REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, ONYANGO OTIENO & NYAMU, JJ.A.)

CRIMINAL APPEAL NO. 493 OF 2007

BETWEEN

JACKSON KINUTHIA KUNGU & OTHERS …….APPELLANTS

AND

REPUBLIC ……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Ochieng', JJ.) dated 9th December, 2004

in

H.C.CRA. NOS. 881, 935, 936 OF 2001)
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JUDGMENT OF THE COURT

Before the Senior Principal Magistrate's Court at Kibera, five counts were preferred against the appellant before us, ***Jackson Kinuthia Kungu*** and ***others.*** In the first and third courts, he was charged together with two others with the offences of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. In respect of the second count, he stood charged with two others with the offence of robbery contrary to ***section 296 (1)*** of the Penal Code and as to the fourth count, he was charged again with the same two others with the offence of shop-breaking and stealing contrary ***section 306 (a)*** of the Penal Code. Lastly in the fifth count the appellant was charged with three others with the offence of burglary contrary to ***section 304 (1)*** and stealing contrary to ***section 279 (b)*** of the Penal Code. They all denied the offences but after full hearing, the Senior Principal Magistrate found three of them guilty of the offence of shop breaking and stealing contrary to ***section 306 (a)*** of the Penal Code and sentenced each to imprisonment for a term of two years together with four (4) strokes of the cane. The appellant was further found guilty of robbery with violence contrary to ***section 296 (2)*** in respect of the third count and was sentenced to death. Although in the second count, he was charged with the offence of robbery contrary to ***section 296 (1)*** of the Penal Code, the learned Magistrate nonetheless, without any explanation and without any amendment to that charge, found him guilty of the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code and sentenced him to death. The sentence in count 4 was rightly put in abeyance pending the execution of the sentence in counts 2 and 3 which were both death sentences. The appellant was not satisfied with the convictions and sentences. He appealed to the superior court vide High Court Criminal Appeal No. 881 of 2001. That appeal was placed before Lesiit and Ochieng', JJ.

who, after full hearing also dismissed it stating in the concluding remarks as follows:-

"In the light of the foregoing evidence, we find that there was sufficient evidence to sustain conviction of the appellant on all 3 counts. Accordingly we uphold conviction on counts 2, 3 and 4 and we also confirm sentence. The appeal is thus dismissed."

That is the decision that has prompted this appeal before us premised on eight grounds of appeal filed by the appellant in person but which were adopted by Mr. Kanyangi, the learned counsel who urged this appeal before us on behalf of the appellant. As grounds 8 and 9, were rightly abandoned by Mr. Kanyangi, only seven grounds remained. These were that:-

"1. The learned Judges of the 1st appellate court erred in law by holding that identification by PW3 was clearly beyond reproach whilst the circumstances under which the same was made were unfavourable to a free from error kind of identification.

2. The learned Judges furthet (sic) erred in law by failing to consider that the subsequent identification by PW3 was weakened by the evidence that he saw me being taken to police by members of the public.

3. The learned Judges erred in law in not considering the fact that the light of moving vehicle was unreliable to enable a free from error kind of identification.

4. It was an error for the learned Judges to have failed to fault PW3 (sic) purported identification whilst there was no evidence pertaining to the light which facilitated the same as adduced.

5. The learned Judges erred in law in believing and relying on testimonies of witnesses whose credibilities were suspect.

6. The learned Judges erred in law by holding that some items were found in my house in absence of coclusive (sic) evidence to prove that the house was mine.

7. The learned Judges erred in law in finding the charges preferred against me proved whilst there existed no coclusive (sic) evidence to prove my guilty (sic) beyond all reasonable doubt."

The incidents giving rise to the charges took place at different places and on different dates. In respect of the second count, the particulars are that on 14th January 2001 at Kiserian in Kajiado District of Rift Valley Province they jointly robbed David Lemuruka Lemasias cash Kshs.20/- and at or immediately after the time of such robbery they threatened to use actual violence to the said complainant. It looks odd to us that though charged with robbery under ***section 296 (1)*** of the Penal Code, the particulars fitted robbery with violence under ***section 296 (2).*** We shall revert to that later in this judgment. The particulars of the third count are that on 17th January 2001 at Kiserian in Kajiado District of Rift Valley Province, they jointly with others not before court robbed David Mungai of cash Kshs.2,000/- and at or immediately or before or immediately after the time of such robbery threatened to beat David Mungai. In respect of the fourth count which was that of shop-breaking and stealing, it was alleged that on 19th January, 2001 at Kiserian in Kajiado District of Rift Valley Province, jointly with others not before court they broke the shop of Nicholas Ndichu Kaurai with intent to steal therein and did steal assorted shop goods, weighing machine, padlock, pressure lamp and radio cassette all valued at Kshs.100,000/- the property of the said Nicholas Ndichu Kaurai.

