REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CRIMINAL APPEAL NO. 166 OF 2010

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

JOSPHAT NTURIBI ……....… ……………………………. APPELLANT

-V E R S U S –

REPUBLIC ………………………………. ………………..RESPONDENT

(From the original conviction and sentence in criminal case no. 1471 of 2009 the Chief Magistrate's Court Meru – S.N.K. Andriessen – P.M.)

JUDGMENT

1. The Appellent JOSPHAT NTURIBI was charged with one count of **Robbery with violence contrary to Section 296 (2) of the PenalCode.** The particulars of the charge were that on the 16th day of August 2009, at Kabaune Market Giaki location in Meru Central district within Easter Province jointly with others not before court while armed with a panga robbed ELIAS MWIRINGI cash Kshs. 15,300/- and a Nokia cellphone valued at Kshs. 3000/- and at or immediately after the time of such robbery used actual violence to the said ELAIS MWIRINGI.

2. That after full trial the court found that an offence of robbery with violence was not proved but there was evidence to convict the appellant with a lesser offence of **grievous harm contrary to section 234 of the Penal Code.** It invoked the provisions of **section 179 (2) of the Criminal Procedure Code** and convicted the appellant with an offence of **grievous harm contrary tosection 234 of the Penal Code.** The court sentenced appellant to life imprisonment.

3. The appellant being aggrieved by both the conviction and sentence preferred this appeal. The appellant relied on six (6) grounds of appeal being as follows:-

> **1. That the learned trial magistrate erred in law and facts in failing to find that alleged identification and recognition wasnot free from possibility of error.**
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> **2. That the learned trial magistrate erred in law and facts in failing to question the prosecution in absence of vital witnesses mention in the trial case.**
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> **3. That the learned trial magistrate erred in law and facts in failing to note that the trialsuffered some procedural irregularities.**
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> **4. That the learned trialmagistrate erred in law and fact innot considering the**

mitigation offered by the appellant.

5. That the learned trialmagistrate erred in law andfacts in failing tofind that the trial suffered some procedural irregularities.

6. That the learnedtrial magistrateerred in law and facts in dismissing and disregarding the unsworn defence without any cogent reasons for the same.

4. When the appeal came up for hearing the court cautioned the appellant that if he proceeded with the appeal and court finds sufficient evidence against him he may be convicted on the offence of robbery with violence. The appellant nonetheless opted to proceed with the appeal. The appellant relied on his written submissions which he handed over to court. The appellant's main grounds of appeal is that the conditions prevailing at the time of the commission of the offence were not conducive for favourable recognition and identification of the assailants; that vital prosecution witnesses were not called; that the trial suffered some procedural irregularities and that the trial court erred in disregarding the appellant's unsworn defence without any cogent reasons.

5. M/s. Kiriga Learned State Counsel appeared for the State. She opposed the appeal. M/s. Kigira Learned State Counsel urged that the conviction and sentence was proper. On the identification of the appellant,the Learned Counsel submitted that the appellant was properly recognized by the complainant, urging that there was also voice recognition of the appellants by PW1. She relied on the case of **James Chege Wanja –Vs- James Mwangi Irungu CR. Appeal No. 323 of 2011 [CA. Nyeri]** at page 3 paragraph 14. She urged that the distance between the appellant and complainant at the time of commission of the offence was very close which enabled the complainant to recognize the appellant and even called him *"Ntubiri why do want to kill me".* She urged that PW1 made a report after the attack. She further submitted that evidence of PW1 was corroborated by PW4 on the nature of injuries that PW1 had sustained. On the number of witnesses M/s. Kigira referred to Section 143 of the Evidence Act urging there is no limit on the number of prosecution witnesses that should be called to prove an offence but the prosecution has discretion to call the number of witnesses they deem fit. She submitted that the ingredients of the offence of Grievous Harm have been satisfied. She concluded by stating that the trial court did not believe PW1 had been robbed of the items listed in the charge sheet and as such found supporting evidence to convict the appellant on a lesser offence of Grievous Harm. She urged that the appeal be dismissed.

6. The Appellant in his reply submitted that in the complainant's first report he did not give the name of the appellant as one of the attackers.

7. This is the first appeal from conviction and sentence. We are therefore the first appellate court and are guided by the principles enunciated in the case of **Okeno Vs Republic [1972] EA 32** where the Court of Appeal set out the duty of the first appellate court in the following terms:-

> ***"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate court's own decision on the evidence. The first appellate court must itself weigh 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 factthat the trial court has had theadvantage of hearingand seeing the witnesses, (See Peter v. Sunday Post, 1958] EA 424.)"***

8. The conviction of the Appellant was based on purported evidence of a single witness (PW1). We have said purported because PW1 gave evidence only in respect of the charge of Grievous

Harm and when the charge was amended on 11/1/2010 and plea taken, the prosecution though it applied to recall PW1, he was never recalled to give evidence in respect of the charge of robbery with violence. It is very important when assessing the evidence of a single identifying witness to examine the conditions of lighting at the time the recognition is made in order to satisfy oneself that the conditions prevailing at the time of recognition or identification, were conducive for a positive identification of the culprits.What the court is required to look for in such evidence was set out by the Court of Appeal in several cases. In the case of **Cleophas Otieno Wamunga v Republic [1989] KLR 424** the Court of Appeal addressed itself thus;-

> ***"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."***

Further in the case of **Paul Etole & Another vs Republic CANo. 24 of 2000 page 2 &3** the Court of Appeal stated:-

> ***"The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second Appellant raised problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the courts should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examineclosely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court shouldremind itself that mistakes in recognition of close relatives and friends are sometimes made."***

9. In this matter we have considered the evidence of PW1 who gave evidence on a charge of Grievous Harm contrary to section 234 of the Penal Code. Our observation is that PW1 testified that there was moonlight and he could see very well. The appellant did not state the position of the moon, he did not state whether it was full or half or quarter moon nor did he state the intensity of the light. He did not state the condition of the weather and whether there was any impediment at the scene of attack. He did state what it was that made him recognize the attacker as the appellant.

10. We also observe the complainant testified the attacker told him to stop andthe complainant called him "*Nturibi why are you killing me."* He did not say he recognized the voice as that of the appellant. He did not tell PW2 and PW3 that he recognized the voice as that of the appellant nor didhe tell PW2 andPW3 that he was attacked by the appellant immediately. PW2 came to his rescue and immediately he made the first report. We observe the name "*Nturibi*" is a common name in Meru and could be any person by the name "*Nturibi*" who could have attacked the complainant and not necessarily the appellant herein. We have doubts as to which *"Nturibi"* the complainant referred to as he did not give evidence in respect of the charge of robbery with violence nor did he give the full names of the attacker in his evidence. If the said *"Nturibi*" was

his relative as he told PW3 and who he claimed to know well.

12. PW2 Selesio Kaunyagi, father to PW1 in evidence testified that the offence took place on 16th August 2009 at 7.30 p.m.when he was with PW1. He did not mention the condition of lighting. He did not mention there being moonlight but testified he heard PW1 shouting *"Nturibi why are you cutting me."* He testified he saw "*Nturibi*" who he identified in court ran away into a shamba. PW2 testified after that PW1 went to police and he went home. PW1 told PW2 he was robbed of a phone and money. During cross examination he admitted he just saw a person run and was told he was the appellant. PW3 who received first report from PW1 did not mention PW1 giving him the name of PW1's assailant as "*Nturibi*"but he said he was attacked by a relative. He did not even tell PW3that there was moonlight which enabled him to recognize the assailant.

13. We have considered the entire evidence relied upon by the learned trial magistrate and are not satisfied that the trial magistrate carefully considered the evidence of the complainant and his witnesses in regard to the conditions of light and what it is that enabled the complainant to make the recognition of his attacker. The mere fact that there was moonlight and that the complainant called the name "*Nturibi*". It was important for the complainant to describe the intensity and position of the moonlight and also describe what exactly he said of his assailant that enabled him to recognize him. As it turns out he gave one single name of his attacker as "*Nturibi*". He never gave any description of his attacker to PW2 and PW3. We find that his evidence was shaky, devoid of material details and did not bring out the circumstances of recognition that would enable this court to find that the appellant was correctly identified or recognized and therefore the conviction is unsafe.

14. The appellant in his grounds of appeal faults the learned trial magistrate presiding over irregularly constituted proceedings. The appellant urged that the trial suffered some procedural irregularity. We have carefully considered the proceedings and note that after the initial charge was amended and plea taken, the prosecution was supposed to call the complainant to give evidence on the substituted charge. The prosecution applied at one stage to recall PW1 who had given evidence on a charge of Grievous Harm but for unexplained reason PW1 was never called as a witness inrespect of the charge of robbery with violence. The trial magistrate relied on PW1's evidence in respect of a charge of grievous harm and which did not relate to the offence with which the appellant was facing. The appellant also applied to have PW2 recalled forfurther cross-examination. The court did not as per record, record the purpose for recalling PW2 for further cross-examination but rejected the appellant's application stating the reason given by the appellant was not sufficient to recall a witness.

15. We have very carefully considered the casual way in which the learned trial magistrate conducted the proceedings before her and agree with the appellant that there were serious irregularities in the way the learned trial magistrate conducted the proceedings.

16. We note the State did not concede the appeal nor did it seek to have a retrial; nevertheless we now turn to the issue of whether or not to order a retrial. The factors which the court must have in mind when considering whether or not to order a retrial are well set out. In the case of **Richard Omollo Ajuoga v Republic HC.CR. A. NO.223 of 2003** the court set out the principle to be applied as follows:-

"In the case of *AHMEND SUMAR V REPUBLIC [1964] EA 481 on Page483*, ***the predecessor to this court stated as follows:-***

> ***"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered.***

The Court continued at the same page at paragraph 11 and stated further:-

> ***“We are also referred to the judgment in** Pascal ClementBraganza Vs. R. [1957] EA 152.* ***In this judgment the court accepted the principle that a retrial shouldnot be ordered unless the court was of the opinionthat on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances ofthat case but an order for the retrial should only bemade where the interest of justicerequireit and should not be ordered where it is likely to cause an injustice to an accused person.***

Taking the cue from that decision, this court in the case of** Bernard LolimoEkimat Vs. Repubic Criminal Appeal No. 151 of 2004* ***(unreported) had the following to say:-

“There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend onthe particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.”

17. We have considered the learned trial magistrate’s proceedings in the instant case and are satisfied that the conviction of the appellant is vitiated by a mistakefor which the prosecution is to blame in regard of availing witnesses. The principle ground of considering whether a retrial should be considered is not therefore met. If the defect which vitiated the trial was a mistake for which the prosecution was to blame, the court would not order a retrial. Wehave also to consider whether all the conditions have been met. As was set out in the case of **Richard OmolloAjuoga (Supra),** a retrial should not be ordered unless the court is of the opinion that on consideration of the admissible or potentially admissible evidence, a conviction might result. We have carefully considered the evidence of recognition and voice identification byPW1 in which we have found that the conditions were not favourable for visual recognition and voice recognition. That upon consideration of admissible or potentially admissible evidence, in this case, particularly that of recognitionand voice identification,we have already come to the conclusion that a convictionmightnot result if a retrial were ordered and that the same evidencewas adduced before the lower court. We are also of the opinion that due to the lapse of time since the case was heard in the lower court, aperiod of six (6) years and the fact that the appellant had applied to withdraw the case but the court rejected his request in view of the nature of the offence, that the interestof justice do not require that an order for retrial be made in this case as it is likely to cause an injustice to the appellant. We therefore decline to order a retrial.

18. Having considered this appeal we have come to the conclusion that the evidence adduced against the appellant fell far too short of proof to the required standard in criminal cases. The offence of robbery with violence was not proved nor was the offence of Grievous Harm proved against the appellant. We find the conviction against the appellant with a less charge of Grievous Harmcontrary to section 234 of the Penal Code was unsafe and should not be allowed to stand. We accordingly quash the conviction and set aside the sentence. Weorder the appellant tobe set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 1ST DAY OF OCTOBER 2015.

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

JUDGE **JUDGE**

1.10.2015 **1.10.2015**