IN THE COURT OF APPEAL

AT NYERI

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

CRIMINAL APPEAL NO. 353 OF 2012

CHARLES NDEGWA NJERI……..…….APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Appeal from the conviction of the High Court of Kenya at Embu

(Lesiit &Ong'udi, JJ.), dated 27th July, 2012

in

H.C.CR.A. No. 353 of 2012)

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JUDGMENT OF THE COURT

This is a second appeal against the judgment of Lesiit and Ong'udi, JJ., dated 27th July, 2012, in which the appeal by Charles Ndegwa Njeri (the appellant) herein was dismissed. It is imperative to set out the essential background facts of this matter although both courts fastidiously did so in their respective judgments. Gabriel Migwi Kibugi (complainant) told the trial court that on 12th July, 2006, at about 5 p.m., at Kiangai village; he was attacked and violently robbed of his mobile phone and 1 kilogram of meat. On the material day he was going about his business in this manner; he attended a meeting at Kiagai coffee factory in the morning, then in the afternoon he visited a local bar called Flamingo bar where he drunk three bottles of beer; thereafter, he went to a butchery and bought a kilogram of meat and returned to the bar and continued drinking another bottle of beer.

When it was time to answer to a call of nature, the complainant securely tacked his piece of meat in the pocket of his jacket, left the bar and went to relieve himself in the urinals. There he found another patron inside the urinal so he said he waited as the place could not fit two people. When it was his turn and he was inside the urinal, he heard somebody holding him from behind. When he turned to check he saw five men. Charles Ndegwa, the appellant, was ahead of the other four men whom he said he only knew by physical features. The complainant told the trial court that the appellant was well known to him. It was the appellant who grabbed him by the collar and when the complainant tried to resist, the appellant hit him on the index finger on the left hand, the other four men quickly frisked the complainant and took away his mobile phone and the kilo of meat. The particulars of the charge sheet stated that the complainant was also robbed of Kshs. 150/=, he said he did not have any money on him. The five

attackers then let off the complainant after slapping him and fled in the direction of the village.

The complainant raised an alarm; it was only Jecinta Wanjira, who was working in the bar who responded. She administered on him first aid on the finger that was bitten by the attacker. The complainant reported the incident to the Assistant Chief of the area, John Muriuki Musa, (PW2), on the same day. He told PW2 that he knew the four attackers and in particular he knew Charles Ndegwa. PW2 advised the complainant to report the matter to local Administrative Police Post, on the same day at about 7 p.m., PW2 visited the scene with administration police, they made enquiries at the bar and they confirmed the report made by the complainant was true.

The complaint's injuries were confirmed by Stephen Ngige, (PW3), who filled the P3 Form in respect of the injuries suffered by the complainant on 21st July, 2006. This is what PW3 told the trial magistrate:

"***There was tenderness on the front neck and he had difficulty swallowing. He had a shallow laceration on the left supraorbital region. There was swelling and pain at the site. He had a cut swelling and pain there too. The injuries were about 12 hours and were caused by both sharp and blunt object. I filled and signed the P3 form on 21st July. 2006, and I wish to produce it (Exhibit one) …".***

The following day, the complainant reported to PW2 that he had spotted one of the attackers at a shop where he said he used to see the attacker hanging out with his accomplices while playing darts and chewing miraa. PW2 went and arrested the appellant, took him to the local police post where the complainant identified him. The appellant was arrested and booked in at Baricho Police Station by PC Peter Maina, (PW4). He said he had known the appellant before in connection with another incident involving burglary and stealing in a matter which PW4 was also the Investigating Officer. This is what PW4 told the court regarding the appellant:

"Accused was one I had known before in another case of burglary and stealing. I was the Investigating Officer in that case. Accused was with 4 others. They were charged before court although this accused was in prison then. He was discharged under section 87 (a) CPC and not charged again. That is the case that made me know accused. Complainant was not known to me at all prior to this case".

PW4 charged the appellant with the offence of robbery with violence contrary to ***Section 296 (2)*** of the ***Penal Code***. The Information in support of the charge stated that; on the 12th day of July, 2006, at Kiangai village in Kirinyaga District within the then Central Province, jointly with others not before court, while armed with offensive weapon namely; knife, robbed Gabriel Migwi Kibugi of his mobile make Motorola CD 950 valued at Ksh 5,000/=, one kilogram of meat Ksh. 150/=, and at or immediately before or immediately after the time of such robbery used actual violence against the said Gabriel Migwi Kibugi.

The appellant pleaded not guilty to the charge, the learned magistrate having heard the evidence of the prosecution witnesses found the appellant had a case to answer and put him on his defence. The appellant gave unsworn statement of defence denying the offence. He gave a chronology of the events that occurred on the 13th July, 2006, the day he was arrested. He contended that he had just gone to Kiangai Shops to relax after completing his daily chores. That is when the Assistant Chief came with two Administration Police and he suddenly saw people running away. As he was wondering what was happening, he was arrested and taken to the police station where he was charged with the instant case.

