REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 145 OF 2010

(Arising from the judgment of Hon. S.M. Githinji, P.M in Nkubu CRC No. 1689 of 2008 delivered on 6th August, 2010)

(CORAM: F. GIKONYO J)

GEORGE MIRITI KALUNGE ..... 1ST APPELLANT

MOSES MUTEMBI KIRIMI ..... 2ND APPELLANT

-Versus-

REPUBLIC ..... RESPONDENT

JUDGMENT

Robbery with violence

[1] The Appellants were charged with the offence of robbery with violence contrary with Section 296(2) of the Penal Code. The particulars of the offence are that the Appellants on the 4th Day of November 2008 at Gakutha Village, Kioru sub- location, Kithirune West Location in Meru Central District within Eastern Province, jointly being armed with dangerous weapons namely stones robbed PETER GATOBU MURIUKI of cash Kshs. 52,000/- and at or immediately before or immediately after the time of such robbery, injured the said Peter Gatobu Muriuki.

[2] They were tried and convicted, and sentenced to suffer death. They were dissatisfied with the decision and filed this appeal citing the grounds; that the prosecution did not prove their case beyond reasonable doubt, the trial magistrate failed to note that the circumstances in the case were not favorable for a positive identification, failing to note that the caps produced in court did not link the Appellants with the alleged offence and that the evidence tendered by the prosecution witnesses amounted to hearsay.

Appellants: court relied on hearsay evidence

[3] The appeal was canvassed by way of oral submissions. The Appellants relied entirely on their written submissions filed on 7th May 2018. They submitted that owing the fact that the offence was committed at night there is doubt that they were positively identified due to the quality of light. They argued that **PW1** and **PW2** contradicted themselves in that **PW1** stated that there was a full moon while PW2 said there was a half –moon. They also urged that, when the complainant gained consciousness he told PW2 that he saw as if his assailant was George. This shows that he was not sure exactly who committed the act. They relied on the case of **Cleopas Otieno wamuga vs. Republic [1989] KLR 424**, **R vs. Turnbull (1976) 3 ALL ER 549**, **Kamau vs. Reublic [1975] EA 139**, **Roria vs. R [1967] EA 583** and **Charles O. Maitenyi vs. Republic [1985] 2 KAR 75**. The Appellants were of firm believe that the caps produced by the prosecution which the witnesses' claimed to have been worn by the Appellants during the alleged ordeal could not have been used to establish the Appellant as the perpetrator of the ordeal. According to them, none of the witnesses explained whether they where unique caps worn by the Appellants alone bearing in mind that young men tend to wear the current trends. Thus, it could not be proven that the Appellants were the owners of the caps. They stated that the court should not have based its conviction on this. They submitted that evidence of **PW2, PW3, PW4**, **PW5, PW6** and **PW7** amounted to hearsay hence rendering prejudice against the Appellants

Prosecution: appellants properly identified

[4] Mr. Namiti, counsel for the prosecution, opposed the appeal. He pointed out that the major issues are identification and recognition. He submitted that PW1 was able to see the Appellants 10 metres away when they approached him, there was a full moon and he knew them. During the attack he shouted the names of the Appellants and on arrival of **PW2** and **PW3** he immediately informed them. When the Appellants were escaping PW2 about 10 meters away was able to recognize George in full moonlight. PW3 was the employer of the 1st Appellant who confirmed that George disappeared from home on that day. He recognized a cap with distinct mark which George used to wear. Thus identification was proper. He stated that the trial magistrate took considerable time to consider their defence. Therefore, it is

wrong to try and fault the trial court for not taking their defence into account.

Duty of court

[5] As first appellate court, I should evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses when they gave evidence. See: **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. In this exercise, the court is not beholden or compelled to adopt any particular style. However, what must be avoided is merely rehashing of evidence as was recorded. Instead, the court should employ a style imbued with judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such style insist on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. I will then express my overall impression of the evidence, facts and the law applicable in absolute clarity and directness. I shall so proceed.

ANALYSIS AND DETERMINATION

[6] The Complainant was attacked, injured and robbed of Kshs. 52,000/- on the 4th Day of November 2008. The issue becomes: who committed this offence? Was it the Appellants?

Recognition and identification

[7] The Complainant **Peter Gatobu Muriuki** testified as **PW1.** He stated that on the material day at around 8.00pm as he was walking he met two people who were about 10 meters away. There was moonlight and so he was able to recognize them for they were casual laborers in the neighboring house at home and knew them for a year; these people were the Appellants. Mutembei had a panga and George a stone. When he got near them George held him on his neck and Mutembei hit him on the right elbow with the panga. He stated screaming out their names and asking George what the problem was. They removed Kshs. 52,000/- from his pocket. This evidence was not controverted at all. It is clear that PW1 knew George. He also identified George at the material day to be one of the persons who robbed him. PW1 also was able to see the 2nd Appellant under the moonlight and he is positive he was one of the persons who attacked him on the fateful night. These people were about 10 meters from him. They eventually had close contact during the struggle herein. And during the attack he was calling George and asking him what the problem was.

[9] **PW5 Edward Kirinya Nkoroi** corroborated the evidence of PW1. **PW5** came to the scene. On his way, two people passed him. He recognized one of them as George because he knew him for about a year and had been employed by his uncle at his home. PW5 was able to identify George but also saw the other person but who he said was a stranger. They both stated that there was moon light which enabled them to identify the appellants. The Court of Appeal in the case of **WAMUNGA vs. REPUBLIC (1989) KLR 426** stated that;-

> ***"It is trite law 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 safely make it the basis of conviction."***

[10] On factors to consider in recognition of an assailant see the case of **R –vs- Turnbull & Others (1976) 3 ALL ER 549**, where it held that said:

> ***"... The Judge should direct the jury to 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."***

[13] It is possible to recognize a person at night in correct conditions such as under moonlight. See the case of **IRENE CHEBET & ANOTHER vs. REPUBLIC [2014] EKLR** where the Court of Appeal agreed with the finding of the trial judge that the 1st and 2nd Appellants were properly identified as the assailants for there was a moon light.

Caps found at scene

[10] In addition, two caps were found at the scene, one with the label of Pallwall overhead was said to belong to George and the other one which was like an army cap belonged to Mutembei. This was so identified by **PW1, PW3** and **PW5** who often saw them adorned in those caps. **PW2 Justus Mutuma Riungu** heard the screams from his home which was about 50 meters away, and went to find out what was happening. When the Appellants saw him they ran away. The caps they were wearing fell at the scene. **PW4 No. 2311953 C. I. George Kireva** assisted in the investigations. **PW7 No. 51236 PC John Gatiti** stated that on 5th November 2008 he was informed of the robbery. He was also informed that the complainant could identity his assailants. He visited the scene, recorded statements of the eye witnesses and received the caps allegedly belonging to the assailants. They did not get the assailants on that day but later traced them in Maua.

[13] **PW3 Jamlick Koome Ringera** testified that George was his employee and the 2nd Accused was living in his brother's house. He stated that the Appellants could not be traced from the material day. PW3 confirmed that the cap that fell at the scene labeled as an army cap belonged to the 2nd appellant for he used to wear it several times. When they were arrested he was called at Kairene Police Station to identify them and he did so at the police cells. In **Evans Kalo Callos v Republic [2014] eKLR** the Court of Appeal stated this:

> ***"There can be no doubt, as the learned editors of Archbold, Criminal Pleading, Evidence and Practice 2012 observe at paragraph 14-28 that "the recognition of clothing can be a valuable aid to identification."***

[15] In the case of **Odhiambo v Republic[2002] 1 KLR 241** the Court of Appeal expressed the following:

> ***"Where evidence rests on a single witness and the circumstances of identification are known to be difficult, then other evidence either direct or circumstantial pointing to the guilt of the accused persons from which the court may reasonably conclude that identification is accurate and free from the possibility of an error is needed."***

[16] I have carefully examined the evidence on recognition and identification and I am satisfied that the circumstances of identification were favourable and free from possibility of error; it can safely be concluded that the appellants were properly identified and recognized under moonlight. A conviction on that basis is safe.

Use of force or violence

[14] PW1 testified that under moonlight he saw Mutembei with a panga and George a stone. When he got near them George held him on his neck and Mutembei hit him on the right elbow with the panga. **PW2** corroborates use of force and violence upon PW1. He stated that he saw two men escaping from the scene. When he arrived he found PW1 lying on the ground with blood oozing from his mouth and nose. He administered first aid and when PW1 woke up he said to him that one of the assailants was George but the other was a stranger. **PW6 Dr. Isaac Macharia** is the one who examined PW1 when he was taken to hospital. He testified that PW1 had 3 scratch marks on the front part of the chest, bruises on both lips and soft tissue on the left wrist joint. The medical evidence is consistent with the evidence of PW1 and PW1, and I find that the two appellants used force and violence upon PW1 when they stole Kshs. 52,000 from him.

Conclusion and verdict

[18] From the foregoing, I am satisfied that there was moonlight sufficient to enable the complainant to identify and indeed identified the two appellants as his assailants on the fateful night. Similarly, the other witnesses whose evidence is discussed above were able to identify the appellants as the assailants herein. Further, caps which were found at the scene were identified by people who knew they belonged to the appellants- this removes any doubt that the appellants were the assailants herein. Such is circumstantial evidence which points to their guilt and reaffirms that identification was proper. The Appellants were properly identified and recognized as the perpetrators. Again, it has been proved that the 1st and 2nd Appellant were armed with a panga and a stone, respectively; such are dangerous or offensive weapon or instrument. Being in company of each other, they, at or immediately before or immediately after the time of the robbery, they wounded, beat, or used personal violence to PW1. I therefore uphold their conviction save I set aside the death sentence. But, the circumstances of this case are grave and I hereby sentenced them to life imprisonment. It is so ordered.

Dated,signed and delivered in open court at Meru this 6th day of June, 2018.

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F. GIKONYO

JUDGE

In the presence of:

Mr. Namiti for State

Appellants – present

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F. GIKONYO

JUDGE