REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 157 OF 2016

PATRICK MWANGI MWAMBA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in ***Thika Chief Magistrate's Court Criminal Case No. 975 of 2013*** *by* ***A. Lorot S P M on 22/12/15)***

J U D G M E N T

1. **Patrick Mwangi Mwamba,** the Appellant, was charged with the offence of **Robbery with violence** contrary to **Section 296(2)** of the **Penal Code.**Particulars of the offence being that on the **27th**day of **February, 2013**at **Makuyu Railway Line** in **Murang'a County** within the **Republic of Kenya** while armed with offensive weapons namely knifes and rungus jointly robbed **Sylvia Wanjiru** ofcash of **KSh. 1000/=** and a **mobile phone** make Techno valued at **KSh. 2000/=** and ator immediately after the time of such robbery used **actual violence** on Sylvia Wanjiru.

2. Having denied the charge and after full trial, the Appellant was convicted and sentenced to**death.**

3. Aggrieved by the conviction and sentence, the Appellant now appeals on the grounds that:

- Circumstances did not favour positive identification.
- Prosecution witnesses' evidence was inconsistent, contradictory and unbelievable in material particulars.
- The Appellant's constitutional rights to a fair hearing in Article 50(2)(c)(j) of the constitution were violated.
- The burden of proof was shifted to the defence and the defence was not considered.

4. Facts of the case were that PW1 **Sylvia Wanjiru,** the complainant,was walking on footwhen a person who was behind her walked past her, stopped slightly ahead and faced her. He was armed with a knife which he raised above her head and told her not to scream. She panicked and screamed. Two people emerged from a farm next to the railway line. She threw the bag she had at the two people. The person who had a knife used it to stab her on the right side of her body near her hip. She identified the person as **Mwangi**. The other two (2) were familiar to her. She used to see the persons at the car wash yard. She had: KShs. 1,050/=, a book, lesso, wallet with documents, watch, make up kit and a cellphone (make Techno) in the bag. A passerby on a motorcycle escorted her to hospital. The matter was reported to the police who investigated and arrested the Appellant and two (2). Subsequently they were charged.

5. When put on his defence the Appellant opted to make an unsworn statement. He stated that he operates

a car wash.He testified that on the 2nd April, 2013 he woke up and worked as usual until 8 pm. On 3rd April, 2013 while asleep at his home, he heard the door being kicked. Officers stormed into his house and arrested him without explaining anything. He was taken to Makuyu Police Station and later charged. He denied having any knowledge concerning the robbery.

6. At the hearing of the Appeal, the Appellant canvassed it by way of written submissions. He stated that evidence of identification and recognition adduced by the Complainant circumstances of identification were not considered. The time taken to observe the assailant was not considered. He faulted the trial court for accepting evidence of recognition adduced by the Complainant. He concluded by stating that failure to disclose the prosecution's case at the outset was unconstitutional and in breach of his rights.

7. In response, the state through learned State Counsel **Ms. Ongake** opposed the appeal. She submitted orally that the identification was accurate, safe and strong enough to warrant a conviction. That the complainant gave positive detailed description of the Appellant and his name to the investigating officertherefore recognition was not in dispute. At the time of the act he used violence such that the complainant was admitted in the hospital for five (5) days.

8. Further, she submitted that ingredients of the offence were proved and the Appellant having been furnished with the prosecution witnesses' statements, he was not prejudiced. She called upon the court to dismiss the appeal and uphold the conviction and sentence meted out.

9. This being the first appellate court, I am duty-bound to re-evaluate and reconsider all evidence adduced at trial afresh and come up with my own conclusions as to what transpired. I must bear in mind the fact that I had no opportunity of seeing of hearing witnesses who testified. **(See Okeno –vs- Republic (1973) EA 32; Pandya VR 1957 EA 336).**

10. This being a case of robbery with violence the prosecution was obligated to prove that:

a. The perpetrator of the offence was armed with dangerous/offensive weapons of instruments; or

b. That the person was in company of one or more persons; or

c. Immediately before of immediately after the time of the robbery the offender wounded, beat, struck or used actual violence to any of the persons **(See Oluoch vs. Republic (1985) KLR 549).**

11. Evidence adduced asto who committed the offence was that of a single witness, the complainant. The court solely relied on her evidence. It was a case of visual identification. In the case of **Wamunga vs. Republic (1989) KLR 426** the Court stated

that:

> ***"It is trite law that where the only evidence against the defendant is evidence against the 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 the possibility of error before it can safely make it the basis of conviction."***

12. In the case of **Anjononi & Others –vs- Republic (1980) KLR 59** it was held that:

> ***"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case of like the present one where no stolen property is found in possession of the accused. Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in source form or another…"***

13. In this case the Complainant stated the offence was committed at 7.00 pm. The Complainant stated that it was the month of February when the sun sets late. It was not dark, there was light. She went on to state that she faced the person directly as there was no distance between them. The person had not covered his face. She recognized him to be Mwangi, a person she knew for a period of two (2) years. She used to see him at the car wash. The information she gave the police regarding the suspect enabled them to arrest the appellant.

14. Taking into consideration the sunrise and sunset worldwide calendar, per the sunset and day length time in Nairobi, Kenya and its environs on the 27/2/2013: sunrise was at 0641 hours and sunset at 1849 hours. This would support the complainant's evidence that it was not dark.

15. It is admitted by the Appellant that he operates a car wash business. Right at the onset the Complainant told the police that her attacker was Mwangi who operated a car wash business therefore her evidence was satisfactory and it was safe for the trial court to act upon it.

16. The Appellant was armed with a knife. A knife is not inherently an offensive item. But circumstances in which it was used made it offensive. This was specifically stated in particulars of the offense (See **Davis Odhiambo & Another V Republic (2005) eKLR**; **Section 89(4)** of the **Penal Code**).

17. Further evidence adduced proved the fact that these were other two (2) persons who took the Complainant's bag. Some of the items were recovered by the police. What was not convincing is how they were recovered. It was alleged that a good Samaritan took them to the police station. No statement was recorded by the individual and no evidence was adduced by the person.

18. At the point of the robbery the Complainant was stabbed with a knife. She was taken to the hospital for treatment. She was taken to theatre where a surgical incision was done. PW5 Dr. Emily Wangeci Njuno examined her and filed a P3 form issued to her. Per her findings she sustained that a penetrative abdominal injury. She had a scar as a result of the laparotomy done. She assessed the degree of injury sustained as grievous harm. This was proof beyond a reasonable doubt that the offender wounded.

19. The Appellant has alleged that his defense was not considered. Denying having committed the offence he gave evidence regarding what he did on the 2nd April, 2013 but he was silent on what he did on the date the offence was committed namely the 27th day of February, 2013. The learned trial Magistrate considered what he said in his defence and remarked that just as his co-accused he did not mention the date when the Complainant was robbed. Therefore the Appellant cannot authoritatively state that his defence was not considered.

20. The Appellant states that his constitutional rights as enshrined in Article 50(2)(j) of the Constitution were breached. The alluded to provision of the law provides thus:

> ***"(2) Every accused person has the right to a fair trial, which includes the right -***
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence"***

21. After the complainant gave evidence prior to being cross examined the Appellant notified the court that he could not proceed because he had been furnished with prosecution witness statements. This was on the 9th July, 2013. Consequently the case was adjourned to the 29th August, 2013. On the stated date the case was adjourned following the absence of the trial Magistrate. When the matter came up next on the 11th December, 2013 the Appellant sought to be supplied with relevant occurrence book entries. As a result the matter did not proceed. The matter came up next on the 9th January, 2014 when it proceeded. The Appellant cross examined the Complainant extensively. Although the learned trial Magistrate did not specifically record that statements had been supplied, the fact that the case proceeded whereby the Appellant and his co-accused cross examined the complainant was an implication that the statements were supplied. This view is buttressed by the fact that in questioning the complainant he sought to

establish if some allegations had been recorded in the statements with the police.

22. Having re-evaluated evidence adduced, I find that the appeal is devoid of merit. Accordingly, it is dismissed in its entirety.

23. It is so ordered.

Dated, Signed and **Delivered** at **Kiambu** this **15th** day of **June, 2017.**

L. N. MUTENDE

JUDGE