REPUBLIC OF KENYA

Court of Appeal at Nyeri

Criminal Appeal 149 of 2006

BETWEEN

JOHN GITONGA ALIAS KADOS…….APPELLANT

AND

REPUBLIC……..RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Meru(Lenaola & Sitati JJ) dated 28th March,2006.

in

H.C.CR. NO. 213 of 2002)

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JUDGMENT OF THE COURT

The appellant herein **John Gitonga (alias) Kadosi** was arraigned in the Principal Magistrates Court at Maua with the offence of Robbery with Violence contrary to section 296(2) of the Penal Code, in that on the 29th day of August,2000 at 11.00 p.m at **Amaku Sub location Kiengu location** in **Meru North District** within the Eastern Province jointly with others not before the court while armed with dangerous weapons namely pangas and iron bars robbed **John Mutua M'Ekotha** of cash Kshs.50,000 and at or immediately before the time of such robbery used actual violence to the said **John Mutua M'Ekotha**. The appellant denied the charge. He was tried, found guilty, convicted and sentenced to the only statutory sentence known to law then for the said offence, namely to suffer death as by law, established by **N. Kimani PM** on the 20th day of June,2002.

The appellant became aggrieved by that decision and he appealed to the High Court at Meru vide

Meru Criminal Appeal No. 213 of 2002 citing 8 grounds of appeal. The said appeal was heard on its merits and in a judgment delivered on the 28th day of March,2006 **Isaac Lenaola and Ruth N. Sitati JJ** dismissed the said appeal and confirmed the conviction and sentence handed out by the subordinate court.

The appellant became aggrieved with the decision of the High Court dismissing his appeal. He appealed to this court firstly by way of seven home grown grounds of appeal filed on the 5th day of June, 2006, and subsequently supplemented by those filed by learned counsel currently on record for the appellant dated and filed on the 4th day of April 2012. In the first set of the grounds of appeal the appellant's complaints are similar to those contained in the supplementary grounds of appeal filed by the current learned counsel on record for him and for this reason only a summary of the content of the supplementary grounds of appeal will be reflected for purposes of assessment. These are that the learned Judges of the High Court erred in law by failing to subject the whole evidence to a fresh and exhaustive scrutiny; in failing to carefully serialize the circumstances under which the alleged recognition of the appellant was made; by adopting the subordinate court's judgment with regard to recognition; in failing to note that the circumstances of recognition in the case of **Simon Gitonga vs Republic Kisumu Criminal Case Number 569 of 1976** were distinguishable; in failing to make a finding that the appellant's constitutional rights as set out in Sections 77(1) and (2)(e) with regard to fair hearing were infringed considering that the appellant was not allowed to cross-examine PW4; in upholding the appellant's conviction for the offence of robbery with violence when the evidence tendered by the prosecution did not disclose all the ingredients for the offence of robbery with violence and lastly by failing to take the appellant's defence into consideration.

On the date fixed for hearing of the appeal, learned counsel **J.K. Ntarangwi (Mrs)** appeared for the appellant, whereas learned counsel **Mr. J.K. Kaigai Ag A.D.P.P**. appeared for the state. In her oral address to court, Mrs. Ntaragwi urged us to allow the appeal on the grounds that all the ingredients required to establish the existence of an offence of robbery with violence are absent in that when the attackers demanded money from the complainant, the complainant responded that he had none which position he never audited in his evidence that he said he had no money simply to ward off the attackers; that in the absence of proof of theft, the offence of robbery with violence should hold. That failure to allow the appellant cross-examine PW4 a crucial witness was prejudicial to the appellant's case considering, that production of an O.B. which allegedly had gone to show that the complainant named the appellant in his report to the police at the earliest opportunity was said by the said PW4 that it had nothing of material importance to the case. It is therefore the appellant's contention that failure to allow cross-examination of PW4 locked out material evidence as to what PW4 meant by saying that there was nothing material in the O.B. in so far as the appellants case was concerned. That the evidence on identification of the appellant in connection with the crime charged does not hold because the intensity of the light used to identify the appellant at the scene of the robbery was not given; the same evidence was not critically analyzed as the two concurrent courts simply assumed that since the parties allegedly knew each other, then the appellant's identity had been established; that the alleged supportive evidence of the other witnesses too does not hold because these witnesses when they flashed torches the attackers were pinning the complainant down, meaning that it is only the backs of the attackers which could be seen and when the attackers fled while giving their backs to these witnesses. Lastly it was argued that the appellant's constitutional rights as enshrined in section 77(1) (2) (e) of the retired constituion were infringed.

In opposition, Mr. Kagai urged us to dismiss the appeal and not to disturb the decision of the previous two concurrent courts on the conviction and sentence against the appellant for the reason that the commission of the offence had been proved to the required standard as there was proof that there was more than one robber, the robbers were armed with dangerous weapons, violence was meted out on the complainant as he was injured; there is no dispute that the case rested on recognition. Also that indeed going by the records PW4 was not cross-examined, however no prejudice was suffered by the appellants failure to cross-examine PW4 who was simply a formal witness as he merely received the report of availability of the appellant whom he arrested; that the trial courts' Judgment was well reasoned; that the appellants defence was considered and taken into consideration and that the High Court revisited the evidence adduced before the lower court, re analysed it properly and thoroughly and rightly found that the trial magistrate had arrived at the correct decision.

This being a second appeal, we are reminded of our primary role as the second appellate court namely to steer clear of all issues of facts and only concern ourselves with issues of law. The appellants' complaints revolve around three main issues of law, namely lack of proof of the existence of the ingredient for the establishing the offence of robbery with violence as set out in section 295 as read with section 296(2) of the penal code, failure to uphold the appellants complaints that his constitutional rights as enshrined in section 77(1) 2(e) of the retired constitution of Kenya had been infringed by the two courts failure to find that the appellants failure to cross-examine PW4, a crucial witness was fatal to the prosecutions case and lastly failure of the first two counts to hold that circumstances under which the appellant was purportedly identified in connection with the commission of the offence of robbery were difficult and they are not condusive to positive identification and could therefore not be relied upon to found a conviction

With regard to proof of the elements of robbery with violence, It is n trite that factors tending to prove existence or non existence of elements of the offence of robbery with violence must be those falling within the prescriptions of law contained in sections 295 as read with section 296 (2) of the penal code. These sections provide:-

"Any person who steals anything and , at or immediately before or immediately after stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or over come resistance to its being stolen or retained is guilty of the felony termed robbery"

Section 296(2) provides that:-

"If the offender is armed with any dangerous weapon or instrument, or is in company with other one or more other person or persons or if at or immediately before or immediately after the time of the robbery he wounds beats strikes or uses any other personal violence to any person, he shall be sentenced to death"

We have duly revisited these two provisions and construed them and we are in agreement with the decision of the Court of Appeal in the cited case of **John Mwikya Musyoka versus Republic Mombasa CRA No.38/99 (UR) that theft is a centrol element in the commission of the offence under section 295 as read with 296 (2) of the Penal Code. The offender must steal something. Proof of theft is an essential ingredient of the charge of robbery with violence"**

Other elements of the offence of robbery with violence that need to be established before a charge of robbery with violence can be sustained have been sunctly set out by the Court of Appeal in numerous of its decision. In **Ganzi & 2 others versus Republic (2005) 1KLR 52** the Court of Appeal sunctity stated that:-

"**The offence of robbery with violence under section 296(2) of the penal code is committed in any of the following circumstances namely:-**

(a)The offender is armed with any dangerous or offensive weapon or instrument; or

(b)The offender is in company with one or more other person or persons or

(c)**At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person".** See also the case of **Odhiambo & another versus Republic (2005) 2KLR176** wherein the same Court of Appeal clarified that:-

"**The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the Penal Code. Other ingredients or elements under section 296(2) include being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under section 296(2), the prosecution must choose and state which of these**

elements distinguishes the charge from the one defined in section 295"

The learned trial magistrate addressed his mind to there being a need to satisfy himself that the ingredients of the charge as laid under section 296(2) of the penal code had been proved to the required standard. In the learned trial magistrate's opinion, the operative word in the said section was the word "**OR"** meaning that if one of the three ingredients was proved, then a conviction under section 296(2) of the Penal Code could lie. To the learned trial magistrate, there was proof that the appellant was in the company of another, and the complainant was assaulted which was sufficient proof of the commission of the offence under section 296(2) of the Penal Code and on that account, he convicted the appellant.

This issue was interrogated by the learned Judges of the first appellate court who after due consideration of the facts that were before them and on application of law to those facts arrived at the same conclusion as the learned trial magistrate that all the ingredients required to be established before a charge of robbery with violence could lie were present and confirmed the conviction by the learned trial magistrate. On our own, we have revisited the assessment, evaluation and the re-assessment and re-evaluation of the evidence on the record before the two courts. We are satisfied as the said first two concurrent courts, and we agree with the state that all the elements of the offence under section 296(2) were present in the evidence that was placed before the first two courts we see no need to disturb that finding. We reconfirm the same.

As for the failure to cross-examine PW4, we find that indeed the record shows clearly that PW4 was not cross-examined by the appellant. We are in agreement with the submissions of the learned counsel for the appellant that indeed the provisions of section 77(1) and 2(e) of the retired constitution of Kenya guaranteed the appellant the right to a fair hearing and the right to cross-examine witnesses tendered by the prosecution to give evidence against the appellant. The learned Judges of the High Court interrogated this issue and made observation that:- **"it was not clear from the record as to whether the appellant was not prepared to cross-examine PW4, Or that he was ready to take on a Doctor in cross-examination and he had nothing to cross-examine PW4 on. That in the absence of an explanation or sufficient address on the issue by either side, to us we are unable to rule on the matter, in one way or the other**". But that observation not withstanding, the learned judges of the High Court ruled that no prejudice had been suffered by the appellants' failure to cross examine PW4 who was only a formal witness.

We have on our own revisited that issue and we make observation firstly that indeed it is not clear from the record as to why the appellant declined to cross-examine PW4. Secondly that it is the appellant who declined to cross-examine the witness. Thirdly nowhere in the entire record, did the appellant request the trial court to recall PW4 for cross-examination before the close of the prosecutions case or in the course of his own testimony. He therefore either sat on his own rights to cross-examine PW4, or waived that right and cannot be heard to complain thereafter. Fourthly we are in agreement with the findings of the learned Judges of the High Court that no prejudice was suffered by the appellant for his failure to cross-examine PW4 considering that PW4 was a formal witness as his role in the prosecutions' case was limited to receiving the report of the robbery from the complainant, whereby the appellant was named as one of the assailants, and then booking the report in the OB. The failure of PW4 to tender the OB to confirm his allegation was cured by the testimony of DW1 No.217781**. I/P Francis Mwambi P/OCS Maua police station,** who produced the OB entry of 29/8/2000, wherein the complainant had named the appellant as a suspect. The correctness of the said entries confirmed the testimony of PW1, 2 and 3 that indeed the complainant named the appellant as a suspect which was booked in the said OB. It was correctly observed by the appellants' counsel that DW1 indeed remarked that there was nothing relevant in the OB concerning the case which may be PW4 could have clarified in his cross-examination. We however find this was a careless oral remark by or an opinion of DW1 which does not oust the correctness of the entries made in the OB. The OB was in fact tendered in evidence and was perused by the trial court. The remark was rightly treated by the previous two courts as being of no consequence to the prosecutions' case and we likewise found it so.

With regard to the issue of identification, we note that the two previous courts concurrently found that the time of the occurrence of the incident was at 11.00 p.m at night , it was therefore dark, available light

was torch light, that all the witnesses PW; 2 and 3 confirmed that they shone the torches they had with them directed at the attackers, that the first one was directed at the person who had commanded PW1 to stop and produce money, the order to produce money was given before the attack, the complainant heard the voice of the appellant as the voice which had given the command to give the money, the complainant described what each of the attackers said and the role each played that the complainant was firm the attackers were from the neighbourhood, and he knew them very well; that PW1,2 and 3 made a report to the police the same night and named the appellant as one of the attackers; that the appellant was on record as having stated that he was known to the witnesses, save that he said he was named in connection with the robbery because of a miraa and land dispute grudge. Lastly shortly after the incident, the appellant was arrested by PW2 and 3 and handed to the Administration police who in turn handed him over to police for action. To the two courts below all these factors went to establish an element of recognition of the appellant in connection with the commission of the robbery subject of this appeal. They were satisfied that this was therefore not a case of mere identification but a case of recognition.

On case law we wish to draw inspiration from the case of **Republic versus Turnbull and others (1956) 3AER 549** where in, it had been held inter alia that "**even in cases of recognition even of close relatives, mistakes do occur,** and thecase of **Paul Etole and Reuben Mbime versus Republic Nairobi Criminal Appeal No.24 of 2000** wherein the Court of Appeal reiterated that

"**in instances where the evidence against an accused person or suspect centres on visual identification there is a need for the court firstly to note that a miscarriage of justice may occur in such cases, which miscarriage of justice could be minimized by the court warning itself of the special need for caution before convicting the accused , secondly by examining the circumstances in which the identification, by each witness came to be made, and thirdly by reminding itself of any weaknesses which had appeared in the identification evidence and lastly that recognition may be more reliable but with a caveat that mistakes in recognition of close relatives and friends are sometimes made."**

We have applied these guiding principles to the findings of the learned Judges of the High Court and we are satisfied as they were, with the findings of the learned trial magistrate, that both courts sufficiently addressed themselves on the circumstances under which the appellant was identified. We are also in agreement that although the time the incident occurred at night, all the three witnesses (PW1), (PW2) and (PW3) had torches with them, they shone these torches, the shining was directed at the scene and these witnesses were able to see the appellant and his co assailants. PW1 even had the opportunity to hear the voice of the appellant when the appellant ordered the complainant to stop and hand over his money which command came before the attack and before the complainant was driven to a state of apprehension. We are satisfied that the witnesses knew the appellant and his co assailant prior to the incident. As a consequence, we find no reason to interfere with the concurrent findings of both the trial court and the first appellate court.

For the reasons given in the assessment this appeal is dismissed.

Dated and delivered at Nyeri this 6th day of February, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

M.K. KOOME

..…….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR