ***When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example, when it depends on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."***

32. The approach on issues of identification was emphasized in the case of **Francis Kariuki Njiru & 7 Others vs. Republic Cr. Appeal No. 6 of 2001 (UR)** where the Court of Appeal stated:

> **"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see *R. v. Turnbull [1976] 63 Cr. App. R. 132*). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuya & Another v. R. Criminal Appeal No. 22 of 1996 (unreported), held that:**
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> **'…….It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence.'"**

33. Applying the principles in the above cases, I take the view that the conditions prevailing at the time the alleged robbery was committed were not conducive for a positive identification of the assailants. The complainant in his testimony did not disclose to the court that at the time he claims to have been recognized the appellants, he was drunk. However, the evidence of PW5 the clinical officer reveals the same. In that regard it is important at this juncture to consider the complainant's state of mind at the time the robbery was occasioned.

34. When PW5 was cross examined by the 2nd Appellant, he stated that the history of the treatment notes reveal that the complainant was from drinking, although the notes did not reveal the kind of alcohol, or the amount he took. Thus, his level of intoxication at the time he met with the robbers is not known. It is common knowledge that the complainant's state of mind resulting from being drunk may have had his ability to identify a person impaired to some significant extent.

35. I now consider the circumstances under which the alleged identification/recognition was made. Going by the trial court record, the evidence therein suggest that the incident allegedly took place at night, about 2130hrs according to the complainant's testimony and the same occurred at a place which had no proper lighting and such circumstances undoubtedly made identification difficult.

36. The prosecution witnesses, specifically the investigating officer and the complainant did not furnish the trial court with any description as regards the intensity of the lighting, the complainant claimed to have used vehicle lights to see the assailants. He did not furnish the court with any other evidence that the recognition or identification was based on voice or other means. Furthermore, the drunken state of the complainant pose dangers of mistaken identification because of drink-impaired cognitive capabilities of the complainant.

37. What worsens the situation in this particular case is that the alleged robbery happened at night when it was dark and the only source of light whose intensity cannot be either known or inquired into was the passing vehicle lights. In is not known whether the alleged vehicle lights were full lights or dimmed.

38. Having interrogated the above issues on identification of the Appellants, the court finds that there is no sufficient evidence to show that the Appellant were positively identified. I am therefore convinced that the identification of the Appellants by the complainant in the circumstances of this case was not free from possibility of error. I also wish to mention that no evidence of recognition, by way of long association and dealings with the appellant was tendered before the trial court to support the alleged recognition.

39. As regards, the alleged theft, the complainant claims to have been robbed of his personal belongings including money to the tune of Kshs.27,000/-, ATM card, ID Card, NHIF which were contained in wallet. I note that besides the complainant's evidence in that regard, there

is no other corroborative evidence adduced by the prosecution to support this particular claim. If I'm to marry this particular issue and the issue of identification that I have already considered above and having made the finding that the assailants were not properly recognized or identified by the complainant as the perpetrators of the alleged offence, the alleged theft cannot be said to have committed by them either. This is because, according to the evidence of the prosecution when the Appellants were arrested their houses were searched and they were not found with any of the items allegedly stolen.

40. The same is further exacerbated by the fact that none of the items the complainant claims to have been stolen was recovered. It is abundantly clear that the prosecution dismally failed to prove the element of theft. In the premises there is no sufficient evidence that creates a nexus between the Appellants and the alleged robbery herein.

41. The upshot of this matter is that the ingredients of the offence of robbery were not proved to the required standard of proof beyond reasonable doubt. In the premises, it is my considered view that the Appeal is meritorious. The conviction of the appellants is quashed; the sentence is hereby set aside. Unless the appellants are otherwise lawfully held, he is to be set at liberty forthwith.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 7TH DAY OF NOVEMBER 2019.

R. NYAKUNDI

JUDGE