Case Number:	Criminal Appeal 168 of 2010
Date Delivered:	04 Jul 2012
Case Class:	Criminal
Court:	High Court at Meru
Case Action:	Judgment
Judge:	Muga Apondi
Citation:	SAMWEL MUTIGA MUGAA V REPUBLIC[2012]eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
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Case Outcome:	-
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Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Criminal Appeal 168 of 2010

SAMWEL MUTIGA MUGAA……APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

(From original conviction and sentence in criminal case NO.1492 of 2009 of Senior Resident Magistrate's court at Tigania).

JUDGMENT

The appellant in this case was charged with the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code. The facts of the prosecution case as stated in the charge sheet are as follows:-

On the 21st day of October, 2009 at Akairu village within Kigochwa location in Tigania East District of the Eastern Province attempted to rob Stephen Kang'oro Kubania of money and other valuables and at or immediately before or immediately after the time of such attempted to use actual violence to the said Stephen Kang'oro Kubania.

After full a trial, the appellant was found guilty and convicted by the trial magistrate. Consequently, the appellant was sentenced to suffer death. The appellant being aggrieved by the conviction and sentence of the learned trial Magistrate preferred this appeal and set forth the following grounds of appeal:-

1. That the learned trial Magistrate erred in law and facts in failing to observe that the alleged identification/recognition was not free from possibility of error.

2. That the learned trial Magistrate erred in law and facts in failing to find that there was no identification parade done in respect of I the appellant to verify the alleged identification.

3. That the learned trial Magistrate erred in law and facts in failing to question the prosecution in absence of vital witnesses mentioned in the trial case.

4. That the learned trial Magistrate erred in law and facts in failing to question the prosecution in absence of vital witnesses mentioned in the trial case.

5. That the learned trial Magistrate erred in law and facts in dismissing and disregarding the sworn defence without giving any cogent reasons for the same.

6. That the grounds herein has been drafted in absence of certified copy of the trial proceedings I pray to be served with the same to enhance me draft firm supplementary grounds.

7. That I pray to be present during the hearing and determination of the same.

During the hearing of the appeal, the appellant opted to produce written submissions to support his appeal. According to the appellant the complainant did not tell the truth. He stated that the complainant had alleged he had gone to steal at 2.00 p.m whereas all that was lies. He stated if that was true the Chief who arrested him ought to have given evidence at the lower court. He also stated that the complainant stated that the appellant had hit him with a stone and that was not true. That there was no way he could have assaulted complainant and fail to take something from him. He contended that the complainant should have stated what the appellant had stolen. The appellant stated that he was arrested when he was in the shamba.

On the other hand, the appeal is opposed by the learned State Counsel Mr. Musau for the Republic. Apart from the above, the learned State Counsel submitted that the appellant was tried and convicted for an offence of attempted robbery contrary to Section 297(2) of the Penal Code. The learned State Counsel submitted that the complainant, who was PW1 was new in the area and met the appellant at 2.00 p.m. The complainant asked the appellant for direction and appellant agreed to show the complainant the way. After walking for a short distance, the appellant took a stone that he used to assault the complainant repeatedly and also ransacked his pockets as he was asking for money. The complainant screamed and members of public went for his assistance. The appellant removed his shirt and started running away but he was pursued by members of public and later arrested. The learned State Counsel submitted that the appeal lacks merits since the conviction was based on adequate evidence from PW1, PW2 and PW3. That the incident took place in broad day light hence the appellant was properly identified. He submitted that there is evidence that the complainant was assaulted and a P3 form produced proved that complainant was injured.

He further submitted that the circumstances of this case fall squarely under the provisions of Section 297(2) of the Penal Code. The appellant in response stated that the State Counsel did not show what the appellant might have intended to steal from the complainant. He further stated all witnesses came from far away except Edward Mathairu. That no exhibit was produced at the lower court because this case was based on lies. He concluded by stating that he was opposing the conviction and sentence as it is based on lies.

Being the first appellate court, we have the duty to reconsider and re-evaluate the evidence which was adduced before the trial Magistrate before making our own independent conclusion. In addition to the above, we also do appreciate and are alive to the fact that we never saw nor heard the witnesses during the trial. Those are some of the principles which are set out in the case of **GABRIEL KAMAU NJOROGE – VS – REPUBLIC(1982-88) 1 KAR at page 1134**.

