REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 134 OF 2014

BETWEEN

JAVAN IMBOI AMIRA ……APPELLANT

AND

REPUBLIC ……RESPONDENT

(Being an appeal against conviction and sentence of death for the offence of robbery with violence under Section 296 (2) of the Penal Code in Kakamega CMC CR. Case No.2022 of 2012 delivered on 4th September 2014 by Hon. J. Ong'ondo Ag P.M)

J U D G M E N T

Introduction

1. The Appellant herein was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars being that on the 26th day of September, 2012 at Bukhulungu location, Kakamega Municipality in Western Province robbed Patrick Langat Kiptanui of one mobile phone make NOKIA 1680, a wallet containing two school ID's and a National ID card, ATM card for Cooperative Bank, one Radio make SONITEC, assorted clothes and kshs.4300/=, Bank slips all valued at kshs.11,150/= and immediately before the time of such robbery wounded the said PATRICK LANGAT KIPTANUI.
2. The appellant appeared for plea on 28/09/2012 and denied committing the offence. Thereafter, the case proceeded to full hearing, the Prosecution called 5 witnesses. The complainant Patrick Langat Kiptanui testified as PW1 while Ronald Kipng'eno Bett and Charles Bett testified as PW2 and PW3 respectively. PW1, PW2 and PW3 were all students of Masinde Muliro University of Science and Technology at the material time. The Clinical officer, Duncan Miningwa who examined the complainant testified as PW4. The last witness PW5 was Number 837755 Police Constable Lilian Ochieng of Kakamega Police Station. She investigated the case against the complainant.
3. At the close of the prosecution case, the appellant was put on his defence. He gave sworn evidence but called no witnesses. After carefully considering all the evidence on record, the learned trial Magistrate was satisfied that the Prosecution had proved the offence of robbery with violence contrary to Section 296 (2) of the Penal Code against the appellant as charged. He convicted the Appellant and sentenced him to suffer death as by law prescribed.

The Appeal

4. Being dissatisfied with both conviction and sentence the appellant personally filed the Petition of

Appeal on 22/09/2014 premised on the following home-made grounds:-

1. THAT he did not plead guilty to the above appended charge;
2. THAT the trial Court misdirected itself both in law and fact by convicting him on the evidence of a single witness under difficult circumstances;
3. THAT the trial Court erred both in law and fact in convincing him on the evidence of recognition yet PW1 testified that the torch light from the motor bike was directed towards him and it beats logic as to how he would have seen the attackers with full lights glaring at him;
4. THAT the trial Court did not consider that PW1's testimony concerning the number of the attackers were conflicting (sic) and doubtful;
5. THAT the trial Court did not consider that PW1's testimony was wanting as he said that he was the only one whom he identified but could not even state the clothing or description of other alleged attackers if at all this crime actually did happen.
6. THAT the trial Court did not consider that a person who has been robbed would have gone to Police Station (sic) to make a report and not wait for the attacker who he was not even sure would show up if at all he did not have a hidden agenda;
7. THAT the trial Court did not consider his alibi defence which was cogent enough to exonerate him from any wrong doing.
8. THAT he was not found with any of the alleged stolen goods;
9. THAT the sentence meted out was very harsh unconstitutional and inhuman in the circumstances.
10. He prayed that his appeal be allowed, conviction quashed and sentence set aside to enable him go home.

Submissions during hearing of appeal

5. The Appellant was represented by Mr. J.I Khayumbi Advocate during the hearing of the appeal while the Respondent was represented by Mr. Omwenga. Counsel for the Appellant combined grounds 2,3,4 and 5 and argued them as one. It was submitted that the trial Court fell into error when it convicted the Appellant on the strength of a single identifying witness, for reasons that:-

a. The alleged offence took place at night;
b. The complainant was all alone at about 11.00p.m at the gate of Masinde Muliro University of Science and technology;
c. The lights of the motor bike were directed at the face of the complainant;
d. Once the motor bike stopped, four people jumped off it and once of them hit the complainant on the head;
e. The complainant did not say which source of light he used to identify his attackers.

6. The second ground of appeal was comprised of grounds 6,7 and 8 and on this ground Counsel submitted that nothing was recovered from the appellant at the time of his arrest at 12.00a.m., just one hour after the alleged robbery. Further that the appellant put up a very plausible alibi defence which did not place him at the scene of crime;
7. Grounds 9 and 10 of the appeal were abandoned.

The appeal was conceded on the following grounds:

a. The trial Court did not warn itself of the dangers of convicting on the evidence of a single identifying witness;
b. The evidence on record does not reveal whether there were any lights at the scene of the robbery for proper identification of the complainant's attackers;
c. It was near impossible for the complainant to identify his attacker if the headlamps of the motor bike were directed at his face;
d. Nothing was recovered from the appellant at the time of his arrest. Thus making the alleged identification of the appellant even more difficult.

Duty of this Court

8. As this is a first appeal, this Court is under a duty to reconsider and evaluate the whole of the evidence afresh with a view of reaching its own conclusions in the matter. This first appeal is like rehearing the case, and that is what the appellant expects of us, our only handicap being that we do not have the privilege of seeing and hearing the 5 witnesses who gave evidence during the trial. The duty of a first Appellate Court was the subject of discussion by the Court of Appeal in the case of **Collins Akoyo Okwemba & 2 others –vs- Republic [2014] e KLR**. In restating the duty of the first Appellate Court, its earlier decision in **Gabriel Kamau Njoroge –vs- Republic [1982 - 1988] 1 KAR 1134** at page 1136 where the Court said:-

"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 on the question of low, to demand a decision of the Court of the 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 be in mind that it has neither seen or heard the witnesses and to make due allowance in this respect. (See **Pandya –vs- R [1957] EA 336, Ruwalla –vs Republic [1957] EA 570.**

9. It is clear from the above that this Court, being the first Appellate Court cannot run away from the task of carefully weighing the Prosecution evidence vis –a- vis the defence of the Appellant. It is only after we do this that we can say with certainty whether the conclusions reached by the learned trial Court on both facts and law can be supported. This duty imposed upon the first Appellate Court is aimed at ruling out the possibility of miscarriage of justice during the trial. See **Ngui –vs- Republic [1984] KLR 729**. We shall now proceed to weigh the conflicting evidence.

The Prosecution's Case

10. The complainant Patrick Langat who testified as PW1 stated that at about 11.00p.m, he had just arrived in Kakamega from his home in Bomet. He headed straight for KITALE INN. He was alone but there were other people in the hotel. Then the Appellant also entered the hotel. PW1 did not know the Appellant before. The Appellant left soon thereafter.
11. After taking his supper, the complainant left the hotel on foot and headed for his home. Just as he was about to get to the gate of Masinde Muliro University of Science and Technology a motor cycle came by carrying 4 people. The motor cycle stopped by his side and he was asked whether he had seen any motor cycle. He told them he had not. PW1 stated that the headlamps of the motor bike were on. The 4 people on the motor bike then alighted and ran towards him and that the appellant was among those who ran towards him. The lights of the motor bike were facing the complainant. PW1 testified he saw the Appellant's face and one of the men hit the complainant on the head with the blunt side of a sword they were carrying and at the same time demanding all that he had. The appellant took the complainant's Nokia phone 1680 which was in the trouser right pocket, a wallet from the shirt breast pocket, 3 ID cards, 4000/= in cash, the National ID, M.MUST ID and University of Nairobi id. A further kshs.300/= was taken from his right side trouser pocket. After the swift action by the assailants, they boarded their motor bike and rode away.
12. The complainant said he followed the robbers and he went back to Kitale Inn to try and establish the appellant's name. The complainant spoke to the lady whom the appellant had allegedly spoken to when he entered Kitale Inn earlier and he was assured that the Appellant was a frequent visitor at the hotel. The complainant decided to wait and see if the Appellant could return to the hotel. Meantime, Ronald Bett, PW2 and Charles Bett, PW3 also came to the hotel for tea and the complainant narrated his ordeal to them. At about 12.30p.m the appellant walked into the hotel, was arrested and taken to Kakamega Police Station where he was received by Number 837755 Police Constable Lilian Ochieng, PW5. PW5 issued the complainant with a P3 form and later charged the Appellant.
13. During cross examination, PW5 stated that she did not conduct an Identification Parade because the complainant had already seen the Appellant. She also stated that she did not talk to any of the workers at Kitale Inn to establish whether indeed what the complainant had said was corroborated.
14. When the complainant was cross examined by Mr. Mango who appeared for the appellant during the trial, he stated that when the Appellant entered Kitale Inn the first time, he (appellant) did not

even sit down, though he spoke to one of the ladies at the hotel for about 5 to 10 minutes. The complainant also stated that there was no moonlight on the material night. He however stated that the night was bright. He also stated that the appellant was dressed in a fancy jeans trouser and a jumper. The complainant denied that the Appellant was arrested by a mob.

15. PW2 stated that when he found the complainant at Kitale Inn at about 11.00a.m, the complainant was bleeding from the hand and that the complainant told him one of his attackers was a person he had seen earlier on at the hotel and that he could identify him if he saw him again. Charles Bett, PW3 corroborated the testimony of PW2.
16. The complainant was treated by Patrick Mambiri Miningwa, a Clinical officer. The report prepared by Mr. Mambiri was presented to Court by Duncan Miningwa who testified as PW5. The report showed that the weapon used to inflict injury on the complainant was sharp. The complainant had a cut on the left hand 4th finger.

The Defence Case

17. The Appellant gave sworn testimony and denied the charge against him on the 26/09/2012. He informed the Court that he arrived in Kakamega town from Kisii at about 10.00p.m and went to Kitale Inn where he took his supper as he talked to Ruth, one of the workers at the Kitale Inn. He left the hotel briefly to answer a call of nature but on coming back, 5 young men confronted him, one of whom told him (Appellant) that he was a bad young man. He also said that the complainant had also taken a meal at Kitale Inn. With the help of some boda boda people, the 5 young men arrested the appellant and took him to Kakamega Police Station.
18. During cross examination, the Appellant stated that he saw the complainant at Kitale Inn first when he (complainant) was eating, being the time when the Appellant was talking to the girl Ruth at Kitale Inn.

Issues for Determination

19. From the evidence on record, there is no doubt that the complainant was robbed of the items set out in the charge sheet as he walked near the gate to MMUST on the material night. It is also clear from the evidence that the complainants attackers were about 4 in number and that before he was robbed he was hit on the head with the blunt side of a sword. After the robbery he was cut on the left hand with the same word that had been used to hit him on the head. The only tricky issue is whether as alleged by the complainant, it is the appellant along with others who robbed the complainant. We note that no recoveries were made from the appellant upon arrest within a time interval of one hour. If the question of identification is resolved in favour of the complainant then there is no way the Appellant can get away from the allegations.
20. The law is that where the Prosecution case rests on the identification of the Appellant, the Court hearing the case must exercise great caution before convicting an accused person on such evidence, lest the conviction results in miscarriage of justice. In a case where that identification is by a single identifying witness, the trial Court must address itself to the inherent dangers associated with such identification as was the position in this case. In this regard therefore, we must ourselves be satisfied that the complainant had sufficient time to observe the Appellant and that the conditions for doing so were favourable for an error-free identification. In the case of **Nzaro –vs- Republic [1991] 2KAR 212**, the Court of Appeal said the following on the issue of identification:

"A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error was essential."

In **Odhiambo -vs- Republic [2002] KLR 241**, the Court of Appeal further stated that:-

"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."

21. In the instant case, the incident took place between 11.00p.m and 12.00 midnight. This is how the attack in part of his evidence in chief:-

"After my supper, I went to college/school on foot. While on my way almost at the gate, a motor cycle came with 4 persons stopped by my side. They asked if I had seen any motor bike headlights were on. They alighted and came towards me running. I could not identify the voice but I saw IMBOI he was among the three that approached me. I had seen him earlier, the motor cycle lights were on. I was some distance ahead of the motor cycle. The lights were facing me. I saw Javan Imboi's face."

22. Our considered view of the above evidence is that it is not clear where the complainant was vis – a- vis the attackers. If it is true that the motor cycle stopped by the complainant's side, how come the assailants could still run to where he was? Further, if it is also true that the lights of the motor cycle were facing him, how could he have identified the attackers under such circumstances?
23. We note that the complainant stated clearly at the commencement of his testimony that he saw the appellant for the very first time when the appellant entered the Kitale Inn for a very brief moment as the complainant took his supper. In the complainant's own words, "Javan Imboi entered the hotel. I did not know him before. He came and asked for some lady worker in the hotel and then left."
24. In our view, the length of time the complainant had the appellant under observation in a different location from where the robbery took place cannot be said to have been sufficient time for a proper and error-free identification of the Appellant.
25. To make the identification even more difficult, the complainant apart from saying during cross examination that "it was bright however, it was not dark" did not describe to the Court what light there was to make the place of the robbery not so dark when in an earlier statement he had stated that "there was no moonlight." We also note from the evidence on record that the complainant's appreciation of his environment just before the attack was zero because he admitted that "I was googling as I walked. The motor cycle was on my side."
26. In the circumstances of this case and although the complainant stated that he identified the appellant as one of his assailants, there was need for other evidence, either direct or circumstantial to corroborate the complainant's story. If for example, the appellant had been found in possession of any of the items stolen from the Appellant during the robbery that would have fixed him to the robbery. In the absence of such evidence and in the face of what was clearly very low standard of investigations, we find and hold that the appellant was not properly identified as one of the robbers who attacked the complainant on the night of the robbery. We also note that the charge sheet should have indicated that the appellant committed the offence with others not before the Court. It is our view that these flaws in the evidence should not have escaped the eye of the learned trial Magistrate.
27. From the circumstances of this case we have a very strong suspicion that the appellant was involved in the robbery. However, suspicion has no force of law. It is like a skeleton without flesh and breath. Any suspicion must be supported by strong, cogent and independent evidence either directly or indirectly linking an accused person to the crime. In this case, the Prosecution failed to clothe our suspicion with the requisite evidence particularly evidence from PW1 of how the whole episode took place. For that reason, the appellant must get the benefit of the doubt.

<u>Conclusion</u>

28. For the reasons given above, we find that the conviction of the appellant was not safe. Accordingly we allow the appeal, quash the conviction and set aside the sentence. Unless he is otherwise lawfully held, the appellant shall be set free forthwith.
29. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega

this 3rd day of March 2016.

RUTH N. SITATI **NJOKI MWANGI**

J U D G E **JU D G E**

In the presence of:

Mr. Khayumbi for Appellant

Mr. Nge'etich for Respondent

Mr. Anunda - Court Assistant