REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 3 OF 2013

(An appeal against both conviction and sentence of the Chief Magistrate's Court at Kakamega in Criminal Case No. 1004 of 20012 [M. I. G. MORANGA PM] dated 28th December, 2012)

ERICK SHAMENEKHA ……..……. APPELLANT

VERSUS

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

JUDGMENT

The appellant was charged in the subordinate court with robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of charge were that on 12th May 2012 at Iyala village, Makkokho sub-location, Iguhu Location in Kakamega South District while armed with dangerous weapons namely slasher robbed Geoffrey Isutsa Shivachi of his mobile phone make No. E62 valued at Kshs.3,500/= and at or immediately before or immediately after the time of such robbery wounded the said Geoffrey Isutsa Shivachi. He denied the charge.

After a full trial he was found guilty, convicted and sentenced to suffer death. He has now appealed to this court on several grounds. He also filed written submissions, which we have perused.

The learned Prosecuting Counsel, Mr. Oroni opposed the appeal. Counsel relied on the evidence of PW1 who had known the appellant two years earlier. Counsel argued that, though the robbery occurred at 1.00 a.m., there was ample light from the security electricity bulb at the gate. In addition, there was a struggle between the appellant and PW1. This enabled PW1 identify the appellant.

In brief, the facts of the case are that PW1, Geoffrey Asutsa Shivachi, a teacher at Shitoli Primary School had attended an anniversary of the death of his uncle on the night of 11th/12th May 2012. At about 1.00 a.m., he walked out towards the gate to receive a telephone call. Suddenly, someone came from the road and hit his hand and his mobile phone dropped down. Though he tried to run to pick the phone, that person outran him and took it. The two struggled and he recognized the face of the attacker through the electricity light that was at the gate. The person was the appellant, who removed a sword from his clothes and cut the complainant from the ear to the cheek. The complainant fell down and lost consciousness. He regained consciousness in the hands of his parents, after being taken there by members of the public, including PW3 Kennedy Musunya Shikanga. PW3 stated that he saw two people who attacked the complainant and snatched his phone. The appellant was one of the attackers.

The complainant was then taken to Mukumu hospital for treatment. The appellant was arrested on 15th May 2012 by members of the public who took him to Malinya Police Station. He was later charged with the offence.

When put on his defence, the appellant denied the offence. He gave sworn evidence that he was a businessman at Khayega. That on the day in question, he was very sick and slept in his mother's house. He also called his mother Henrieta Biteti DW2 as a witness. She supported the appellant's story.

Faced with this evidence, the trial magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. The court convicted the appellant and sentenced him to suffer death. Therefrom arose this appeal.

This being a first appeal, we are duty bound to re-evaluate all the evidence on record and come to our own inferences and conclusions. See the case of ***Okeno -vs- Republic (1972) EA 32***.

We have re-evaluated the evidence. The conviction of the appellant is predicated on the evidence of identification or recognition by the complainant PW1, and an eye witness PW3.

The complainant said that he recognized the appellant whom he knew before. PW3 said he knew the appellant as his pupil. Evidence of recognition is more reliable than identification of a stranger. However, even where recognition is alleged by prosecution witnesses, the court is required to take precautions before convicting on the said evidence. In the case of ***Eria Sebwato -vs- R. [1960]EA 174*** the court stated as follows -

"That this accused, well known to the complainant should go with seven other men to commit an organized robbery in a house where he was well known seems to me to be inexplicable. He must have known he was bound to be recognized, and that, in my view casts doubt on the evidence of the complainant and his wife ….."

We entertain similar misgivings in the circumstances of this case. The complainant PW1 claims to have known the appellant two years earlier. The appellant and his mother confirm such prior knowledge. PW3 knew the appellant earlier. The appellant was his pupil in school. In the circumstances of this case it is highly doubtful that the appellant would have boldly gone to rob the complainant PW1 of his mobile phone in the open glare of the electricity security light at the gate, without any mask, fully aware that he knew him well.

In addition to the above, neither PW1 nor PW3 made any report to anybody, immediately after the incident that they had recognized the appellant.

There is no evidence that the people who took the complainant to his father were informed that the appellant was the robber. It is trite that where there is positive identification or recognition, the first people to arrive at the scene are expected to be informed of that recognition by those who claim to know the culprits. This is simply natural. It strengthens the weight of the said recognition or identification. See the case of ***Anjononi & Others -vs- Republic [1980] KLR 54.***

The failure of the prosecution herein to tender any evidence to show that PW1 and PW3 informed the first people who arrived at the scene that they recognized or identified the appellant, creates great doubts in our minds that they recognized or identified him. The benefit of that doubt has to be given to the appellant and we do so.

Another issue we would want to address is the way the learned trial magistrate considered the evidence. Perusing through the judgment, it is clear that the learned trial magistrate shifted the burden of proof to the appellant. That was a mistake. The learned trial magistrate took one and half pages of the typed judgment to criticize the defence of the appellant in isolation from the prosecution case. In addition, though she found great loopholes in the way the investigations were conducted, and that the alleged weapon was neither taken for analysis by the government chemist to confirm if it had blood stains nor produced in court, she still went ahead and convict the appellant.

In our view, the learned magistrate should have weighed the evidence of the prosecution against the defence. Where there were doubts in the prosecution case, the benefit of the same should have been

given to the appellant. It was not the function of the court to build a case for the prosecution as the trial learned magistrate tried to do.

Considering all the evidence on record, we come to the conclusion that the prosecution did not prove its case against the appellant beyond any reasonable doubt. We allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

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

GEORGE DULU **HELLEN WASILWA**

JUDGE **JUDGE**