REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 118 OF 2012

ROBERT BARINJA……..……..APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 863 of 2011 Republic vs Robert Barinja in the Resident Magistrate's Court at Kabarnet by S. M. Soita, Senior Principal Magistrate dated 19th June 2012)

JUDGMENT

1. The appellant was originally charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. He also faced an alternative charge of handling stolen property contrary to section 322(2) of the Penal Code. However, at the end of the trial, the learned trial Magistrate held as follows-

> *"In view of the fact that no injuries were sustained by the complainant I will reduce the charge to that of simple robbery under section 296 (1) of the Penal Code for which I find the accused guilty and convict him accordingly".*

2. The appellant was sentenced to 7 years imprisonment. The appellant has appealed against his conviction and sentence. The petition of appeal was filed on 4th July 2012. It raises nine grounds of appeal. The principal grounds urged can be condensed into five. First, that there was no positive identification; secondly, that the complainant (PW1) and one V M (PW2) were untruthful or unreliable witnesses; thirdly, that neither the investigating officer was not called as a witness nor was the initial report to the police was produced; fourthly, that there were material discrepancies on the dates and time of the offence; and, lastly, that the ingredients of the offence of robbery were not proved beyond reasonable doubt.
3. The particulars of the original charge were as follows: that on 19th November 2011 at Marigat Location in Baringo District, and while armed with a dangerous weapon, namely a knife, the appellant robbed T T of a school bag containing, among other things, clothes, text books and exercise books all valued at Kshs 5,000. The alternative particulars were that the appellant handled those items knowing or having reason to believe them be stolen.
4. The State has contested the appeal. The case for the State is that the evidence tendered at the trial proved the charge beyond reasonable doubt. Regarding identification of the appellant, the State

submitted that the complainant trained a light on the appellant's face. The appellant was armed with a knife. The complainant identified the appellant by a scar on his face. The appellant was also identified in a parade and found in possession of the stolen items. The State discredited the defence tendered by the appellant at his trial. In a nutshell, the State submitted that the appeal lacked merit and should be dismissed.

5. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw my own conclusions. In doing so, I have been careful because I have neither seen nor heard the witnesses. See *Njoroge v Republic* [1987] KLR 99, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190, *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 (unreported), *Paul Ekwam Oreng v Republic* Eldoret, High Court Criminal Appeal 36 of 2011 (unreported).
6. The complainant (PW1) was a form four student at **[Particulars Withheld]** Secondary School. On 19th November 2011, he was on his way from school. He was in the company of a female student (PW2) also a form four student at a different school. They alighted from a vehicle at Kuikui trading center. They hired a motorbike to Chemidany trading centre arriving there at 8.30pm. They started walking home. As they crossed the river, PW2 said she heard some movement behind them. PW1, who was using a light from his mobile phone, said he saw someone seated ahead of them. They passed him. He greeted them. That person asked the complainant to give him the phone to call somebody. The complainant said the phone had no airtime. The stranger grabbed and punched the complainant. He flashed out a knife. The complainant let go of his bag and took off. He said he identified the appellant from a scar on his forehead. He saw it when he trained the light from the mobile phone onto the appellant's face.
7. PW2 on the other hand testified that she held onto the complainant; the appellant kicked her. She identified him from the scar. As the complainant and appellant struggled, she hid in the bush. In the meantime, the complainant ran to the shopping centre and called his father. A "good Samaritan" took him back to the scene to look for PW2. They found her. Elders were called. The next day, he reported the matter to the police. Later that day, he was informed that a suspect had been arrested. He went to Chemidany AIC Church compound where the appellant was being held. He identified him.
8. PW3, a village elder, was at Chemidany centre on 19th November 2011. At about 8.30 p.m. he left some youth playing a game of pool. One of them was the appellant. He was woken up later and informed of the attack. He said he went to the scene and collected a biro pen. He showed it to the youth who were playing pool the previous evening. They said the pen belonged to Robert [appellant]. He called a police reservist (PW4). They arrested the appellant and asked him where the stolen school bag was. The appellant said it was in his house. He was escorted there by about ten people. PW3 then called PW1 and PW2 who came and identified the appellant as well as the stolen items.
9. The defence of the appellant went like this; he is a farmer. There had been theft of his farm produce. On 19th November 2011, he heard people in his shamba. He thought they were thieves. He went to check. He was armed with arrows and a torch. The strangers took off. He found a bag, a ladies panties and a condom. He formed the impression the strangers were having sex on his farm. PW1 and PW2 denied that allegation. The next morning, he took those items to the village elder PW3. PW3 told him to keep them until their owner made a claim. He returned with the items to his house. He was then arrested as detailed earlier. On the way to the station, he said the police reservist stole his Kshs 1,200 and took his identity card. The following day, the parents of PW1 and PW2 demanded payment of Kshs 30,000 to drop the matter. He refused. He was then charged with the offences.
10. The learned trial Magistrate found that defence unbelievable and an "afterthought". He found that the appellant *"actually attacked the complainant and stole his bag"*. From the passage of the judgment I highlighted earlier, he found him guilty on the lesser charge of simple robbery.
11. There are some inconsistencies in the prosecution evidence. The attack occurred at night at about 8.30 p.m. across a river. The complainant was using some light from his mobile phone. He and PW2 had never met the appellant. PW1 said that PW2 heard some noise. PW1 then trained a light on the appellant who was seated ahead of them. When they passed him, he greeted them. PW2 on the other hand said that she heard some movement behind them; like some breaking twigs. They saw the appellant stand up and follow them from behind. He caught up with them. Was the

appellant *first* seen behind or ahead of the complainant and PW2?

12. The identification of the appellant is also called into question. It was dark. The only light was from a mobile phone. The persons were total strangers. Granted those circumstances, it is doubtful that a positive identification was made from a scar on the appellant's forehead. PW2 in particular scampered off for safety into the bushes as the appellant struggled with the complainant. It is even more doubtful that PW1 and PW2 identified the *particular* knife produced at the trial. In the absence of proof of an offensive weapon, and considering the appellant was alone, the ingredients of the offence of robbery with violence were absent. The learned trial Magistrate agreed and went for the lesser offence of simple robbery. But in the absence of clear identification, even that was unsustainable. I think what happened is that PW1 and PW2 identified the appellant the next day at the church compound when the police reservist conducted some form of identification parade. It was not a proper identification parade. It is instructive that by then, the appellant was a prime suspect from the biro pen collected at the scene. See *Matthew Wafula and 2 others v Republic* Eldoret, High Court Criminal appeal 130 of 2010 (unreported).
13. Granted those circumstances, I am hard pressed to accept that the identification was *positive*. I am unable to say that the lighting conditions from a mobile phone were *favourable* to identify a complete stranger in the darkness. See *Abdalla Bin Wendo v Republic* [1953] EACA 166, *Joseph Ngumbao Nzalo v Republic* [1991] 2 KAR 212, *Obwana and others v. Uganda* [2009] 2 EA 333 at 337, *Richard Kinyuru and another v Republic* Nairobi, High Court Criminal Appeal 290 of 2009 [2012]eKLR, *Salim Swaleh Mapinga v Republic* [2013] eKLR.
14. There are also discrepancies in the time of the offence. PW3, the village elder, said he left Chemindany centre at 8.30p.m. after closing his business. He left about 10 youths, including the appellant, playing a game of pool at the centre. He was woken up later in the night and informed of the attack. PW1 and PW2 said they were attacked at 8.30p.m.after crossing the river. The appellant could not have been at two places at the same time. I have also seen the original charge sheet read to the appellant on 22nd November 2011. It stated that the offence occurred on 19th November 2011 at 8.00p.m. That charge was substituted on 13th March 2012 with the particulars I set out at the beginning. The fresh charge sheet had no reference to time.
15. The appellant was found with the stolen items. He never denied possession. He had explained that he found them on his shamba and had that he took them to the village elder (PW3) who asked him to keep them until they were claimed by their owners. The learned trial Magistrate did not believe the appellant and dismissed that defence as an afterthought. It might as well be that the appellant was *not* lying. It might also be true that PW1 and PW2, two 16 year olds who had spent a whole day and part of the night *travelling* from school to home, were friends making out on the appellant's shamba. A cardinal precept of our law is that the burden of proof, subject to section 111 of the Evidence Act, rests entirely with the prosecution. It never shifts to the accused. The appellant was not obliged to fill in the gaps left by the prosecution. Any doubt must be interpreted in favour of the appellant.
16. The investigating officer did not testify in this matter. Instead, his colleague who took over the matter, PW5, testified. He produced a biro pen, wallet and the appellant's identity card. He said he was *told* they were recovered from the scene. It was classic hearsay. The appellant had stated that on the way to the police station, PW4, the police reservist, took his money and identity card. Could they have been inserted in the bag? PW5 in cross-examination conceded that the biro had no special mark to identify it; only that it was "*peculiar in that area"*. He also conceded that he was not told "*the actual time the [stolen] items were recovered"*. PW5 said the pen and identity card were recovered in the bag. But in his statement to the police (page 14 of the record of appeal) PW3 had said he *found* the pen at the scene on the night of 19th November 2011. That makes better sense because the pen was shown to the youth the next day. They said the pen belonged to the appellant. The bag was later retrieved from the appellant's house. All those doubts and discrepancies should have been resolved in favour of the appellant. They created doubt on the guilt of the appellant. There is no room for assumptions in a criminal trial. See *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).
17. On the totality of the direct and circumstantial evidence, it is difficult to say that the facts were *consistent* with the *guilt* of the accused. See *Sawe v Republic* [2003] KLR 364. Granted those circumstances, I am unable to agree with the learned trial Magistrate that the original charges or even the lesser charge of simple robbery were *proved* beyond reasonable doubt. In the end, this

appeal is allowed. The conviction and sentence against the appellant is hereby quashed and set aside. The appellant shall be set free forthwith unless held for some other lawful cause.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 2nd day of December 2013

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Mr……for the appellant.

Mr……..……...for the State.

Mr. P. Ekitela, Court Clerk.