IN THE COURT OF APPEAL
AT ELDORET
(CORAM:O'KUBASU, ONYANGO OTIENO & VISRAM JJA)
CRIMINAL APPEAL NO 501 OF 2010
BETWEEN

SAMWEL BARASA JUMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT
(Appeal from conviction and sentence of the High Court of Kenya at Kitale (Ombija & Mwilu JJ) dated 16th December 2010

in
H.C.CR.A NO 43 of 2007)
****

JUDGMENT OF THE COURT

The appellant, **SAMWEL BARASA JUMA**, was arraigned before the Chief Magistrate's Courtat Kitale on 18th May, 2006 in Criminal Case no 1648 of 2006 charged with robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the offence were as follows:-

"On the 7th day of May 2006 at Waitaluk Village in TransNzoia District within Rift Valley Province jointly with another not before court while armed with offensive weapons namely panga and knives robbed AGNETA ONYANGO MENYA of cash Kshs. 3,500/- and at or immediately before or immediately after the time of such robbery assaulted the said AGNETA ONYANGO MENYA."

The appellant denied the charge and his trial commenced on 14th September, 2006 before PN Gichohi (Ag Principal Magistrate). The prosecution called the complainant Agneta Onyango Menya (PW1) who testified that on the material day the appellant violently attacked her with a panga and in the process demanded shs. 3,500/-. She (PW1) sustained a cut on three of her left fingers. She lost the shs.3,500/- which the appellant had demanded. She was rushed to Maili Saba Hospital for treatment. In the course of her evidence in chief the complainant stated, inter alia:-

"Then on 11th (the following day) police officers came for me from my house. They told me that they had arrested the suspect. They wanted me to go and identify if he was the one. I was taken to Moi's Bridge Police Station. I did not see him. On 14/5/2006 I went again to Moi's Bridge. The accused person was brought to me. I was able to identify him. I recorded a statement. The accused is in the dock. I am certain he is the one who robbed me. He had come to me during the day. I was able to identify him."

There was the evidence of F.E (PW2) a standard 3 boy who testified that on the material day he had seen the appellant who asked him (PW2) whether he needed somebody for weeding of maize.

The appellant was arrested by Cpl John Otieno (PW3) whose evidence on how he effected the

arrest was as follows:-

"I was given a tip off through a telephone call that the person we were looking for was spotted in Maili Saba accompanied by a woman. That he was wearing a white jacket and had a cap and was trying to hide his identity with the said cap. That the man was near the tailor's shop. I proceeded there. I found the accused. I was alone. I identified myself as a police officer from Maili Saba Patrol Base. Upon seeing I was a police officer accused attempted to escape. He was arrested by members of the public and we arrested him. I arranged for his escort to Moi's Bridge Police Station. Then I summoned the complainant to go and see if the person I had arrested was the suspect who had robbed her. I had been given the description by the complainant that the suspect was slightly brown, about 5ft 6". The informer then had told me that the man used to live in Eldoret but had moved to his home in Waitaluk. I do not wish to disclose the identity of the informer. I enquired from accused why he was trying to run away when I identified myself but he would not explain. People do not normally run away when I identify myself to them as a police officer unless they have something to hide."

Lastly there was the evidence of Linus Likale (PW4) a clinical officer at District Hospital Kitale who examined and treated the complainant. It was his evidence that the injuries sustained by the complainant were caused by a sharp object. He classified the degree of injuries as harm and he completed the P3 form which was produced in evidence as Exhibit 1.

When put on his defence the appellant gave a sworn statement in which he said that he had taken his clothes to the tailor and while he sat waiting police officers came and arrested him. He was taken to Moi's Bridge Police Station where he saw a woman while a police officer hit him. The appellant denied having been involved in the commission of the offence.

In a judgment delivered on 31st July 2007 the learned trial magistrate convicted the appellant and stated:-

"The circumstances herein were excellent for a clear and proper identification and I believe accused was so identified. The defence has no effect to the prosecution case. The case was properly corroborated and proved against accused beyond any reasonable doubt. I find him guilty of the charge of robbery with violence contrary to section 296(2) of Penal Code as charged and I convict him accordingly."

After that conviction the appellant was sentenced to death as provided by law.

Being aggrieved by both conviction and sentence, the appellant filed an appeal to the High Court. The learned Judges of the High Court (Ombija & Mwilu J) considered the appellant's appeal and found it unmeritorious. In their judgment delivered at Kitale on 16th December 2010 the learned Judges said inter alia:-

"We have evaluated the evidence of the prosecution vis-a-vis that of the defence. We have also come to the conclusion that the case against the appellant was proved beyond any reasonable doubt. For that reason we confirm the conviction and sentence. In the result we dismiss the appeal in its entirety."

Still aggrieved by the foregoing the appellant now comes to this Court by way of second appeal relying on the following grounds of appeal:-

"1. THAT: Your lordship, the appellate Judges erred in law when they upheld that the evidence of a boy who was a single witness was fatal and that there was no possibility of error

2. THAT: Your lordships, the appellate Judges erred in law because their findings were against the weight of the available evidence to prove the nature of this case.

3 THAT: Your lordship, the appellate Judges erred in law when they failed to appreciate that the evidence of a single witness in support of appellant's conviction is purely insufficient.

4 THAT: Your lordship, the learned trial Judges erred in law when they upheld the conviction and the sentence without considering that I was not found in possession of the alleged exhibits from the complainant.

5 THAT: Your lordship, the appellate Judges erred in law when they came to the conclusion that I was fond in worry and that shows that I was involved in the said robbery."

This is the appeal that came up for hearing before us on 19th September 2011 when Mwinamo Delmas appeared for the appellant while Mr. A.O. Oluoch Senior Deputy Prosecution Counsel appeared for the State.

In his submissions Mr. Mwinamo argued the first three grounds of appeal together and these related to the issue of identification. He submitted that the complainant confirmed that she did not know the appellant and that the appellant was shown to her at the police station. It was further submitted that E (PW2) was not at the scene where the robbery took place.

As regards the fourth ground of appeal Mr Mwinamo submitted that there was no weapon recovered to prove that the complainant had been injured.

Finally, Mr Mwinamo submitted that it was not established beyond doubt that the appellant committed this offence.

In opposing the appeal Mr Oluoch pointed out that the offence was committed in broad daylight and that identification parade was unnecessary as PW2 had known the appellant. It was Mr Oluoch's submission that the evidence of PW1 and PW2 placed the appellant at the scene of crime.

We have considered the rival submissions in this appeal and we are of the view that the main issue is identification. In **ANJONONI & OTHERS v THE REPUBLIC [1980] KLR 59** this Court said:-

"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused."

The present appeal fits in the above stated scenario since the appellant was not found in possession of any stolen property. We have deliberately set out the evidence of the prosecution witnesses as we need to examine it as we deal with the important issue of identification. It is true that the incident took place in broad daylight but how was the appellant identified? The gist of the complainant's evidence as regards the identification of the appellant was that she went to Moi's Bridge Police Station where the appellant was brought to her on 14th May, 2006, so that when she testified on 14th September 2006 the appellant had already been shown to her. She admitted in cross-examination that she had not seen the appellant before the incident hence they were strangers to each other. Thus, the evidence of the complainant was at best dock identification.

The evidence of the young boy E (PW2) did not advance the prosecution case since all that this witness saw was the appellant with another person going towards the complainant's house and after a short while the appellant was back looking for a job – weeding of maize. Later the appellant was seen "running through Simeon's farm." Taking all the foregoing into consideration, we are not satisfied that the prosecution had proved beyond doubt that the appellant was properly identified as the one who had violently robbed the complainant on the material day. The evidence of the complainant in so far as identification of the appellant was concerned was weakened by the fact that the appellant was shown to her at the police station. What the police should have done was to conduct a proper identification parade rather than call the complainant and point out the appellant to her.

In **RORIA v R [1967] E.A. 583** at p.584 the predecessor of this Court made the following observation:-

"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 s.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"

The facts of this appeal fit in the foregoing observation.

In view of the foregoing, we are not satisfied that the appellant's identification was proved beyond reasonable doubt. Consequently, this appeal is allowed, the conviction quashed and the sentence of death set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at Eldoret this 11th day of November, 2011.

E.O. O'KUBASU

……
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
……
JUDGE OF APPEAL

ALNASHIR VISRAM
……..
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR