REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 114 OF 2013

KITILI MUNYAO …….....APPELLANT

VERSUS

REPUBLIC …….....RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Case No. 2189 of 2008 by Hon. J. Oseko, P.M on 30/12/2006

JUDGMENT

1. The appellant was jointly charged with another with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code.**
2. Particulars of the offence being that on the **1st** day of **September 2008,** at **Kamuti Uiini Village, Katheka Kai** Location in **Machakos District within Eastern Province,** Jointly with others not before court robbed **Paul Mutuku** Kioko of Cash Kshs. 2000/=, one radio make Zonitea, one panga and one lesso all valued at Kshs.4100/= and at or immediately before or immediately after the time of such robbery wounded the said **Paul Mutuku Kioko.**
3. In the alternative the appellant was charged with handling stolen property contrary to **Section 322(2)** of the Penal Code. Particulars of the offence being that **2nd** day of **September 2008**, at **Kamuti Uiini Village, Katheka Kai Location** in **Machakos District** within **Eastern Province**, otherwise than in the course of stealing, he dishonestly received or retained one, panga and one lesso knowing or having reason to believe them to be stolen property.
4. He was tried, convicted and sentenced to suffer death. Being aggrieved by the conviction and sentence, he appeals on grounds that:-

i. The findings of the trial magistrate were not supported by the evidence on record.
ii. The magistrate erred in law and fact by convicting on evidence of a single witness without cautioning herself.
iii. The magistrate erred in law and fact by relying on evidence of identification without evaluating it.
iv. Evidence adduced was contradictory and un-corroborated.
v. The defence put up was rejected.

5. The case as presented by the prosecution was that on the **1st September, 2008** at **8.00pm**, PW1, **Paul Matuku** was having dinner with his children, when they heard a loud bang on the door. He saw the appellant with two other men enter the house, the door having given way. They were armed. The appellant hit the hurricane lamp that was on. They demanded money from him. They cut him injuring him. They took his money that was realized from sale of maize, a radio cassette; make Sony-tech, a lesso and a panga. He reported to the police who moved to the scene two (2) hours later. Neighbours had already answered his call of distress. They went to the appellant's

house where they recovered his panga and lesso. The appellant was arrested and charged.

6. In his defence the appellant stated that he was asleep inside his house when he heard a knock on his door at midnight. He opened, police officers asked him for the radio that had been stolen. They searched his house. Nothing was recovered. Nevertheless they charged him.
7. At the hearing of the appeal the appellant relied upon his written submissions whereby he buttressed his grounds of appeal.
8. In response thereto, the learned State counsel, **Mrs Saoli** submitted that PW1 and PW3 clearly identified the appellant who was a neighbour. The appellant and others were armed with rungus and pangas and when the alarm was raised neighbours came. They laid ambush and he was captured. Evidence adduced was straight forward which made the conviction proper. He called upon the court to dismiss the appeal and uphold the conviction.
9. This being the first appeal, we are duty bound to re-evaluate evidence adduced at trial and draw our own conclusions. We also note the fact that we neither saw nor heard witnesses who testified. (***see Okeno versus Republic [1972]E.A. 32; Kariuki Karanja versus Republics [1986] KLR 190).***
10. It has been contended by the appellant that conditions that existed did not favour proper identification. In convicting him the trial magistrate had this to state:-

> "… ***they saw him well. He spoke to the complainant who knows him well as a neighbor and who is the one who demanded money from him. He was at close approximation…(sic) there was light from a lantern and he saw the 1st accused really well and recognized him…"***

11. The court did consider visual recognition in the case of ***Anjononi & Others versus Republic [1976 – 80] 1 KLR 1566*** *and stated thus:-*

> ***"… 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 another".***

12. In regard to voice identification of the Court of Appeal in the case of **Karoni versus Republic [1985]KLR 290** stated thus:-

> ***"identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases, care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification."***

13. It is not in dispute that the appellant was a neighbour of PW1, PW2 and PW3**.** They used to interact; he would shop at PW1's shop. On cross-examination PW1 described him as his neighbour **Peter Kaliti.** When the robbers entered the house according to PW1 and PW3 the lantern lamp was on. Light emanating therefrom enabled them to see the persons. They failed to identify two (2) of the people but they identified the appellant as their neighbour.
14. The incident occurred at 8.00pm. There was sufficient lighting. PW1, PW3 and others were eating. Both witnesses state that the appellant hit the lamp after entering the house but this was after they saw him. They were categorical that he carried a panga, a weapon he used to hit the lamp.
15. It was the appellant who demanded money from PW1. This enabled them to recognize his voice. These were people who knew the appellant. They were familiar with his voice intonation. In cross-examination this fact was not disputed, the trial court therefore made no error in relying on the evidence adduced in that regard. Circumstances that prevailed then favoured correct identification.
16. Consequently the question to be answered is whether the trial magistrate was required to warn herself of the dangers of convicting on such evidence? Right at the outset we do point out that the prosecution's case was not based on evidence of a single witness. Nevertheless it is imperative for us to point out that we understand the danger that would lie where dependence of the

prosecution's case is solely on evidence of a single witness that would require a court to satisfy itself that evidence adduced is sufficient to return a verdict of guilty.

17. In the case of **Roria versus Republic [1967] E.A. 583 the East African Court of Appeal stated thus;-**

> ***"a conviction resting on identity invariably causes a degree of uneasiness, and as Lord Gardner L.C. said recently in the House of Lords in the course of debate, there may be a case in which identity is in question, and if any innocent people are convicted today. I should think that in nine cases out of ten, if they are as many as ten, it is on question of identity. That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although, no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances, it is safe to act on such identification".***

18. This is a case where the evidence of PW1 was corroborated by that of PW3, **Mutie Mutuku**, his son and minor aged **13 years** who was not a child of tender years. ***(Section 2 of the Children's Act***); and the court did satisfy itself of that fact.
19. Following the attack PW3 and his siblings wailed uncontrollably. Their distress call attracted the attention of neighbours who answered by going to their home. PW2, **Stephen Mulili** amongst others found PW1 bleeding from the injury he sustained. He disclosed the name of his assailant as **Peter**, the appellant herein. They walked to the appellant's home and laid ambush. They were able to see the appellant with two (2) others returning home at about 1.00am carrying some items.
20. PW2, he stated that there was moonlight that enabled him to see. Having seen the appellants, they went back to the complainant's home. The police had been called. They arrived shortly thereafter. They moved to the appellant's house and recovered a panga and lesso that were positively identified by the complainant. Although in his defence, the appellant argued that nothing was recovered from his house. The evidence adduced by PW2 in regard to the recovery made was corroborated by that of PW5, **IP Charles Theuri** who made the recovery.
21. To prove the charge, the prosecution did establish that indeed the appellant with two (2) other persons, were armed with offensive weapons that they used to assault the complainant. They did take away what the complainant owned without his consent, money inclusive. It is contended by the appellant that per the charge sheet the sum stolen was indicated as **Kshs. 2000/=** but per evidence of PW1 they took away his jacket which had **Kshs. 14,320/=** in the pocket. This does not make the charge sheet defective as stated by the appellants because the prosecution was required to prove a singular ingredient of the offence. (***see Oluoch versus Republic [1985] KLR.***
22. A re-consideration of the evidence adduced shows that the grounds of Appeal raised have no merit. They are rejected. In the result the appeal fails. Accordingly it is dismissed.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **10TH** day of **SEPTEMBER, 2014.**

THURANIRA B. JADEN **L.N. MUTENDE**

JUDGE **JUDGE**