REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 14 OF 2015

PATRICK THEURI NGATIA……..….APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

(Appeal from original conviction and sentence in Karatina Principal Magistrates' Court Criminal Case No. 184 of 2014 (Hon. D.N. Musyoka) on 23rd April, 2015)

JUDGMENT

The appellant and one Stephen Mbogo were charged with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code** (cap 63). The particulars of the offence were that on the 3rd day of March, 2014 at Gatunganga location, Chieni village in Mathira West District, within Nyeri County, while armed with a dangerous weapon namely a somali sword, they jointly robbed Duncan Muthiga Wachira of one cell phone (Vodafone) valued at Kshs 1000/=, Kshs 400/=(cash), 2kgs of maize valued at Kshs 100/=, ½ kg of sugar valued at Kshs 50/=, ½ kg of cooking fat valued at Kshs 40/= ½ of rice valued at Kshs 40/= and Kerosene valued at Kshs 20/= and at immediately before or immediately after the time of such robbery used actual violence on the said Duncan Muthiga Wachira.

He was convicted as charged and sentenced to death. He appealed against the conviction and sentence and the grounds of his appeal are as follows: -

1. The learned magistrate erred in law and fact by failing to note that the appellant's constitutional rights under article 25(c), 50(2) (c) of the Constitution were violated;

2. The learned trial magistrate erred both in law and in fact in convicting the appellant when the charge against him was not proved beyond reasonable doubt;

3. The learned trial magistrate erred both in law and in fact in convicting the appellant based on the evidence of single identification witness without warning himself of the dangers inherent in such evidence;

4. The learned magistrate erred both in law and in fact by failing to evaluate the evidence in relation to other cognate minor offence under the provisions of **section 179** of the **Criminal Procedure Code;**

5. The learned magistrate erred in both law and in fact by failing to note that considering the circumstances of the case, **sections 13(4), 207, 208** of **the Penal Code** were applicable; and

6. The learned trial magistrate erred both in law and in fact in rejecting the appellant's defence without giving any reason contrary to the requirements of **section 169** of the **Criminal Procedure Code.**

In order to appreciate whether there are any merits in the appellant's appeal, it is necessary that this court reconsiders the evidence at the trial. More importantly, as the first appellate court, this court has the legal obligation to evaluate the evidence on record afresh and come to its own conclusions without necessarily being bound by the factual findings of the trial court. It has, however, to give an allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses. The duty of this court in this respect is well explained in **Okeno versus Republic (1972) EA 32** where the Court of Appeal stated as follows: -

> ***An appellant 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; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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. (See page 36).***

On 3rd March, 2014 at about 8 PM, the complainant was walking to his home and while on his way, so he testified, he heard the voices of the appellant and Stephen Mbogo behind him. They were people he knew since they hailed from the same village and therefore he could easily recognise their voices. They had all been drinking at a club at Gatunganga shopping center before the appellant left; on his way home, he passed by a shop to make some household purchases.

For a short while, the appellant and his co-accused went silent but soon thereafter, according to the complainant, they tiptoed towards him and grabbed him by the neck. As they held him, he was able to see them because, it was his evidence that it was not completely dark. As matter of fact, he was able to tell that Stephen Mbogo was the one who held his neck while the appellant frisked his pockets. When he attempted to resist, the appellant stabbed him in the abdomen. As a result, he sustained such a serious injury that his intestines were exposed. Besides assaulting him, they robbed him of the purchases he had made together with his phone and money and left him lying unconscious on the road where he remained till the following morning.

Most of the rest of the prosecution witnesses were people who found the complainant on the roadside the morning after the incident. **David Gathuri Mugi (PW3), a** minor who was on his way to school, was one of them. When he saw the state in which the complainant was he called **Stephen Mwangi Ndirangu (PW3**) who then proceeded to the scene and took the complainant to hospital. **Lucas Kioni Gitonga (PW4)** also went to the scene and it was in his vehicle that the complainant was driven to the hospital.

One other person who came to the scene was **James Kioni Nyaguthi (PW5),** the assistant chief of the area from which the appellant, his co-accused and the complainant hailed. He testified that upon talking to the complainant, he told that the appellant and his co-accused had stabbed him. Being people he knew well, he later assisted in their arrest. The complainant's father, Francis **Wachira (PW6)** was informed of what befell his son by **Stanley Theuri (PW7)**; he testified that the complainant told him that the appellant and **Stephen Mbogo** were the people who attacked and injured him.

Dr Stephen Wang'ombe (PW8) presented the medical evidence of the nature and extent of the complainant's injuries; he testified he examined the appellant two weeks after he had been stabbed. He established that indeed he sustained multiple wounds in the abdomen; they were inflicted by what in his opinion was a "sharp weapon". He also opined that the degree of injury was "maim".

The investigation of the case was conducted by police **Constable Moses Emukule (PW9)** who testified that after he received the report of the complainant's attack from the assistant chief, **James Kioni Nyaguthi (PW5), h**e proceeded to the hospital where the complainant had been admitted and took his

statement. According to him, the complainant named his attackers in his statement and based on that information, he arrested them. When he interrogated the appellant, the latter admitted that indeed he attacked the complainant but only because he had insulted him.

The trial court was satisfied that with this evidence the prosecution had made out a prima facie case for the appellant and his co-accused to be put on their defence. The appellant's co-accused offered an alibi which, apparently, was accepted by the trial court and thus he was acquitted. He had, however, admitted he met the complainant at about 6PM on the material evening and even asked him if they could go home together but the appellant declined.

On his part, the appellant gave sworn evidence to the effect that on 3rd March, 2014 at about 9:30 PM, he was taking beer at a bar at Gatunganga. The appellant happened to have been drinking in the same bar at that time. It was his evidence that the complainant, who was well-known to him, was thrown out of the bar after he caused some commotion and poured down the appellant's beer. The appellant further testified that he hit him with a stick when the appellant asked him to pay for the beer.

While going home, he found the appellant on the way apparently waiting for him; he had a torch and was also armed with a walking stick. He told the appellant that he was waiting for him so that they could fight. The appellant responded that he was not interested since he had even forgotten about the issue of the beer. They then started fighting, and somehow the appellant discovered that the complainant had a knife. As he struggled to snatch the knife from him, the complainant fell down and it is then that he was stabbed. He denied committing the offence.

As far as I can see, that is all there was in evidence.

The offence of robbery is defined in **section 295** of the Penal Code, **Chapter 63 Laws of Kenya** but the essential elements of the offence of robbery with violence and the penalty thereof are prescribed under section **296(2)** of the Code.

Section 295 of the **Penal Code** states;

> ***295. 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.***

Section **296(2)** of the Code defines when robbery as defined under **section 295** escalates into robbery with violence; it says: -

> ***296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.***

For a conviction on the offence of robbery with violence to be sustained, the prosecution must prove that the robbery victim was not only robbed but also that at the time of such robbery, any of the following facts were in existence: -

(a) The accused was armed with any weapon or instrument that may deemed to be dangerous or offensive;

(b) The accused was in the company of one or more persons;

(c) Immediately before or immediately after the time of the robbery, the accused wounded, beat up, struck or used violence to any person.

The complainant's evidence was that he was attacked by two people one of whom stabbed him. There is sufficient evidence that he was assaulted in the process and therefore there is no doubt that violence was visited upon him. If there was evidence that anything was stolen from him, then a case for robbery with violence was made out and the primary question would be whether the appellant was the person who perpetrated this crime.

The record shows that the appellant questioned whether indeed the complainant lost any item at the time he was attacked. The complainant's response was that he did not have any receipts because ordinarily one is not issued with receipts when he buys ordinary commodities in retail shop. Indeed, that may be true but I also note that the complainant gave a vivid description of the shop he made his purchases from; he knew the owner of the shop and could even recall that it was the shopkeeper's wife who sold the items to him. As much as the prosecution has the prerogative of whom to call as their witnesses, the evidence of the shopkeeper or his wife would have dispelled any doubt as to whether indeed the complainant bought those items and therefore whether he lost them in the course of the robbery. It must be noted that the conviction of the appellant was tied to the question of whether anything was stolen from the complainant when he was attacked.

It is also noted that apart from the shop items, he also said that he lost a cell phone whose receipt he had. The investigation officer admitted in his evidence that the complainant showed him the receipt. Curiously this receipt was not exhibited in court.

In my estimation, it is possible that indeed the complainant may have been in possession of the items he alleged were stolen from him but then the trial court could not proceed on the basis of probabilities or speculation; it could only act on evidence before it. I have not been able to find any plausible reason why the prosecution did not call the shop owner or his wife as witnesses; neither is there any reason why the receipt for the cell phone was not produced. In the absence of this evidence, I must come to the conclusion that there was no evidence beyond reasonable doubt that the complainant lost the items particularised in the particulars of the offence. Accordingly, I hold that the offence of robbery with violence was not proved beyond reasonable doubt.

The facts, however, reveal that though the offence of robbery with violence may not have been committed, some other cognizable offence was committed and it appears that even the appellant himself was alive to this fact particularly when, he impeached the decision of the learned magistrate on the ground that he failed to take into account the fact that the evidence revealed other offence which to him is a "cognate minor offence" under the provisions of **section 179** of the **Criminal Procedure Code (cap 75)**.

The offence the appellant must have had in mind is that of grievous harm contrary to **section 234** of the **Penal Code**; that section states as follows:

> ***Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.***

Grievous harm is defined in **section 4** of the **Penal Code** to mean;

> ***Any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense***

According to the medical evidence on record, the complainant's injury was rated as "maim" and therefore it amounted to grievous harm as understood in **section 234** of the Penal Code. The question that logically follows is whether the appellant is the person who inflicted this injury.

It is noted that apart from the complainant and the person who may have injured him there was no other witness who could possibly testify as to how and the circumstances under which the complainant was injured; in other words, there was no eye witness. Having perused the record, and analysed the evidence, I

have not found any reason why the learned magistrate should not have believed the complainant that he was injured by the appellant. He found appellant to have been consistent and candid in his evidence. I agree with him.

On the contrary, I am unable to accept counsel for the appellant's argument that the complainant was not a credible or trustworthy witness on account of inconsistency or contradiction in his evidence because I simply cannot find such deficiencies in those aspects of the complainant's evidence which the counsel has pointed out as the basis of impeachment of the complainant's evidence. For instance, according to the learned counsel, the complainant admitted that he was drunk yet he claimed to have been from a shop at the time he was attacked. What I understand the complainant to have said is that he had been drinking in the same bar as the appellant but after he left, he passed by a shop where be bought some household commodities on his way home. I do not interpret his evidence to be that he could only have been at the bar and not the shop or vice versa; he was at both the places but at different times.

It has been noted that the complainant could vividly recall in whose shop he went to and the shop attendant who attended to him. If he was in this state of disposition, and in the absence of any evidence to the contrary, I am persuaded that the fact that the complainant had been drinking prior to his attack could not, of itself, be a sufficient ground to create a reasonable doubt on his ability to appreciate his surroundings or make a rational judgment.

The learned counsel for the appellant also argued that the trial court should have found the credibility of the complainant and the value of his evidence wanting because, in his view, his testimony on identification of the appellant was not consistent. It was not clear from the complainant's evidence, according to counsel, whether the complainant saw his attackers or he only recognised them by their voices. Again, here I must respectfully disagree with the learned counsel because, as I understand the testimony of the complainant, he first recognised the appellant's voice together with that of his co-accused behind him but that when they attacked him, he was able to see them. As far as the appellant is concerned, the complainant was not a stranger to him; he is a person he knew before and he admitted as much in his evidence. In these circumstances the possibility of a mistaken identity was too remote to influence the learned magistrate to reach any other conclusion.

On this same question of identification, I entirely agree with the decisions cited by the learned counsel for the appellant in **Nyeri High Court Criminal Appeal No. 51 of 2006 John Wagura Nyambura versus Republic; Abdallah Bin Wendo & Another versus R (1953) 20 EACA 166; Wamunga versus Republic (1989) KLR 424** on the need for the trial court to be vigilant whenever it has to base a conviction on the evidence of identification or recognition and more so when the evidence is that of a single identification witness. However, the identification of the appellant does not appear to me to have breached any of the underlying principles enunciated in these decisions.

Afortiori, looking at the evidence on record in its entirety, there is no doubt that the appellant and the complainant crossed paths at the material time. The appellant himself testified that the complainant was injured in the course of a fight between them and that their duel was preceded by some conversation. As noted, the two hailed from the same village and it was their evidence that they were familiar with each other. With this evidence, there is no basis to doubt the complainant's evidence that he positively identified the appellant when he was attacked. In fact, considering that the appellant himself admitted that he was with the complainant, one may argue, and legitimately so, that the question of identification was fait accompli. I am mindful that the burden is always on the prosecution to prove its case beyond doubt and it does not have to rely on the accused person's defence to fill any gaps that may be apparent in its case. However, where the option adopted by the accused person in his defence, whether he opts to remain silent or to testify on oath or give an unsworn statement, does not create any reasonable doubt in the prosecution case, then there is no reason why the prosecution evidence that tends to prove his guilt should not be accepted.

I found the appellant's evidence that complainant somehow got mysteriously stabbed when he fell down not to have been quite convincing and the learned magistrate was correct in rejecting it altogether.

In the final analysis, I would quash the appellant's conviction for the offence of robbery with violence and instead substitute it with that of grievous harm contrary to **section 234** of the **Penal Code**; accordingly, the death penalty meted out against him is hereby set aside and substituted with the sentence of 10 years' imprisonment. It is so ordered.

Signed, dated and delivered this 12th day of May, 2017

Ngaah Jairus

JUDGE