REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 175 OF 2013

DANIEL MBURU MUGO.................................APPELLANT

VERSUS

REPUBLIC...STATE

(Appeal from the Sentence of the Senior Principal Magistrate's Court

at Narok Hon. Temba A. Sitati–Ag. Senior Resident Magistrate

delivered on the 6th June, 2013 in CMCR Case No. 688 of 2012)

JUDGEMENT

The appellant **DANIEL MBURU MUGO** has filed this appeal challenging his conviction and sentence by the learned Senior Resident Magistrate sitting at the Narok Law Courts. The appellant had been arraigned before the lower court on 25/6/2012 facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were that

"On the 25th day of March 2012 at Narok Upper Manjengo area in Narok North District of the Rift Valley Province jointly with others not before court while armed with dangerous weapons namely pangas, rungu, metal bars robbed DOUGLAS KOILEKEN KISIO a mobile phone Nokia, wrist watch, two ATM cards, ID Card, torch, cap, wallet and cash 400/= all valued at Ksh 7,800/= and immediately before or immediately after the time of such robbery used actual violence tot he said Doughlas Koilekon Kisio"

The accused pleaded **'Not Guilty'** to the charge and his trial commenced on 6/11/2012. The prosecution called a total of six (6) witnesses in support of their case.

The complainant testified as **PW1**. He told the court that on 25/3/2012 at about 11.00pm he was on his way home from the Midrock Hotel in Narok Town. Near the Catholic Church at Majengo four men accosted him. The men were armed with pangas, clubs and metal bars. They demanded that the complainant give them all that he had. The complainant replied that he had nothing to give. The men pounced on him and assaulted him. The complainant fell unconscious.

When he came to his senses he realized that his Nokia mobile phone, identity card, ATM cards wrist

watch, cap and wallet containing Ksh 400/= had been stolen. The complainant staggered home arriving at 4.00am and his wife administered first aid to him. The next day the complainant went to seek treatment at Narok District Hospital. He was admitted there for three (3) days. Thereafter he reported the incident to police.

On 1/6/2012 police called the complainant to go to the police station. He went there and found his stolen mobile phone which he identified by the serial number. The lady who was found in possession of that phone one **LUCY MUTHONI GICHUKI** was initially charged alongside the appellant. Later on the prosecution withdrew the charges against this **'Lucy Muthoni'** and opted to treat her as a witness in the case.

Police carried out investigations and tracked the stolen phone leading eventually to the arrest of the appellant. At an identification parade conducted by police the complainant positively identified the appellant. He was then arraigned in court and charged.

At the close of the prosecution case, the appellant was found to have a case to answer and was placed onto his defence. He gave an unsworn defence in which he denied any and all involvement in the robbery in question.

On 6/6/2013 the learned trial magistrate delivered his judgment. He convicted the appellant of the Offence of Robbery with Violence and thereafter sentenced him to death. Being aggrieved by both his conviction and sentence the appellant filed this appeal. **MR. NJOGU** Advocate argued the appeal on behalf of the appellant. **MS OUNDO** for the State opposed the appeal.

As a court of first appeal I am obliged to consider the prosecution evidence afresh and draw my own conclusions on the same. In the case of **AJODE Vs REPUBLIC [2004] 2 KLR 81** the Court of Appeal held

"In law it is the duty of the first appellate court to weight the same conflicting evidence and make its own inference and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that"

Counsel for the appellant raised the following grounds in this appeal.

1. Failure to comply with Section 200(3) of the Criminal Procedure Code.

2. Lack of proper identification

3. Failure to call crucial witnesses.

I will now proceed to consider each ground individually.

This trial commenced before **HON. W. N. NJAGE** Chief Magistrate who heard the first three (3) prosecution witnesses. On 26/3/2013 **HON. T. A. SITATI** Senior Resident Magistrate took over the case. The record indicates clearly that the provisions of Section 200(3) of the Criminal Procedure Code were explained to the appellant. He respondent thus

"Accused – I wish to recall PW1 and PW3 to be recalled (sic). I had not fully cross-examined PW1 I had not asked any question to PW3, I would like to ask them again"

This request was properly complied with. Both **PW1** and **PW3** were recalled. **PW1** was recalled on 9/5/2013. The witness stated that he stood by his earlier testimony. The appellant proceeded to cross-examine the witnesses a second time. Similarly **PW3** was re-called to the stand that same day. She too stated that she stood by her earlier testimony and the appellant cross-examined her.

The fact that the two re-called witnesses did not repeat their testimony does not in my view mean that Section 200(3) was not complied with. The appellant was in court and heard their initial testimony. He did not seek any clarification. Indeed the appellant in seeking the re-call of the two witnesses was clear that he only wished to cross-examine them further. I find that the provisions of Section 200(3) were properly complied with. The appellant was informed of his right to recall witnesses and he exercised that right. I therefore dismiss this ground of the appeal.

The next ground of appeal touches on the question of identification. It is trite law that a fact may be proven by the evidence of a single witness; however where there is only one identifying witness the court must carefully scrutinize that evidence of identification. In the case of **MAITANYI Vs REPUBLIC [1986] KLR 198** the Court of Appeal held as follows

"***1. Although it is trite law that 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 a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult***

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description"

This is an incident which occurred at night – at 11.00pm to be precise. No doubt it was dark. The only eye-witness was the complainant himself. He stated that he had a torch which he flashed at his attackers. This court wonders how much one can see by the flash of a torch. The circumstances cannot be ignored. The appellant was alone. He had been accosted by 4 men armed with dangerous weapons. The men pounced on him and beat him up. With the light of torch it is doubtful that the appellant would have been able to get a good look at his attackers.

The complainant also claims that there were security lights from nearby building which enabled him to identify the robbers. He has not however indicated the strength of those security lights or how far from the scene they were.

In the **Maitanyi Case** the court further held that:-

"The court must warm itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warm itself after making the decision. It must do so when the evidence is being considered and before the decision is made"

A perusal at the judgment reveals that the learned trial magistrate did not so warm himself before relying upon the evidence of this single identifying witness.

I note that an identification parade was conducted at Narok police station at which the appellant was positively identified by the complainant. However given the observations made above it is doubtful whether there existed a sufficient basis for such an identification. In other words is the court satisfied that the appellant had ample time and opportunity in the first place to see and identify his attackers. In

AJODE Vs REPUBLIC (supra), the Court held that

"It is trite law that before a parade is conducted and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then conduct a fair identification parade"

PW5 CHIEF INSPECTOR BERNARD NJERU who conducted the parade made no mention of a description having been given to him by the complainant before he arranged the parade. Further the complainant himself says he did not give police any description of his attackers – he only stated that one was being called **'Amenya'**. The appellant does not bear the name **'Amenya'** and no evidence is tendered to suggest that is his nick-name. Thus I find that there remains doubt regarding the identification of the appellant by the complainant and I find merit in this ground of appeal.

The prosecution sought to rely upon the **'doctrine of recent possession'** to establish a link between the Nokia phone stolen from the complainant during the robbery and a phone recovered by police as one **'Lucy Muthoni'.** The complainant was called to identify the recovered phone. He said he identified the phone as his by the serial number quoted. There is nothing to show that the appellant ever owned a Nokia mobile phone bearing the same serial number as the recovered phone. It was remiss of the trial magistrate to fail to read and record the serial numbers on the recovered phone. To merely mention a serial number without quoting it is of little if no assistance to any court.

PW6 PC RONALD CHEMOSIT who was the investigating officer told the court that he tracked the number of stolen phone through the service provider and traced it with one Lucy Muthoni. This **'Lucy Muthoni'** informed him that it was the appellant who had sold the phone to her. Although this **'Lucy Muthoni'** was initially charged in this case, the prosecution later withdrew the charges against her indicating that they would call her as a witness. She never testified in this case. This way the only witness who could provide credible link between the appellant and the recovered phone. Her failure to testify was fatal to the prosecution case.

PW3 DORIS MUTHONI was a former girlfriend to the appellant. She claimed that she was present when the appellant sold the phone to Lucy for Ksh 1,700/=. There is no agreement signed by the parties to prove that such a sale took place. In the absence of the testimony from the actual buyer of the phone this evidence of **PW3** remains a mere allegation. In any criminal case the onus lies on the prosecution to prove each aspect of its case beyond reasonable doubt. At no time does the burden ever shift to the accused.

Based on the foregoing I find that the prosecution case lacked cogency and left certain crucial questions unanswered. The benefit of doubt must be awarded to the appellant. I am satisfied that this appeal has merit and it is hereby allowed. The conviction of the appellant is quashed and the death sentence imposed by the trial court is also set aside. The accused is to bet set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nakuru this 19th day of December, 2016.

Mr. Obutu holding brief for Mr. Njogu

Mr. Motende for State

Maureen A. Odero

Judge

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