REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 71 OF 2011

DAVID EYANAE …..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal arising from the decision of Hon. T. Nzyoki, SRM in Lodwar Principal Magistrate's Court in Criminal Case No. 707 of 2010)

J U D G M E N T

The Appellant was jointly charged with another for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. Particulars are that on the 11th day of October 2010 at Kiwanja Ndege in Turkana West District within Turkana County, jointly robbed Edome Mariao of his cash of Khs. 15,000.

The Appellant was convicted and sentenced to death. Being dissatisfied with the conviction and sentence, he preferred an appeal to this Court and raised the following grounds:-

1. *That there was no weapon used during the attack.*
2. *That two people are said to have participated in the robbery but it was only the Appellant who was convicted.*
3. *That there was no mention of witnesses in the charge sheet.*
4. *That there was no mention of any weapon in the charge sheet.*
5. *That the charge sheet does not show how the robbery occurred.*

The brief facts of the case are that on 11th October, 2010 at around 7.30 pm, the complainant Edome Mariao had closed his butchery business and was walking home. As he was crossing Kakuma Airstrip he saw two men walking behind him. He did not think that the two had any bad intention. As the two men reached him, one of them grabbed him on the neck from behind and strangled him. The other one held his legs and wrestled him to the ground. He testified that he did not see the person who had held his neck from behind but that he managed to identify the Appellant herein who was his neighbour. He testified that the Appellant is the one who held him by his legs and that he is the one who removed Kshs. 15,000 from his shirt pocket. He testified that he was able to recognize the Appellant who came close to his head which was firmly held on the ground.

After the robbery, he went home and told his neighbours he had been robbed by two men one of whom was the Appellant. The complainant with others went looking for the Appellant at the scene and at Kakuma Trading Centre in vain. They then went back and laid in wait outside the Appellant's house. The Appellant came back at around 10.30 pm and was arrested. The enraged mob which had arrested the Appellant wanted to lynch him but a Chief identified as Ekwoma called Administration Police Officers

who came in time and re-arrested the Appellant. The Administration Police Officers escorted the Appellant to Kakuma Police Station where he was booked. On the following day, the Investigating Officer took over the investigations and preferred the charge of stealing from a person against the Appellant which charge was later changed to robbery with violence.

The Appellant's appeal was opposed by Mr. Kimanzi State Counsel on the ground that the Appellant had been identified by the complainant who was his neighbour and that the robbery was witnessed by Pw 2. He also took issue with the Appellant for not calling his sister whom he had claimed was with him elsewhere.

As a first appellate Court, were are expected to evaluate the entire evidence that was adduced before the lower Court and reach our own conclusions. Before we analyze and evaluate the evidence, we must comment on the grounds put forth by the Appellant. The grounds do not in any way raise anything which can be described as grounds of appeal. The grounds simply do not assist the Appellant's appeal. We bear with him because the grounds were prepared by the Appellant himself. This raises a major concern where Appellants as in the present case are not represented by a Legal Counsel. The Appellant for instance has raised the fact that the charge sheet does not show how the robbery occurred. The manner in which the robbery occurred cannot be described in a charge sheet as this is a matter of evidence. The names of witnesses are ordinarily expected to be shown in a charge sheet but failure to do so does not prejudice the accused's case as the accused is provided with copies of witness statements before commencement of the Trial.

A charge sheet ought to state that the robbers were armed with a weapon and the weapon named in the charge sheet. In the present case, there was no evidence that the robbers were armed with any weapon and it was therefore not necessary to indicate that a weapon was used when there is no such evidence.

The Appellant seems to complain that there were two persons charged but that he was the only one convicted. The Appellant should know that conviction or otherwise is a matter of evidence and if there is no evidence against one suspect, that suspect can be acquitted and the other convicted. It does not always follow that persons jointly charged should either be acquitted or convicted together.

We now turn to evaluate the evidence as recorded by the Trial Magistrate. Our mandate as a first appellate Court was set out in the case of **Okeno Vs Republic [1972] EA 32**. We are expected to carry out a fresh and exhaustive examination of the evidence. We are also expected to weigh conflicting evidence and draw our own conclusions.. We are merely not expected scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions. We are expected to make our own findings and draw our own conclusions. We are however expected to make allowance for the fact that we, unlike the Trial Court did not have the advantage of hearing and seeing the witnesses who testified.

We have analyzed the evidence of the complainant who stated that he recognized the Appellant herein as one of those who robbed him of his Kshs. 15,000. It is important to point out that the complainant testified on two different dates. He at first testified on 23/11/2010 before he was stood down to enable the Prosecution to amend the charge sheet as evidence of the complainant had shown that the offence of robbery with violence had been disclosed. The second time the complainant testified was on 09/12/2010. During the first time the complainant testified on 23/11/2010, this is what he said and we quote:-

"During the attack I was able to identify one David Eyanae who held me by the legs and fell me down. He is a neighbour. I was not able to identify the man who held me by the neck from behind."

When the complainant returned to the dock on 09/12/2010 this is what he had to say and we quote:-

"The second man held me by the two legs and the two felled me down. The first man who was strangling me by the neck held me firmly on the ground. The second man who was holding my legs put his hands in my pocket and took Kshs. 15,000 which I had gained from my meat trade..... The

person who tore the pocket is David Eyanae the first accused now before the Court. When the first accused was holding my head on the ground, he was too close to me and I was able to see his face clearly..... I saw the man who was holding my head from behind and did not see his face. The first accused person is the man who I clearly saw as he was holding and strangling me by the neck."

It is clear that there are contradictions between the evidence of the complainant as given on 23/11/2010 and 09/12/2010. Whereas the complainant testified on 23/11/2010 that the person who held him by his legs is the Appellant, in the testimony of 09/12/2010, he says that the Appellant is the one who held him by the neck. This is a material contradiction which the Trial Magistrate should have noticed and taken into account. There was no evidence on record indicating that once the complainant was felled to the ground, the Appellant moved from the legs and held him by the neck. There is also no evidence on which position the complainant lay while on the ground. Was he facing up or sideways? Naturally a person being strangled should not keep his eyes open as to see the person strangling him. The complainant was robbed at night at around 7.30 pm. He was under strangulation and he would not have properly seen his assailants. The contradiction in the evidence of the complainant as to the roles of each of his two attackers goes on to confirm the possibility that he did not identify the Appellant as one of his attackers.

The State Counsel argued during the hearing that the robbery was witnessed by Pw 2. We have gone through the evidence of Pw 2 Jackson Ewoi. His evidence is clear that the complainant left ahead of him and that after he closed his business, he took a ride on a motor bike and while on the way, he found the complainant who was crying. The complainant told him that he had been robbed and that he mentioned the Appellant as one of the robbers. It is therefore clear that Pw 2 was not with the complainant during the robbery.

The Trial Magistrate did not warn himself of the danger of convicting on the evidence of a single witness. In **Roria Vs Republic [1961] EA 583** it was held that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, there is need for other evidence.

In the present case, the conditions for proper identification were not there. The complainant had seen two people walk from behind him but did not identify them. If it was dusk as he claimed in his evidence, he would have been able to identify the Appellant at this stage as he says that he is his neighbour. He was held from the back by the neck and wrestled to the ground before again being strangled as his head was firmly held on the ground. In these circumstances, it was not possible that he would identify the Appellant whom at first he claimed held his legs.

In **Republic Vs Eria Sebwato [1969] EA 174** it was held that:-

"... When the evidence alleged to implicate an accused is entirely on identification, that evidence must be absolutely watertight to justify a conviction..."

In the present case, the evidence is entirely on identification. This evidence is not watertight as we have demonstrated hereinabove in this judgment. The Appellant was alleged to have stolen Kshs. 15,000 from the complainant. The arrest was effected a few hours after the robbery. If he was indeed the one who had robbed the complainant, he would have at least been found in possession of some money. There was nothing recovered on him and as such the only evidence implicating him is that of identification which we find was not watertight. Had the Magistrate considered the circumstances obtaining at the time of the identification and contradictions in the evidence of the complainant, he would have not arrived at the conclusion which he did.

We find that the identification of the Appellant was not free from error. It was not safe in the circumstances to convict the Appellant. We quash the conviction and set aside the sentence. The Appellant should be set free forthwith unless otherwise lawfully held.

Dated and delivered at Kitale on this 6th day of November, 2013.

E. OBAGA

JUDGE

L. NDOLO

JUDGE

In the presence of:

Appellant: ….....

Respondent: ….....