REPUBLIC OF KENYA

Court of Appeal at Nyeri

Criminal Appeal 555 of 2010

JULIUS BAARIU MUNORU.....…….....…APPELLANT

AND

REPUBLIC…….....…..RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Meru (Lenaola & Ouko, JJ) dated 11th July, 2007.

in

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

JUDGMENT OF THE COURT

The appellant herein **Julius Baariu Munoru** was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code before the principal magistrates court at Maua vide criminal case No.655 of 2002, in that on the 29th day of August,2000 at 11.00p.m at **Amaku Sub Location Kiengu location, in Meru North District** within the Eastern Province jointly with another 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 after the time of such robbery used actual violence to the said **John Mutua M'Ekotha**.

The appellant denied the charge as laid. He was tried by the lower court. Seven (7) witnesses gave evidence for the prosecution, namely (**PW1), John Mutua M'Ekotha (PW2), Stephen Maru Mungania, (PW3) Samuel Njulu Kibul, (PW4) No.93049679 AP Fred Kithure, (PW5) No.57714 P.C.Ronald Mukangai, (PW6) No.61546 P.C. Timothy Mbitiwe, and (PW7) Paul Murunga**. While the appellant was the sole witness for his defence. After the trial, the appellant was found guilty convicted and sentenced to the only mandatory sentence for the offence charged namely death by **N. Kimani** Principal Magistrate, on 21st day of March, 2003.

The appellant became aggrieved by that decision and appealed to the High Court vide Criminal Appeal No.213 of 2002 which appeal was dismissed by **Isaac Lenaola, William Ouko,JJ** on the 11th day of July,2001. The appellant was aggrieved and he has appealed to this court citing seven (7) grounds of appeal. In summary it is contended that, the learned appellate judges erred in law in upholding the appellant's conviction in reliance to Section 382 CPC, by upholding the mode of arrest by PW4 which was not confirmed by PW1; by upholding the conviction in reliance on the visual identification by recognition as was alleged by PW1, PW2 and PW3; by upholding the conviction on charges which had not been proved in accordance with Section 77(2) of the Constitution of Kenya in view of the glaring discrepancies on the record; by upholding the conviction thereby the burden of proof on his shoulders while rejecting his defence contrary to the provisions of Section 212 CPC.

On the hearing date, learned counsel **C.Mwai (Miss**) appeared for the appellant, while learned counsel **J. Kaigai Ag A.D.P.P**. appeared for the state. In her oral high lights to court, Miss Mwai urged us to allow the appeal on the grounds that since the prosecution's case rested solely on the evidence of identification, the same cannot hold as this is a clear case of mistaken identity which does not meet the criteria in the celebrated case of **Republic versus Turn bull and others (1976) 3AER 549 at 552**. This is the two previous courts failed to pay attention to the fact that the alleged time for the offence was 11.000 p.m., the intensity of the torch light was not given, the distance between the appellant and the complaint was not given, the evidence of the other witnesses namely PW2 and 3 did not aid the prosecution's case because it was said these two witnesses flashed their torches as they were running away which did not give them ample time to register the appearance of the appellant. Lastly that no investigations were carried out to confirm the truthfulness or otherwise of the allegations made against the appellant. All these go to make the circumstances of identification difficult which created a high possibility of mistaken identity which should have been considered by both the trial magistrate as well as the first appellate court and resolved in favour of the appellant.

In opposition to the appeal, **Mr. Kaiga** urged us to dismiss the appeal arguing that issues of mistaken identity do not arise from the evidence this was a clear case of recognition. To the state, this court should confirm the two concurrent findings of both the subordinate court and the High Court because the evidence against the appellant was overwhelming. Although **Mr. Kaiga** concedes that the incident was at 11.00 p.m, and that it was a dark night, he contends that it is common ground that the complainant had a torch and although the intensity of the torch light was not given, it is evident that the complainant did not flash only once but more than once. Further that the evidence of PW2 and 3 could not be disregarded as it went to corroborate the evidence of the complainant considering that they are the ones who answered the complainant's distress call. Lastly that the court should not lose sight of the appellants conduct of disappearing from the vicinity soon after the incident which is not consistent with his innocence.

