REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 2 OF 2016

(An Appeal arising out of the conviction and sentence of HON. H. BARASA – (PM) delivered on

24th December 2015 in ELDORET CM CR. Case No.1919 of 2013)

JOSEPH KWATENGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Joseph Kwatenge 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 14th May 2013 at 10.30 p.m. at Lwandeti Market in Kakamega County, the Appellant, jointly with others not before court, while armed with an offensive weapon namely an AK 47 rifle robbed Geoffrey Mutembei Sabatia of one motorcycle Registration No. KMCY 714W Boxer Bajaj red in colour, three mobile phones make Samsung Galaxy, LG E45 and Nokia 1280 and Kshs.200/- and before the time of such robbery wounded the said Geoffrey Mutembei Sabatia (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 appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of hearsay evidence that was not corroborated and did not establish the charge brought against him to the required standard of proof. The Appellant took issue with the finding reached by the trial court that he had been identified on the basis of the evidence of recognition by voice and by visual identification. He was aggrieved that he was denied the opportunity to interrogate the first report that the complainant made to the police when the trial court failed to compel the prosecution to provide him with Occurrence Book (OB) report during trial. In essence, the Appellant challenged the evidence of identification that was adduced by the prosecution witnesses which, in his view, left a lot to be desired in terms of establishing his guilt. The Appellant faulted the trial magistrate for rejecting his defence and that of his witnesses without ascribing any reasons and thereby prejudiced him. He was finally aggrieved that he had been sentenced to serve a sentence that is unconstitutional. He urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. In summary, it was his submission that the evidence of identification that was adduced by the prosecution witnesses did not support the finding reached by the trial court that he had been positively identified. The Appellant took issue with the manner in which the trial court evaluated the evidence of voice identification that was adduced by the prosecution witnesses. He was of the view that the same was fraught with inconsistency and doubt to the extent that it could not be said to have constituted proper identification. He observed that the trial court failed to take into consideration that the robbery incident took place at night and therefore it was not possible for the prosecution's witnesses to be certain that they had identified him. He faulted the trial magistrate for failing to take into consideration the entire circumstances surrounding the robbery and thereby reached the erroneous decision that he had been identified.

The Appellant pointed out that although he applied to be given the first report that was made by the complainant to the police, and although the court had directed the prosecution to supply the same to him, the request was not honoured before the prosecution closed its case. The non-disclosure of this evidence was proof that the first report made to the police did not identify or point at him as the person who robbed the Appellant. The Appellant was aggrieved that his defence, and particularly the fact that he had visited the complainant in hospital after the robbery incident, and the fact that his motorcycle was robbed from him on the night of the robbery, should have been sufficient evidence to exonerate him from the crime. On sentence, the Appellant submitted that he was not allowed to properly mitigate the sentence and therefore the verdict that was reached by the trial court was unconstitutional. The Appellant urged the court to allow the appeal.

In response, Ms. Oduor for the State opposed the appeal. She submitted that the prosecution had established to the required standard of proof

the charge that was brought against the Appellant. The evidence adduced by the prosecution witnesses was consistent and corroborated. It placed the Appellant at the scene of the robbery. It set out the role the Appellant played in the robbery. She noted that although the robbed items were not recovered, three of the prosecution witnesses who were at the scene, placed the Appellant at the scene, and further, pointed out the fact that they had recognized his voice during the robbery. It was the prosecution's case that the Appellant was a member of the gang that robbed the complainant, and in the course of the robbery shot him. The injury that the complainant sustained required that he be hospitalized for a period of seven (7) days. She urged the court not to be persuaded by the Appellant's testimony in his defence and that of his witnesses. She was of the view that the entire defence evidence was properly found to be incredible by the trial court. In the premises therefore, she urged the appeal to be dismissed.

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 carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the submission made by the parties to this appeal. It was clear from the evidence adduced by the prosecution witnesses that the prosecution relied on the evidence of identification to secure the conviction of the Appellant. According to the complainant, on the night of 14th May 2013 at about 10.30 p.m., he was at his video hall at Lwandeti Shopping Centre. There was an English Premier League football match that was being screened. According to the complainant, people paid for the opportunity to watch the match which was being screened via the pay Television channel, DSTV. He recalled seeing the Appellant who was seated behind him. The Appellant was known to him prior to the robbery incident. At some point during the first half of the match, he was called by his wife to go home and have supper. He left the video hall and went to his house. His house was about twenty metres from the video hall. He told the court that as he left the video hall, he heard someone say ***"ametoka kujeni"*** meaning ***"he has left so you may come".*** The complainant did not take this statement seriously.

When he reached his house, before he was served supper by PW3 Beatrice Chepkosia Majoni (his wife), his employee by the name Godrine Nabwire Sifuna came rushing to the house and told him that there were police officers who were outside their compound. The complainant advised the said Godrine not to worry because he had not committed any crime. Shortly thereafter, he saw a person dressed in police uniform enter the house. He was armed with a rifle. He heard a voice which he told the court he recognized to be that of the Appellant instructing the person to shoot him. Before he could react, he was shot on the chest. He collapsed and lost consciousness. He regained consciousness while admitted at Webuye District Hospital. He told the court that during that night, he was robbed of his motorcycle Registration No.KMCY 714W. He was also robbed of three mobile phones, a Samsung 19070, a Nokia 1280 and an LG twin SIM touch screen. He produced receipts proving ownership of the said items that were stolen. The robbed items were not recovered.

The complainant's testimony regarding the way he identified the Appellant was corroborated by PW3 and PW4 Godfrey Kihara. PW4, at the time was employed by the complainant to collect entrance fees from those who wanted to watch the match at the video hall. He recalled seeing the Appellant at the video hall. When the complainant went to his house, the Appellant followed him. He decided to go to the complainant's house to collect the remote control of the television set because, at the time, it was half time and he needed to change channels. While at the complainant's house, a person dressed in police uniform armed with rifle entered the house and threatened to shoot them. They lay on the ground as they were ordered. PW3 and PW4 testified that they heard the voice of the Appellant instruct the person with rifle to shoot the complainant. The complainant was shot. The person then searched the complainant's pockets and took his phones. They then left.

PW3 and PW4 raised alarm after the robbers had left. They rushed the complainant to hospital where he was admitted. A report was made to the police. PW5 PC John Kulecho, then based at the CID office at Lumakanda visited the scene of crime. He collected the spent cartridge and also recorded statements from the people at the scene. PW5 explained that he later investigated the case and reached the conclusion that it was the Appellant who had committed the robbery. An important piece of evidence was adduced by PW6 Inspector Ben Kiptum Bett, a Ballistics expert attached to the CID Headquarters. He testified that the spent cartridge recovered from the scene of crime was similar in characteristics to another spent cartridge that was recovered in another robbery scene within the area. The cartridges were discharged from an AK 47 rifle.

The complainant's P3 form was produced by PW1 Dr. Peter Wanja then, based at Webuye District Hospital. From the P3 form, he explained that the complainant had a penetrating wound on the front part of the chest exiting via the right scapular region. He treated the complainant by having the wound cleaned and putting him on antibiotics. He assessed the degree of injury as harm.

When the Appellant was put on his defence, while admitting that he was at the scene of robbery, he denied that he robbed the complainant. He explained that he had gone to watch a football match at the complainant's video hall. He heard a shot being fired. He took cover. During the robbery his motorcycle was robbed from him. The Appellant called three witnesses DW2 Sifuna Shikuku Mukasa, DW3 Geoffrey Kisiangani and DW4 James Wafula Nyongesa. They all testified that they were with the Appellant on the night in question when the robbery took place. They corroborated his testimony that he was also a victim of the robbery.

On re-evaluation of the evidence of identification, this court is guided by the landmark decision of **Maitanyi –vs- Republic [1986] KLR 198 at P.200** where the court of Appeal held thus:

> ***"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:-***
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> ***"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 prosecution relied essentially on voice identification in its bid to secure the conviction of the Appellant. Voice identification is good evidence especially where the person identifying the voice is familiar with the voice of the assailant (See **Libambula – Vs- Republic [2003] KLR 683)**. The complainant and the two prosecution witnesses at the scene testified that it was the Appellant who commanded the person wearing police uniform and who was armed with a rifle to shoot the complainant. The three witnesses testified that they identified the complainant by his voice. They did not see him. This was because the robbers accompanying the person wearing the police uniform had covered their faces with masks. This court considered the fact that it was dark. There were many people at the scene. There was a commotion at the complainant was shot and thereafter robbed. This court found it difficult to believe the testimony of the complainant and the two prosecution witnesses that whereas they did not see the Appellant, they were able to identify him by his voice. Theirs was voice identification made in circumstances which were difficult. In the hectic circumstances of the robbery, the complainant and the two prosecution witnesses, being terrorized and traumatized could have been mistaken that they had identified the Appellant's voice.

Following the Maitanyi decision, the doubt regarding the evidence of identification could have been resolved if the prosecution produced other evidence to support that evidence. Since the stolen items were not recovered, there was no other evidence that the prosecution relied on other than that of identification. There is a pertinent issue that the Appellant pointed out in his appeal. He stated that during trial, his request to have the first report made to the police produced in court was thwarted by the prosecution's failure to produce the same before the close of their case. This is important because the robbery incident took place on 14th May 2013. The Appellant was arrested on 28th May 2013. During this period, the Appellant behaved normally. He was residing in the same area as the complainant. He did not go underground. In fact, he visited the complainant in hospital.

PW5, the investigating officer told the court that he visited the complainant while in hospital and recorded his evidence. If that be the case, *why did it take such a long period for the Appellant to be arrested?* That issue would have been clarified if the first report had been produced before the trial court. Furthermore, whereas there is a possibility that the Appellant may have visited the complainant in hospital with a view to concealing his role in the robbery, this court's re-evaluation of the evidence adduced before the trial court clearly points to the fact that the decision by the police to charge the Appellant with the offence was an afterthought. The ballistics report produced in evidence by PW6 clearly showed that the rifle that used to shoot the complainant had been used in a spate of robberies in the area. The Appellant was not connected with these other robberies.

Having carefully reconsidered the entirety of the evidence adduced before the trial court, this court cannot reach a finding that the evidence of identification adduced by the prosecution was free of the possibility of error or mistaken identity. The circumstances in which the robbery took place were not conducive for positive identification. The complainant and his witnesses may have been mistaken that they had identified the Appellant's voice during the robbery incident. Further, the failure by the prosecution to produce the first report when ordered by the trial court makes this court agree with the Appellant that the refusal to produce the said first report may have supported his assertion that in the first report, the complainant may not have informed the police the identity of the persons who robbed him. Reasonable doubt was raised in regard to the manner in which the Appellant was arrested two weeks after the robbery incident. The reasonable doubt is resolved in favour of the Appellant. The evidence that the Appellant gave in his defence may well be the true position of what transpired on the material night.

The upshot of the above reasons is that the appeal lodged by the Appellant has merit. It is hereby allowed. The Appellant's conviction is quashed. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF OCTOBER 2018

HELLEN OMONDI

JUDGE