The leaned trial magistrate being satisfied that the offence against the appellant was proved to the required standard, convicted and sentenced him to death. Being dissatisfied with the conviction and sentence, the appellant unsuccessfully appealed to the High Court. Unrelenting, the appellant filed this second appeal which is premised on the following grounds of appeal:

1. ***The 1st Appellate court erred in law in failing to subject the evidence of the trial court to fresh***

exhaustive analysis and draw its own conclusions on facts.

2. ***The appellate court erred in law in failing to find that this was a case of single identifying witness in difficulty circumstances.***

3. ***The appellate erred in law in failing to consider the need for the trial court to warn itself of the danger of convicting on the evidence of one identifying witness and also failing to find corroborative evidence.***

In further elaboration of the above grounds, Mr. Nderi, learned counsel, for the appellant submitted that the trial court convicted the appellant on the basis of evidence by a single identifying witness; the evidence by the complainant was not properly evaluated because there were gaps that left doubts whether the complainant was able to recognize the appellant as one of the assailants. Firstly, the urinal was too small and it was the complainant himself who said could not fit two people; it, therefore, defeats logic that it could have fitted five attackers and the complainant as the evidence stated the attack took place while inside the urinal. Secondly, what kind of lighting was available in the urinal that aided the complainant to recognize the appellant; it is trite that identification by recognition although it is more reliable can also be mistaken even if it was during the day. Another factor that eluded both courts below according to counsel, was the fact that the complainant was in a drinking spree and had drunk beer the whole afternoon. The complainant was drunk and this could have impaired his ability to identify the attackers; thus had the High Court Judges carried out an exhaustive analysis of the evidence, they would have arrived at a different conclusion that the case was not proved to the required standard.

On the part of the state, Mr. Kaigai, learned Assistant Director of Public Prosecutions, opposed this appeal. Counsel submitted that the case was adequately proved against the appellant based on evidence of identification through recognition. Mistaken identity was not possible as the attack occurred in broad daylight at about 5 p.m. The complainant gave the name of his attackers to a person in authority immediately after the attack and his evidence was unshaken. The matter of drunkenness was properly addressed by the Judges of the High Court; they found no justification of interfering with the findings of the trial magistrate. Counsel urged us not to interfere with the concurrent findings of the two courts below.

This is a second appeal. By dint of the provisions of ***Section 361 (1) (a)*** of the ***Criminal Procedure Code***, only matters of law fall for our determination unless it is demonstrated that the two courts below failed to consider matters they should have considered or looking at the entire case, their decisions on such matters of fact were plainly wrong in which case this Court will consider such omission or action as matters of law. See ***Karingo – v – R, (1982) KLR 214***, a second appellate court will not as a 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)".

Two legal issues warrant our consideration; identification of the appellant; and whether the learned Judges of the High Court properly re-evaluated the entire evidence and subjected it to fresh analysis as mandated by law. Is the evidence of identification through recognition safe? In ***Anjononi & others -vs- Republic (1976-80) 1 KLR 1566,*** this Court held at page 1568,

"This was, however a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."

This is what the trial magistrate had to say about identification which was also reproduced by the High

Court Judges:

"This was a case where complainant, (PW1), was attacked while he was alone. He was the only identifying witness in the circumstance. According to PW1, the incident took place around about 5 p.m. He had gone to the bar about 2 p.m. He categorically stated that he had just ordered for a fourth beer and was not drunk. He said that he clearly identified accused as he was the one in front of the pack of men who attacked him. PW1 candidly explained accused (sic) a person well known to him both physically and by his names CHARLES NDEGWA… I am satisfied that PW1 positively identified the accused…".

On the part of the High Court Judges, this is what the judges had to say about the identification of the appellant:

"The complainant described how he was attacked. He said that as he relieved himself in the urinals he heard people enter and he looked back and saw people walk in led by the appellant whom he knew before by the name and physically. It was broad day light. The complainant said he saw the appellant clearly before they attacked him. He gave the appellants name to a person in authority on the first opportunity he had. In the case of <u>Terekali &Another –vs- Republic</u>, [1952] E. A…. it was held:-

"Evidence of first report by the complainat to a person in authority is important as it often provides a good test by which the truth and accuracy of sub-sequent statement may be ganged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with other…".

We are satisfied that in view of the complainant's clear evidence of identification by recognition, and in view of the evidence of first report to PW2 and Administration Police Officer, we find the prosecution adduced strong evidence against the appellant".