This being a second appeal we are reminded of our primary role as the second appellate court which is to steer clear of issues of facts and only concern ourselves with issues of law. See the case of **Gacheru versus Republic (2005) 1KLR 688.** We have duly done so, and we find that thecentrol issue in the rival arguments is whether the appellant was sufficiently linked to the commission of the alleged robbery against the complainant subject of this appeal. Both sides agree that analysis of the evidence on appellants identification adduced by the complainant John **Mutua M.Ekotha (PW1**) and his two witnesses **Stephen Maru Mungania** (**PW2)** as well as **Samuel Njulu Kibui** is central in either confirming or ousting the charges against the appellant.The complainant stated partially in his evidence in chief in part thus:-

"I met with Kadosi and Julius Baariu, Baariu is the accused at the dock. I shone a torch on them and saw them after Kadosi told me to stop. Kadosi told me to produce money from close quarters and told him I had no money. Accused had an iron bar, rod which he hit me with on the head and I fell. Accused put apanga on my neck and they took my Kshs.50,000.00 which I had obtained for an order of Miraa… I knew the accused before as I see him at Kiengu Market"

When cross-examined the complainant responded thus in part:-

"Identified you and Kadosi. It is you who hit me and I fell. You then went underground hence you were not immediately arrested…. I know your home.

PW2 on the other hand stated in his evidence in chief in part:-

"He was screaming. I went with another colleague. We shone a torch and saw complainant felled by three people. Those people on seeing us ran away. They were one John and Baario…" **(**when cross-examined PW2 replied in part:-

We had torches on. I saw you from 6 meters away with the help of my torch…. We mentioned your name to the police as one of the robbers. I knew you before quite well. You then disappeared and it

took long for you to be arrested"

Whereas PW3 on the other hand had this to say in his examination in chief in part:-

"We heard noise on the road. We went and I shone the torch on them… they are the accused and John Kadosi who ran away and disappeared*…" when cross examined PW3 responded thus*

"I was with PW2 there. I had a torch on. We mentioned your name as Julius Baariu and Kadosi…"

In findings against the appellant the learned trial magistrate had this to say:-

"Issue for determination before me is whether accused person is guilty as charged or not. Prosecution to prove the same to the required standard. From the evidence on the record, it is quite clear that robbery was perpetrated against the complainant on the fateful night, was the accused a party to the perpetration of this offence?. There is the testimony of the complainant. He knew accused before by seeing him at Kiengu. Accused even in his defence concedes he is from Kiengu. Complainant shone a torch on them and saw one Kadosi and the accused person. This was at a close range. Even accused hit him from close range with an iron rod. On the complainants' evidence, he is quite candid and direct. From the state of circumstances obtaining then, I have no difficulty in reaching to the conclusion that complainant indeed identified the accused person as one of the perpetrators of the offence with one Kadosi. Indeed it was identification by recognition as the accused person was known to the complainant before this date.

Indeed there is the evidence of PW2 who came to the scene immediately after being attracted by screams. He found PW1 having been felled to the ground by three people. PW2 identified through a torch one John and Baariu. Baariu is the accused person…..This witness had no grudge with the accused person so he has no reason to fabricate this charge against the accused person… This witness saw the accused and the other two persons from a distance of 6 meters away with the help of a torch. When PW1 and 2 went to the police station they mentioned the names of the complainant's attackers which included the name of the accused person. It is then there after that the accused went underground…"

When re-evaluating and re-assessing the evidence on appeal as the first appellate court, the learned Judges of the High Court made findings that the complainant made a report to **PW5. P.C. Ronald Mukangi** at **Maua police station** and provided the names of the appellant and that of **John Gitonga,** which first report was well corroborated by PW5 that all the prosecution witnesses who were at the scene of the robbery were in agreement that the incident took place at about 11.00 p.m.; that they were able to identify the robbers with the help of the torches; that they further confirmed that the appellant and one **John Kadosi** were persons known to them prior to this occasion; that the complainant even knew the appellant's house; that the appellant came into close encounter with the complainant and was able to positively recognize him; that **Mungania and Kiboi** both had torches which they directed to where the complainant was being robbed and they straight away recognized the appellant and **John (Kadosi);** that **Mungania** was familiar with the appellant as the latter was a frequent customer in the hotel he worked in; that **Mungania** was emphatic that he knew the appellant quite well before the incident.

