



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT MERU)**

**(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)**

**CRIMINAL APPEAL NO. 56 OF 2013**

**BETWEEN**

**MARTIN MUNGATHIA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from Judgment of the High Court of Kenya at Meru*

*(Apondi & Makau, JJ.) delivered on 18<sup>th</sup> July, 2012*

*in*

***H.C.CR. Appeal No. 70 of 2010)***

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. Martin Mungathia, was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal code**. The charge against the appellant was that on the 31<sup>st</sup> day of August, 2009, at Jua Kali area in Isiolo District within Eastern Province, with others not before court being armed with dangerous weapons namely Somali sword robbed Osman Saney Hamur Ksh. 1,200/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Osman Saney Hamur.

2. The complainant Osman Saney Hamur PW1, testified that on 31<sup>st</sup> August, 2009, at about 2.30 am he was going home from BP petrol station where he worked; that when he reached the Jua Kali area he was surrounded by three attackers who emerged from a nearby kiosk; the attackers stopped him and one of them cut him on the back of the head; that there was security light from the nearby Waso dispensary; the scene of crime to Waso dispensary is about 50 meters; it was clear and there was nothing blocking the lights; that he saw two of the attackers and the appellant was one of them; the appellant is the one who cut him on the head and ordered him to surrender his mobile phone and cash; the appellant was standing close to him and threatened to cut him again as he lifted his panga; the complainant produced Ksh. 1,200/= and gave the appellant; he had no mobile phone. The complainant described the appellant as having a nose with a scar and a mark on his face. The trial court saw the mark on the forehead. The

complainant further testified that he went back to the petrol station and informed his colleagues of the attack; his colleagues accompanied him to the scene and met the three attackers; they gave chase and arrested the appellant; the appellant was arrested by a one Mohammed Adan (PW2) as the other two disappeared. The Somali sword was recovered and it had blood stains; the complainant testified he was taken to Isiolo District Hospital while the appellant was taken to Isiolo Police Station; both of them rode in the same Nissan vehicle.

3. PW2 Mohammed Adan testified that he worked at BP Petrol Station and on the material day at around 3.00 am, the complainant PW1 came screaming that he had been attacked; he was bleeding from his head; he said he had been attacked near Waso dispensary; together with PW3 and others they went to Waso dispensary and PW1 pointed to them where he was attacked; they went to the scene and found three men who started running; they chased them and arrested the appellant; a knife was recovered from the appellant.

4. PW3 Abdirizak Mohammed testified that on 31<sup>st</sup> August, 2009, at around 3.00 am he was going home at Bulapesa; that when he reached Tori at Jua Kali area, he received a phone call from one Ibrahim who told him that there was a person who was attacked on that road and, therefore, he should not use the road; that he went back to the BP petrol station where he met the complainant whose head was full of blood. That the complainant told them he was attacked by three men near Jua Kali area; they took PW1 to hospital and then followed the road where the attack had taken place; that on nearing Waso hospital they saw three men who ran away; they gave chase and arrested the appellant as the other two escaped; that the appellant dropped a knife which was blood stained. After arresting the appellant, the complainant identified him as one of the persons who attacked him. PW3 testified he knew the appellant as he frequently saw him at Isiolo market; that he had no grudge with the appellant.

5. PW 5 Mohammed Duba a clinical officer at Isiolo District Hospital testified that his colleague Elias Muhidin filled a P3 Form in relation to the complainant. The medical report showed that the complainant had a deep cut wound on the occipital region and a cut on the cheek; the injuries were stitched and dressed; the degree of injury was harm.

6. In his defence, the appellant in a sworn testimony stated that on 31<sup>st</sup> August 2009, he left work at 6.30 pm and went to Jua Kali area; he did not find his wife in the house and stayed outside for about one hour; he went to her friend's house who informed him that his wife had gone to Isiolo; he went to Isiolo and found his wife at Savannah Bar and he asked her where she had left their child; that she was drunk and she started abusing him; he left the bar and on his way out he met a Nissan vehicle at the gate of Waso Hospital; when he reached the vehicle a young man who was standing outside asked him to stop and he questioned him where he was coming from; that a fight ensued and another boy came from the vehicle with a panga and cut him on the right eye; that they took him to the police station and he was charged with the present offence; that while in the vehicle another young man (complainant) came from Waso Dispensary with his head bandaged; the Nissan took the complainant to Isiolo Hospital and he was taken to the police station. In cross-examination, the appellant testified that he had no document to prove that he was taken to hospital and stitched for the injury in his right eye; that he was not issued with a P3 Form.

7. The trial court having considered and analysed the evidence convicted the appellant and sentenced him to death. In finding the appellant guilty, the trial magistrate expressed as follows:

***“ From the evidence, it is not in dispute that the complainant was attacked by a group of robbers on the material night. The said robbers injured him and robbed him of his Ksh. 1,200/=. The issue to be determined by the court is whether the accused person was properly identified as one of the attackers. The complainant said that he was able to identify the accused person by aid of security light from Waso dispensary which was nearby. He said he knew the accused person before and he recognized him. The complainant's evidence is corroborated by that of PW2 Mohammed Adan and PW3 Abdirizak Mohammed who arrested the accused person. They said they met the accused person and two others at the scene. Soon after the incident they arrested the accused person and recovered from him a sword which was stained with fresh blood. The said sword was exhibited in court. PW2 and PW3 had no grudge against the accused person and,***

**therefore, had no reason to implicate the accused person falsely. I, therefore, believe their evidence. The accused person in his defence claimed that the knife was with the people who attacked him; however, when the accused cross-examined PW2 and PW3 he did not raise that issue. Therefore, his defence is an afterthought....The upshot is that I find that there is overwhelming evidence against the accused person. His defence is false. I have no doubt in my mind that the accused person was among the persons who robbed the complainant. I accordingly find him guilty as charged ”.**

8. Aggrieved by conviction before the trial court, the appellant lodged a first appeal to the High Court (Muga Apondi and Makau, JJ.) which was dismissed. In upholding conviction and sentence, the learned Judges stated:

**“From the evidence on record, it is apparent that the complainant was able to identify and recognize the appellant through electric light emanating from Waso Dispensary. There is clear evidence that there was nothing blocking the lights and it was clear. In addition, PW1 stated that he had known the appellant before ...and he used to see him at Jua Kali.....Besides, the appellant was arrested immediately at the scene of the incident by the complainant’s colleagues after chasing him from the scene. The complainant was able to identify the appellant immediately he was arrested as one of the attackers....We have found that the conditions for forming positive identification were favourable...and the trial court did not rely on the issue of identification and recognition but also on the circumstantial evidence which squarely put the appellant at the scene of the incident. Significantly, the accused was arrested immediately after commission of the offence. The trial court’s finding that the appellant’s defence was an afterthought is based on proper analysis of the evidence before the trial court”.**

9. Dissatisfied with the dismissal of the first appeal , the appellant has filed this second appeal raising the following grounds to wit:

**i. That the learned Judges of the High Court erred in law by basing their judgment on the evidence of identification and recognition by a single witness which evidence was unsafe to rely on to convict the appellant.**

**ii. The learned Judges erred in law by failing to analyse the inconsistencies in the evidence of PW1 and, therefore, arrived at a wrong decision of a single witness;**

**iii. The learned Judges dismissed the appellant’s appeal yet other than the evidence of a single witness, there was no other circumstantial or direct evidence pointing to the guilt of the appellant.**

10. At the hearing of the appeal, learned counsel **Mr. Mwirigi Kaburu** represented the appellant while the state was represented by **Messrs Mosses Kahiga Mungai**.

11. Counsel for the appellant elaborated on the grounds of appeal submitting that identification of the appellant was not proved to the required standard; that the conditions for positive identification were not free from error and did not exist; the offence was committed at night and both the trial court and the High Court did not test the brightness and intensity of the light emanating from Waso Dispensary; the relative position of the appellant to the source of light was not interrogated and that there was no indication whether there was any other source of light at the scene of crime. Counsel further submitted that the circumstantial evidence on record does not point to the guilt of the appellant; that the knife which was recovered at the scene was not subjected to DNA examination to determine the identity and source of the blood stains; that the complainant did not give any description of his attackers to his colleagues when he went to seek help at the BP petrol station and PW2 was not able to demonstrate that the person arrested (appellant) is the person who actually attacked the complainant. Counsel submitted that there was doubt as to whether the person arrested is the person who attacked the complainant; that the appellant should be given the benefit of doubt.

12. The State in opposing the appeal submitted that the offence was proved beyond reasonable doubt; that the appellant was arrested at the scene of crime within less than 10 minutes of committing the offence; that the proximity and short distance between the scene of crime and Waso dispensary where the source of light emanated from was sufficient to enable the complainant identify the appellant; that the complainant in his first report to his colleagues at the BP petrol station stated he was attacked by persons he knew; it was submitted that the conduct of the appellant in running away when the complainant's colleagues came to the scene is a pointer to a guilty mind; that the appellant's defence was considered but it did not dent the prosecution case.

13. We have considered the submissions by both the appellant and the State as we note that this is a second appeal which must be confined to points of law. As was stated in ***Kavingo – v – R, (1982) KLR 214***, a second appellate court will not as general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. In ***David Njoroge Macharia – v- R, [2011] eKLR*** it was stated that under **Section 361 of the Criminal Procedure Code**:

***“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong vs. Republic (1984) KLR 213*”.***

14. In the present case, the appellant is faced with a charge of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. A charge under this section has three essential ingredients that must be proved by the prosecution. In ***Johana Ndungu –v – R, Criminal Appeal No. 116 of 1995***, the ingredients for the charge of robbery with violence were stated to be:

***(i) if the offender is armed with any dangerous or offensive weapon or instrument or***

***(ii) if he is in company with one or more other person or persons or***

***(iii) if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person.***

15. We note that the evidence against the appellant is the testimony of a single witness coupled with circumstantial evidence relating to his arrest. In the case of ***Charles O. Maitanyi vs. Republic, (1986) KLR 198***, this Court held that:-

***“Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification”.***

16. On our part, it is our duty to examine if the two courts below erred in law in finding that the prosecution had proved the essential ingredients of the charge of robbery with violence and if the appellant was properly identified as the perpetrator of the crime. We are alive to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction on under **Section 296 (2)** of the **Penal Code**. In the instant case, the testimony by the complainant is that he was attacked by three people. Considering that the complainant was attacked by three persons, we are satisfied that one of the ingredients of the offence of robbery with violence was proved. Whoever attacked the complainant was in the company of one or more persons.

17. The appellant contends that the trial court and the first appellant court failed to reconcile the inconsistencies in the prosecution evidence. It is the appellant's case that the testimony of the complainant PW1 is inconsistent; that the inconsistencies were not considered by the two courts below. We have examined the testimony of the complainant PW1 and we are satisfied that there are no fundamental inconsistencies that dent the prosecution case. The appellant has not succinctly identified the alleged inconsistencies and how they dent the prosecution case. The record supports the submission by

counsel for the appellant that the blood stains on the recovered Somali sword was not subjected to DNA analysis. In our considered view, the absence of DNA analysis is not fatal to the prosecution case because the two courts below did not base conviction of the appellant on the recovered sword or on the blood stains. Conviction of the appellant was premised on identification by PW1 and circumstantial evidence relating to chase and arrest at the scene of crime by PW2 and PW3.

18. The key issue as pointed out by the first appellate court is the identity of the person(s) who attacked the complainant. The circumstantial evidence in this case relates to arrest of the appellant through chase by PW2 and PW3. In ***Sawe v Rep.*, [2003] KLR 364**, the court said:-

***(1) In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt;***

***(2) Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on;***

***(3) The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused”.***

19. In the case of ***JAMES MWANGI –VS- REPUBLIC*, [1983] KLR 522**, this court set out clear guidelines regarding the circumstances when circumstantial evidence will suffice as proof of the guilt of an accused person. In that case it was held as follows:

***“In a case depending exclusively in circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused’s guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference ...”.***

20. In the instant case, both PW2 and PW3 testified that they chased the appellant and arrested him at the scene of crime. PW1 identified and recognized the appellant as one of the persons who attacked him. The arrest and identification of the appellant took place immediately after the attack. In our considered view, the chain of events from the time of attack to the time of arrest was not broken; the concatenation of events and the short interval between attack and arrest are circumstantial evidence that the two courts below properly took into account in arriving at the conclusion that the appellant was one of the persons who attacked the complainant. On record, there are no other co-existing circumstances that would weaken or destroy the inference that the appellant was one of the persons who attacked the complainant. The record shows the appellant was arrested at the scene of crime and identified by the complainant immediately upon arrest. The complainant could only see the unique scar at the nose and forehead of the appellant through close proximity; in his testimony PW1 testified he was facing the appellant at close range when he threatened to cut him again. We are satisfied that these unique scars strengthen the complainant’s testimony that he was able to positively identify the appellant and that the identification was free from error. We see no reason to fault the concurrent findings of fact by the two courts below.

21. Further, we have evaluated the judgment of the High Court against the evidence on record and observe that the two courts below concurrently arrived at the finding of fact that the appellant was one of the persons who attacked the complainant. In ***Tayab - v - Kinanu*, (1983) KLR 114**, this Court stated that an appellate court will not interfere with a trial court’s finding of fact based on assessment of the credibility and demeanour of witnesses who gave evidence, unless it was wrong in principle. This being a second appeal that is confined to points of law; we see no reason to disturb the finding on credibility of PW1, PW2 and PW3 by the two courts below. The judgment of the High Court shows that the learned Judges duly warned themselves of the dangers of relying on the testimony of single identifying witnesses. We concur with the analysis of the evidence on record by the learned Judges pertaining to identification

of the appellant. We agree with the analysis and conclusions by the learned Judges when they stated as follows:

***“From the record, it is apparent that the complainant was able to identify and recognize the appellant...That the appellant was standing very close to the complainant facing him; that the complainant looked at the appellant; the complainant stated that the appellant had a mark on his face, that is to say a scar on the forehead and that the nose also had a scar, which was seen by the lower court. The appellant in cross-examination admitted he had a depressed forehead and that he sustained that injury in 1982 when he was in school. The mark he admitted is visible and cannot be hidden”.***

22. The upshot of our analysis is that this appeal has no merit and is hereby dismissed. The conviction and sentence as passed by the trial court and confirmed by the High Court is hereby upheld.

***Dated and delivered at Meru this 26<sup>th</sup> day of February, 2015.***

***ALNASHIR VISRAM***

.....

***JUDGE OF APPEAL***

***MARTHA KOOME***

.....

***JUDGE OF APPEAL***

***J. OTIENO-ODEK***

.....

***JUDGE OF APPEAL***

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**