REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 140 OF 2013

FESTUS KIOKO KILONZO……..……...……..…APPELLANT

VERSUS

REPUBLIC……..……..……RESPONDENT

(An appeal arising out of the judgment of Hon. M. W. Murage CM and sentence imposed by Hon. P.N. Gesora SPM in Criminal Case No. 1395 of 2012, delivered on 27th June 2013 at the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant was charged in the trial Court with the offence of robbery with violence, contrary to section 295 as read with section 296(2) of the Penal Code. The particulars of the offence were that that on the 18th day of September 2012 at lower Kiandanii sub-location, Mumbuni location, in Machakos district within Eastern Province, the Appellant jointly with another robbed Pauline Mwende Mutinda of Kshs. 100,000, a mobile phone make Nokia C 36, safaricom airtime credit cards and safaricom line replacement cards all valued at Kshs. 110, 000/=, and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Pauline Mwende Mutua.

The Appellant was arraigned in the trial court on 20th September 2012 where he pleaded not guilty to the charge. He was tried, convicted of the offence and sentenced to death. The Appellant being aggrieved by the judgment of the trial magistrate, has preferred this appeal against the conviction and sentence. The main grounds of appeal are stated in the Appellant's Amended Petition of Appeal dated and filed in Court on 5th February 2015.

The grounds of appeal are that the trial magistrate erred in law and fact by:- failing to satisfy herself as to whether the ingredients of the offence of robbery with violence contrary to section 296(2) of the Penal Code were satisfied; failing to give weight to the evidence of PW5 that the Appellant at the time of arrest did not have in his possession the green paper bag; failing to note and appreciate that there were material inconsistencies in the prosecution case as to whether the Appellant was arrested while in possession of the alleged stolen items; finding the Appellant guilty when there was no evidence that the complainant was robbed of anything; and convicting the Appellant when the evidence did not meet the required standard of beyond reasonable doubt.

The Appellant's learned counsel, Andrew Makundi & Co. Advocates, filed written submissions dated 5th February 2016 and supplementary submissions dated 17th May 2016. It was argued therein that the ingredients of robbery with violence as set out in the Court of Appeal decision in **Oluoch V Republic**

(1985) KLR were not presented by the prosecution, particularly as the evidence of PW3 was that no recovery was made from the Appellant at the time of his arrest.

Further, that there was no description tendered by the complainant of the alleged second person who was in the company of the Appellant. It was also submitted that the charges were defective as the prescribed ingredients of the offence were not present in the facts adduced in court. Reliance was placed on the decision in **Yongo V Republic, (1982-88) KLR 167** in this regard. In addition it was submitted that the charge as framed contravened section 137 of the Criminal Procedure Code, and the material omission to adduce evidence in support of the charge defeated the position of the law that requires criminal matters to be proved beyond reasonable doubt.

It was contended that the material inconsistencies as to whether the Appellant was with a green bag in the testimony of PW1, PW4 and PW5 also put into question the identification of the Appellant. Lastly, it was submitted that there was no connection of the Appellant to the commission of the offence and therefore the offence was not proven beyond reasonable doubt. In that regard the Appellant cited the case in **Republic vs Derrick Waswa Kuloba, (2005**).

Mrs Tabitha Saoli, the learned Prosecution counsel, filed submissions dated 10th March 2016 in response to the Appellant's appeal. It was urged therein that the ingredients of the offence of robbery with violence were clearly seen in this case, and that even though the Investigating Officer was categorical that no recovery was made after the robbery, and the witnesses stated that the Appellant was not in possession of the robbery, it is not the value of the subject matter robbed but the completion of the action of robbery that is relevant. The decision in **Anthony Muchai Kibuika vs Republic**, **2013 e KLR** was cited in support of this position.

It was also contended that the Appellant must have given the stolen paper bag to his accomplice and that is why the stolen property could not be recovered. Lastly, it was submitted by the prosecution that all the witnesses testified that the Appellant was running, and that he did not explain why he was running to exonerate himself.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

Of the five prosecution witnesses, the complainant Pauline Mwende Mutinda (PW1), testified that on 18th September 2012 she had closed her Mpesa shop at 6.30pm, and was headed home when she met two young men at the gate. She had a paper bag with Kshs. 100,000/=, Kshs. 60,000 float on her phone, replacement card 60, credit card of 100,50,10, a record book, earphones, keys and her phone Nokia C36. One of the men took the paper bag and she tried to struggle with them but they pushed her down and she screamed.

Christopher Mutuku (PW2) who was PW1's employer; PW3 who was Stephen Mwongela Kawai and who was on his way home at the time; and Richard Nzioki (PW4), an assistant chief; all testified that they heard screams and saw people chasing at someone shouting 'thief'. The also testified as to witnessing the Appellant being arrested. PW5 was PC Sammy Lekulal from Machakos Police Station who testified that he found an occurrence book record of a suspect who had been booked for robbery, and that he recorded the statements of the witnesses and charged the Appellant.

