REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL 92 OF 2009

(Lesiit and Makau JJ)

COLLINS KIMATHI.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Being an Appeal against both conviction and sentence of the learned trial magistrate Hon. Weldon Kiror Meru CMCR Case No. 32 of 2009)

JUDGEMENT

TheAppellant was charged before the Chief Magistrates Court at Meru with one count of robbery with violence contrary to section 296(2) of the Penal Code. The prosecution case was that the Appellant together with others not before the court while armed with a sword robbed Robison Mwiti Maingi of cash Ksh.5000/- and a mobile phone on the 25th December, 2008 at Gitimbine Market Meru County. The Appellant was found guilty of the charge and was convicted and sentenced to death. Being aggrieved by the conviction and sentence the Appellant filed this appeal.

The Appellant has raised six grounds of appeal in his petition as follows:

0. **That the learned trial magistrate erred in law and fact in convicting and sentencing the Appellant for the offence of robbery with violence contrary to section 296(2) when the ingredients for such an offence was not proved.**

0. **That the learned Senior Principal magistrate erred in law and fact in not considering contradictory evidence by prosecution witness.**

0. **That the learned Senior Principal magistrate erred in law and fact in not considering that the complainant made a report of assault and not robbery with violence vide OB No. 96/26/12/2008 which was read in court by P.C. Njeru the Investigating Officer.**

0. **That the learned Senior Principal magistrate erred in law by shifting the burden of proof to the Appellant.**

0. **That the learned Senior Principal magistrate was totally biased against the Appellant throughout the trial.**

0. **That the Judgment of the learned Senior Principal Magistrate is against the weight of law and evidence.**

At the hearing of this appeal the Appellant was represented by Mr. A. Anampiu. Mr. A. Anampiu urged that the ingredients of the charge of robbery with violence were not proved. Counsel urged that the only evidence against the Appellant was that of PW1 because the rest of the witnesses i.e. P.W 2, 4,5 and 6 all said what the complainant informed them regarding the incident. The four witnesses did not witness any robbery but they did see a tussle between the complainant PW1 and the Appellant and others. Mr. Anampiu urged that the initial report made to PW7, the Investigating Officer vide O.B No. 96 of 25th December, 2008 was that of assault. Mr. Anampiu also urged that the Appellant made a report of assault against the complainat and his report was OB No. 103 of the same date. Mr. Anampiu urged the court to find that what emerged from the evidence was that there was a fight between the Appellant and the complainant, and that the same was corroborated in the evidence of two defence witnesses DW2 and 3 and the statement of the Appellant.

The State was represented by Mr. Motende learned state Counsel. Mr. Motende opposed the appeal. The learned State Counsel urgued that all the ingredients of the offence of robbery with violence under section 296(2) of the Penal Code were proved. Counsel urged that the complainant's evidence was that the Appellant and others stabbed him with a knife and robbed him of his mobile phone and cash immediately he alighted from his vehicle. Mr. Motende submitted that PW2 and 4 who were at a bar nearby came out of the building in time to see and recognize the complainant surrounded by young men among them the Appellant whom they knew before. PW5 saw the Appellant as the last person to leave the complainant at a ditch where the complainant had fallen. Mr. Motende argued the court to find that the Appellants defence was inconsistence and contradictory and therefore could not be acceptable. Counsel urged us to find that the identification of the Appellant was that of recognition and therefore more reliable. For that proposition counsel relied on the case of **Joseph Kiage Nyachuya vs Republic [2006] eKLR** where the Court of Appeal quoted one of its own cases **Anjononi Vs Republic [1980] KLR 59** thus:

"**A recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other."**

We are the first Appellate court and are therefore mandated to subject the evidence adduced before the lower court to a fresh evaluation and analysis and to make our own conclusions bearing in mind we neither saw nor heard any of the witnesses and giving due allowance. The duty of the first Appellate court was elaborated in the case of **Okeno Vrs. Republic 1972 EA 32** where the Court of Appeal stated in that case as follows:-

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."

The facts relied upon by the prosecution are brief. The complainant PW1 was attacked by some youth immediately he alighted from his vehicle at 8 pm on the material evening. He was stabbed by the Appellant on the left hand and then grabbed by the other five youth and dragged into a trench where he was beaten. He was robbed his cash Ksh.5,000/- and a Nokia phone. Those who went to his rescue

were PW 2, 4, 5 and 6. PW 2, 4, 5, and 6 in their testimony all stated that they saw complainant surrounded by young men who threw him into a ditch. They identified one of those young men as the Appellant. These witnesses did not witness any robbery.

The Appellant's defence was that he entered the complainant's bar on the material evening while drunk, accompanied by his aunt. He said that when he stood up in order to go to the toilet, due to drunkenness he fell at the complainant's table. The Appellant said that the complainant's workers pushed him out of the bar and beat him until he was unconscious and left him in a trench outside the bar. He said that his mother who has a business nearby was alerted and took him to hospital where he was admitted for a couple of days. He denies committing the offence alleged and said that the same workers who beat him are the same ones who testified against him.

The Appellant called two witnesses. Dw2 testified that he was with the Appellant on the material evening that the Appellant asked him to go and buy samosas when the Appellant went to the bar. DW2 testified that he heard commotion in the bar and when he entered he saw the Appellant being removed from the bar by the complainant. He said that the complainant and the Appellant fought and fell into a trench. He said he saw someone called Gichuru enter the bar and return carrying an iron bar. DW2 said that he saw that person follow the Appellant but said he did not know what transpired.

DW3 was a tout at Gitimbine Stage. He said that three people who included the Appellant asked him to call them from a bar nearby when a matatu came. They then entered a bar where they started taking alcohol. DW3 said that after sometime he heard noise coming from the bar and when he went to check he saw three people pushing the Appellant on the corridor of the bar. He then saw the complainant go to where the Appellant was and the two of them fought until they fell into a trench. He said that people managed to separate them however, the complainant beat the Appellant and that another man came with an iron bar to hit the Appellant with it but the Appellant managed to ran away.

Having considered the evidence adduced by the prosecution and the defence in this case. We find that there are facts which are not in dispute. The first fact which is not in dispute is that that the Appellant and the complainant had a confrontation on the material evening. The nature of the confrontation is however in dispute. The prosecution case was that the complainant was surrounded by some youths who roughed him up.

The second undisputed fact is that after this confrontation both the complainant and the Appellant reported the matter to the police. Going by the number of the OB reports by both it was the complainant who reached the police before the Appellant. Both reports were of assault causing actual bodily harm.

The third undisputed fact is that both the complainant and the Appellant were treated for the injuries suffered in that confrontation. It is also undisputed that the injury suffered by the Appellant was so severe that it necessitated his admission in hospital for treatment and management. In fact the Appellant was arrested for this offence while still admitted in hospital.

Mr. Anampiu has raised pertinent issues affecting the prosecution case. The most important issue is why did the complainant in his initial report to the police report that he had been assaulted, and why is it that the Appellant was eventually charged with the offence of robbery with violence?

We have looked at the evidence of the complainant in an effort to find answers to these questions. We find that the complainant gave conflicting evidence and therefore contradicted himself. In his examination in chief the complainant testified that he was driven to the police station by one Gituma where he reported the matter before proceeding to the hospital. In cross examination he said that he reported the matter to the police immediately it occurred which was by 8.20 pm. He then changed and said that he did not personally make the report to the police but that one Gituma and one Mbaabu reported on his behalf. He said that he did not know the kind of report they made to the police. In re-examination he changed his evidence totally and stated that he did not report to the police but was informed that the matter had been reported to the police.

It came out clearly that the complainant was not a straightforward person and did not come out clean on a very simple matter of who reported to the police and what the nature of the report was. Gituma was called as a witness and he was PW4. He admitted taking the complainant to Meru Police Station after the attack. In his evidence in chief he did not mention making any report to the police. In cross examination by Mr. Anampiu for the Appellant he stated that the report was made by one Mbaabu. He then added

"**Mbaabu is the one who went to record the incident in the OB. We thought it was an assault and that was the report he made to the police**."

Taking into account that PW4 was with the complainant immediately after the incident and even escorted him to the police and later to the hospital, it is quite obvious to us that by the time the complainant was taken to the police station he had not informed any one, including Gituma and Mbaabu, that the Appellant had stolen his phone and money. That explains why the initial report made to the police was that of assault.

The issue still remains, at what stage did the offence change from assault to robbery with violence? Looking at the complainant's evidence his account of how the incident occurred gives the impression that it was vivid in his mind how the incident occurred and how he was robbed. He stated

"**They all grabbed and dragged me into a trench they beat me I was shouting all along. People came. I got hold of the accused person because I was bleeding they took off with my Nokia 1600 and cash Ksh.5000…."**

From the complainant's evidence it is clear that he was aware that he was robbed of his money and mobile phone at the time the incident occurred. If he was then aware that he was robbed, how come he never mentioned to anyone about it. We think that considering the entire evidence by both sides, and considering that even though PW2,4,5 and 6 went to the scene soon after the incident started to unfold none of them witnessed any one taking either the phone or money or any object from the complainant, the only plausible and reasonable conclusion we can arrive at is that the complainant was never robbed and the issue of robbery was an afterthought.

The complainant in our view was not a credible witness. In the Court of Appeal case of **NDUNGU KIMANYI –V- REPUBLIC [1979] KLR 283, MADAN, MILLER and POTTER JJA** held:

"**The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."**

The principle in the above case applies. It is unsafe to rely on the complainant's evidence after having given the court an impression that he was not a trustworthy witness. What was required was other material evidence to implicate the Appellant with the offence. We find such evidence lacking. The complainant's evidence that he was robbed by the Appellant did not receive corroboration from the witnesses who were the first persons to arrive at the scene of the incident. There was no other evidence against the Appellant. The prosecution evidence did not therefore establish to the required standard the offence charged of robbery with violence contrary to section 296(2) of the Penal Code.

The Appellant denied this offence and called two witnesses. The learned trial magistrate found the defence case contradictory and did not believe it. We think that it is settled law that an accused person bears no burden of proving his defence is true or of proving his innocence. It is sufficient if an accused person, in answer to the charge puts forward a defence which introduces into the mind of a court a doubt either in the prosecution case or a doubt that he was involved in the offence against him. Looking at the totality of the evidence before the lower court we find that the Appellant in his defence case introduced a doubt in the mind of the court whether indeed any robbery was committed against the complainant. The learned trial magistrate did not consider that defence and therefore failed to interrogate that very important issue whether indeed any robbery was committed against the complainant. What we think the

evidence before the court establishes is that both the complainant and the Appellant were involved in a scuffle as a result of which both parties were injured. One of them more was injured seriously than the other.

Having come to the conclusion we have of this case we find that the prosecution failed to prove the charge of robbery with violence against the Appellant to the required standard of proof beyond any reasonable doubt. In the circumstances we find that this appeal has merit and should be allowed.

Accordingly we allow the Appellant's appeal, quash the conviction and set aside the sentence. We order that the Appellant should be set at liberty forthwith unless he is otherwise lawfully held.

DATED SIGNED AND DELIVERED THIS 12TH DAY OF JULY 2012

LESIIT, J.

JUDGE.

J. A. MAKAU
JUDGE.