As we have stated above, the incidents giving rise to the various charges took place on different dates. On 14th January 2001, David Lemuruka Lemasias (PW3) arrived at Kiserian bus stage at 1.30 p.m. on his way from Nairobi to his house. After walking few paces from the bus stage he saw two people, one in front of him. He walked past them but upon reaching Ebenezer area, he entered a shop and picked some flour. On coming out of the shop, he saw the same two men but now a head of him. They walked fast as David walked behind them. On reaching the Corner area, one of them produced a knife and ordered him to produce all the valuables he had. He said he had nothing and pleaded for mercy. They did not beat him

but took Kshs.70/- from his pocket after searching him. After that the two robbers left and David reported the incident to Ngong Police Station the next day, but he was referred to Kiserian police post. He went there on 16th January 2001 and recorded a statement. On 19th January 2001, he saw a group of people escorting suspected thieves and he identified the appellant among the suspects that were being escorted to the police station. He went again to Kiserian police post and identified the appellant as one of his assailants. He was not able to identify the second person. The appellant who had earlier been arrested by members of the public was, according to PC Joshua Musi (PW7) rearrested by one Sgt. Mutisya and another officer both of whom were not called as witnesses as the former was on leave when the case came up for hearing and the latter was admitted at Mbagathi Hospital then. Meanwhile on 17th January 2001, David Ndungu Mungai (PW2) arrived at Kiserian from Nairobi at 10.15 p.m. He started walking home together with another woman who was his neighbour. They were walking along Koikali road. On reaching the flat area, two men passed them and thereafter started walking slowly. The two men stopped after about 100 metres; flashed their torches towards Mungai and his neighbour and ordered them to hand over all the valuables they had. The woman handed over to them the bag she had and Mungai gave them Kshs.2,000/- and his note books. Mungai turned round and saw two other men behind them. Those in front were armed with sword, chuma (iron bar) and rungus. The attackers also threatened the woman with a sword and she pleaded with them not to kill them. During the intervening period, a motor vehicle approached them from behind David and the woman. It lit up the faces of the attackers in front of them so that Mungai clearly saw the faces of their assailants who were in front of them. He recognized the appellant as one of the attackers and as the one who pulled out the sword and used it to threaten the woman companion. He had previously seen him walking armed with another person he identified as the first accused in the trial court. He referred to him as a resident in the area whom he knew well. He was unable to identify the other attackers. David ran to Kiserian Police Post to report the attack and theft on them. Nicholas Ndichu Kaurai (PW4) was operating a shop at Kiserian. He said in court that on 19th January 2001 at 7.00 a.m. he went to his shop at Kiserian. He found the shop's rear door open. The padlock was missing. He found several shop goods stolen all valued at Kshs.100,000/-. He reported to the police. After a short time, his neighbour told him, they had arrested a suspect. He joined that neighbour, and found that one Njoroge who was the third accused in the trial court had been arrested. Njoroge led them to a house which was occupied by the appellant and first accused at the trial. On searching that house, Ndichu found his padlock among many padlocks retrieved from that house. They arrested the appellant and first accused in the trial court. They took first accused, third accused, and the appellant to Kiserian police post but before they reached the post, they met police officers on the way and they rearrested the appellants. PC Joshua Musi (PW7) produced the exhibits recovered from various houses including the padlock recovered from the house where the appellant and first accused were staying.

