REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 44 OF 2013

FREDRICK GITONGA NJUE……..……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Being an appeal against conviction and sentence in a judgment delivered in Runyenjes Principal Magistrate's Court Criminal Case No. 120 of 2013 (Hon. M. Obiero) on 24th May, 2013)

JUDGMENT

The appellant was jointly charged with two others with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. According to the particulars of the offence, on the 23rd day of February 2013 at Kairimu village in Embu county, Fredrick Gitonga Njue, P M N and K G N, jointly with others not before court, being armed with dangerous weapon namely screw driver robbed Charles Machinji of his mobile phone make X2-02 valued at Kshs 6000/= and immediately before and immediately after the time of such robbery used actual violence to the said Charles Machinji.

The appellant and his co-accused were convicted of the offence for which they were charged; the appellant was sentenced to death but the 2nd and 3rd co-accused who were minors were committed to probation for three years and to serve three years at Shimo la Tewa borstal institution respectively.

The appellant was not satisfied with the learned magistrate's decision and so he appealed against the conviction and sentence. Amongst the grounds of appeal, the appellant has contended that the learned magistrate erred in law by relying on contradictory and inconsistent evidence of the prosecution witnesses; the learned magistrate erred in law when relied on a defective charge sheet; the learned magistrate erred in law and in fact when he relied on a confession by a co-accused that was not consistent with section 25A of the Evidence Act; the learned magistrate erred in law and in fact when he failed to consider that no exhibits were found on the appellant; the learned magistrate erred in law and in fact when he failed to consider that the appellant was charged with an offence different from what he was booked in for; and finally, the learned magistrate erred in law and in fact when he rejected the appellant's defence and thereby violated section 169(1) of the Criminal Procedure Code.

The learned counsel for the state conceded to the appeal on the grounds that the learned magistrate relied on a purported confession which does not meet the threshold of a confession as contemplated under Section 25A of the Evidence Act and by so doing the learned magistrate shifted the legal burden of proof to the appellant when it should have been borne by the prosecution.

The learned counsel for the state also took issue with the identification of the appellant. According to counsel, an identification parade ought to have been conducted in view of the circumstances under which the appellant was arrested. He said that the charge sheet was inconsistent with the evidence on record. The evidence itself was deficient of any corroboration.

Despite the state counsel's concession, this court as the first appellate court is enjoined to look at the evidence afresh, revaluate it and come to its own conclusions bearing in mind that, unlike the trial court, we do not have the advantage of seeing and hearing the witnesses. In this regard we are following the decision of the Court of Appeal in the case of **Okeno versus Republic (1972) EA 32** which was followed and applied by the Kenya Court of Appeal in **Mwangi versus Republic (2004) 2KLR.** In its pertinent part, the Court of Appeal was of the view that:-

"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."(See page 36).

It is apparent from the record that the complainant, Charles Machinji (PW2) was a chief inspector of police who at the material time was an administration police officer in charge Runyenjes District. He testified that on the 23rd February, 2013 at 10.30 pm, he parked his car opposite a petrol station. Just as he was walking towards a hotel, he saw somebody trying to remove a side mirror from the car. He went back and caught him but immediately thereafter two other people emerged one of whom took a cell phone from his pocket and the other hit him with a piece of wood on his left arm and upper lip.

The assailants ran away as the complainant pursued them; according to his evidence he chased the attackers for a distance of about 100 metres and in the process met two of his officers corporal Mbatia and corporal Imbare who joined him in chasing the assailants. The complainant gave up the chase went back to his car and drove to his house. After about 10 minutes, the two officers who were assisting him to chase the attackers came with a suspect whom the complainant identified as one of the people who had attacked him. He was the 3rd accused in the trial court. The complainant together with his officers and the 3rd accused person proceeded to the police station where the complainant made a report of the robbery. The 3rd accused is said to have led the police to where the other accused persons were hiding; they were eventually arrested and escorted to the police station.

According to the complainant, while he was struggling with his attackers a motor vehicle stopped by and he was able to see and identify the attackers using the lights from the motor vehicle.

Upon cross-examination, the complainant testified that his attackers were arrested at 11.30 p.m. the same night armed with the piece of wood that had been used to attack him. However, the piece of wood was not produced in court. He confirmed that he did not give the police the description of his attackers but that the police relied on the information given by the 3rd accused person to arrest the other two accused persons.

The clinical officer who examined the complainant and filled his P3 form was Nicodemus Muguna; he testified as PW1. According to his report the complainant was examined on 24th February, 2013 though the form was filled on 6th may 2013. In his report he confirmed that the complainant's upper lip and right

palm were swollen and that the injuries were caused by a blunt object. The P3 form was produced and admitted in evidence as prosecution exhibit 1.

