



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.101 OF 2012**

*(An Appeal arising out of the conviction and sentence of Hon. D. Onyango – PM delivered on 22<sup>nd</sup> March 2012 in Kibera CMC. CR. Case No.2430 of 2010)*

**ANTONY MBUGUA NGUKU .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Anthony Mbugua Nguku, 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 the 7<sup>th</sup> day of May 2010 at Waithaka Village in Nairobi, the Appellant, jointly with another not before the court and while being armed with a dangerous weapon namely a pistol, robbed Kezziah Njeri Ndegwa of Kshs. 30,000/= cash and two mobile phones, all valued at Kshs.34,000/= and at or immediately before or immediately after the time of such robbery, threatened to inflict actual bodily harm against the said Kezziah Njeri Ndegwa. The Appellant was arraigned in court on 20<sup>th</sup> May 2010 and pleaded not guilty to the charge. After full trial, he was convicted of the charge and was sentenced to death. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial court for relying on the evidence of a single witness without warning itself of the possibility of mistaken identity. He was aggrieved that the trial court had relied on evidence of identification made under difficult circumstances. He faulted the trial court for convicting him and yet his guilt had not been established to the required standard of proof. He was particularly aggrieved with the fact that the initial police report did not contain details of his description. He was further aggrieved with the fact that the trial court had failed to put his defense into consideration before arriving at the decision that he had indeed committed the offence. In the premises therefore, he urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, Ms. Rashid appeared for the Appellant while Ms. Nyauncho appeared for the State. They both presented written submissions to the court. They further made oral submissions before court. Ms. Rashid, learned counsel for the Appellant, submitted that the Appellant had been convicted by the trial court on the evidence of identification made under difficult circumstances. She stated that the Appellant's case was that of mistaken identity. To support her assertions, she questioned why the complainant did not tell the police that the Appellant was well known to her at the time of the incident. This was because they had previously interacted with each other. She submitted that according

to the evidence on record, it was clear that the complainant did not know the identity of her real attackers.

She relied on the case of **Charles Ouma –vs- Republic CR.A 222 of 2002** in submitting that the evidence of a first report by the complainant to a person in authority was important as it provided a good test by which the truth and accuracy of subsequent statements would be gauged. In this regard, she submitted that the fact that the complainant admitted in evidence on oath that she did not tell the police that she knew the Appellant was proof that her case was a made up story in a desperate attempt to get a culprit for the robbery. Lastly, she submitted that the trial court erred in shifting the burden of proof to the complainant. In the premises therefore, she urged the court to allow the appeal, quash the appellant's conviction and set aside the sentence that had been imposed on him.

Ms. Nyauncho, learned counsel for the State opposed the appeal. She submitted that the prosecution was able to prove that the appellant was the one who had robbed the complainant in the company of another man. She stated that although the robbery took place at night, there was light from electricity that enabled the complainant to see the Appellant. Finally, she submitted that the complainant filed a complaint with the police, the identification was proper and that the court properly assessed the demeanour of the Appellant in reaching its decision. In this regard, learned counsel for the State relied on the case of **Jackline Vidanya Baraza V Republic CR. No. 79 of 2011** where the court stated that the trial court normally has the advantage of hearing and seeing the witnesses and therefore the appellate court should give allowance for that. In the premises therefore, she urged the court to dismiss the appeal and uphold the conviction of the Appellant. In a rejoinder, Ms. Rashid submitted that the evidence ought to have been beyond reasonable doubt, and that the Appellant was indeed a victim of the robbery.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced by the prosecution witnesses and by the defence before the trial court, so as to arrive at its independent determination on whether or not to uphold the conviction of the appellant (**see Okeno -vs- Republic [1972] EA 32**). In so doing, the court is mindful of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot give an opinion as regarding the demeanour of the said witnesses (**see Soki –vs- Republic [2004] 2KLR 21**). In the present appeal, the issue for determination by the court is whether the prosecution established a case for this court to uphold the conviction of 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.