Although this was evidence by a sole identifying witness we find the two courts below carefully analyzed the prevailing circumstances and the fact that a first report identifying the name of the appellant as one of the assailants was given promptly to a person in authority. We have considered the entire record of appeal and submissions by counsel for the appellant on the issue of identification of the appellant as a person who attacked the complaint, in particular the conclusions drawn by the two courts below and we see no justification for interfering with their conclusion that the appellant was properly identified.

This now takes us to the second point urged before us which is re-evaluation of the evidence before the trial court. We have considered this aspect especially in light of the fact that the appellant was charged, convicted and sentenced to death for the offence of robbery with violence. That is according to the charge sheet the prosecution relied on the fact that the appellant was armed with an offensive weapon namely; a knife, and he was in the company of others who were not before the court. We begin with the definition of what constitutes the charge of robbery with violence as provided under ***Section 296 (2)*** of the ***Penal Code***. See also the case of ***<u>JOHANA NDUNGU v R</u>, CR. A. 116 of 1995,*** (unreported) where this Court held:

*"**The essential ingredient of robbery under Section 295 is <u>use of</u> or <u>threat</u> <u>to use</u> actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in S. 296(2) which was given below and any one of which if proved will constitute the offence under the sub-section:***

1. ***If the offender is armed with any dangerous or offensive weapon or instrument, or***
2. ***If he is in company with one or more other person or persons; or***
3. ***If, at or immediately before or immediately after the time of the robbery, he wounds, beats,***

strikes or uses any other violence to any person".

Analyzing the first set of circumstances, there was no evidence by the complainant that the appellant was armed with the knife that is described in the charge sheet. Secondly, although the charge sheet stated that the complainant was robbed of Kshs. 150/=, the complainant told the court that he was not robbed of any money. This was the gist of his evidence:-

"…Accused was ahead of other four men who were only known to me by their physical features. Accused was known to me by as Charles Ndegwa. When he came towards me, he grabbed me by the collar and I tried to resist. When I tried to grab him as well he bit me on the index finger on the left hand. I tried to raise alarm but accused fastened his grip around my throat and choked me.. I did not have any money on me…".

The clinical officer who treated the complainant for the injuries sustained told the court that he treated the complainant for an injury caused by both sharp and blunt objects. The offence of **robbery with violence** was not proved by the first set of circumstances because the offender was not armed with a dangerous or offensive weapon. We now look at the second set of circumstances that is if it was shown by evidence that the appellant was in the company of one or more persons.

We find this evidence that the appellant was in the company of one or more attackers problematic. Unfortunately both courts below did not address this aspect. The complainant was attacked while in the urinal. He said it was a small place where two people could not fit. Also the attacker must have come from behind and held him by the neck. What compounds this evidence is the fact that the complainant did not give a description of the other people who were with the appellant despite the fact that he said that he knew them physically. The complainant only gave the name of the appellant. The attack must have happened very fast as it was not even witnessed by other bar patrons, not even the patron who was in the urinal before the complainant. This evidence presents doubts as to whether the appellant was accompanied by others and if so, why there was no description given of his accomplishes. We also wonder why no investigations were carried out to establish whether the appellant was accompanied by others because the court must be satisfied that the appellant was in the company of one or more to prove the charge of robbery with violence under the second set of circumstances.

In view of what we have stated above, the learned Judges of the High Court did not fully analyze this evidence, for if they had done so; they would have come to the conclusion as we have done, that there is variance between the particulars of the charge and the evidence that the appellant was not armed with any weapon; the evidence of whether he was in the company of one or more was not at all tested. We find this evidence of merely stating the appellant was in the company of others without more is not safe to sustain a conviction of robbery with violence.

Accordingly, we find the evidence that was before the two courts below discloses a lesser cognate offence of simple robbery contrary to ***Section 296(1)*** of the ***Penal Code***. We, therefore, quash the appellant's conviction for the offence of robbery with violence and set aside the death sentence passed against him.

The issue that follows is whether as a result the appellant should be set at liberty**.** ***Section 179(2)*** of the ***Criminal Procedure Code*** provides thus:

"179(2) when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it".

As aforementioned *t*he facts in this case proved a lesser charge of simple robbery contrary to ***Section 296 (1)*** of the ***Penal Code*** and the maximum sentence provided is 14 years. Pursuant to the provisions of ***Section 179(2),*** we quash the conviction of the appellant of the offence of robbery with violence and substitute it with the conviction of the appellant of simple robbery. The appellant has been in custody since 12th October 2007, which is over eight years, to us that seems to be sufficient sentence for the offence of simple robbery. We substitute the death sentence with the period of sentence already served by the appellant since conviction. Unless the appellant is otherwise lawfully held, he is to be set at liberty

forthwith.

Dated and delivered at Nyeri this 18th day of March, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

J. OTIENO - ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR