REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 173 OF 2010

JEREMIAH KAUME.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Jeremiah Kaume was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code (CAP 63) of the Laws of Kenya.

The particulars of the offence were that on the 18th day of August, 2009, at Nchooro Location in Tigania District, within Eastern province, jointly with another not before court, while armed with offensive weapons, namely dagger and panga, robbed Dominic Muchui of one mobile phone make Nokia 6050, solar battery 12 volt and cash Kshs 100/= all valued at Kshs 11,400/= and at or immediately thereafter, used actual violence on the said Dominic Muchui.

The Appellant was tried, convicted and sentenced to death. He is was aggrieved by the conviction and sentence and therefore filed this appeal. In his petition of appeal, the appellant raised the following issues:

1. **The Learned Magistrate erred in law and fact in finding that the prosecution had proved its case against the appellant to the required standard.**

2. **The Learned Magistrate erred in law and fact in convicting the appellant on contradictory evidence by the prosecution witnesses.**

3. **The Learned Trial Magistrate erred in law and fact in failing to believe the evidence offered by the defence.**

The appellant therefore prays that the appeal be allowed, conviction be quashed and sentence set aside. He was represented by Mr. Ringera Advocate while Mr. Mungai appeared for the State.

We are the first appellate court, and it is our duty to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis and draw our own inferences and conclusions. We are alive to the fact that we neither saw nor heard any of the witnesses and so cannot comment on their demeanor. We are guided on the duties of a first appellate court by the Court of Appeal decision of ***Kiilu And Another V Rep (2005) 1 KLR 174*** where the Court of Appeal held thus:

"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions.."

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.."

Mr. Ringera, Counsel for the appellant, submitted that this case turns on evidence of identification as the offence took place at night when it was dark. He submitted that the circumstances under which the witnesses indentified the appellant were not conducive to proper identification. He further submitted that there were inconsistencies in the evidence of PW1, 2 and 3 in respect of the time when the offence was committed because whereas PW1 said it was at 6.45 p.m., PW2 said it was 5.45 p.m. and PW3 said it was about 7.00 p.m.

Mr. Mungai, Learned Counsel for the State on the other hand, opposed the appeal and contended that the case bordered on recognition as opposed to identification; that PW1- 3 recognized the appellant having schooled with the appellant since childhood. Consequently, he submitted that the appellant was properly convicted and sentenced and urged the court not to disturb the conviction and sentence.

The prosecution's case was as follows; PW1 Muchui Dominic was on 18th August at around 6:45 p.m., coming from the shop where he had been sent by his mother to collect a battery which had been taken to be charged; the appellant held him by the collar and ordered him to remove everything that he had. The appellant then put his hand in his pocket and removed his mobile phone a Nokia 6050 model and demanded for money which he denied having. He was pushed onto a footpath; hit him, he fell on his stomach, and removed Kshs 100/= that was in his trouser pocket. After a few minutes, he heard screams and realized the appellant and his accomplice had left. PW1 then got up and ran towards the direction where the screams were emanating and found a woman (PW2 Lucy Aburo) asking the appellant why they were robbing her. He told the woman that he had also been robbed by the appellant and his accomplice. As Members of the public gathered at the scene, the appellant escaped. He further testified that the woman informed PW1 that at the time that she met the appellant and his accomplice they were carrying a battery. They were then advised to report to Tigania police station which they did and the following day, they went to the appellant's home, he was arrested and escorted to the police station. He further testified that he knew the appellant prior to this incident and that his accomplice one Sammy has since disappeared.

PW2 Lucy Aburo testified that on 18th August 2009 at around 5:45 PM she was coming from Ngundune market heading home when she met the appellant and one Sammy. They stopped her and the appellant put his hand in her pocket, and she screamed as he retreated. A young boy (PW1) then came from the bushes and informed her that the appellant and his accomplice had robbed him as well. She further testified that the appellant was holding a paper bag that contained a battery in one hand and a knife in the other hand. Members of the public then gathered at the scene and the appellant ran off. PW1 and 2 proceeded to Tigania police station to make a report. She further testified that she knew the appellant and the said Sammy since her home was across the road to theirs.

