REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 1 OF 2011

CHARLES MAINA KARIMI.....APPELLANT

Versus

REPUBLIC….....RESPONDENT

(Appeal from conviction and sentence in Nyeri Chief Magistrate's Court (Hon. Ogembo D.O, PM) delivered on 5th January, 2011)

JUDGMENT OF THE COURT.

1. The appellant herein, faced a charge of robbery with violence Contrary to Section 296(2) of the Penal code. The facts of the case in the lower court were that on 19/9/2010, at Muringato Estate, Nyeri District within Central Province, he robbed Denis Mugo Macharia of one mobile phone make Nokia 6085 valued at Kshs.14,000 and at or immediately before or immediately after the time of such robbery struck the said Denis Mugo Macharia using a rungu.

2. A total of 5 witness testified for the prosecution at the conclusion of which the trial magistrate convicted the appellant and sentenced him to suffer death as prescribed by law.

3. The appellant in his home made appeal attacks the verdict of the lower court on the main that the trial court erred in law and fact by not finding that the identification allegedly made during the attack was insufficient to lead to an arrest.

4. When the appeal came up for hearing before us, Ms Maundu who appeared for the DPP informed us that she was conceding to the appeal on the issue of identification. We therefore reserved our judgment pending the review of evidence to see if we concur with the conclusion reached by the DPP.

5. The issue of identification touches on the evidence of the complainants (PW1) and PW2. PW1's evidence was that on 19/9/2010 at about 7.45 pm he was at Hill Court in Kingongo with PW2 walking on the road when they met the appellant. That as they walked along, appellant started following them and on being asked why, he produced a rungu from his jacket and hit the complainant with it on the hand and took PW1's phone from his shirt pocket a Nokia 6085. appellant then escaped when a car approached them but after about 1 minute, appellant came back and gave him back his simcard before hitting PW2 also with a rungu and then disappearing.

6. The following day, together with one Peter and Mugo, they laid an ambush against appellant at the same spot. He pointed appellant out and he was caught. The witness confirmed that he had identified appellant well as the scene was well lit with security lights that showed his face well as they talked to him. He testified that he was injured on the left hand but he never went to hospital.

His phone was never recovered. PW2 Irene Wairimu gave similar evidence to PW1.

7. PW2 was also part of the group that laid an ambush against the appellant the following day. With PW1 they pointed him out and appellant was caught. She also confirmed that the scene had been well lit and that she had properly identified the appellant.

8. Pausing here the question the court asks is: was the manner and circumstances of the attack conducive for identification? Both PW1 and PW2 have testified that the scene of the attack was well lit by security lights from neighbouring houses. It was their evidence that when PW3 and 4 responded to their distress call they told them they could identify the appellant well. They further in the company of PW3 and 4 laid ambush the next day around the same time and pointed out the appellant who was pursued and apprehended by PW3 and 4.

9. Whereas it need not be a subject of adverse interpretation and bearing in mind that the onus of proof in all criminal cases, in absence of any statutory provision, lies on the prosecution, it was curious that the accused throughout his trial chose not cross-examine any prosecution witnesses and once put on his defence offered none at all.

10. Section 211(1) of the CPC provides that at the close of the prosecution case and after such summing up, submission or argument as the case may be, if it appears to the court that a case has been made out against an accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused and inform him that he has a right to give evidence and the manner such evidence may be given. What this means is that in putting the accused in his defence the court is persuaded that the prosecution has established a prima facie case which in the absence of any evidence to the contrary it can safely convict.

11. As a first appellate court, we are required by law to revisit evidence adduced at the trial court afresh, analyze and evaluate it and reach our own conclusion bearing in mind that the trial court had the advantage of seeing the demeanor of and hearing the witnesses.

12. Whereas the DPP informed us that they were conceding to the appeal on the basis of insufficiency of identification evidence, we have analysed the prosecution's evidence in support of the charge and the findings of the trial magistrate thereon and are persuaded that the conviction was safe and uphold the same.

13. The appeal is therefore dismissed and the conviction and sentence by trial court upheld.
14. It is so ordered.

Dated and delivered at Nyeri this 6th day of November 2013.

OUGO R.E

….....

JUDGE

ABUODHA N.J

….....

JUDGE

Delivered in open Court in the presence of..... for the Appellant and..... for the Republic