Inthis particular case, the complainant, namely PW1 Stephen Kangoro testified that he comes from Nteba Location. The complainant recalled that on 21/10/2009 at 2.00 p.m he was going home from his place of work and as he approached Kiguchwa he met the appellant. The complainant who was new in the area asked the appellant for directions. That the complainant and appellant walked together for few minutes and after crossing a river the appellant took a stone and hit the complainant repeatedly on the head. The complainant fell down and screamed. That when some people came, the appellant removed his shirt and fled.

PW1 stated that members of public gave a chase and arrested the appellant. That they proceeded to

Chief's camp then to Mikinduri Police Station. The complainant was then treated at Miathene Sub-district hospital.

PW1 identified medical card and P3 form which were marked as MFI and MFI 2 respectively. PW1 stated that the appellant was demanding money as he hit him and he frisked his pockets as he beat him but did not find any money. PW1 stated that he had notknown the appellant before the incident.

During cross-examination PW1 testified that he was new in the area and he asked for directions near a bush. That the appellant demanded money as he assaulted the complainant and that appellant frisked PW1's pockets but did not find any money. PW1 stated that the appellant was trying to rob him. PW1 also testified that it was during the day time and he never suspected that the appellant could be a robber. That members of public came, chased and caught the appellant. That appellant was caught a few metres from the scene of the attack. PW1 testified that some of the people who arrested the appellant are witnesses. PW1 testified also that he did not know whether the peoplewho arrested the appellant were appellant's enemies. On the other hand, PW2, James Kathiari, testified that on 21st October, 2009 at 2.00 p.m he was assisting Edward Mathairo, PW3 to plant a shrub fence, when they heard screams and went to check. That PW2 saw a young man who was running away without a shirt. That he was being chased by other people. PW2 testified that they found another person who lay on the ground bleeding from the head. That they lifted him and took him to Akairo trading center. That the young man who was being chased was brought by the people who were pursuing him. PW2 testified that the complainant told them the young man was trying to rob him. The young man was escorted to Chief's camp at Kiguchwa chief's camp. That they then proceeded to Mikinduri police station. PW2 identified the young man who was being pursued as the accused in the dock before the trial court. PW2 testified that he had not seen the appellant before that incident. During cross-examination PW2 testified that he did not find the appellant robbing the complainant but he saw appellant being pursued. He testified also that he had not known the complainant before and the latter told them that appellant had hit him with a stone. PW2 testified that he saw appellant clearly after he had been arrested. Besides the above, PW3 Edward Mathairu testified that on 21st October, 2009 he was at his farm when he heard people arguing and pupils making noise.

PW3 left the farm and went to the road whereby he found someone with a lot of blood on his head and people running about. PW3 testified that the person he found bleeding told him that he had been hit by someone else and the person was being chased by other people. PW3 testified that a young man who was naked was brought and complainant pointed him out as the one who had attacked him. People wanted to lynch the young man but PW3 telephoned the chief who told him not to allow people to kill the young man. The Chief advised PW3 to take the young man to Chief's camp. That they took the young man to Chief's camp, then to Mikinduri police station. PW3 testified that he knew the appellant before that day and that he saw the complainant that day for the first time. During the cross-examination PW3 testified that it was the complainant who identified the appellant as the person who had assaulted him and tried to rob him. That PW2 came and found PW3 planting the fence. PW3testified that he prevented people from beating the appellant after he requested to be protectedfrom the mob that wanted to lynch the appellant. PW3 also testified that the complainant told them that the appellant was showing him directions and led him to a river. PW3 testified that he had known the appellant since his childhood. That he never threatened to have appellant locked up.That he did not know that the appellant had a case with his step-mother. That the appellant did not have a weapon. PW3 testified that he believed what he was told by complainant and because the appellant begged PW3 to prevent people from killing him. That he did not have grudge against the appellant. On the other hand, PW4 Geoffrey Murithi Muthomi testified that he is a Clinical Officer at Miathene Hospital. That he had a P3 form of one Stephen Kangaro aged 45 years who reported in the hospital on 21/10/2009 with history of having been assaulted by someone known to him. PW4 testified that the complainant had multiple bruises on the scalp. That he had

tenderness on both sides of the ribs. That the injuries were one day old. That a blunt object had been used to inflict the injuries. Complainant was treated. PW4 assessed the degree of injury as harm. PW4 testified that he filled the P3 form on 22/10/2009 and produced treatment note and P3-MFI and MFI-2 as exhibits 1 and 2 respectively. During the cross-examination PW4 testified that the complainant had not been cut but was hit with a blunt object. Besides the above, PW5 No.35986 Corporal Aaron Kimutai testified that he was stationed at Mikinduri police station. That on 21/10/2009 at 4.00 p.m he was on duty at the police station when Chief of Kiguchwa one Joseph Mwereria accompanied by the complainant and members of public brought the appellant to the police station. PW5 testified that it was alleged the appellant tried to rob the complainant. That complainant had an injury on the head which he alleged had been inflicted with a stone as appellant tried to rob the complainant. PW5 testified that he recorded the complainant's report and gave him a referral note to the hospital.

Later PW5 locked up the appellant in police cells. He recorded statements of witnesses. The appellant was later charged with the present offence. PW5 stated that they did not recover the stone appellant used to hit the complainant. PW5 stated that the complainant informed him that the appellant attempted to rob him of his money. During cross-examination PW5 testified that the appellant was not brought with anything to the station. PW5 stated that the appellant was arrested at the scene of crime. PW5 testified that appellant never told him of any land dispute between him and Mathairu. PW5 testified that he did not agree that Mathairu framed the appellant.

After the prosecution closed their case, the trial Magistrate found that the prosecution had established a prima facie case against the appellant. The trial court therefore found that the accused had a case to answer and complied with the provisions of Section 211 of the Criminal Procedure Code. The appellant opted to give sworn evidence and call no witnesses.

According to the appellant, who gave evidence as DW1, his name is SamwelMutigaMugaa who comes from Kiguchwa. He testified that he is a farmer. That on 21/10/2009 the appellant testified that he went to his farm to pick tea. That PW4, Edward Mathairu came to his farm with two strangers and told him Chief wanted to see the appellant. That the Chief wanted to see the appellant over an identify card that the appellant had returned with a defective photo. That they all proceeded to Chief's Office whereby the appellant was arrested and locked up in the cells. The appellant stated that he was told he had quarreled with Mathairu after appellant's father died. He stated that he was told that Mathairu had married his mother and he wanted to revenge. That at 2.00 p.m the appellant stated he was put in a vehicle and driven to Mikinduri police station. He was locked up at the station. That at 4.00 p.m he was told he would be framed with a robbery case by a policeman. That the appellant testified that at 5.00 p.m he was asked for Kshs.10,000/= so that the policeman could release him and that when he failed to raise the amount, he was fingerprinted and on resisting he was beaten by the Officer. He testified that there were no witnesses from the village and that the witnesses were strangers. He stated that the witnesses gave hearsay evidence. He stated that the Chief was not called. During cross-examination the appellant testified that he was picking tea alone from his father's farm. He testified that he does not know Stephen Kangaro but he saw him on that day. Appellant stated that Mathairu is the one who made the complainant frame the appellant. Appellant testified that it is what he thought. Appellant then closed his case.

This court has carefully considered the evidence which was tendered in the lower court together with the judgment of the trial Magistrate. From the evidence on record, it is clear that the incident took place in broad daylight at 2.00 p.m in an open space and it is apparent that the appellant was able to identify the complainant. Complainant sought from the appellant to be shown direction and appellant agreed. They walked together for few minutes before appellant hit the complainant who screamed for help. The members of public who came to complainant's aid chased and arrested the appellant. There is

no doubt whatsoever that the appellant was arrested immediately at a short distance from the scene of crime as he tried to flee. In addition on being brought to where the complainant was the complainant identified the appellant to PW2 and PW3 as the person who had hit him as he tried to rob him. That though the complainant had not previously seen the appellant, he was able to identify the appellant very well. He recalled that he had asked the appellant for directions and appellant offered to show him the way. That they walked together for a few minutes before the appellant attacked the complainant. Appellant frisked complainant's pockets but did not find any money. The complainant screamed and appellant started running away. Besides the above PW2 and PW3 immediately went to the scene of crime when they saw a young man being chased by members of public. He was arrested by members of public within a short distance and on being brought to the complainant, the latter confirmed that the appellant was the young man who had hit him and tried to rob him. The arrest of the appellant was within a short distance from scene of crime and within a very short time. This court entirely agrees with the learned State Counsel that the appellant was properly identified.

The evidence on record shows that the complainant did not even know the appellant but he was able to identify the appellant during attempted robbery. The court concur with learned State Counsel that the circumstances during the attempted robbery was favourable for positive identification. The leading case as far as identification is that of **Republic – V – Turnbull & Others(1976) 3ALL ER**. The above case set down the basic principle to be considered when the issue of identification came into place. In addition to the above in the case of **Robert Gitau Wanjiku – Vs – Republic** Criminal Appeal No.63 of 1990(Nakuru), the Court of Appeal held as follows:-

"It was held in Abdullah Bin Wendo and Another V R 1953 Volume KXX 166 and Cleophas Otieno Wamunga V R(Criminal Appeal No.20/89) that evidence of identification should be tested with great care especially when it is known that the conditions favouring a correct identification were difficult. The witness who testified that they could identify the appellant in circumstances of shock and fear could easily be mistaken because the duration of observation was short. We are doubtful whether the witnesses could have identified the appellant's face in the manner described by the witness. We are also doubtful how the witnesses were able to identify the appellant in the identification parade. In this respect, the appellant complained that it was easy for him to be picked up because in the parade he was only one from the cell."

Besides the above, in the case of **Abdulla bin Wendo & Another – V – Republic(1953)** 20 EACA 166 the court stated:-

"There was a need for testing with the greatest care the evidence of a single witness respecting identification, especially when it was known that the conditions favouring a correct identification were difficult. In such circumstances what was needed was other evidence, whether it be circumstantial or direct, pointing guilt, from which a Judge or Jury could reasonably conclude that the evidence of identification, although based on the testimony of a single witnesses, can safely be accepted as free from the possibility of error."

Apart from the above, in the case of **Francis Kariuki Njeru & 7 others –V-Republic**Criminal Appeal Case No.6 of 2001(UR), the Court stated as follows:-

"The evidence relating to identification had to be scrutinized carefully, and was only to be accepted and acted upon if the court was satisfied that the identification was positive and free from the possibility of error. The surrounding circumstances had to be considered and among the factors the court was required to consider was whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all."

In this particular case, we are satisfied that the trial Magistrate did not only rely on the issue of identification by the complainant but also on circumstantial evidence which squarely put the appellant at the scene of crime. Significantly, the accused, was arrested immediately after the commission of the offence and within a short distance from the scene of crime as he was fleeing and thereafter was immediately identified by the complainant.

Apparently in this case, the witnesses save PW3 did not even know the appellant and hence there cannot be any ground to allege that they had any malice whatsoever against him. PW1 was new in the area and PW2 did not know the appellant and we find that it was highly unlikely that the two would conspire with PW3 to frame the appellant. We further find that the appellant in his evidence did not say or demonstrate how PW3 used the complainant to frame him neither did he state in his defence how PW2 was involved in the case. We do not see the basis of a total stranger framing the appellant for an offence he never committed. We have also carefully considered the evidence adduced before the trial court and we are unable to find any evidence before the court to make us believe that any grudge existed between the appellant and PW3. It is apparent in this case, that when the appellant was chased and arrested PW3 was not amongst the chasers and arresting persons. The Appellant in actual fact pleaded with PW3 to prevent the public from lynching him. PW3 in actual fact is the one who intervened and saved the appellant from being lynched. He even called area Chief for advice and was able to escort appellant to the Chief's camp and to police station. We therefore find that there cannot be ground to allege that the prosecution witnesses had any malice whatsoever against the appellant.

We are satisfied that it was the appellant who actually committed the offence of attempted robbery contrary to Section 297(2) of the Penal Code. We have no doubt whatsoever that the identification of the appellant was positive and without any errors at all. We do hereby agree and concur with the conclusion made by the learned trial magistrate who took into account the appellant's defence and found it to be an afterthought and also who took into account of the circumstantial evidence.

On the basis of the above, we hereby dismiss the appeal on conviction since the same has no merits at all. On the issue of sentence we are guided by the case of **DAVID MWANGI MUGO – VS – REPUBLIC – CRIMINAL APPEAL NO.368 OF2007(Nairobi)** in which Court of Appeal stated:-

" The appellant was convicted of an offence of attempted robbery with violence punishable by death in terms of Section 297(2) of the Penal Code. In terms of Section 389 of the Penal Code the appellant shall not be liable to imprisonment for a term exceeding seven years. But he was sentenced to death. The apparent conflict in the law may only be resolved by parliament. But the appellant is entitled to the less punitive of the two sentences. "

In terms of Section 389 of the Penal Code, the appellant shall not be liable to imprisonment for a term exceeding 7years. The upshot is that the appeal on conviction is hereby dismissed, the appeal on sentence is hereby allowed to the extent that, the appellant serves a sentence of 7 years from the date when he was convicted. Those are the orders of this court.

JUDGMENT READ, SIGNED AND DELIVERED AT MERU THIS 4th DAY OF JULY, 2012.

MUGA APONDI **J. A. MAKAU**

JUDGE **JUDGE**

Judgment delivered in open court in presence of:

……State Counsel

……..appellant's counsel

……appellant

MUGA APONDI **J. A. MAKAU**

JUDGE **JUDGE**

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