REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 23 OF 2013

(An appeal against both conviction and sentence of the Principal

Magistrate's Court at Butali in Criminal Case No. 529 of 2012

[S. N. ABUYA] dated 29th January, 2013)

DANIEL MATHENGE KIMUTAI ……………………..……. APPELLANT

VERSUS

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

JUDGMENT

The appellant was charged with another with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code. The co-accused, who was 1st accused in the trial Peter Wanyama, was also charged separately with handling stolen goods contrary to section 322 of the Penal Code.

The particulars of count I were that on 28th July 2012 at Sulungai market in Kakamega North District of Kakamega County jointly with others not before court while armed with dangerous weapons namely a rifle and an iron bar robbed Jackson Chekata Tipo seven mobile phones of different makes, safaricom airtime cards of different prices worth Kshs.10,000/=, orange airtime cards of different types worth Kshs.2000, sugar , cooking fat, one battery lamp, china made and cash Kshs.13,500/= all valued at Kshs.45,900/= the property of Jackson Chekata Tipo and immediately before the time of such robbery used actual violence to the said Jackson Chekata Tipo.

The particulars of count II were that on the same day and place jointly with another not before court while armed with dangerous weapons namely a rifle and iron bar robbed Philip Kabuti Charles Kshs.10,000/= the property of Philip Kabuti Charles and immediately before the time of such robbery used actual violence to the said Philip Kabuti Charles.

The particulars of the alternative charge against that Peter Wanyama were that on 1st August 2012 at Eldoret Town Uasin Gishu District of Uasin Gishu County otherwise than in the course of stealing dishonestly received or retained 14 pieces of Safaricom airtime cards of 20 shillings each knowing or having reason to believe them to be stolen goods.

After a full trial, Peter Wanyama was acquitted on all the charges against him. The appellant was however convicted on both counts I and II. He was sentenced to suffer death in count I. The sentence in count II was left in abeyance.

Being dissatisfied with the decision of the trial court, the appellant appealed to this court through his

advocate M. Kiveu, listing seven (7) grounds of appeal. At the hearing of the appeal, he appeared in person and stated that Mr. Kiveu had withdrawn from acting for him. He filed written submissions which we have perused.

The learned Prosecuting Counsel, Mr. Oroni opposed the appeal. Counsel relied on the evidence of PW1, PW2 and PW3. He stated that PW2 even described the complexion of the appellant. He also described what the appellant did at the scene of robberies.

The case for the prosecution, in brief is that on 28th July, 2012 at about 7.00 p.m., PW1, Jackson Tipo, the complainant in count I was at his shop at Silungai market in Kakamega County. His business was selling clothes and other goods. Suddenly, as he was serving a client PW2, Philip Kabuti, he saw a person enter the shop suspiciously. A second person then entered the shop. PW1 then informed PW2, the complainant in count II to be careful. The intruders then demanded money from PW1 from the day's collections. Before he responded, they hit him with a blunt object and he became unconscious. The intruders then took several telephone credit cards, mobile phones and other items from the shop. They also robbed PW2, Phillip Kabuti of money and hit him and he also became unconscious.

Moses Wemali, PW3 had just arrived near the shop to buy telephone credit on a motor bike. While outside the shop of PW1, he saw people jumping onto the motor bike. One cocked a gun, slapped him and he fell down. The motor bike Reg. No. was KMCS 209G. PW3 stated that he recognized Peter Wanyama, the 1st accused who was acquitted, as one of those people. He had known him because they had schooled together in 1992 – 1996. It was his evidence that he was the boda-boda operator of the subject motor bike which belonged to one Sophia Kisengu.

On the same night at about 8.00 p.m., one David Ngige, PW6 saw the same Peter Wanyama who was acquitted, on a motor bike. In this witness's evidence, Peter Wanyama was the owner of the said motor bike.

After investigations, PW6 was initially arrested. He was however later released and became a prosecution witness.

The appellant and his co-accused were arrested later on 1st of August, 2012 at Eldoret. They were arrested by PW7, PC Amos Mangoli from the Police Flying Squad. They were arrested on information that they had been seen in suspicious circumstances at a bakery along Uganda road Eldoret. On the police approaching, the two started running away but were restrained. The police found on them 14 pieces of Safaricom credit cards of 20/= on Peter Wanyama while the appellant was found with a master key whose possession he never explained satisfactorily. They were thus arrested and charged in court.

When put on their defences, each of the two gave detailed sworn evidence. They were cross-examined. The appellant admitted that he had refused to take part in an identification parade. He thought that the person who was to identify him had seen him before.

Faced with this evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt on both counts of robbery with violence. The learned trial magistrate convicted and sentenced him. The co-accused was acquitted on all the charges. Therefrom arose this appeal.

This being a first appeal, we have to start by reminding ourselves that as a first appellate court, we are duty bound to re-evaluate all the evidence on record and come to our own conclusions and inferences. See the case of ***Okeno -vs- Republic [1972] EA 32***.

We have evaluated the evidence on record afresh. The appellant was arrested because of allegations from informers. The informers were not disclosed to the court. The said informers were not called by the prosecution to testify. The arresting officer, PW7 merely stated that the informers stated that they had seen suspicious people. The appellant was not found in possession of anything that was relevant to the robberies alleged. He was found with a master key. No evidence was tendered to connect the master key

with any of the offences. Even assuming that it was true that he was found with a master key, which we doubt, such evidence would be evidence of mere suspicion. The master key was not connected or alleged to be connected to any of the offences. Evidence of suspicion, however strong, cannot be a basis for sustaining a conviction in a criminal case. See the case of ***Sawe -vs- Republic [2003] KLR 364***. The conviction was therefore not sustainable.

The appellant was not identified at the scene of the robberies. The person who was identified by PW3, Moses Wakulua Wemali was the co-accused who was acquitted. It is therefore evident that if any of the accused was associated with the commission of the crimes, it was the co-accused who was acquitted and not the appellant. It was therefore a mistake for the learned trial magistrate to have found that the appellant was involved in the commission of the offences.

In criminal cases, the burden is always on the prosecution to prove an accused person guilty beyond reasonable doubt. The accused does not have a burden to prove his innocence. See the case of ***Woolmingtone -vs- DPP [1932] AC 462***. Our perusal of the judgment leads us to the conclusion that the learned trial magistrate made erroneous inferences on the evidence on record and shifted the burden of proof to the accused. The magistrate stated in the judgment as follows -

> ***"There is no doubt that the 2nd accused person was one of the robbers even though he was not known to the complainant and he refused to participate in the identification parade electricity lights (above) was on at the time scene (PW1's shop) and PW1 was able to see and visually identify the 2nd accused in the dock as one of the robbers and his evidence was collaborated by who was at the scene at the time of robbery and used the electricity light at the crime scene (PW1' shop) to see and visually identify the 2nd accused person and the robbery having taken 15 minutes to commit the robbery that was sufficient time for PW1 and PW2 to see and observe the robbers well.***
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> ***On the other hand the 2nd accused person defence that he was just arrested in a house where alcohol is sold in Eldoret on 1st of August at 2 p.m and he was charged with the offence he doesn't know and he didn't commit and with a person he didn't know was not a believed defence afterthought and he never asked PW7 (his arresting officer) about alcohol and never told the offence was committed."***

Firstly, there is no evidence that any of the eye witnesses PW1 and PW2 identified the appellant visually at the scene using electricity light. The person who was said to have been seen by PW3 outside the shop was acquitted. It was a mistake for the learned magistrate to come to a finding that PW1 and PW2 identified the appellant at the scene. Secondly, in requiring the appellant to ask specific questions explain the commission of the offence, the learned magistrate was shifting the burden of proof to the defence. The burden was on the prosecution to establish the commission of the offence as well as the persons who committed the offence. That burden cannot be shifted to an accused person. The appellant had a Constitutional right to even keep quiet.

Having evaluated the evidence on record afresh, we are of the view that the conviction of the appellant is not safe. The appeal has merits. We allow the appeal, quash the conviction and set aside the sentence imposed. We order that the appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 11th day of February, 2014

HELLEN WASILWA

JUDGE

GEORGE DULU

JUDGE