REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CRIMINAL APPEAL NO. 13 OF 2014

SAMWEL OMAIYO KASIMIRI……..…APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

(Being appeal from the conviction and sentence in Ogembo CMCR NO. 860 of 2013) (Hon. D.O. Ogola Ag. CM)

JUDGMENT

1. The appellant, **Samuel Omaiyio Kisimiri**, and two others appeared before the Chief Magistrate at Ogembo charged with robbery with violence, contrary to S.296(2) of the penal code in that; on the 16th June 2013 at Ritembu Sub-location, Kenyenya District Kisii County, jointly with others not before Court, being armed with dangerous weapon namely iron-bars, pangas and rungus robbed Milka Kemunto Mose of her cash Ksh 10,055/=, T.V set Panasonic valued at Ksh 6,000/=, a pressure lamp valued at ksh 1,500/= and twenty six (26) hens valued at Ksh. 13,000/= all valued at Ksh 20,500/= and immediately after the time of such robbery threatened to use actual violence to the said Milka Kemunto Mose.

2. There was an alternative count of handling stolen goods contrary to S.322 (2) of the penal code. This related not to the appellant but his two co-accused. One of the two co-accused was discharged under S.87 (a) of the Criminal Procedure Code after her case was withdrawn by the prosecution.

After a full trial, the appellant and the remaining co-accused were convicted on the main count and sentenced to death.

3. Being dissatisfied with the conviction and sentence, the appellant preferred this appeal on the basis of the grounds contained in his petition of appeal dated 18th February 2014, and supplementary grounds of appeal dated 4th May 2015, filed herein by the firm of **Sonye Ondari & Co. Advocates**.

At the hearing of the appeal, learned counsel, **Mr. Ondari**, appeared for the Appellant while the learned prosecution counsel, **Mr. Otieno**, appeared for the State/Respondent.

4. Through the learned counsel, the appellant concentrated his arguments on conviction and submitted that the ingredients of the charge were not established as there was no assault. That, the complainant (PW 1) was at the time of the offence surprised and shocked as to properly identify the appellant. Besides, the complainant stated that the offender had covered his head. That, if indeed the complainant knew the appellant very well, then why did it take long for him to be arrested and why was his name not given to the police?

5. The appellant went on to submit that he was a "boda boda" (m/cycle taxi) operator in the area and was arrested for a different offence only to be implicated by the complainant with the present offence. That, the complainant was unbelievable by stating that the robbers stood at the window for two hours yet they had gone there for a robbery. That, the complainant did not state why the robbers stood at the window for that long and indicated that she saw the appellant as she walked out with a certain sickly lady who was not called to testify and corroborate her (complainant's) evidence.

6. The appellant contended that the complainant was the key witness of identification but her evidence showed that she was called to the police station only to identify her stolen television which was never found in his (appellant's) possession and this explained why he was not charged with handling stolen property.

The appellant also contended that the prosecution embarked on a fishing expedition in order to implicate him.

7. It was further submitted by the appellant that there was no certainty as to when and where the complainant was able to identify him yet she stated that the robbers ordered her to switch off the lights as they gained entry into her house. That, the complainant, referred to torch light without indicating the intensity thereof.

That, he was arrested only after being implicated by the co-accused who alleged that he (appellant) gave him a T.V set.

The appellant submitted that the trial court was under a duty to properly ascertain the prosecution evidence of identification and/or recognition but implied that this was not done.

8. The appellant contended that he was not properly identified and could not have been identified if his head was covered. He relied on the case of **Abdallah Bin Wendo & Another Vs. Republic (1953) 20 EACA 166** in support of his case and further contended that the alleged voice identification was not proper. He also contended that favourable conditions for identification did not exist and urged this court to find that his conviction was not proper and set him free.

9. The respondent through the learned prosecution counsel submitted that the appellant was properly identified by the complainant as she saw him and another when they entered the house before the lights were switched off. That, the appellant held a "panga" (machete) while his colleague had a torch and both were near the complainant who observed them for five (5) minutes. Thereafter, she was ordered to switch off the lights. That, she had previously known the appellant with whom she spoke while he asked for money and threatened to kill her.

10. The respondent contended that there was sufficient evidence of identification from the complainant who recognized the appellant and knew him as a neighbour. That, the offence of robbery with violence under S.296 (2) of the penal code was established as the appellant had a panga and uttered threats of violence during the robbery. That, he was also in the company of others and did not have to assault the complainant for the offence to be complete.

11. The respondent submitted that the appellant was arrested for another offence and a T.V set recovered. That, the set was stolen when the present offence was committed and was recovered from where it was hidden after the appellant led the police to the spot.

The respondent contended that the conviction of the appellant was safe and urged this court to dismiss the appeal.

12. This is a first appeal and as such the duty of this court is to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **Okeno Vs. Republic (1972) EA 32**).

In that regard, the case for the prosecution was briefly that on the material date at about 1.00 am, the complainant, **Milka Kemunto Mose (PW 1)**, was asleep in her house together with a sickly elderly lady called Nyamokami who later woke her up and requested to be taken out for a call of nature.

13. The complainant while assisting the old lady tried to open the door but found it locked from outside. There was electric light outside the house and on peeping through the window the complainant saw two people in green uniforms and walking from the kitchen. She did not identify them immediately but did so when they entered the house. She switched on the electric lights in the house and at that juncture saw and identified the appellant (Omaiyo).

14. She (complainant) said that the appellant was in green uniform and had covered his head. He had a "panga" while his accomplice had a torch. He (appellant) ordered the complainant to switch off the lights. She recognized his voice as he was a person whose home was near hers. She was threatened by the two intruders who ended up stealing her property and locking her house from the outside before standing outside at the window for about two (2) hours. Her stolen property included a television set. After the intruders left she remained awake upto about 6.00 am when she realized that her property had been stolen. She then reported the matter at Magena Police Post.

15. Six (6) days after the incident, the complainant was called to Magena Police Post to identify stolen property recovered from suspects. She saw her stolen television set and identified it. She found the appellant having been arrested as one of the suspects. She learnt that he had been arrested for theft of a motor cycle. The stolen T.V set was recovered while in the possession of **Elizabeth Kemunto Mochama (PW 2),** who lived in one house with the appellant's co-accused and who indicated that the T.V had been brought therein by the co-accused.

16. **Zablon Mogoi Onyango (PW 3),** was at his house on 20th June 2013, at 9.00 pm when he was informed that thieves were being chased from his shop at Magena Market. He went to the shop on the following day and learnt that one of the thieves had been lynched and that the appellant's co-accused was responsible for bringing the thieves. He and others proceeded to the house of the co-accused where they found a T.V set and some phones. The co-accused on his arrest mentioned the appellant and later pointed out the house of the complainant as the place where the T.V had been stolen from.

17. **Cpl Joshua Musau (PW 4)**, investigated the case and eventually charged the appellant and his co-accused with the present offence. He indicated that the two had been handed to the police after being apprehended by members of the public for involvement in tobbery. The alleged stolen T.V and mobile phones were also handed to the police. He (PW 4) also indicated that the appellant was implicated by his co-accused.

18. In his defence, the appellant denied the offence. He vowed that he has never stolen from anybody in his life and stated that he was a boda boda (m/cycle) operator and had taken a customer to the police station where he found some people under arrest. He was ordered to alight from his motor cycle and into the police station where he was joined with those under arrest. He was surprised by his arrest as he had lived in the area for twenty eight (28) years and had never been arrested at all.

19. The trial court considered all the foregoing evidence and arrived at the conclusion that the charge was proper before the court and that the prosecution had discharged its obligation of proving beyond reasonable doubt that the appellant and his co-accused were responsible for the offence. The trial court then went ahead to convict the appellant and sentence him to death.

20. This court's view is that the appellant was convicted essentially on the evidence of identification adduced by the complainant (PW 1). The incident occurred in the hours of darkness. This was therefore evidence of identification by a single witness in difficult circumstances.

