REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 35 OF 2015

PETER MAINA MURIITHI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (S. Jalang'o)

at Baricho, Criminal Case No. 1650 of 2014 dated 7th August, 2015)

JUDGMENT

1. **PETER MAINA MURIITHI,** the appellant herein was charged at **Baricho Principal Magistrate's Court vide P.M.C.CR. No. 1650/14** with the offence of Robbery with Violence contrary to ***Section 296(2)*** of the Penal Code. The particulars of the charge were that on the 1st November, 2014 at Kiaroe Village in Kirinyaga West District within Kirinyaga County jointly with others not before court robbed PAUL NDERITU KABAI, the complainant, of Kshs.9,200/= and a mobile phone telephone worth Kshs.2,000/= all valued at Kshs.11,200/= and immediately before or immediately after the said robbery struck the said Paul Nderitu Kaboi. The appellant denied the offence and the matter went for full trial. After the trial, Hon. S. Jalango, Senior Resident magistrate found him guilty of the offence and sentenced him to death in accordance with the law.

2. The brief summary of the case at the trial court as per the proceedings showed that P.W.1 Paul Nderitu Kaboi, the complainant in the case, was on 1st November, 2014 walking home on foot with Kshs.9,200/= from the proceeds of pork which he had earlier sold. The witness told the trial court that it was around 10 p.m. at night while he was on his way home when suddenly he was accosted by the appellant and 2 other people who were hiding in a nearby bush. He told the trial court that he had a torch light on his mobile phone which helped him to identify the appellant before he hit him with a metal bar demanding money and the mobile phone he had. They robbed him of Kshs.9,200/= which is all he had and a mobile phone. He told the trial court that he threw sand on the eyes of the assailants in order to escape which he did. It was his evidence that he screamed for help and was later taken to Karatina Hospital for treatment and later reported the incident at Ndiriti Police post.

3. The evidence of P.W.1 was corroborated to some extent by P.W.2 **JULIUS MUCHOKI WACHIRA** who told the trial court that he was with the complainant walking home and that they parted ways on their way home at some point as each headed to his respective home. Later at around 10 p.m. he was informed that the complainant had been attacked on the way by robbers. He told the trial court that he rushed to the scene and found the complainant bleeding and they took him to Hospital with his brother. He identified a

yellow blood stained jacket which he said was worn by the complainant at the material time. He did not see the robbers. Cpl Benard Alumasa P.W. 3, told the trial court that a report concerning the robbery was made at the AP Camp on 3rd November, 2014 and that the complainant reported that he knew one of the culprits. He told the court that they started looking for the appellant whom he later arrested at a local bar on 9th November, 2014. The evidence was supported by P.W.4, I.P. Paul Sigilai, the investigating officer in the case. He confirmed that a report concerning the robbery was booked at Ndiriti Police Post where he was attached at the time. He told the trial court that he went to the scene of the crime and recovered a blood stained jacket belonging to the complainant and produced it as Prosecution Exhibit 1. He confirmed that the appellant was arrested by P.W.3 and brought to the Police Post and later taken to court to be charged with the offence. P.W.5 Dr. Stephen Wangombe testified too and produced a P3 as Prosecution Exhibit 3 and confirmed to the trial court that the complainant had suffered injuries which he classified as "harm". He told the trial court that he examined the complainant on 10th November, 2014 and approximated the age of injuries prior to examination to be 12 hours and indicated that the probable type of weapon used was blunt.

4. In his sworn evidence in defence, the appellant raised alibi and told the trial court that he was away in Embu between 12th October, 2014 and 9th November, 2014 where he worked in a construction site. He further testified that on 10th November, 2014 while drinking in a local bar, he bought some drinks to a woman which led to an altercation with a man in the bar who was later joined by 2 others who subdued him and arrested him after which they charged him with the offence of robbery with violence. He denied any involvement in the robbery and denied knowledge of the complainant.

5. The trial court upon evaluating the evidence presented before it found the appellant guilty of the offence as he found that the appellant had been positively identified. In convicting the appellant the learned trial magistrate stated inter alia;

> ***"I find that the complainant has been able to place the accused at the scene of crime. He identified and recognized the accused using the torch light from his mobile phone. The fact that the complainant knew the accused made identification to be very easy."***

The trial court then sentenced him to death as provided by the law.

6. The appellant felt aggrieved and filed this appeal citing the following grounds namely:

> *i.* ***That the trial magistrate erred in law and fact by not considering that the offence took place at night and the lighting was not sufficient enough to identify or recognize the appellant.***
>
> *ii.* ***That the trial magistrate erred in law and fact by not considering that the complainant testified that he was attacked from behind and his phone taken away "yet the light said to have been used was from the same phone which was not practical.***
>
> *iii.* ***That the trial magistrate erred in law and fact by not considering that the first report made to the police station by the complainant was that he was attacked by unknown people and never mentioned the appellant's name.***
>
> *iv.* ***That the trial magistrate erred by not considering the fact that the initial report by the complainant did not include the fact that he had been robbed of money.***
>
> *v.* ***That the trial magistrate erred by not considering the contradictions in the evidence of P.W.1 and P.W.5.***
>
> *vi.* ***That the trial magistrate erred in law and fact by not considering that the immediate witnesses were not called to testify.***
>
> *vii.* ***That the trial magistrate erred by not considering the appellants defence which was***

unshaken by the prosecution.

7. At the hearing of this appeal, the appellant introduced what he described as "amended grounds of appeal", but the same apart from being improper and strange in law violated the provisions of Section 350 (2) of the Criminal Procedure Code as the appellant had not sought leave from this Court to rely on additional or other grounds other than those set out in his petition dated 10th August, 2015. The said "amended grounds of appeal" are unsigned and will not be considered by this Court in this appeal. I will therefore delve on the original petition itself which was supported by the appellant's written submissions.

8. In his written submissions, the appellant who appeared in person contended that the light used in identification was not sufficient and that the trial court's conviction was solely based on identification. In his view, the learned trial magistrate erred in his judgment because in his contention the light emanating from a mobile phone cannot be sufficient enough for positive identification at night. He pointed out that the model of the phone used was not given to consider if the light was sufficient and this he submitted made his conviction unsafe.

9. The Respondent through the State opposed the appeal and on the question of identification, Mr. Sitati learned counsel for State responded that the complainant knew the appellant because they were neighbours and that identification was positive because of the mobile phone torch light and that the close proximity reduced any error in identification. In his view the appellant was positively identified and recognized.

10. This Court has considered all the grounds in this petition and my considered view is that the determination of this ground will dispose of this appeal. This is because the conviction of the appellant by the subordinate court was solely based on identification as highlighted above.

11. I have carefully analysed and re-evaluated the evidence at the trial court as required of me as an appellate court in order to come to my own conclusion on whether or not identification of the appellant was positive enough to find a conviction. (See **OKENO –VS- R (1972) E.A. 32.**

12. It is important in criminal cases to note that an accused person should not be convicted solely on evidence of identification which could be mistaken. The court must satisfy itself, when relying upon such evidence, that the identification is free from any possibility of error. (See the case of **SAID AWADHI MUBARAK -VS- REPUBLIC [2014]eKLR)**. The trial court must warn itself before finding a conviction especially where such evidence is of a single witness and in cases where the defence alleges that he was mistaken. This is the position taken in the case of **NZAVO –VS- REPUBLIC (1970) KLR 70.**

13. Now turning to this appeal, the complainant told the trial court it was around 10 p.m. at night when, as he was heading home, noticed the appellant and 2 other people hiding in a nearby bush. He told the trial court that he identified the appellant as he had a mobile phone which he used as a torch. He stated that he asked the appellant what the problem was and he was hit and robbed of cash and the said mobile phone. The trial court was convinced beyond reasonable doubt that identification of the appellant was positive because he was known by the complainant. With due respect to the learned trial magistrate, I find that identification of the appellant was anything but free from error in the following aspects:-

Firstly as submitted by the appellant, the source of the light was not conclusive in terms of the intensity of the light emanating from the said phone. The make or type of the phone was not described. This Court is of course aware and takes judicial notice of those popular sizeable phones in Kenya that are popularly known as "mulika mwizi" which are renowned for their prowess in emitting sufficient light hence its name but there was no evidence adduced at the trial that the mobile phone used by the complainant was such type of phone.

Secondly the complainant told the trial court that the assailants including the appellant were hiding in a nearby bush and if that was the case how possible was complainant able to identify the appellant at that hour of the night and hiding with some source of light whose intensity was uncertain? It is true as the

respondent submitted that the complainant told the trial court that the appellant was known to him as he was a neighbour. But in his defence, the appellant denied the fact. It is also important as I have stated above that even in cases of recognition the law still demands that care be taken in such circumstances. In the case of **R –VS-TURNBULL (1976) 3 ALL ER 549** a relevant observation to this case was made as follows:

> ***"Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

14. The complainant did not also tell the trial court whether he directed the beam of the light directly towards the face of the appellant in order to positively identify him. In the case of **MICHAEL OCHIENG ODONGO -VS- REPUBLIC** (CR. A. NO. 208 OF 2006 – Court of Appeal at Kisumu), the Court of Appeal held as follows:

> ***"It has not been narrated that the appellant was seen in the direct beams of the torch. As there is no evidence of the size of the torch nor the intensity of the light, it cannot under the circumstances prevailing then, be said that the appellant had been positively identified as a member of a five man gang."***

This Court finds that the circumstances in that appeal is quite similar to this present appeal. The identification of the appellant was not free from error and could have been mistaken given the circumstances obtaining.

15. It is also justified for the appellant to feel aggrieved by the decision of the trial court because of not considering his sworn defence at all in its judgment. This with respect to the learned magistrate was erroneous. A defence of an accused person whatever the weight of such defence must be considered for the interest of justice and also as a matter of ensuring that justice is seen to be done. In his sworn defence, the appellant had told the court that he was not known to the complainant and the trial court needed to have considered this aspect in evaluating the evidence of the prosecution especially in regard to identification and recognition. I find that there was an error of judgment by the trial court by omitting the same and had it considered it perhaps its decision would have been different.

16. I also find that there was no explanation given by the prosecution why the complainant took time to make a report at the Police post about the robbery. I find that had he done so and having stated that he knew one of the gangs the Police would have moved swiftly and perhaps arrested the culprit immediately. By reporting late, 2 days after the incident crucial time was lost and this compromised the quality of the investigation and its outcome.

In the end I find after evaluation of the evidence relied upon by the trial court in convicting the appellant, that the conviction was not safe. The evidence adduced by the prosecution did not prove the case against the appellant beyond reasonable doubt. The evidence, on identification was not sufficiently positive to sustain a conviction in such a case. This appeal is merited. I allow the same, quash the conviction and set aside the sentence imposed. I direct that the appellant be set at liberty forthwith unless otherwise 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-Kikuyu

Sitati for State present

Peter Maina Muriithi appellant in person present.

COURT: Judgment signed, dated and delivered in the open court in the presence of the appellant appearing in person and Mr. Sitati for the Respondent.

R. K. LIMO

JUDGE