Sergeant Thomas Imbare (PW3) who is said to have joined the complainant in pursuing his assailants said that on the 23rd day of March, 2013 at around 12.00 a.m. he was on patrol together with his colleague, corporal Mbatia near Millennium petrol station when they saw two people chasing each other. According to this witness, the person who was chasing the other fell down while the one being pursued ran towards sergeant Imbare and his colleague; they immediately arrested him and took him back to the person who had fallen down. This person told them that the person whom the officers had arrested had attacked him; that the attacker was accompanied with others who had stolen his phone and ran away.

According to Sergeant Imbare, while they were escorting the person they had arrested to the police, he pointed out to them his colleagues at Budget supermarket. They were arrested and the three of them were escorted together to the police station. The complainant was not with them when they arrested the two suspects.

Corporal Jessy Mbatia is the officer who was on patrol with sergeant Imbare. He confirmed that they were on patrol on 23rd February, 2013 at 12.00 a.m when they saw somebody chasing a young boy. The person fell down but the young boy ran towards them; they arrested him and took him to the person who had been pursuing him. This person told them he had been attacked by three people who had stolen his phone. The boy they had arrested said that the phone had been taken by one of his colleagues. While escorting the boy to the police station, he showed the officers where his colleagues were; they were all arrested and escorted to the police station together. It is while at the station, according to this witness, that the complainant came and identified them as the people who had attacked him.

The investigating officer police constable Zakari Momanyi (PW5) testified that on 24th February, 2013 at around 1.00 a.m. the complainant, two administration officers and three suspects came to Runyenjes police station. The complainant reported that the three suspects had attacked him and stolen his phone at millennium petrol station. According to this officer, the complainant was injured on the face, nose and knees. Upon interrogation the suspects denied having attacked the complainant.

In their defence the accused persons including the appellant herein gave unsworn testimony; the appellant in his evidence said that, at the material time, he was a miraa seller and that on 23rd day of February, 2013 he was at Runyenjes when he was arrested near a mini supermarket; this was around 10.30 p.m. The 2nd accused testified that he was aged fourteen years and that on the material night he was at millennium petrol station with the 3rd accused person when they were arrested by the police and asked to enter a motor vehicle that was parked by the road side. After a few minutes, the 1st appellant was also brought to the vehicle after which they were all escorted to the police station. The third accused confirmed that on 23rd February, 2013 he was at millennium petrol station together with the 2nd accused when somebody came and alleged that he had broken the side mirror of his car; he started running away but this person caught up with him. He was handcuffed and taken to the police station. The 3rd accused said that the person brought him back to the millennium station where he was beaten by this person before he revealed that he had been in the company of the 1st and the 2nd accused persons.

The description of the arrest of the accused persons' arrest varies quite radically between the testimonies of the complainant himself, the two administration officers who are said to have come to his assistance when he was pursuing the 3rd accused person and the investigating officer. The complainant informed the court that it was about 10.30 p.m. when he met his two officers while he was chasing after the 3rd accused person. It was his evidence that the officers carried on with the chase when he left and drove to his house and that it was while he was at his house that those officers brought the 3rd accused

person to him.

The two officers' version of events was completely different from that given by the complainant; according to them, they were on patrol at 12.00 a.m. and not 10.30 pm when they saw a person chasing another. The one pursuing fell down but they managed to catch the one being pursued since he was running towards their direction any way. The officers' evidence was that they immediately took the 3rd accused person to where the complainant was and that it is after that that they arrested the appellant and the 2nd accused person and took them to the police station. Indeed the investigating officer confirmed that in his evidence that the two officers and the three suspects came to the station at the same time.

If the officers' version is true, it would mean that they never chased the 3rd accused person as alleged by the complainant and they did not meet the complainant before they chased and apprehended the 3rd accused. It would also mean that these officers never went to the complainant's home as claimed by the complainant. In the face of these contradictions, the credibility of the complainant as a witness and the truthfulness of his evidence were cast in doubt the benefit of which should have been found for the defence.

It is also intriguing to note that although the complainant said that the officers were his juniors there is nothing from their description of events to suggest that there was any sort of familiarity between them even after they met him.

The complainant also said that was attacked with a piece of wood which was recovered; however, Thomas Imbare PW3 was categorical that no weapon whatsoever was recovered from the scene of crime. In any event the weapon that the accused persons are alleged to have been armed with and which appears in the particulars of offence was a screw driver and not a piece of wood.

A very crucial issue in the entire episode which, in our view, should have been taken into account by the trial court is the question of identification of the accused persons including the appellant herein. The complainant said that he was able to see his attackers with the help of the light from a motor vehicle that stopped by. While it is not clear from his evidence for how long the motor vehicle stopped, it would appear from the description of events that his duel with his assailants was not only brief but it was also in circumstances that can properly be said to have been unfavourable for identification of any of the accused persons including the appellant herein.

Having properly found that none of the accused persons could have been identified the trial court proceeded to convict the accused persons based on what he termed as admissions by the accused persons. This is what the learned magistrate said;

***"…I am of the opinion that the conditions under which the complainant allegedly identified the accused persons were not ideal and he could not have identified the accused person positively. However, it is clear from the testimony of PW2 that he chased one of the accused persons that is the 3rd accused person. It is also clear from the testimony of PW3 and PW4 that they arrested the 3rd accused person and that it is the 3rd accused person who was being chased by PW2. The 3rd accused person has admitted that he was chased by PW2 and that he was arrested by PW3 and PW4. The said 3rd accused person has also admitted that he was in the company of the 2nd accused person. From the above I am of the opinion that although the conditions at the scene were not ideal for positive identification, the admissions by the 3rd* accused person clearly demonstrates that the 2nd and the 3rd accused person were at the scene of the alleged incident."**

Here, we agree with the learned state counsel that the learned magistrate fell into error and shifted the legal burden of proof to the accused person. It is not for the defence to fill in the gaps in the prosecution case, the legal burden of proof is always on the prosecution. (See the case of **Ramanlal T. Bhatt versus Republic (1957) E.A 332 at page 334)**.As for the appellant this is what the learned magistrate had to say;

"As for the 1st accused person, it is not clear whether he was at the scene. As such the second issue for consideration is what led to the arrest of the 1st accused person."

Even after finding as a fact that it was not clear whether the appellant was at the scene, the learned magistrate proceeded to make a finding that:-

"*From the circumstances of the case, I am of the opinion that it was the 3rd accused person who was trying to remove the side mirror and the 2nd and the 1st accused person joined him when he was caught by PW2."*

The only evidence that the learned magistrate could have relied upon to make this erroneous finding is the evidence of the complainant who said that as he tried to apprehend the 3rd accused person two other people emerged; of the two one took his phone and the other hit him with a piece of wood. We have already expressed our reservations about the credibility of the complainant as a witness and the truthfulness of his testimony; however, taking the learned magistrate at his word, if it had been established as a fact that the circumstances for positive identification were not favourable on what basis would the evidence of the complainant be accepted that he was able to identify the appellant or any of the other accused persons"

The complainant never gave any description of any of his attackers and more particularly the appellant herein who was roped in this case only because the 3rd accused person pointed him out as one of the people he was with at the Millennium petrol station. We are of the view that had the complainant been able to describe the appearance of his attackers, the minimum that would have been expected from investigation officer was an identification parade out of which the complainant would have picked his attackers based on his impression of how his attackers looked like. It was not enough to charge the appellant simply because his co-accused had allegedly pointed him out and that the complainant had identified him without taking him through the legal and requisite process of identification.

In the recent Court of Appeal decision in **Criminal Appeal Case No. 389 of 2009, Peter Maina Mwangi & Jackson Kimaru versus Republic** , the court reiterated the importance of an identification parade in cases where identification evidence was crucial. One of the arguments by the state in that case was that the police saw the robbers attacking the complainants and they pursued the assailants and never lost sight of them during the pursuit. He argued that the immediate arrest and production of the appellants at the police station, just as it was in this case, negated the need for an identification parade. In discounting this argument, the court held that it is a well settled principle that the evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. The court went further and reiterated the importance of an identification parade; it said at page 6 of its judgment that:-

"In this case J admitted that she did not give the description of the 1st appellant to the police before he was arrested and before she identified him when he was brought into the police station. We are of the considered view that J's evidence ought to have been tested by her first recording her initial statement indicating whether she could identify her attackers and giving their descriptions. Her ability to identify her attackers should have been tested by an identification parade."

The court proceeded to allow the appeal and said at page 7 of its judgment that;

"From the foregoing, we are convinced that there was no proper testing of the evidence of identification and recognition by the two lower courts. Had the evidence been thoroughly tested and analysed we cannot be sure that the lower courts would still have come to the same conclusion."

The evidence of identification in this case was not tested at all and to the extent that such evidence was core to the case against the appellant the conviction and sentence was, to say the least, a miscarriage of justice.

For the reasons we have given we agree with the learned counsel for the state that this appeal should be allowed, the conviction quashed and the sentence set aside. We therefore order that the appellant be set free forthwith unless he is lawfully held.

Signed and delivered in open court at Embu this 24th day of December, 2013

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H.I. Ong'udi Ngaah Jairus

JUDGE **JUDGE**