REPUBLIC OF KENYA sw

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL CASE NO. 38 OF 2018

PAUL NJUGUNA alias BISSY.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence dated 20th March, 2018, criminal case No. 545 of 2017 in the Chief Magistrate court at Kajiado (Hon S.M. Shitubi.-CM)

JUDGMENT

1. PAUL NJUGUNA alias Bissy, the appellant, was charged at the Chief Magistrate's court, Kajiado, with the offence of robbery with violence contrary to section 296(2) of the Penal Code. Particulars of the offence were that on the 1st day of May 2017 at Kitengela Township, within Kajiado county, jointly with another not before court armed with dangerous weapons namely knives, robbed David Kairanya Paul of cash Kshs. 3, 000/= and immediately at or before the time of such robbery, used actual violence to the said David Kairanya Paul.

2. The appellant pleaded not guilty and after a full trial in which the prosecution called four witnesses and the appellant's defence, the appellant was convicted and sentenced to serve 30 years imprisonment. Aggrieved with both conviction and sentence, he lodged this appeal raising several grounds of appeal, namely:

> ***1) That the learned trial magistrate erred in matters of law and fact by basing my conviction on the sole identification evidence of a single witness, the complainant, without any other independent witnesses***
>
> ***2) That the trial magistrate erred in matters of law and facts by failing to rule out altogether as to the existence for the possibility of mistaken identification of the robbers by the complainant more so in view of the prevailing circumstances at the sceneof crime by the time of the attack.***
>
> ***3) That the trial magistrate erred in matters of law and facts by failing to properly scrutinize the entire evidence adduced, whereby had he done so would have accorded the appellant benefit of the doubt as the burden of proof was not discharged.***
>
> ***4) That the provisions of section 169(1) of the criminal procedure code was not complied with in relation to my defence statement***

Appellant's submissions

3. The appellant argued his appeal through written submissions dated 24th September, 2019. He submitted that conviction was on the basis of evidence of a single witness and therefore his conviction was unsafe given that the trial magistrate did not rule out the possibility of an error or mistaken identity by the complainant. He also submitted that PW1's evidence was contradictory with regard to the actual time of the attack, the quality of light at the scene of crime and the length of time the incidence took place for a proper identification.

4. On the issue of identification, he submitted that because of the violence subjected to PW1, there was a possibility of mistaken identity of the attackers. He pointed out that PW1 admitted to have taken beer and was drunk. In addition, he submitted that PW1 never gave description of the attackers given to the police and the distance of the light in relation to the point of attack is unknown.

5. He relied on ***Cleopas Otieno Wamunga v Republic Cr. Appeal No. 20 of 1989 KLR424,*** wherein it was held that; "***Evidence of visual identification can bring out 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 correctness of one or more identification of 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."***

6. He also relied on ***Francis Karuiki and 7 others vs. Republic*** Cr. Appeal No 6 of 2001 [200] eKLR where it was held that; *"**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 satisfied that the identification is positive and free from possibility of error."*** The appellant urged this court that his appeal be allowed, conviction quashed and sentence set aside.

Respondent's submissions

7. Mr. Meroka, Principal prosecution counsel, opposed the appeal, supported the conviction and sentence through written submissions dated 1st February 2019 and filed in court on the same day. Counsel submitted that section 296(2) of the Penal Code is clear that if the offender is armed with any dangerous weapons or instrument, or is in company with one or more other person, or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he is guilty of the offence and is to be sentenced to death.

8. It is counsel's submissions that the prosecution discharged its burden of proof and proved the elements of the offence beyond reasonable doubt. He further submitted that proof of any of the three ingredients will suffice and the burden will have been discharged. Reliance was placed on ***Peter Oyugi Mokaya and 2 others v Republic*** Criminal appeal no. 353 of 2009, for the submission that "Meting ***out personal violence upon a victim is only one of those ingredients of robbery with violence under section 296 (2). Thus even if personal violence upon the complainant was not proved, the other ingredient of being more than one person still caught up with them."***

9. It is counsel's submission that the prosecution evidence proved the ingredients of the offence; that the complainant was attacked and injured on the night of 1st May, 2017 hence the ingredient of causing harm was proved. Regarding whether the assailants were armed. It is the PW1's evidence that he saw the appellant with a club and a knife which objects were intended to inflict body harm, though not used.

10. On the identity of the appellant, it was submitted that PW1 was in a position to identify the assailants and was able to recognize his assailants who were his customers in his 'muguka' business. It was further submitted that there was no mistake on the recognition since there was community lighting which enabled PW1 to properly recognize the appellant. Reliance was placed on the case of ***Anjoinani and others v Republic*** [1980] KLR where it was held that; *"**Recognition is more satisfactory, assuring and reliable than identification of stranger because it depends upon the personal knowledge of the assailant in same form or other."***

11. Prosecution prays for the appeal be dismissed and the conviction and sentence be sustained.

Determination

12. I have considered the appeal, submissions made on behalf of the parties and authorities relied on. This being a first appeal, this court, as a first appellate court, has a duty to re-evaluate, and scrutinize the evidence that was placed before the trial court and come to its own conclusion on that evidence. It must however bear in mind that it did not see the witnesses testifying and therefore make allowance for that.

13. This legal position has been stated in a number of decisions. In ***Okeno v Republic*** [1972] EA 32, the Court of Appeal set out the duties of a first appellate court, stating:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion… It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses…"***

14. in ***Kiilu & Another vs. Republic*** [2005]1 KLR 174, the same Court held that:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

15. And in ***Naziwa v Uganda*** [2014] UG CA 28 (10th April, 2014)**,** the Court of Appeal of Uganda observed that it is the duty of the first appellate court to re-evaluate all the evidence on record and make its own findings of fact on the issues while giving allowance for the fact that it had not seen the witnesses as they testified, before it can decide on whether the decision of the trial court can be supported.

16. This view was reiterated by the Supreme Court of Uganda in ***Fr. Narsensio Begumisa & 3 others v Eric Tibebaga*** [2004] UGSC 18 (22 June 2004), thus;

> ***"It is a well settled principle that on a first appeal, the parties are entitled to obtain from the court of appeal its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."***

17. **PWI,** the complainant, testified that on on the midnight of 1st May 2017 he at the kit4engela old stage waiting to board a vehicle to take him to Nairobi to buy mogoka. Three young men he knew as Bissi, Kirarua and the third he came to know as Maina attacked him. The appellant had a club and a knife, the other (second accused) held him by the neck then the appellant hit him with the club on the back and he fell down. The 2nd accused took Kshs. 3000 from his pockets. During the incident, the knife was pointed at him to scare him. He was injured in the process but was able to identify and recognize the attackers since there was bright electricity light from "mulika mwizi." And were his customers. The attackers ran away when they was motorcyclists. He reported the matter at Kitengela police station and recorded a statement and was issued with a P3 Form. He then sought treatment at Kitengela Sub County Hospital where the P3 form was filled. He told the court that although he did not know where they lived he was able to trace their place. On 2nd May, 2017, he took the police to the appellant's house where he was arrested. Nothing was recovered.

18. In cross examination the witness told the court that it was the 2nd accused (Jackson Wario Maliau) who took money from his pocket and he had a club and that Bissy (the appellant) held him before he was hit. He told the court that there were 5 people who witnessed the incident but refused to record statements.

19. **PW2,** No.79028 PC Samuel Kipruto based at Kitengela Police station told the court that he was approached by a colleague PC Wamwangi and told him that he was investigating a case of robbery and that the victim knew the homes of his attackers. They went to the appellant's house in NoonKopir area in the accompany of PW1 and arrested them and took them to the police station. in cross examination, he told the court that PW1 mentioned names but never gave descriptions of his assailants.

20. **PW3,** Elgar Chepkangoni, a clinical officer at Kitengela Sub-County Hospital, testified that he examined PW1 and filled the P3 Form on 2nd May 2017. The PW1 was in fair general condition but had a swollen and painful left earlobe; the upper lip had redness and minimal swelling. And pain at the back. These were soft tissue injuries secondary to trauma. He assessed the degree of injury as harm and the probable weapon used was a blunt object. He signed and stamping the P3 Form which he produced as "PEx1."

21. **PW4,** No. 55491 PC Charles Mwai, the investigating officer, testified that on 1st May 2017 at 11am, PW1 went to the station and reported that day at 3am, three young men armed with knives and clubs attacked and robbed him Kshs. 3000 and injured him in the process. PW1 was issued with a P3 Form. He told the court that PW1 told him that he could identify some young men he knew by nick names "Bissy. Kirarua and Maish. According to the witness, PW1 said the three young men lived at Noonkopir where he also lived. They went with PW1, arrested the appellant and another person and took them to the station. After investigations he charged them. In cross examination, he told the court that PW1 identified the appellant by his nick name only.

22. The appellant gave a sworn testimony in his defence. He told the court that on 1st May 2017, he was in kitengela town until 8 p.m. when he went to his house. The next morning, he heard a knock on his door and when he opened he found policemen. They arrested him and took him to Kitengela police station and charged. They also arrested his cousin who had visited him. According to the appellant, the charges were framed against him; that he is not aware of the nickname "Bissy" and that he is not PW1's customer. In cross examination he told the court that the police were not with PW1 when they arrested him.

23. After considering the above evidence, the trial court concluded that the prosecution had established the ingredient of the offence that PW1 was attacked by more than one person; that the attackers were armed and used violence against him at the time of robbery.

24. I have gone through the evidence of the prosecution. There is no doubt that **PW1** was indeed attacked by three armed people who robbed him of money and used violence against him during the robbery. That evidence established conclusively the ingredients of the offence of robbery with violence as required by section 296(2) of the Penal Code. The trial magistrate cannot be faulted on that finding. What is contentious is whether the prosecution proved beyond reasonable doubt that the appellant was among the people who robbed PW1.

25. The trial court considered the evidence tendered by the prosecution and defence and stated;

> ***"The only issue for determination is if the accused and the juvenile were properly identified. For this we have only evidence of one eye witness- the complainant. The other witnesses are said to have refused to record statements. The complainant was alone. Time of attack was past midnight. However, from his evidence there was very bright light coming from the "Mulika mwizi" electric lighting which light up the place well. He said he saw the suspects who were previously known to him come.(sic). He knew them for he used to sell "muguka" at the stage. The investigating officer (PW4) confirms that indeed the complainant used to sell "Muguka" at the stage."***

26. The court went on:

> ***Both Accused and juvenile claimed that they did not eat muguka. They said that they did not even know the complainant before. Yet in cross examination they never challenged his evidence. They did not question where the complainant on how (sic) he got the nick names which they only denied during their statement in defence. They even failed to challenge the lighting of the scene of crime- the fact that it was very bright and conducive in positive identification…"***

27. The court then concluded:

> ***"I have no doubt in my mind that he positively identified the two. I have warned myself on the danger of convicting on evidence of a single witness. However, i am convinced that the suspects were positively identified and that the complainant was a truthful witness. I find that the charge is proved against the accused beyond reasonable doubt. I find the 1st accused guilty as charged and proceed to convict him under section 215 of the criminal procedure code."***

28. The appellant has faulted the trial court for convicting him on the basis of evidence of a single identifying witness. He contended that the identification by recognition was not possible at the time of the attack given the prevailing circumstances. The appellant argument is that PW1 failed to give the police description of the robbers and the distance of the light in relation to the place of attack. In his defence, the appellant denied being at the scene of crime. He told the court that he did not know PW1 and that had never been his customer.

29. On his part, PW1 testified that although the attack took place at midnight, there was bright electricity light from "mulika mwizi" which enabled him to recognize the appellant who was his customer and who often bought "muguka" (khat) from him thus making it possible to identify and recognize his attackers.

30. The appellant's conviction was solely on the evidence of a single identifying witness through recognition. The learned trial Magistrate concluded that the appellant was recognized by his victim because he was known to them and that recognition was made possible by aid of electric light from the nearby street light.

31. There is no doubt that the offence was committed at night. The prosecution argues that PW1 was able identify his attackers at that time and that recognition was not impaired in anyway. The trial court agreed with the prosecution and concluded that on the evidence, the appellant was properly identified through recognition

32. I have reviewed evidence on this issue. Evidence of recognition is a matter of fact and where the prosecution relies solely on this evidence, it has the onus to prove that the circumstances were conducive for identification through recognition. There is a long line of decisions on this issue.

33. In ***Tumusiime Isaac v Uganda*** [2009] UGCA 23(10thJune2009)**,** the Court of Appeal of Uganda set out the factors which the trial court should consider in deciding whether the conditions under which the identification was made were conducive for positive identification without the possibility of error or mistake. They include; whether the accused was known to the witness at the time of the offence; the conditions of lighting; the distance between the accused and the witness at the time of identification and the length of time the witness took to observe the accused.

34. Similarly, in ***Wamunga v Republic*** [1989] KLR 426, the Court stated:

> ***"[I]t is trite that where the only evidence against a defendant 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 were favourable and free from possibility of error before it can be safely make it the basis of conviction"***

35. This principle had earlier been stated in ***R v Turnbull & Others*** (1976) 3 All ER 549 thus:

> ***"... The Judge should… examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?..Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

36. And in ***Francis Kariuki Njiru & 7 others v. Republic*** [2001]e KLR, the Court of Appeal held;

> ***"The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinised 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. 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"***

37. I have myself gone through the record of the trial court and in particular the prosecution evidence and that of the defence. Indeed the evidence of the prosecution on identification was by PW1 only. PW1 was emphatic that he was able to identify his attackers and recognized them because they were familiar to him. He had known them for about two years and they were his customers. He told the court that he used to conduct his business at the Kitengela old stage. When he went to the police, he not only told them that he knew his attackers and where they lived but also gave the police the attackers' nick names.

38. PW2 and PW3 told the court that PW1 gave names of his attackers and that he knew where they lived. They also told the trial court that he led them to the appellant's house where he was arrested. This was almost immediately after the robbery.

39. On lighting, there is no evidence on record to cast doubt that the evidence by PW1 that there was bright light at the scene was not true. The appellant did not dispel this evidence at all during cross examination. His argument that the prosecution did not tell the distance from the light in relation to the scene of crime though attractive, should have been raised at the time he cross examined PW1 to demolish the witness evidence on the possibility that the light was not sufficient to enable a proper identification through recognition.

40. The appellant also argued that PW1 did not give the police description of his attackers when he reported the robbery incident. The evidence of PW2 and PW3 was that PW1 mentioned nick names of his attackers and told them that he knew where they lived. Indeed PW1 led the police the where the appellant lived and they arrested him. The fact that he told the police that he knew his attackers that would

explain why he led the police to his house not long after the robbery and was arrested in that house.

41. The appellant also argued that he did not know PW1 and denied being his customer. He however told the trial court that he was at Kitengela town on that evening but left for his house at 8pm. The record shows that the appellant told the court that he sometimes worked as a tout at the old Kitengela stage. PW1 also told the court that he carried his business at the same stage and that is where he would sell ***Khat*** (muguka) to the appellant raising the possibility that the two knew each other.

42. If the appellant's argument that he did not know PW1 and that he had never been his customer, was to be true, how would PW1 pick out a total stranger and frame him as the one of the people who robbed him and lead the police to his place and he is arrested from that house? The appellant did not allege any previous misunderstanding between him and PW1 that would be reason to pick him out as one of the robbers. I do not find merit in this argument.

43. The trial court was live on the dangers of convicting the appellant on the basis of evidence of a single identifying witness and properly warned itself before relying on that evidence. The trial court headed the warning by the Court of Appeal in ***Wamunga v Republic*** [1989] KLR 426 that where the only evidence against a defendant is evidence of identification or recognition, a trial court is to examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

44. I am satisfied that the trial properly evaluated evidence in this regard and properly warned itself before convicting the appellant. I see no fault on the trial court. I have myself evaluated the evidence by the prosecution and taken into account the principles regarding evidence of single identifying witness through recognition. I am satisfied that the conditions were favourable for a proper identification and that the appellant was properly identified as one of the people who attacked PW1.

45. The appellant argued that the trial court did not comply with section 169(1) of the Criminal Procedure Code in that the court did not consider his defence. Section 169(1) of the Criminal Procedure Code provides that ***"Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."*** I have gone through the judgment of the trial court and I am satisfied that the trial court properly considered the appellant's evidence in arriving at the conclusion it did.

46. Regarding sentence, the law provides for a death penalty. However, the appellant was sentenced to 30 years imprisonment which is a lawful sentence in view of the current jurisprudence. I also note that the trial court considered mitigation before meting out that sentence. According to the record, the appellant was arrested on 1st May 2017. He was convicted and sentenced on 20th March 2018 which means he had spent about a year in custody during his trial. The trial court did not however take this period into account in sentencing the appellant to 30 years.

47. Taking into account the circumstances of this case, the age of the appellant and the objectives of sentencing, the sentence of 3o years is reduced to 20 years. Consequently the appellant's appeal on conviction is dismissed. Sentence is reduced of 30 years is hereby reduced to 20 years. The sentence shall run from the date of arrest, that is 1st May 2018.

48. **Orders accordingly**

Dated Signed and Delivered at Kajiado this 15th Day of November 2019.

E C MWITA

JUDGE