PW3 Shadrack Muriki corroborated PW1 and 2's evidence when he testified that on 18th August 2009, he was going to his uncle's home at Kirukiri when he met the appellant and one Sammy. He greeted them but they seemed not to be interested with his greetings and noticed that the appellant was carrying a battery. He then heard screams, he went to check and found a woman and a young man who told him that that the young man had been robbed a battery and Kshs 100 and a mobile phone. He then advised them to report to the police station. He knew the appellant and Sammy whom he has not been seen since that day.

PW4, Sgt John Ngugi the investigating officer in this case, testified that on 18th August 2009 he was at Tigania police station when he received a complaint from PW1 that he had been robbed by two people at

Lukururu area as he went home from collecting a battery. He identified the said people as the appellant and one Sammy Nairoti and that they had robbed him of a battery, a mobile phone and Kshs 100/=. He visited the scene accompanied by PC Nyaga and Mugambi with a view to tracing the suspects but in vain. The following day the appellant was brought to the police station by members of the public accompanied by PW1.

In his sworn testimony, the appellant said that he was arrested on 18/8/2010 and while at the police station is when he learnt of the allegation that he had robbed Muchui but he denied. His defence is that he was framed because he had differences with PW1 over a girl and denied knowing PW2. He called DW2 Stephen Kilonzo as a witness. DW2 said that on 18 and 19/8/2010 the two of them were working on the farm from 8.00 a.m. to 4.00 p.m. and that thereafter they went their separate ways. He could not tell what DW1 did after they parted.

We have carefully considered the submissions by the appellant and the State Counsel and the grounds of appeal. In addition, we have reevaluated the evidence on record.

It is the appellant's case that there were contradictions in the prosecution evidence as to what time the robbery allegedly took place. According to PW1, he was accosted about 6.45 p.m. as he walked home from the market where he had gone to collect a battery. On the other hand, PW2 said that it was about 5.45 p.m. while PW3 said that it was about 7.00 p.m. In such an occurrence, it would not be expected that one would stop to look at the watch to see the time of the occurrence. The time that the witnesses said the robbery took place was an estimation of the time. In the case of ***Njuki Vs Rep 2002 1 KLR 77***, the court said the following in respect of discrepancies in the evidence of witnesses:

> ***"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused… however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused".***

In the instant case, the witnesses were not many but even then, the three estimated the time and it could have been anything from what they told the court i.e. 5.45 p.m. to 7.00 p.m. The only question that needed to be answered is whether there was sufficient light for the witnesses to see and identify or recognize the appellant.

PW1 said that the incident was about 6.45 p.m. He did not state how much light there was. All that he said was that he saw the appellant's face. The two came into close contact when PW1 said the appellant got hold of him by the collar and even spoke to him ordering him to remove all he had, pushed him to the foot path and made him lie down there. When the attacker held him by the collar, it means that they came face to face. In our considered view, PW1 and the appellant came into close proximity and that was sufficient opportunity for PW1 to recognize the appellant especially that he was a person he knew there before. In his defence, the appellant admitted that they knew each other before and had even had a dispute over a girl.

PW2 on the other hand said the incident was at 5.45 p.m. and that there was enough light. She also said the accused came face to face with her when he attempted to rob her by putting his hand in her pocket. PW2 also knew the appellant as an immediate neighbor. PW2 said there was enough light since this was during evening hours. Because of the close proximity we believe PW2 was in a position to recognize the appellant.

PW3 told the court that it was about 7.00 p.m. but there was no enquiry made about the light that was available for PW3 to see the people he met. When he met the appellant, he was not yet aware of the robbery but learnt a few minutes later because he had seen the appellant carrying a battery which PW1 complained of having been robbed of. He said that he had gone to school with the appellant. PW2 had also seen the appellant with a battery. This is evidence of not one identifying witness but three. We believe that being people who knew the appellant, they did see and recognize him as the person who

robbed PW1 and attempted to rob PW2. In ***Anjononi Vs Rep (1976-80) 1 KLR 1566***, the Court of Appeal had this to say of evidence of recognition:

> ***"This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

As was rightly observed by the trial magistrate, the appellant's identity was not in question since all the three witnesses knew the appellant. This was actually a case of recognition as opposed to identification since the three witnesses knew the appellant prior to this incident and their evidence to this effect remained unshaken even in cross examination. Consequently we are in agreement with the submissions by the State Counsel that this was a case of recognition as opposed to identification and that the appellant was actually positively identified as the perpetrator of this crime together with his accomplice who is still at large.

In his defence, the appellant alleged that he was framed because he had disagreed over a girl with PW1. As discussed elsewhere in this Judgment, we found that the defence is an afterthought having not raised it earlier during the hearing of the case to avail PW1 a chance to respond to the said allegation. Besides, even if he had a grudge with PW1, there is no reason why PW2 and 3 would make such serious allegations against the appellant. There was no suggestion that they had any dispute and we find that PW2 and 3 must have been telling the court the truth.

In addition to the above, a report of the robbery was made to Tigania Police Station at about 8.40 p.m. to PW4 on the day. PW4 told the court that PW1 named the assailant as Jeremiah Kaume (the appellant) and Sammy Nairoti, whom all the witnesses saw but that Sammy has since disappeared. Even when PW1 met PW2, he identified the appellant and his accomplice as the people who had just robbed him and PW2 said the appellant was still carrying the battery. The importance of a first report cannot be underscored because the events are still fresh in the mind of the witnesses with no room for fabrication or change of mind or chances of the evidence being changed to suit the circumstances.

The Court of Appeal considered the importance of a first report in ***CRA 82-88/2011 Kioko Kilonzo & Others V Republic*** when it relied on the decision of ***Terekali & Others V Rep (1952) EACA*** where the court said:

> ***"… Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against late embellishment on made up case. Truth will always come out from a statement taken form a witness at a time when recollection is very fresh and there has been no time for consultation with others …".***

In this case, the robbery had taken place about dusk and the report was made within 2 hours. We have no doubt in our minds that PW1 and 2 recognized the appellant as the robber. Whether the defence was considered by the trial court; the appellant denied having robbed PW1 but that they had differences over a girl. The appellant did not disclose who this girl they had a dispute over with PW1 was. The appellant had an opportunity to cross examine PW1 but at no time did he allege that they had such a dispute.

DW2 Stephen Kilonzo testified that on 18 and 19/8/2008 they spent the whole day in the farm with the appellant between 8.00 p.m. and 4.00 p.m. However, after 4.00 p.m. they went separate ways and he could not know if the appellant committed an offence after parting. From the evidence of PW1-3 the offence herein was committed about 5.45 p.m. to 7.00 p.m. DW2 was not with the appellant at that time and he could not possibly know if the appellant committed an offence. In the Judgement of the trial court, the court said:

> ***"There is nothing in the cross examination by accused that shook that evidence. The accused in his defence claims that the complainant framed him because of differences they had over a girl. The court finds that claim to be highly unlikely. The accused never brought out the issue while***

cross examining the complainant. He brought it out for the first time while making his defence.

The accused in his defence called one witness Stephen Kilonzo who testified as DW1. According to DW1 he worked with the accused in a farm on 18th and 19th August, 2009 from 8.00 a.m. to 4.00 p.m. That evidence does not assist the accused's defence in any way. DW1 was not with the accused on 18th Aught, 2009 at 6.45 p.m. when the incident happened".

Clearly the court did consider the defence in detail but dismissed it as an afterthought and untrue. In our view, even if the appellant had a dispute with PW1 over a girl, which we do not believe, there is no reason why PW2 and 3 would frame him. We are in agreement with the trial court and find that his defence is clearly an afterthought, unbelievable and we reject it as such.

Having found that this case turns on recognition as opposed to identification, we are satisfied that the appellant and his accomplice were recognized by PW1, 2 and 3; It is the appellant and his accomplice were the perpetrators of the offence.

In an offence of robbery contrary to Section 296 (2) PC, the prosecution has to prove the existence of three elements:

1. **The offender is armed with any dangerous and offensive weapon or instrument; or**

2. **That the offender was in the company of one or more other persons; or**

3. **That immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any persons.**

See ***Oluoch V Republic (1985) KLR 549***

In this case, the appellant was in company of another who has disappeared. They stole PW1's property which has hence been recovered. We find that the offence of robbery with violence was committed.

The prosecution evidence was overwhelming and sufficient to found a conviction. Consequently, we do find the conviction to be safe and we uphold it.

On sentence, the learned trial magistrate imposed the mandatory death sentence. The sentence was therefore lawful and legal and there is no basis for interfering with the same.

In the end, we find the appeal to be without merit and we accordingly dismiss it.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF JULY, 2015.

R.P.V. WENDOH J. A. MAKAU

JUDGE JUDGE

PRESENT

Mr. Musyoka for State

Faith/Ibrahim, Court Assistants

Mr. Ringera for Appellant

Appellant, Present