The trial court was thus required to exercise great care before convicting the appellant on the basis of such evidence given that there was no dispute that the offence was indeed committed.

The necessary ingredients of the offence were duly established in terms of the decision in the case of **Johana Ndungu Vs. Republic Criminal Appeal No. 116 of 1995.**

21. In that case, the Court of Appeal held that:-

"The essential ingredient of robbery under S.295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing.

Therefore, the existence of the aforedescribed ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in S.296(2) which was given below and any of which if proved will constitute the offence under the sub-section".

1. ***If the offender is armed with any dangerous or offensive weapon or instrument or***
2. ***If he is in company with one or more other person or persons; or***
3. ***If at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person".***

The existence of one of the three sets rendered the offence of robbery with violence under S.296(2) of the penal code complete. It therefore mattered not that the complainant (PW 1) was not assaulted and injured during the offence.

22. With regard to evidence of identification by a single witness the applicable principle was set out in the old case of **Abdalla Bin Wendo & Another Vs R. (supra),** where it was stated that:-

"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but the rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification; especially when it is known that the conditions favouring a correct identification were difficult".

This principle was treated with approval in **Roria Vs. Republic (1967)EA 583 and Odhiambo V. Republic (2002) 1 KLR 241.**

23. The prosecution evidence of identification was the main basis of the case against the appellant as he was not found in possession of the T.V set allegedly stolen from the complainant. The alleged mention of his name by his co-accused was not credibly established neither could it be relied upon in the absence of corroboration considering that it was regarded as a statement by an accomplice.

In **Huka & Others Vs. Republic (2004) EA 266,** the Court of Appeal stated that it is incumbent upon the first appellate court to examine afresh the evidence of visual identification of the accused to ensure that any possibility of error is eliminated.

24. In this case, the possibility of error was not eliminated because firstly, the complainant's evidence regarding identification was contradictory and unreliable. She was not certain as to when and how she identified the appellant. She indicated that she saw him outside the house where there was light thereby implying that there was no light in the house. She again indicated that she saw the appellant when he entered the house where there was light which she was ordered to switch off. The intensity of the light (if any) and the duration she took to observe and identify the offenders were not explained with certainty.

25. Secondly, the appellant was said to have covered his head meaning that the complainant could not visually identify by face the person whom she alleged was the appellant.

Thirdly, the complainant's evidence of identification was never corroborated yet there was another person at the scene at the material time.

It cannot therefore be said that the appellant's alleged identification by the complainant was proper and

free from the possibility of error or mistake whether or not the appellant was previously known by the complainant.

26. As it were, the complainant's identification of the appellant was mere dock identification which is generally worthless and unreliable unless preceded by a properly conducted identification parade (see, **Gabriel Njoroge Vs. Rep. (1982-88) 1 KAR 1134** and **Kiarie Vs. Rep. (1984) KLR 739)**.

On the question of identification, the law is now well settled in that a trial court has the duty to consider with utmost care, evidence of identification or recognition before it bases conviction on it. In particular, if the condition under which such identification is purported to have been made were not favourable and if the identification is by a single witness.

Even in cases of recognition, there is need to exercise caution before a conviction is entered **(**see, **John Njeru Kihaka & Another Vs. Rep. Nyeri Criminal Appeal No. 436 of 2007 (C/A)).**

27. Evidence of visual identification must be watertight as it is possible for even an honest witness to make a mistake.

In this case, there was no such watertight evidence and this court is of the view that the trial court did not exercise the greatest care in considering the complainant's evidence of identification which was clearly lacking in credibility and reliability.

It is for all the foregoing reasons that this court finds that the appellant's conviction by the trial court was neither safe nor sound.

This appeal must and is hereby allowed to the extent that the conviction is quashed and the sentence set aside.

The appellant shall forthwith be set at liberty unless otherwise lawfully held.

J.R. KARANJAH

JUDGE

[Delivered and signed this **5th** day of **May** 2016].