The trial court found that the Appellant had a case to answer and put him on his defence. The Appellant gave sworn testimony and did not call any witnesses. He stated that on the material day from 6 a.m to 4 p.m he had a *tuk tuk* (motorcycle taxi) that developed mechanical problems and he took it to the garage at 5pm. Further, that at 6pm as he was walking, he saw people running and he was arrested, put in motor vehicle and taken to the police station.

The two issues raised by the Appellant's grounds of appeal and submissions are firstly, whether there was proper identification of the Appellant as the person who committed the offence; and secondly, whether

the Appellant's conviction for the offence of robbery with violence was based on consistent and sufficient evidence.

In the present appeal PW1 testified that she was able to identify one of the men who had attacked her since the attack took place before 6.45pm and there was light. She stated as follows:

> **"I did not know the attackers. I went out the person who snatched the paper was arrested. I had seen him during the attack. There was still light. I had seen him during the struggle. I identified him. I said he had not hurt me. He is the one in the dock. I did not know him before that day."**

Pw2 on his part testified that on 18.9.12 at 6.50 pm he was at home when he heard a scream next to the gate. He went to the gate and found PW1 struggling to stand, whereupon PW1 told him she had been robbed. PW2 then ran towards the direction the robbers had gone and saw a young man with a green paper bag. He shouted 'thief' 'thief' upon spotting him, and members of the public gave chase. After the man was arrested, PW2 realised that he did not have the paper bag with him and had handed it over to someone else. He then sent for PW1 who was able to identify the Appellant.

I*n* ***Maitanyi vs Republic*** **, *(1986) KLR 196* the** Court set out what constitutes favourable conditions for a correct identification by a sole testifying witness as follows:

> **"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".**

I have also reminded myself of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, *inter alia*, that:

> **"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".**

In the circumstances of the present appeal, PW1 testified that there was enough light on, and that the Appellant was wearing a white shirt and t-shirt. However, there was no evidence given by PW1 about a green paper bag being taken by her attackers, nor any evidence that PW2 was given a description of the attackers by PW1 to be able to identify the Appellant as the one who had attacked her after he gave chase.

More fundamentally, as this was not a case of recognition since PW1 did not know her assailants before the attack, there ought to have been an identification parade carried out to identify the assailant, and no evidence of such an identification parade was brought by the prosecution. In addition, there was contradictory evidence as to the amount of light at the time of the attack since PW3 testified that he was driving when he heard people chasing someone and shouting "thief", and that he put his full lights on, and saw someone with a paper bag in the middle of the road.

Lastly, the length of the time the attack was not specified for the Court to be able to gauge if it was enough for PW1 to identify her assailants, particularly given that PW1 and PW2 did not give any description of the attackers in their evidence. The Court therefore finds that considering these circumstances, the identification of the Appellant as the person who committed the offence was not reliable.

On the issue of whether there was sufficient evidence to convict the Appellant for the offence of robbery

with violence, section 296 (2) of the Penal Code provides as follows:

> **"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

The prosecution must prove theft as **a central element of the offence of robbery with violence, as the offence is basically an aggravated form of theft. The** other elements of the offence of robbery with violence were elaborated by the Court of Appeal in ***Ganzi & 2 Others v Republic*** **[2005] 1 KLR and** in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** as follows:

> **1. If the offender is armed with any dangerous or offensive weapon or instrument, or**
>
> **2. If he is in the 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.**

I am alive in this regard to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction of robbery with violence under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**.

In the present appeal the theft was only witnessed by PW1, and no corroborating evidence of the robbery was called, since all the other witnesses testified on events that happened after the said robbery. In addition neither PW1 nor PW2 who was the owner of the Mpesa shop where PW1 was working, brought any evidence of ownership of the items alleged to have been stolen, which items were not recovered. PW2, PW3, PW4 and PW5 all testified that the green paper bag which they testified they saw the Appellant carrying as he was running was not recovered on him when he was arrested. There is therefore no evidence before the Court on which a finding can be made that the items alleged to have been stolen indeed existed, and were stolen. This Court has also already found in this regard that the identification of the Appellant who stole the items was not safe.

This evidence by PW1 that the Appellant was in the company of another person at the time of the alleged robbery was also not corroborated by any of the other witnesses, neither was the alleged accomplice identified or arrested. No offensive or dangerous weapon used by the Appellant in the robbery was brought in evidence, neither was there any evidence of any injury or harm caused to the PW1 by the Appellant . There are therefore gaps and doubts raised by the prosecution case, and I find that the evidence brought by the prosecution was not sufficient to prove the offence of robbery with violence beyond reasonable doubt.

Arising from the foregoing reasons, I accordingly quash the conviction of the Appellant for the charge of robbery with violence, contrary to section 295 as read with section 296(2) of the Penal Code. I also set aside the sentence of death imposed upon the Appellant for this conviction and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 18TH DAY OF JULY 2016.

P. NYAMWEYA

JUDGE