The facts of the case are as follows. The complainant, Mrs. Kezziah Njeri Ndegwa, was at the time of the robbery a business woman operating a Mpesa shop at Waithaka area in Nairobi. According to her testimony, on the 7<sup>th</sup> day of May 2010 at around 7.15pm while at her place of business, the appellant, who was allegedly dressed in a black woolen cap and a red t-shirt, approached her and asked her if he could withdraw the sum of Kshs.5000/= via Mpesa. Shortly after his arrival, a tall man came armed with a pistol and asked her whether she knew what he was holding. When she answered in the affirmative, the man ordered her to give him all the money and proceeded to warn her not to scream or else he would shoot her. The complainant testified that the appellant then tried climbing onto the counter to get to her shelf in order to access the money whereupon she told him to wait for her to open the door for him. The complainant stated that the Appellant then went with her to her bedroom and she showed him where the money, approximately Kshs.30,000/=, was in a white envelope. The Appellant then took the money together with both her phones, valued at Kshs.4000/= and left the shop with the taller man.

The complainant stated that she then left her shop and went to her husband, PW2, who was in a nearby bar and told him about the robbery. She testified that she told PW2 who was in the company of another man that she knew the short man whereupon PW2 told her not to reveal to anyone that she knew the short man because he would come back to harm her. PW2 and his friend then made a report to the local DO's office. The complainant testified that 5 days after the robbery, on 12<sup>th</sup> May 2010, at about 9.30 pm and in the company of PW2, the Appellant came to her shop in the company of another man and asked her whether they had closed for the day. She answered in the affirmative and the two promptly left. The complainant then told PW2 that it was the Appellant who had robbed her earlier. The complainant and PW2 then followed the Appellant into the nearby bar where they arrested him with the help of security guards at the bar and escorted him to Waithaka Police station. At the station, CPL Peter Kariuki, PW5,

was assigned to investigate the case. After concluding his investigations, he formed the view that indeed a case had been established for the Appellant to be charged with the offence that he was convicted.

When the Appellant was put on his defence, he denied committing the offence. He told the court that although he was present at the scene when the offence was committed, he had gone to the complainant's shop as a customer and not as a robber. He further denied having been in cahoots with the taller man when the incident occurred.

Upon re-evaluation of the facts of this case, in light of the submission made before this court on this appeal, it was clear to the court that the prosecution did not prove its case on the charge of robbery with violence to the required standard of proof beyond any reasonable doubt. From the evidence adduced by prosecution witnesses, it was evident that the prosecution relied on the sole identifying testimony of complainant. The identification was made in difficult circumstance. She testified that she was able to recognize the Appellant during the robbery. It is not clear from the evidence how she was able to recognize the Appellant other than what the complainant said in regard to the alleged physique of the Appellant. She said that the Appellant was short and was accompanied by a tall man who was the one who armed with a pistol. Other than the description, she did not give any other description that enabled her to be certain that it was the Appellant who was in company of the man that robbed her. She told the court that she did not disclose the description of the persons who robbed her after heeding to her husband's advice that she should not make such disclosure in case she was attacked again. This was the reason why the complainant did not give the description of her assailants in the first report that she made to the police other than state that she could recognize one of the persons who robbed her. Five days later, when the Appellant went to her shop, she pointed him out to her husband. The Appellant went to a nearby bar to relax. He was apprehended by members of the public and taken to the police station.

As stated earlier in this judgment, the prosecution relied on the sole identifying evidence of the complainant. The robbery incident took place at 7.30 p.m. It was at night. Although the complainant testified that there was electric light, it was not clear from her evidence the time the robbery took to enable her to be certain that she had identified the Appellant as one of her assailants. The complainant said she recognized the Appellant. She did not place any material before the court to enable the court, with certainty, to reach the conclusion that she had indeed recognized the Appellant as one of the robbers. She did not even know the name of the Appellant even though she alleged that the Appellant was her usual Mpesa customer. From the evidence that the Appellant adduced in his defence, it was apparent that he was a customer at the shop. He never made any attempt to escape from the area even after allegedly committing the offence. He returned to the shop five days after the incident. This was not an action of someone who had a guilty mind. This court was not persuaded that the sole evidence of identification by the complainant, made in circumstances which were obviously difficult, was such that the possibility of mistaken identity can be ruled out. The Appellant's assertion that he was a victim of mistaken identity is therefore within realm of possibility. Reasonable doubt was raised regarding whether the complainant actually identified the Appellant as one of her assailants. Her conduct after the robbery in failing to give the description of her assailants in the first report that she made to the police renders her testimony of identification doubtful.

The upshot of the above reasons is that the appeal lodged by the Appellant has merit and is hereby allowed. His conviction is quashed. The death sentence imposed upon him is set aside. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 14<sup>TH</sup> DAY OF JUNE 2017**

**L. KIMARU**

**JUDGE**