REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 36 OF 2014

JULIUS MUCHIRA NJOKA……..……...…APPELLANT

-VERSUS-

REPUBLIC…….....…….…….....…….....RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (T. M. Mwangi) at Gichugu, Criminal Case

No. 383 of 2013 dated 11th July, 2014)

JUDGMENT

1. **JULIUS MUCHIRA NJOKA,** the appellant herein was charged with Robbery with Violence contrary to ***Section 296 (2)*** of the **Penal Code** in Gichugu Principal Magistrate's Court Criminal Case No. 383 of 2013. The particulars of the offence were that on 23rd July, 2013 at Kagonjo Village Gatu sub location within Kirinyaga County jointly with others not before court being armed with dangerous weapons namely pangas robbed JOSPHAT GIKUNJU KABUNJI of a mobile phone make TECHNO S/NO. 867489013342515 valued at Kshs.2500/= and immediately before or immediately after such time of robbery used actual violence to the said JOSPHAT GIKUNJI KABUNJI. The appellant denied the charge and the case went on full trial upon which he was found guilty and convicted of the offence.
2. The evidence adduced at the trial court in brief indicate that on 23rd day of July, 2013 at around 7.30 p.m., Josphat Gakunji Kabongi the complainant and P.W.1 in the case were walking home from Kianyaga Town in the company of his friends Johnson Muu Njuki (P.W.2) and Alex Mureithi (P.W.3) when they were confronted at a bridge crossing Thiba river by two thugs who ordered them to stop. P.W. 2 and P.W.3 told the trial court that they took off but P.W.1 was unlucky as he was caught and assaulted with a panga and in the process robbed of his mobile Techno phone worth Kshs.2500/=. He was left injured at the river. He told the trial court that he was able to identify one of the attackers as the appellant herein and that what helped him to identify him was the moonlight and light emanating from an electric bulb from a nearby water supply installation.
3. The evidence of P.W.2 and P.W.3 corroborated the evidence of P.W. 1. They both told the trial court that after they had managed to flee from the thugs, they realized that their friend P.W.1 had been left behind and with the assistance of villagers, they went back to the scene of crime and found the complainant by the river injured, bleeding from the head and legs. They took him to the Police where they reported the incident and took him to Kianyaga Sub District Hospital where he was treated. The following day the two witnesses told the court that they went back to the scene of the attack where they recovered one brown sandal and a red cap. P.W. 1 identified the cap and the shoe as belonging to the appellant. They took the exhibits to the Police Station and went

looking for the appellant whom they later arrested and took to the Police Station and later recorded their statements.

4. The 3 witnesses (P.W. 1, P.W.2 and P.W.3), were all positive that they identified the appellant from the light emanating from nearby water supply and moonlight. P.W.3 went further and told the trial court that he heard the voice of the complainant and recognized him. P.W.6, Dr. Grace Murugi Kariuki, a doctor called to testify in regard to injuries suffered by the complainant confirmed that as per the P3 which she produced as exhibit 4 on behalf of her medical colleague, confirmed that the complainant had suffered injuries. She told the trial court that the complainant had 2 deep cut wounds on the head and front side of both legs.
5. The investigation officer, one P.C. Mathew Mugambi (P.W.4) narrated to the trial court the action they took after a report was made at the Police Station. He however, conceded that the initial report as recorded at the Occurrence Book indicated that the robbers were not identified. The officer who booked the report one P.C. Kofa Galgalo (P.W.5) told the trial court that the complainant was brought in unconscious and that he recorded the incident and sent the complainant and people who accompanied him to hospital for treatment. The sandal and the cap recovered were produced as exhibits 2 and 3 respectively by the investigation officer.
6. In his unsworn defence the appellant denied the offence and told the trial court he was in a business dealing with buying and selling of macadamia nuts. He further told the trial court that he was in his house the whole night of 23rd July, 2013 and was surprised when he was arrested on 24th July, 2013. He claimed that he was a victim of mistaken identity and that the complainant was not a stranger to him having met previously on several occasions.
7. The trial court upon evaluation of evidence found that P.W.2 and P.W.3 could not have identified the appellant given the circumstances obtaining at the time. In his judgment the learned trial magistrate concluded that because the attack was so sudden and the 2 witnesses immediately took off, it was not possible for them to identify the complainant. He was however, satisfied that the complainant was able to identify the appellant as he was known to him and found that based on that and the fact that the other ingredients of the offence had been established by the prosecution, he found the appellant guilty, convicted him and sentenced him to death as provided by the law.
8. The appellant was aggrieved by the conviction and preferred this appeal citing the following grounds namely:-

i. ***That the learned trial magistrate erred by relying on shoddy investigation.***
ii. ***That the learned trial magistrate erred in law and fact by failing to consider that he was not properly identified given that the offence took place at night.***
iii. ***That the learned magistrate erred in law and fact by failing to consider that identification parade was not done.***
iv. ***That the learned magistrate erred in law and fact by failing to consider that the stolen phone was not recovered and that the receipt produced in court could have belonged to another phone.***
v. ***That the learned magistrate erred in law and fact by failing to consider contradictions in the case.***
vi. ***That the learned magistrate erred in law and fact by relying on evidence of a single witness who was unconscious and could not comprehend events.***
vii. ***That the learned magistrate erred in law and fact by not considering the fact that the appellant was not mentioned in the initial report to the police.***
viii. ***That the learned magistrate erred in law and fact by dismissing his defence.***

9. In his written submissions, the appellant pointed out that there was inconsistencies in the prosecution case citing the evidence of the investigating officer (P.W.5) who stated that the initial report made by the witnesses did not indicate that the assailants were known or had been recognized while the evidence of P.W. 1 and P.W.2 indicated that he had been recognized. He contended had he been positively identified and recognized during the robbery his name could have been mentioned when the first report was booked on the Occurrence Book. He also faulted the prosecution for failing to conduct an identification parade which in his view could have helped in clarifying the issue of identification.
10. The appellant also contended that in view of the fact that the stolen phone was not traced to him there was nothing to connect him with the offence and that the learned trial magistrate misdirected

himself by ignoring his defence. It was also contended that the prosecution case at the trial court did not meet the minimum threshold of proof beyond any reasonable doubt.

11. The respondent through the office of the Director of Public Prosecutions opposed this appeal. Mr. Sitati learned State Counsel for the Respondent, orally submitted that the prosecution case was overwhelming and well corroborated. He denied the appellant's assertion that the prosecution case was not well investigated. His contention was that the charge against the accused was as a result of investigation and that all the ingredients of the offence were well established.
12. On identification, the Respondent submitted that the appellant was positively identified. Mr. Sitati added that the identification of the appellant was done in close range with the assistance of moonlight and electric light from a nearby water supply station. It was further submitted that the complainant knew the appellant well prior to the incident and that he engaged him by calling him by his name Muchira on the fateful night. In his view, identification was beyond reasonable doubt. He submitted that there was no need of identification parade as the appellant was known to the complainant and the other 2 prosecution witnesses (P.W. 2 and P.W.3).
13. The respondent denied that the prosecution case was marred by contradictions and inconsistencies pointing out that the evidence of P.W.1 was consistent with the evidence of P.W.2 and P.W.3 both of who were with the complainant during the robbery incident. Mr. Sitati opined that the investigating officer (P.W.5) corroborated the evidence of the witnesses and there was no evidence of any inconsistency at the trial.
14. On the question of reliance of evidence of a single witness, the State submitted that the trial court duly cautioned itself in relying on the evidence of the complainant (P.W.1) to find that identification of the appellant was positive and free from possible error. He supported the learned trial magistrate in finding that the law does not prescribe a number of people to identify an accused person in cases of this nature.
15. On the ground that the appellant's defence was not considered, the respondent was of the view that the alibi raised by the appellant was found to be false as there was no evidence to establish the same and that it was possible for the appellant to have sneaked out of his house, commit the offence and retreat back to his house. Mr. Sitati submitted that both the conviction and the sentence meted out against the appellant was safe as all the ingredients of the offence were proved to the required standard in law.
16. I have considered this appeal, the grounds upon which it is made and the written submissions. I have also considered the response made by the respondent. The work of an appellate court in a first appeal is to re-evaluate the evidence tendered in trial and arrive at or draw it s own conclusions or inference noting that unlike the trial court, it is unable to tell the demeanor of witnesses as they testified unless of course such demeanor is observed and recorded by the trial court.
17. On identification parade, I agree with the respondent that where the complainant knows a suspect or where the suspect is arrested in his presence, there would be no need to carry out an identification parade as the purpose for such parade would be spent. It would be prejudicial and unfair to an accused person if a complainant who has prior knowledge of him is asked to go and pick him out in an identification parade. The appellant in this case should not therefore feel prejudiced in any way because no identification parade was done in his case.
18. I am also not convinced by the appellant's contention that the trial court never considered his defence or that there was an error on his part to dismiss the said defence which was unsworn in any event. The same normally carry less weight as compared with a sworn statement. The appellant cannot therefore fault the trial court for putting less weight on his defence.
19. The question of identification in my view is critical in this appeal as this appeal rests on it. The appellant has contended that he was not properly identified because if he had been identified his name could have been mentioned in the initial report made at the Police Station. It is true that the robbery incident took place at around 7.30 p.m. or thereabout by which time it is generally safely assumed that darkness will have set in. The complainant (P.W.1), Johnson Muu Njuki (P.W.2) and Alex Mureithi (P.W.3) all told the trial court that there was moonlight and some light from a bulb in a nearby water supply station. The trial court found that the events must have unfolded so fast when P.W.1 and his two companions were ordered to stop at the bridge and correctly concluded that their first reaction was to flee for their dear lives. Under such circumstances the court found that P.W. 2 and P.W.3 probably had no time to look back and identify the appellant.

If the said conditions were unfavourable for positive identification by P.W.2 and P.W.3, I find it suspect and inconsistent for the trial court to have found after discounting the evidence of P.W.2 and P.W.3, that P.W. 1 could in the same circumstances properly identify the appellant. I have noted the caution with which the trial court treated the evidence of P.W.1 in so far as identification is concerned which I find correct. I am however, unable to comprehend the reasoning behind the discounting of evidence of P.W.2 and P.W.3 and at the same time giving weight to the evidence of P.W.1 by the trial court. The trial court found that if P.W.2 and P.W.3 had positively identified the appellant at the scene, they would have stated so when they first reported the incident at the Police Station. This finding in my view upon re-evaluating the evidence tendered at trial court in totality well founded. P.W.4, the investigating officer in the case told the trial court that from the Occurrence Book and the investigation diary detailing initial report, indicated that the complainant did not manage to identify any of the suspects in the robbery incident. P.W.5 the officer who received the report and booked it in the Occurrence Book was not helpful to the prosecution in my considered view because he told the trial court that the complainant was unconscious at the time the report was made when he was brought to the Station by his friends. It is important to note that the evidence of P.W.1, P.W.2 and P.W.3 to the trial court never made any indication that the complainant became unconscious after the attack. If anything their evidence was the opposite. P.W.2 and P.W. 3 told the trial court that they found the complainant at the scene of the attack injured and he explained to them that his phone had been stolen and how he had been assaulted. P.W. 1 clearly told the court what happened during the incident and after the incident. It is therefore unlikely that the complainant was unconscious at the time when he gave his friends a narrative of what happened after they ran away for their dear lives. I also find that the complainant was conscious at the time as he told the trial court how he went to the Police in the company of P.W.2, and P.W.3 and other villagers and later to Kianyaga Sub District Hospital. That kind of evidence is inconsistent with someone who had lost consciousness and I find that the learned trial magistrate with respect fell into error when he concluded that the complainant (P.W.1) was unstable in his mind when the report was first made at the Police station. In my view there was no evidence to support the proposition except the evidence of P.W.5 which I have found to be inconsistent with the evidence of P.W.1, P.W.2 and P.W.3.

20. It is also my considered view that the item recovered from the scene of crime – indicated to be a brown sandal and a red cap were not connected to the appellant in a satisfactory way. The prosecution needed to have established if the shoe or the cap fitted the appellant and demonstrate clearly that the appellant was either seen wearing those items either during the day prior to the attack or during the robbery itself. The probative value of the said evidence was lost by the omission by the prosecution during trial to connect the items recovered at the scene of crime to the accused which could have helped in dispelling the appellant's contention that his identification was not positive. It is also important to note that a court should exercise great caution when relying on evidence of a single witness. The surrounding circumstances should clearly point to the fact that there was no possibility of error. In the case of **Abdalla Bin Wando & Anor -Vs- Reginam [1953] 20 EACA 166** the Court of Appeal for East Africa held as follows:

> ***"Although subject to certain expectations a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such respecting the identification especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances other evidence, circumstantial or direct pointing to the guilt is needed.***

See also **R. -VS- Turnbul (1973) 3 ALL ER 549**.

21. In this case, the trial court was told that a light from a bulb said to have been approximately 20 metres away plus a moonlight helped the eye witness and in particular the complainant to identify the appellant in this appeal. The brightness of the moon or the intensity of the light from the given distance was not given. It was uncertain if the moon was full, half, quarter or under clear sky. I am unable under such circumstances to clearly say that the learned trial magistrate was correct to make the conclusion he did that there was conducive environment for positive identification

especially given the fact that identification even by recognition at night can be mistaken and can lead to miscarriage of justice if not treated with care.

22. It is on the basis of the above that I find that conviction of the appellant given the circumstances was not safe. The eye witnesses and in particular P.W.1, P.W.2 and P.W.3 were not positive on the identification of the appellant because if they were they could have readily told the Police when they reported the incident about an hour after the incident. The fact that they told the Police initially that they were unable to identify the attackers and only changed their minds later that they had identified the appellant, should have created doubts in the mind of the trial court and the benefit of such doubts are normally given to the accused person. The trial court in my view fell into error of judgment when he concluded that the complainant was not in the right frame of mind to identify his attackers when he reported the incident. The complainant was, though injured, conscious and aware of surroundings when the report was made at the Police Station. The erroneous assumption by the trial court in my view led to the wrong conclusion that the prosecution had proved its case beyond reasonable doubts.

In the light of the above finding this Court finds merit in this appeal. It is allowed. The conviction is quashed and the sentence is reversed. The appellant shall be set free forthwith unless lawfully held. It is so ordered.

Dated and delivered at Kerugoya this 5th day of May, 2016.

R. K. LIMO

JUDGE

5.5.2016

Before Hon. Justice R. Limo J.,

State counsel Sitati

Court Assistant Willy Mwangi

Appellant present

Interpretation: English-Kiswahili

Sitati for State present.

Julius Muchira appellant in person present

COURT: Judgment signed, dated and delivered in the open court in the presence of Sitati for State and Julius Muchira Njoka, the appellant in person.

R. K. LIMO

JUDGE

5.5.2016