The above constituted the evidence before the trial court and upon which that court found the appellant guilty and convicted him and upon which the first appellate court on consideration affirmed that conviction. Mr. Kanyangi, the learned counsel for the appellant in his submission before us, contended that the first appellate court in confirming the conviction and the sentences, did not revisit the above evidence a fresh and did not analyse and evaluate it as was required of it by law. He submitted further that had the superior court done so, the appellant's first appeal would have been allowed as there was no proper evidence on identification of the appellant as one of the perpetrators of the second and third offences in the charge sheet and there was also no proper evidence to demonstrate that the padlock connecting the appellant to fourth count could not be opened by any other key other than that produced by Ndichu. He also submitted that the charges were defective as there were two charge sheets and it was not clear upon which charge sheet the trial court proceeded and in any event count 2 read ***section 296 (1)*** whereas the appellant was convicted under ***section 296 (2).*** He further said that as the alleged threats to the complainants in counts 2 and 3 were not proved, the offences of robbery with violence under ***section 296 (2)*** were not proved. Mr. Monda, the learned Senior State Counsel, on the other hand felt the offences were proved as required by law. He felt the second count was meant to be under ***section 296 (2)*** and not ***section 296 (1)*** as the particulars and the evidence in record demonstrated that the offence committed was robbery with violence under ***section 296 (2)*** and not robbery under ***section 296 (1).*** In his view, the evidence that was adduced was sufficient for convictions that were entered against the appellant. He stated further that the charge sheet used by court was the one amended in parts and signed on 30th January 2001 by the officer in charge of the relevant police station.

In respect of each count in which the appellant was convicted, only one main witness gave evidence. As regards the fourth count of shop breaking and stealing, the only evidence connecting the appellant to the offence was that a padlock stolen from Ndichu's shop apparently at the time the shop was broken into and several shop goods stolen from therein, was found in the house in which he and the first accused were staying few days after the shop was broken into, and he gave no explanation as to how he came to be there. In other words, he was found in possession of a recently stolen item and did not explain his possession and thus the doctrine of recent possession applied to him. In respect of the two robberies, only David gave evidence on robbery on him on 14th January 2001 and only Mungai gave evidence on robbery on him on 17th January 2011. We thus agree with Mr. Kanyangi, that in respect of both charges, the trial court had a duty to consider with the greatest care the evidence of each witness and particularly as to identification of the appellant which he challenged. This is because on each count the evidence that was before the court was that of a single witness. In respect of Mungai on count 3, that care was even greater when it was considered that the robbery took place at night with Mungai and his companion being sandwiched between the four robbers two in front and two behind and with the only source of light coming from a moving vehicle that was from behind them but falling on the faces of the two robbers in front of them. Equally, we agree with him that the superior court being the first appellate court had the duty of revisiting that evidence afresh, analyzing and evaluating it and had to come to its own independent conclusion but always bearing in mind that the trial court had the advantage of hearing and seeing those two witnesses and giving allowance for that. Thus the first appellate court also had to consider with the greatest care the evidence of David and Mungai being single witnesses in respect of counts 2 and 3 respectively. In the well known case of ***Abdallah bin Wendo & Another vs. R, (1953) EALR volume 20 page 166,*** the predecessor to this Court held:-

"Although subject to certain exceptions, 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 such witness respecting the identification, especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances other evidence, circumstantial or direct, pointing to the guilt is needed."

In another well known case of ***Roria vs. Republic, (1967) EA 583,*** Sir Clement de Lestang, V.P. followed Abdallah's case (supra) with approval stating:-

"A conviction resting entirely on identity invariably causes a degree of uneasiness and as LORD GARDNER, L.C. said recently in the House of Lords in the course of a debate on section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts;

"There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity."

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

He then quoted ***Abdallah bin Wendo & Another V. R*** (supra) decision in extenso. The appeal before us being a second appeal, by dint of the provisions of ***section 361*** of the Criminal Procedure Code, we cannot go into the matters of fact unless it is demonstrated to us that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or that looking at the entire case, it is clear that they were plainly wrong on matters of fact. Mr. Kanyangi says the superior court failed in its duty to analyse and evaluate the evidence that was before the trial court afresh. We shall now proceed to consider that complaint.

On the second count, David was the only witness. The superior court set out his evidence at page 4 of its judgment and allocated over two pages to his evidence and analysis of it. At page 6 that court came to the following conclusion on his evidence:-

"To our minds, the identification by PW3 is clearly beyond reproach. He saw two young men, and they later accosted him. Although one demanded this (sic) valuables, he said that he would not be able to identify him, as his attention was focused on the appellant. He also explained that he had concentrated his attention on the appellant as he was holding a knife to his stomach. He therefore had a good reason to concentrate his attention of (sic) the appellant.

And whilst it is true that PW3 first reported the matter at Ngong Police, instead of a (sic) Kiserian Police Post, we cannot see any reason why that should lessen the veracity of PW3's evidence."

And on the third count, the superior court again devoted over one page to discussing the evidence of Mungai and ended that discussion with its independent conclusion by question and answer at page 8 which was as follows:-

"It is clear that the incident is said to have taken place at night. PW2 was attacked by robbers, somewhat unexpectedly. He was only able to identify one of the attackers when his face was lit up by the headlights of a vehicle that approached the scene. Was the said identification reliable?

The witness did not specify the duration during which the face of the appellant was hit (sic) up. He also did not state how bright the lights were. But he emphasized that he clearly saw the face of the appellant. Bearing in mind the fact that PW2 knew the appellant well, as a resident of the area and considering that PW2 told the police that he could identify one of the robbers, when he made his first report, we find no reason at all to doubt the appellant's identification."

In our view, the above are clear evidence that the first appellate court did not only analyse and evaluate the evidence that was tendered in respect of the charges in respect of which the appellant was convicted but it did so with greatest care. We see no basis for faulting the superior court.

In our own view, David was attacked in broad day light at 1.30 p.m. The robbers were only two and there was no evidence that many people were passing by along the road where he was walking after leaving the shop. We see no reason why he should have been doubted when he was the person who later, on his own volition identified, the appellant who was being escorted to police post on account of another offence. As to the third count, Mungai stated in evidence that he knew him well as he was a resident of that area. That was identification by recognition and not identification of a stranger. In the case of ***Anjononi & others vs. R. (1980) KLR 59*** this Court stated at page 60 as follows:-

"Being night time the conditions for identification of the robbers in this case were not favourable. 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 upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro ole Gutiya vs. The Republic. " *(unreported)*

We are of the view that Mungai's evidence was properly accepted and acted upon by the trial court as well as that of David. That being our view of the matter, we cannot interfere with the decision of both courts. As we stated earlier, appellant's conviction on the fourth count was based on the doctrine of recent possession. Mr. Kanyangi's argument that the padlock could be opened by many other keys cannot stand in this case because first, before Ndichu tried to use his key to open the padlock, he identified his padlock among many others that were at the police post. That in effect meant that apart from the fact that later his identification of his padlock was proved correct by his using the key to that padlock and opening it, he had identified it as his and that identification was not challenged. It could have been proper even without the use of the key. Use of the key was only an added proof. Secondly and in any case, there was no other key produced by the appellant or any other person which also opened that padlock. That reduced Mr. Kanyangi's argument to no more than speculation. Of course several things are possible but in law and particularly in criminal law facts must be adduced to support a proposition.

In our view the first charge sheet duly signed and dated was the correct charge sheet and was the one the

court acted upon. Nothing turns on that complaint.

Before we conclude this judgment, we do agree with Mr. Kanyangi that the appellant should not have been found guilty of the offence of robbery with violence under ***section 296 (2)*** of the Penal Code in respect of the second count. That count clearly charged the appellant with the offence of robbery under ***section 296 (1)*** and although the evidence adduced proved robbery with violence under ***section 296 (2)*** nonetheless as the charge was not amended, he could not be convicted of a more serious offence of which he was not charged. The court had no jurisdiction to do so. We cannot accept Mr. Monda's argument on that aspect for we too have no jurisdiction to enhance the charge when it was not preferred at the trial court. It was plainly wrong for the trial court to convict the appellant of the offence of robbery with violence under ***section 296 (2)*** of the Penal Code in respect of the second count whereas that count was of robbery under ***section 296 (1)*** of the Penal Code. To that extent, we allow the appeal in respect of that court as regards conviction of the appellant under ***section 296 (2)*** of the Penal Code, set aside the conviction, and death sentence in respect of that count. In its place the appellant shall stand convicted of the offence of robbery under ***section 296 (1)*** of the Penal Code. He is sentenced to imprisonment for the period already served. We note that his sentence in respect of the fourth count, although in law is not yet served as it was put in abeyance pending the outcome of the appeal to the superior court and to this court. He has been in prison for over nine years. We order that the sentence which was imprisonment for 2 years be treated as already served.

Subject to the above the appeal is dismissed.

Dated and delivered at Nairobi this 14th day of OCTOBER, 2011.

R. S. C. OMOLO
.....
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

J. G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR