REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CRIMINAL APPEAL NO. 2 OF 2014

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

KEVIN NDUNG'A WANGUI ……..…… APPELLANT

-V E R S U S –

REPUBLIC ……..RESPONDENT

(From the original conviction and sentence in criminal case no. 435 of 2013 of the SPM's Magistrate's court at Isiolo – B.M. Ombewa – Ag. P.M.)

JUDGEMENT

1. The Appellant herein Kevin Ndung'a Wangui was charged with one count of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were a follows:-

> ***"On the 10th day of August 2013 at Marsabit township in Marsabit Central District within Marsabit county, jointly with another not before court, while armed with a crude weapon namely a metal bar robbed PHILIP MUSEMBI MULINGE of cash Ksh. 2,000/- and two (2) mobile phones make Nokia C – Nokia 1100 all valued at Kshs. 9,500/- and immediately before the robbery assaulted the said PHILLIP MUSEMBI MULINGE".***

2. That after full trial the learned trial magistrate convicted the Appellant and sentenced him to suffer death. The Appellant being aggrieved by the conviction and sentence imposed upon him by the lower court preferred this appeal setting out the following grounds of appeal:-

> 1. **That the learned trial magistrate erred in law and facts when he failed to note that the complainant planted this case because of grudge after knowing that the woman who was his friend was also my friend.**
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> **2. That the learned trial magistrate erred in law and facts when he failing to note that the prosecution carried shoddy investigation in respect of the case because they did call the owner of the bar.**
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> **3. That the learned trial magistrate erred in law and fact when he failed to note that there was no weapon neither money or phone purported to have been stolen from the complainant were recovered from the appellant to support the evidence.**

3. When the appeal came up for hearing the Appellant appeared in person. The state was represented by Mr. Mulochi learned state counsel.

4. We are the first appellate court and as expected of us we have subjected the entire evidence adduced before the lower court to a fresh evaluation and analyses bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance. We have drawn our own conclusion and were guided by the Court of Appeal in the case **of Isaac Ng'anga Kahiga alias Peter Ng'ang'a Kahiga v Republic Criminal Case no. 272 of 2005** as follows:-

> ***"in the same way, a court hearing a first appeal (i.e. a first appellant court) also has a duty imposed on it by law to carefully examine and analyze afresh 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 demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO –v- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-***
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> ***"The first appellate court must itself weight conflicting evidence and draw its own conclusion*** (Shantilal M. Ruwala V Republic [1957] EA 570.). ***It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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 (See Peters V. Sunday Post, (1958) EA 424)"***

5. The Appellant submitted written submissions and stated that he had nothing else to add. The Appellant in his written submissions has submitted that the prosecution evidence in support of the charge was inconsistent, uncorroborated hence leaving the prosecution case with glaring doubts. That the trial court erred in convicting the appellant on evidence of PW1 which was uncorroborated. He also submitted that PW1 was drunk and hence he was not sure of what was happening around him. He urged that there was a big possibility that in that situation he picked the appellant on a mistaken identity. He further submitted that PW1's evidence was inconsistent with the particulars of the charge sheet. The Appellant submitted that PW1 did not state how far he was from the security light before he was attacked. He urged at the time of the attack the appellant did not mention seeing the Appellant nor did he say what light was at the scene, it's intensity adding that key witnesses one Joy and Steven Mutuku who PW1 claimed saw the Appellant were not called as prosecution witnesses. Their absence he submitted weakened the prosecution case and that the prosecution did not prove the case to the required standards. He relied on the case of **Bukenya v Uganda [1967] EACA 341** and **Juma Ngonda v Republic [1982 – 1988] KCA 454** in support of the proposition that the evidence of an essential witness should have been called by the prosecution in compliance with the duty placed upon the prosecution to make available all witness as necessary to establish the truth of the whole matter even if the evidence would be inconsistent and adverse to the prosecution case. Though the prosecution has in general a discretion whether to call or not to call someone as a witness as if it does not call a vital or relevant witness without satisfactory explanation, it runs the risk of the court presuming that the evidence which could be and is not produced would if produced had been unfavourable to the prosecution.

6. The appeal was opposed. Mr.Mulochi learned state counsel urged us to dismiss this appeal for lack of merits. Mr.Mulochi submitted that there was overwhelming evidence against the appellant. On evidence of PW1 he submitted that it was detailed on how the offence was committed even though the offence took place at 9.30 p.m. He urged that there was security light which enabled PW1 to see the appellant. He urged that this is a case of recognition and that the appellant was well known by the complainant as there was a time the appellant spent a night at the complainant's home. In support of his submission on recognition he refered us to the case of

Julius Kalewa Mutunga vs Republic C.A. Criminal Appeal No. 31 of 2005 (Nyeri) where the Court of Appeal held that:-

> ***"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."***

7. Mr.Mulochi, learned state counsel submitted further that at the material time the Appellant was in the bar with the complainant and that PW3's evidence corroborated PW1's evidence on the injuries. He added that the Appellant on being put on his defence decided to keep quiet and submitted that it beats logic for the Appellant to aver on appeal that he was framed when he did not raise the issue in defence.

8. The facts of the prosecution case are that on 10th August 2013 at Marsabit Township in Marsabit Central District within Marsabit County the Appellant jointly with others not before court, while armed with a crude weapon namely a metal bar robbed the complainant, Philip Musembi Mulinge, of cash Kshs.2000/- and two mobile phones make Nokia C1 and C Nokia 1100 all valued at Kshs. 9,500/- and immediately before the robbery assaulted the complainant Philip Musembi Mulinge.

9. PW1, Philip Musembi Mulinge testified that on 10th August 2012 as from 7.p.m. to 9.30 p.m. he was at Free World Wines and Spirits bar drinking. That he had Kshs. 11,000/- out of which he used Kshs. 2000/- remaining with a balance of Ksh. 9000/-; that in the bar there were other customers who included Kevin who was near him. He gave Kshs 7000/- to Joy Kanana to keep for him for he feared he could use it. He was to collect the same the following day. He remained with Kshs. 2000/-. He testified that he knew Kevin the appellant as he had slept in his house at one time; that Joy Kanana gave him his phone C-1 which she had been charging for him. He also testified that he had another phone Nokia 1110. The complainant as he was leaving he dropped his phone Nokia C1 but one of the people around picked it and gave it to him. He left the bar at 9.30 p.m. followed by the accused. He testified there was security light; that as the complainant was going home he was hit with a metal on left hand and when he looked back he was hit on the head and fell down. He stated it was Kevin who hit him and that when he fell down Kevin opened his pocket and took money and his two phones. He screamed for Joy and Steven; that Mutuku came and when accused saw him he ran away. The complainant reported to the police the following day whereby he was issued with a P3 form and went o Marsabit District Hospital for treatment; that Kevin was arrested after two days after the complaint identified the appellant at his workplace. PW1 testified that nothing was recovered from the appellant. He further testified that at the bar he never saw accused with metal bar and that he did not have grudge with him. On cross-examination PW1 testified that he saw the appellant when he was at Free World.

9. PW2, No. 84309 PC. Policyne Ouma, the Investigating Officer attached to Marsabit Police Station testified that on 11th August 2013 she received report from the complainant that the previous night he was assaulted by two people and he knew one of them as Kevin while on his way home from Free World. He told her he had been assaulted and injured on the left hand and robbed of two phones and Kshs. 2000/-; that PW2 conducted investigations and arrested the appellant after he was identified by a woman who was selling in the bar and the complainant identified the appellant. PW2 testified that she arrested the appellant on 14th August 2013 four days after the incident. On cross-examination PW2 testified that no weapon was recovered. She confirmed the appellant was arrested after four (4) days.

10. PW3, Dr. Imbusi testified that on 12th August, 2013 he attended to the complainant at Marsabit District Hospital who had a P3 form and who alleged that he had been assaulted by someone known to him. He had a haematoma on occipitus; bruise on lower jaw; wrist joint of the left hand which was swollen and tender. Injury was seven (7) days old. He assessed the degree of

injury as harm and produced P3 form as prosecution Exhibit 1.

11. The Appellant on being put on his defence opted to keep quiet and left the matter to the court to decide. He did not call any witnesses.

12. The conviction of the appellant was based on evidence of recognition by PW1 and the report he made to PW2. It is very important in our view when assessing the evidence of recognition of the attacker/attackers for the court to examine the conditions of lighting at the time of recognition is made and the duration of the offence and the distance of the attacker from the complainant amongst other factors to satisfy oneself that the conditions that prevailed at the time were conducive for positive recognition of the culprit or culprits.

13. The Court of Appeal has in several cases set out what oen has to look for in such evidence. In the case of **Cleophas Otieno Wamunge V Republic (1989)KLR** the Court of Appeal stated as follows;-

"The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery CJ. In the well-known case of R. Vs Turnbull 1976 (3) All E.A. 549 at Pg.552 where he said "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. We have carefully examined the evidence of the single witness, PW1, the complainant who gave evidence upon which he claims he saw and recognized the appellant.

15. Our observation is that PW1's evidence is that he saw one Kevin, who he described as the accused while inside the Free World bar. That when he left, the appellant also left. And as he was going home he was suddenly hit with a metal bar on his left hand and on turning to look back he was hit on the head and fell down. He claimed it was Kevin who hit him. He had known Kevin for a long time. He gave the name of Kevin as his assailant to PW2. The complainant did not tell the trial court how he was able to see the person who assaulted him. He did not state the source of security light in regard to where the attack took place. He did not say how far he had gone from the bar when the attack took place. It is of significance to note the complainant did not in his evidence state that when he was attacked he turned and saw the person who attacked him. He did not give the name of Kevin as the attacker to the people who immediately came to his rescue including Joy and Mutuku. We find that the trial court failed to investigate the distance of where the source of lighting was as regards to the scene of the attack; its intensity and its relation to where the attacker was.

16. The learned trial magistrate in his judgment stated as follows as regards lighting on the scene of the incident:-

"He also testified that the incident happened where there was security lights".

We find that the trial court fell into an error when it failed to investigate on the source of lighting, the intensity of lighting, place where the attack took place from the source of lighting and whether the lighting was sufficient to enable the complainant see and recognize the attacker.

17. The trial court we found failed to warn itself on special need for caution before convicting the appellant on evidence of a single witness, PW1 and in failing to examine closely the

circumstances in which the identification by PW1 came to be made. We find that the evidence of PW1 on recognition unreliable and find that it is possible for the complainant to have mistaken the attacker with the appellant who he had left behind at the bar few minutes before the attack. We have considered the fact that the complainant had been taking drinks in the bar as from 7 p.m. to 9.30 p.m. and we cannot rule out the chance of him having been drank and mistaking his attacker for the appellant in view of his state of mind that could have resulted in misjudgment due to drink. We are of the view that a person who has been taking drinks close to two (2) hours could not have a clear state of reasoning and as such one cannot rule out that one can possibly make a mistake on his attackers or even on the person he thinks he saw attacking him.

18. We are therefore not satisfied that the learned trial magistrate carefully evaluated the complainant's evidence in regard to the conditions of the light and what it was that enabled him to make recognition of the attacker nor did the court consider the state of mind of the complainant after taking drinks for close to two (2) hours.

19. In the instant case we have upon evaluation of the prosecution evidence have no doubt an offence of robbery was committed. That the complainant was robbed and injured. The evidence of PW1 is corroborated by that of PW2 and PW3 on the nature of the injuries sustained by the complainant at the time of the attack. We however find no evidence connecting the appellant with the commission of the offence of robbery with violence. The prosecution evidence is inconsistent and contradictory as to how many people committed robbery against the complainant. The charge sheet states the appellant jointly with another robbed the complainant of the properties listed on the charge sheet. PW1 in his evidence in chief never mentioned that the attacker was in the company of another. He has contradicted himself on the contents of the charge sheet. PW2 and PW3 contradicted the complainant in that PW2 testified that PW1 told her he was assaulted by two people who were known to the appellant. PW3 testified PW1 told him he was assaulted by someone known to him. PW1 further testified that the appellant was arrested after two days (2) from the incident whereas PW2 testified the appellant was arrested after 4 days. We have carefully evaluated the prosecution evidence and as submitted by the appellant we find it to be inconsistent, contradictory and short of proving the prosecution case to the required standards.

20. We have observed that the appellant did not give evidence and opted to keep quiet. He acted within his constitutional rights and failure to give evidence should not be basis of making an inference as to accused's guilty. The burden of proof in a prosecution case always lies within the prosecution and the court is only supposed to make a decision on whether the prosecution has proved the case beyond reasonable doubt and the failure of the accused to give evidence is not here or there and should not influence the court's decision in absence of evidence being adduced to the requires standards.

21. In conclusion we find that the circumstances of recognition were not conducive to positive recognition. We accordingly find merit in this appeal, quash the conviction and set aside the sentence. The Appellant should be set at liberty unless he is otherwise lawfully held.

READ AND DELIVERED IN OPEN COURT IN MERU THIS 8th DAY OF JULY 2015.

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

JUDGE **JUDGE**

8.7.2015 **8.7.2015**