REPUBLIC OF KENYA

IN THE HIGH CFOURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.42 OF 2013

DANIEL MALENYA LUKUHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 516 of 2012 in the Principal Magistrate's Court at Vihiga, (Hon G.A. Mmasi, Ag. SPM) dated 27th February, 2013)

JUDGMENT

1. The appellant, ***Daniel Malenya Lukulu***, was charged with the offence of robbery with violence contrary to ***section 295*** as read with ***section 296(2)*** of the penal Code. Particulars of the offence stated that on the 19th day of May 2012 at Lukelo Village in ***Vihiga County*** within Western Province, jointly with another (not party to this appeal,) while armed with dangerous weapons namely, Rungus, robbed ***Alex Silingi Omondi*** of one mobile phone make ***Huawei, a wallet containing two sim card plates Safaricom/Orange, voter's card, photocopy of identity card all valued at Kshs.3,000/- and immediately after the time of such robbery wounded the said Alex Silingi Omondi***.

The appellant faced an alternative charge of handling stolen goods contrary to ***section 322(1)(2)*** of the penal Code, particulars being that on the 19th day of May 2012 at Wavondi Village in Vihiga County within Western Province otherwise than in the course of stealing, dishonestly retained one mobile phone Huawei, one wallet containing two sim card plates, Safaricom/Orange, voter's card and a photocopy of identity card, knowingly or having reason to believe them to be stolen goods.

2. The facts of the case were that on 19th May, 2012, PW1 ***Alex Silingi Omondi*** while going to sleep, was attacked by a group of four people who were armed with clubs (rungus). The assailants stole from him a mobile phone, photocopy of identity card and two sim card plates for Safaricom and Orange. The witness told the court that he had managed to see one of his assailants who he described as wearing a black jacket and had a kikoi on his head. PW1 raised an alarm attracting members of the public including his brother. They pursued the assailants and caught up with the appellant. They found on him the cellphone, voting card, photocopy of identity card as well as Safaricom and Orange sim card plates that had just been taken from him. They took the appellant to the Assistant Chief. Police came and re-arrested him and went with him.

3. PW2, ***David Omondi Keyiya*** told the court that on 19th May, 2012 at about 8.00 pm he heard screams and rushed out to check what was happening. PW1 told him that he had just been attacked and robbed. He flashed a torch and saw someone running away. PW2 pursued him while calling for help from neighbours. Neighbours joined in the pursuit and with their help, the appellant was arrested. He was found with the cellphone and wallet belonging to PW1. The appellant was handed over to the Assistant

Chief and was later re-arrested by the police.

4. PW3, ***Silomon Asava,*** told the court that on 19th May, 2012 at about 8.00 pm he heard screams outside and rushed out. He saw neighbours chasing a robber and joined them. They arrested the appellant and recovered from him items that had been stolen from PW1. The appellant was handed over to the Assistant Chief and later to the police.

5. PW4, ***Bernard A Juma***, at his part told the court that on the material date he was in the house, PW1 left to go and sleep and after a short while he went out and saw PW1 held by some people. PW4 screamed attracting his grand father. The attackers ran away. They pursued them and members of the public were able to apprehend the appellant and recovered the items that had been stolen from PW1.

6. ***PW5, Francis Sucha***, told the court that on 19th May, 2012 at about 8.00 pm he heard people shouting 'thief' outside. He went out and went to where people were. He found the appellant having been arrested and stopped members of the public from beating him. The appellant told him that his name was ***Evans Musera.*** He was searched and a wallet was found on him. They also recovered a mobile phone ***Nokia*** which he identified in court. He called the police and handed over the appellant to the police and the items recovered.

PW6, ***Loy Agirona***, a clinical officer testified that she examined PW1 who had a swelling on the back and chest. He also had a cut wound on the right hand. She assessed the injury as harm. She signed the P3 form on 28th May, 2012. She produced the treatment notes and P5 as PEx7 and PEx8 respectively.

PW7, ***No.43176 CPL Johnson Mumali,*** told the court that on 19th May, 2012 at about 8.30 pm he received a call from PW5 regarding the arrest of a suspect. Together with his colleague, ***Geoffrey Iowa,*** they proceeded PW5's, where they re-arrested the appellant and also took charge of the exhibits recovered from him. He produced them as PEx1-6.

7. The appellant, who was sworn testified that on 7th June, 2012 he was at home when two police officers went to his home and asked him to accompany them to the station. At the station, he was placed in cells and charged in court the following day with robbery with violence. According to the appellant, the charges were framed up due to a land dispute between him and the complainants, his uncles who want to take his land. That is why they want him jailed. He denied committing the offence.

8. From that evidence, the trial court convicted the appellant and sentenced him to death provoking this appeal.

The appellant's appeal is on the grounds that the trial court relied on the evidence of a single identifying witness; that the trial court never warned itself on the danger of relying on the evidence of a single identifying witness; the trial court failed to find that the case was poorly investigated; that the prosecution never proved its case as enquired and that the trial court never properly considered evidence of witnesses especially PW6.

9. During the hearing of the appeal, the appellant who was unrepresented relied on his written submissions while ***Mr Oroni***, counsel for the respondent, opposed the appeal orally.

The appellant's submissions were to the effect that he was not properly identified since it was at night and conditions were not favourable for a positive identification. He further submitted that people who made arrest had not seen the suspect commit the offence and that the prosecution did not prove that the person arrested by members of the public was the same one charged in court. The appellant further submitted that according to PW3, and PW4 and PW5, the phone produced was a Nokia yet PW1 said his phone was a Huawei. According to the appellant, there were two arrests; One on 19th May, 2012 when a person by the name ***Evans Masera*** was arrested, 7th June, 2012 when he was arrested. He pointed at the evidence by PW7 the investigating officer who admitted that he arrested the appellant on 7th June, 2012, at his home far from the scene of crime. The appellant's submission was that he was not the person arrested at

the scene on 19th May, 2012.

10. The appellant submitted further that the offence of robbery with violence was not proved given that the phone produced in court was not that allegedly stolen from the complainant and the fact that the charge of handling stolen property also failed. The appellant took issue with PW4 saying he was a minor yet he was not subjected to a ***voire dire*** examination hence his evidence was inadmissible. Finally the appellant submitted that the prosecution did not call relevant witnesses especially those who claimed to have arrested him on the material evening, 19th May, 2012.

11. ***Mr Oroni,*** learned counsel for the respondent, opposed the appeal and submitted that the prosecution presented sufficient evidence before the trial court and proved its case beyond reasonable doubt. According to learned counsel, the appellant was arrested and items stolen from PW1 recovered. He was also identified by PW1 as one of the people who had attacked him. He urged that the appeal be dismissed.

12. This being a first appeal, it is the duty of this court to re-evaluate and re-consider the evidence that was before the trial court afresh and draw its own conclusion from such evidence, without overlooking the fact that the trial court had the singular advantage of seeking and hearing the witnesses testify. (See ***Okeno v Republic*** [1972] EA 32. In the case of ***Isaac Ng'ang'a Kahiga & another v Republic*** [2006] eKLR, the Court of Appeal stated:-

> ***"A court hearing a first appeal (ie a first appellate court) also has to carefully examine and analyse a fresh the evidence on record and come to its own conclusion on the same, but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanour so the first appellate court would give allowance for the same."***

13. The appellant's first complaint is that the identification was not positive due to the prevailing conditions and therefore it was not free from possibility of error, and that the trial magistrate erred when she ***relied*** on a single identifying witness. The appellant has further argued that he is not the person who was arrested on 19th May, 2012.

14. The law on identification is clear that where the evidence against an accused is one of identification by a single or multiple witness(es), the court should subject the evidence on a careful scrutiny to determine that it was free from the possibility of error before making it the basis of a conviction. In the case of ***Francis Kariuki Njiru & 7 others v Republic*** [2001] eKLR the Court of Appeal stated:-

> ***"The law on identification is well settled as this court has from time to time said that the evidence relating to identification must be scrutinised carefully and should be only accepted and dated upon if the court is satisfied that the identification was positive and free from the possibility of error."***

15. In this appeal, the robbery took place at night, about 8.00 pm. The only means of light, was a torch which, according to PW1, enabled him to see his attackers. After being attacked, the attackers were chased and the appellant arrested and handed over to PW5 who called the police and handed the appellant to PW7. The name of the person arrested was given as ***Evans Musera.*** According to PW1, his phone a Huawei and wallet were recovered from the appellant.

16. PW2 told the court that he heard commission outside and went out. He saw people chasing someone and joined in. He saw the suspect already arrested and PW1's items recovered.

17. PW3 said he joined the chase and they arrested the appellant and recovered the stolen items. PW4 said he found the appellant had been arrested while PW5, the Assistant Chief said he found the appellant had been arrested and he gave his name as ***Evans Musera***. They searched him and found a ***Nokia phone*** in his pocket and a wallet in his pocket. He then handed him to the public. In cross examination, the witness insisted that they recovered a Nokia mobile phone and that the appellant was arrested on 19th

18. The conditions for a positive identification, in my view, were not conclusive on that material night. PW1 was attacked by a group of people and was obviously surprised and shocked. He could not have had an opportunity to identify his attackers, let alone the appellant. As was stated by the Court of Appeal in the case of ***Wamunga v Republic*** [1989] KLR 426:-

> ***"It is strite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

And the same court addressed the manner of testing the evidence of a single identifying witness in the case of ***Maitanyi v Republic*** [1986] EA 198 thus:-

> ***When testing the evidence of a single witness a careful inquiry ought to e made into the nature of the light available, conditions and whether the witness was able to make a true impression and description. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision. It must do so when evidence is being considered before the decision is made."***

19. I have perused the record of the trial court and it is clear that the learned trial magistrate never addressed her mind on the circumstances surrounding the appellant's identification and the possibility of error before convicting him.

20. Secondly, this is said to have been a case of chase and arrest which would have removed any possibility of mistaken identity. However, all the witnesses except PW3, said that they found the appellant having been arrested. No one testified that he arrested the appellant. Moreover, the person arrested gave his name as ***Evans Musera*** while the appellant is ***Daniel Malenya Luvuhi*** the Assistant Chief (PW5) said that is the name he gave. That is not the only contradiction. PW5 also said that the search recovered a ***Nokia*** mobile phone which he identified in court, while PW1 said his phone was Huawei which he also identified in court. I have perused the record of the trial court and the list of Exhibit. Although P~Ex1 is a mobile phone, the record is silent on the make, which makes it difficult to tell whether it was a Nokia or Huawei.

21. The law recognises the fact that there are bound to be contradictions or inconsistencies in a trial and a court has a duty to reconcile them and see if they would cause prejudice to the accused and affect conviction or sentence. And where the trial court fails in this duty, the Court on Appeal will be under obligation to do so.

In the case of ***Joseph Maina Mwangi v Republic*** [2000] eKLR, the Court of Appeal stated:-

> ***"In any trial, there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the Criminal Procedure Code viz whether such discrepancies are such as to cause prejudice to the appellant, or they are inconsequential to the conviction and sentence."***

The same point was considered by the same court in the case of ***Njuki & 4 others v Republic*** [2002] KLR 771 where the court stated:-

> ***"Where discrepancies in the evidence do not affect a otherwise proved case against an accused. A court is entitled to ignore those discrepancies."***

22. And in ***Vincent Kasyula Kingo v Republic, Criminal Appeal No.98 of 2014***, the Court of Appeal stated that a trial court has a duty to re-concile discrepancies where any is alleged to exist and where there is failure to do so, an appellate court has an obligation to reconcile them and determine whether they go to

the root of the prosecution case or not.

23. The trial magistrate did not address her mind on these discrepancies or reconcile them. Whether the phone stolen from PW1 was allegedly recovered from the appellant remains unclear, and so is the fact of what type of phone was produced in court as PEx1. These are not minor discrepancies that can be ignored, bearing in mind that the appellant is said to have been chased, arrested and stolen property recovered from him. I also note that the trial magistrate dismissed the alternative charge of possession of stolen goods for the reason that the charge of handling had not been proved.

24. Another issue that raises concern in this appeal, is the date of the appellant's arrest. Whereas witnesses said he was arrested on 19th May, 2012, and ***PW7,*** the investigating officer was clear in this when he testified that he re-arrested the appellant on that night and took him to the police station, he again said that he arrested the appellant on 7th June, 2012 at his home far from the scene. I have perused the charge sheet and it shows that the appellant was arrested on 7th June, 2012. There is no explanation why there is this inconsistence.

25. The prosecution has a duty to prove its case against an accused person beyond reasonable doubt and that burden never shifts to the accused. As stated in the case of ***Gachanja v Republic*** [2001] KLR 425:

> ***"It is a cardinal principle of law that the burden to prove the guilt of an accused person lies on the prosecution. An accused person assumes o burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probability."***

And in the case of ***Wibiro alias Musa v R*** [1960] 184, the Court of Appeal stated that the onus is always on the prosecution to prove its case beyond reasonable doubt.

26. In the present appeal, it is clear that the prosecution did not discharge its burden of proof. There are gaps and inconsistencies in the prosecution case which leave lingering doubts. The appellant, in his defence denied committing the offence and said he was not the one arrested on 19th May, 2012. His evidence was that he was arrested at home on 7th June, 2012 and both PW7 and the charge sheet confirm this. There is no explanation why, if the appellant was arrested on 19th May, 2012, at the scene, he was again arrested on 7th June, 2012 at his home. There should have been an explanation on this. The person who was arrested on 19th May, 2012 gave his name as ***Evans Musera*** while the one in court is different. There s no evidence to show that the appellant is the same person who was arrested on 19th May, 2012.

27. From my re-evaluation and analysis of the evidence on record, I am not satisfied that the prosecution's case was water tight as to found a safe conviction. I find that the appellant's appeal has merit and is allowed. I hereby quash the conviction, set aside the sentence and order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Kakamega this 7th day of September, 2016.

E.C. MWITA

JUDGE