REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL 141 OF 2011

MUTUA MBAU ………………..……………………..................…………….………………. APPELLANT

VERSUS

REPUBLIC ....…... RESPONDENT

(Appeal from a conviction and sentence in Criminal Case No. 581 of 2010 of the Principal Magistrates Court at Makueni (Hon. J Karanja SRM) dated 4th July 2011)

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JUDGMENT

The appellant, **Mutua Mbau**, was charged with **robbery with violence** contrary to **section 296(2)** of the Penal Code in that on 24th January 2010, at Muaani Village, Sakai Sub-Location within Mbooni East District, jointly with others not before the court robbed Boniface Mwendo Mutunga, cash 2,100/=, one mobile phone make Siemen F 50 valued at Kshs.2,400/= and at the time of such robbery used actual violence to the said Boniface Mwendo Mutunga. He denied the charge. After a full trial, he was convicted and sentenced to suffer death as provided for by the law.

Being dissatisfied with the court's decision, the appellant has appealed to this court against both conviction and sentence. He initially filed a petition of appeal on 12th July 2011. Before the hearing of the appeal, with the leave of this court, he tendered amended grounds of appeal and written submissions.

His grounds of appeal are that his identification or recognition was not positive and free from possibility of mistake, that there was no report made by the complainant soon after the incident implicating him, that the charge was defective, and that his defence was rejected without proper reasons contrary to section 169(1) of the Criminal Procedure Code.

At the hearing, the appellant adopted his written submissions and elected not to address the court orally.

Learned State Counsel, Mr Mwenda, opposed the appeal. Counsel submitted that the complainant was robbed on 24th January 2010. He lost his property and was injured. The issue before the trial court was whether the appellant was involved in the robbery. Counsel contended that the learned magistrate took into account the fact that there was full moon, and that there was a struggle between the complainant and the appellant for about 5 minutes. During the struggle, the appellant and the complainant were at close proximity. The appellant himself had agreed that he had prior business dealings with the complainant.

Therefore, the two knew each other before the incident, meaning that this was a case of recognition.

In brief, the facts of the prosecution case are as follows. On 24th January, 2010, PW1 Bernard Mwendwa Mutunga, (the complainant), was heading home from Muaani Market. As he walked behind the shops he met 3 people. He was hit by the one of the three, (whom he claimed to be the appellant). He hit him in his private parts using his knee. He fell down and the other two people, who were ahead, turned and attacked him. He held the appellant and they struggled. However, the attackers took his wallet with Kshs.2,100/= and a mobile phone make Siemens valued at Kshs. 2,400/=. He screamed and people came to his rescue. By this time, the culprits had already fled. It was 7 p.m. He reported the incident to the police at Ngoluni Police Post on 26th January, 2010. He was treated and a P3 form filled, which was produced as an exhibit. The injuries suffered were classified as harm. The appellant was not arrested immediately. He was arrested on 15th April 2010 by APC Ismael Nabwera (PW2), as he was said to have gone into hiding.

When put on his defence, the appellant gave an unsworn statement. He stated that on 15th April 2010 at 9 a.m., he went to Muaani shopping centre and while at a butchery, he was arrested and taken to Mumbuni Police Station.

Faced with this evidence, the learned trial magistrate delivered a judgment on 4th July, 2011 and stated as follows:-

"If the accused was already known to the complainant, it would have been an issue of recognition which would have been easier for the complainant to do. When questioning the complainant in cross-examination, the accused implied that he (complainant) owed him money that they did business. This shows that the accused was indeed known to the complainant."

This being a first appeal, we have to remind ourselves that we are duty bound to evaluate the evidence on record afresh, and come to our own conclusions and inferences, giving allowance to the fact that we did not have an opportunity to see the witnesses testify and determine their demeanour – *see* **Okeno –vs- Republic (1972) EA 32.**

The appellant claims that the charge against him was defective. We have perused the charge. It is for the offence of robbery with violence contrary to section 296(2) of the Penal Code. The ingredients of the offence of robbery with violence are satisfied when either when the offender is armed with a dangerous or offensive weapon or instrument, or where he is in the company with one or more other person or persons, or if immediately before or immediately after the time of such robbery, he wounds or beats, strikes or uses other personal violence to any person.

The appellant was charged with robbery with violence on account of being in the company of others, and that he used personal violence on the victim **Boniface Mwendo Mutunga**. The ingredients of the offence were satisfied. We see nothing defective about the charge. We dismiss that ground.

We have considered the evidence on record. The prosecution case is based on identification by a single witness. We have to be alive to the legal considerations to be taken by a court in relying on such evidence to find a conviction. In **Nzaro –vs- Republic (1991) KLR 70**, the Court of Appeal held, *inter alia*,:-

"Whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn (himself) of the special need for caution before convicting the accused person in reliance on the correctness of identification or identifications."

The incident herein occurred at night, it was around 7 p.m. The appellant knew the complainant before. This is clear from his cross-examination when he suggested that the complainant owed him some money. The complainant also stated that he knew the appellant as a person he used to see at the market. The appellant did not challenge that evidence either in cross-examination or in his defence. We find that this is a case of recognition which might be more reliable than ordinary identification. However,

we must still caution ourselves on the need to take care before relying on such evidence of recognition. In the case of **Republic –vs- Ndalamia & 2 Others (2003) KLR 638**, the Court held, *inter alia*, that:-

2. Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

In relying on the evidence of recognition herein by a single witness, the learned magistrate did not specifically caution himself that mistakes may be made. The learned magistrate merely stated:-

"If the accused was already known to the complainant, it would have been an issue of recognition which would have been easier for the complainant to do. When questioning the complainant in cross-examination, the accused implied that the he (complainant) owed him money that they did business. This shows that the accused was indeed known to the complainant. In those circumstances, I do find that the identification of the accused as one of the robbers was proper."

In our part, we have cautioned ourselves. We have perused the evidence on record. The incident occurred at night at 7 p.m. The light referred to by the complainant was moonlight. The intensity of the moonlight, whether full moon or otherwise was not given. The complainant however gave the events in regard to the participation of the appellant in the robbery as well as the recognition. He stated as follows:-

"I met three people 2 were ahead. Accused was behind. He hit me with his knee on my private parts. I fell and the ones ahead turned back and attacked me. I screamed and people came to my rescue. They took my wallet with Kshs.2,100 and phone worth Kshs.2,400/=, a Siemens …. I identified him using light from the moon and I held him as we struggled."

In our view, the evidence on record clearly established the part played by the appellant in the robbery and his recognition. He was an active participant in the group that robbed the complainant. The two struggled and were therefore at close proximity. That close encounter provided a suitable opportunity for recognition. In addition, when the complainant first reported the incident to Ngoluni Patrol Base on 26th January, 2010, he mentioned the name of the appellant Mutua Mbeu, as the person he had recognized. It was also in evidence that the appellant was not traced between 26th January, 2010 to 15th April, 2010 when he was arrested. He did not challenge the evidence that he went into hiding. We find and hold that the appellant was positively recognized by the complainant as one of the robbers. In our view, there was no possibility of mistaken identity. We also dismiss the contention by the appellant that no report was made on his identity after the incident.

The appellant claims that his defence was not considered contrary to section 169(1) of the Criminal Procedure Code. We have perused the judgment. We are of the view that indeed, the learned magistrate considered the appellant's defence. After giving a summary of what the appellant stated, the learned magistrate stated thus in the judgment:-

"The accused did not mention anything about the material day in his defence."

The learned magistrate went ahead to disbelieve the defence. On our part, we find that the learned magistrate did consider the appellant's defence and rejected the same on valid reasons. It is a fact that the appellant did not mention anything about the date of the offence, or the allegations levelled against him, nor his whereabouts upto the date of arrest almost three (3) months after the event.

To conclude, we find that the appeal has no merits. We dismiss the appeal and uphold both the conviction and sentence of the trial court.

Dated and delivered at Machakos this **17th** day of **July** 2012.

Asike - Makhandia **George Dulu**

<u>Judge</u> **<u>Judge</u>**

In presence of:
Nyalo – Court clerk
Appellant present in person