Against the afore set out findings were applied principles of law drawn from the decision in the case of **Republic versus Turn bull (1956) 3 AIIER 549 at 552** wherein there is observation that:-

*"**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."***

And also the decision in the case of **Cleophas Otieno Wamunga versus Republic CR. Appeal No. Ksm of 1989 (UR)**wherein the Court of Appeal held inter alia that:-

"Whenever the case against a defendant depends wholly or to a great extent on the correctness of one

or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance of the correctness of the identification.”

Upon application of the afore set out principles of case law to the facts the learned Judges of the High Court delivered themselves thus:-

“We have no doubt in our mind that the appellant was one of those who robbed the complainant on the night of 29th day of August, 2000. He was clearly identified and placed at the scene by the prosecution evidence which was unchallenged”

It is this confirmation of positive identification of the appellant to have been at the scene of the robbery, and to have in fact robbed the complainant which we have been called upon by the appellant to fault and upset and by the state to confirm. We have already set out above excerpts from the evidence of the prosecution witnesses namely (**PW1), (PW2) and (PW3)**. We have revisited the said evidence and we are in agreement that the evidence point irresistibly to the conclusion that there was no doubt that the three witnesses had previously known the appellant prior to the incident; that it was correctly found by the first two courts that although it was dark, all the three witnesses had torches. It is appreciated that the size of the torches and the intensity of the light was not brought out in the evidence. But evidence of identification through torch light has been lent credence by the supportive evidence of (PW5) **P.C. Ronald Mukangai** who testified that the complainant made a report to **Maua Police Station** shortly after the incident and named his assailants. On this account, we make findings as the first two concurrent findings of the first two counts that no evidence was adduced to create a doubt on the evidence that the complainant and his witnesses named his assailants at the earliest opportunity. This finding on our part makes reliance on the said evidence of recognition as being safe. The fore going findings not withstanding, we are in agreement as were the learned Judges of the High Court that in such cases its is usually safe for the court to warn itself of the possibility of mistakes that may occur even in the clearest of such cases. See the case of **Anjononi and others versus Republic (1976 - 1980) KLR 1566** wherein at page 1568 there is observation that: -

“We consider that in the present case the recognition of the appellants by Wanyonyi and Joice whom they were previously well known personally, the first appellant also being related to them as their son in law, was made possible and satisfactory in the two brightly lit torches which two of the appellants kept flashing about in Wanyonyi’s bedroom in such a manner that the possibility of any mistake was minimal. In addition immediately after the robbers left, Wanyonyi reported their names to the owner of the farm where he worked. He also later on the same night gave the names of the three appellants to the police as the robbers who had robbed him. We are satisfied there was no mistake as to the identity of the three appellants and they were properly found guilty of the offence with which they were charged with.”

For the reasons given in the assessment we are satisfied that the evidence on identification was correctly analyzed by the lower court and the Superior Court. Both the learned trial magistrate as well as the Judges of the High Court properly informed themselves of the dangers involved in relying on such evidence and we are in agreement that the three witnesses could not have been mistaken on their evidence of recognition. The totality of the evidence of these prosecution witnesses sufficiently placed the appellant at the scene of crime on the night of 29th August 2000. We agree with the superior court’s findings that the guilt of the appellant had been proved beyond reasonable doubt. We therefore find no merit in this appeal. It is dismissed in its entirety.

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

ALNASHIR VISRAM
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JUDGE OF APPEAL

R.N. NAMBUYE

…….....
JUDGE OFAPPEAL

M.K. KOOME
…….....
JUDGE OF APPEAL

I certify that this is a

true copy of the original.
DEPUTY REGISTRAR