Case Number:	Criminal Appeal 242 of 2009
Date Delivered:	18 Jul 2012
Case Class:	Criminal
Court:	High Court at Meru
Case Action:	Judgment
Judge:	Muga Apondi
Citation:	ISAIAH MAROO V REPUBLIC[2012]eKLR
Advocates:	-
Case Summary:	..
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL 242 OF 2009

ISAIAH MAROO …….. APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

(Criminal Appeal against both conviction and sentence by P.W. Macharia SPM at Maua SPM Criminal Case No. 1202 of 2008 delivered on 2.7.2009)

J U D G M E N T

The appellant in this appeal had been charged for the offence of Robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence are that**:-**

"On the 29TH Day of June 2008 at Kanuni Location in Igembe District within the Eastern province jointly with another not before court and while armed with dangerous weapon i.e. panga robbed Charles Muria Njau Ksh. 5000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Charles Muturia Njau."

After a full trial the appellant was found guilty and convicted for the above offence. Subsequently the appellant was sentenced to death as provided by the law. Being by the aggrieved the conviction and sentence that was passed by the trial magistrate the appellant filed this appeal.

In his memorandum of appeal the appellant has listed the following grounds:

1. That, the trial magistrate erred in both law and facts in failing to observe that the alleged recognition and or identification was difficult in the circumstances prevailed during the attack.

2. That the learned trial magistrate erred in law and facts in failing to note that there was an existing grudge between I the appellant and the complainant.

3. That the learned trial magistrate erred in both law and facts in failing to find that the prosecution failed to avail witnesses mentioned in the trial case especially those who

participated in my arrest.

4. That the learned trial magistrate erred in law and facts in dismissing my preferred unsowrn defense without giving any cogent reasons.

5. That the grounds herein has been drafted in the absence of the trial court proceedings hence I pray to be served with the same to enhance me draft further firm supplementary grounds.

During the hearing of appeal the appellant handed over to this court amended grounds of appeal and written submissions. The said amended grounds are as follows:

1. "The learned trial magistrate gravely erred in all points of law and facts when he convicted me in this case while relying in the evidence of identification/recognition that was allegedly made by the complainant without him considering that I was just a victim of the circumstances.

2. That the learned trial magistrate erred in law and facts when he convicted me in this case while relying on insufficient evidence.

3. That the learned trial magistrate further erred in points of law and facts when he convicted me in this case while being so much impressed with my mode of arrest without him considering that I was just a victim of the circumstances.

4. That still the learned trial magistrate erred in law and facts when he convicted me in this case without him considering that, the prosecution side failed to avail the crucial vital witnesses before the court.

5. That the learned trial magistrate erred in both law and facts when he convicted me to death sentence without him not finding out that a mandatory death sentence upon I the appellant was arbitrary and unconstitutional and the execution of the same in the instant case would amount to in human.

On the other hand the State which was represented by Mr. Mungai opposed the appeal on the ground that the case was proved beyond any reasonable doubt. In addition to the above, the learned State Counsel also submitted all the ingredients of robbery with violence were proved. Besides the above he submitted that the accused was well identified at the scene of crime and prior to that he was known by the complainant, PW2 and PW3. According to the learned State Counsel PW3 had stated that he had known the appellant for many years since they were classmates. In addition to the above there was also the evidence of PW2 who was a fellow villager. Apart from the above he also submitted that the appellant was identified by PW 2 when he was about only ten metres away. He also noted that both the appellant and his accomplice were armed with pangas. The above story was also corroborated by PW3. The learned State Counsel also submitted that both PW2 and 3 went to the scene immediately PW1 was attacked. He also pointed out that the incident took place at around 6 pm which was broad day light. That enabled the witnesses to recognize the appellant clearly. He also pointed out that there was no doubt that the complainant was attacked and that the defence never identified the issues at the trial. Further to the above he contended that after the incident, the appellant fled from his home for five days before he was arrested. He contended all the ingredients of the charge of robbery were proved. On the basis of the above he has urged this court to uphold the application and dismiss the appeal.

Being the first appellate court we have the duty to re analyze and re-evaluate the evidence that was

adduced in the lower court. Apart from the above, we are also alive and sensitive to the fact that we did not have the advantage of observing the manner and demenour of the witnesses. Those basic principles were laid down in the case of **Simiyu And Another Vs Republic [2005] I KLR 192.** In this particular case PW1 Charles Mutura Njau testified that on 29th June, 2008 at around 6.00 PM while he was walking home he met two men who were known to him. The first person was Isaiah Maroo who is now the appellant. However the 2nd person was known to him only physically and not by name. Both men were armed with a panga and they ordered him to stop. In response PW1 obeyed and he was ordered to produce money. When he hesitated and told them he did not have money the appellant got him by the collar of his coat and raised his panga threatening him with death. Consequently the appellant inserted a hand in his breast pocket of the coat and removed cash Ksh.5,000/-. Thereafter PW1 started to shout for help and one of the robbers ran away. On the other hand Kainga and Kirima rushed to the scene and helped him to struggle with the appellant who managed to slip away and escape. The appellant managed to run away with the money and panga. From there, the complainant made a report at Kanuni D.O.'s officer to the police officers. He informed the officers that he was able to recognize Maroo as one of his attackers. He was later referred to Maua Police station where he made a formal report. After five days the appellant was arrested but the cash Ksh.5000/- was not recovered. On the other hand PW2 John Kirema Murungi and PW3 Julius Kainga Njau confirmed that they heard the complainant raising the alarm and they rushed to the scene. On arrival both of them saw the appellant and his accomplice attacking the complainant while armed with a panga. They also confirmed that the complainant immediately complained that he had been robbed of cash Ksh.5000/-

Thereafter PW2 and PW3 escorted the complainant to Maua Police Station. The last prosecution witness was PW4 PC Albert Ambera who summarized the prosecution case. When the appellant was placed on his defence he denied committing the offence for which he had been charged for. Besides the above, the appellant recalled that on 12th July 2008 while he was heading towards Kimongoro a vehicle drove past him and stopped. Among the passengers in that vehicle was Charles Mutura who was the complainant in the lower court. According to the appellant he was arrested and driven to Maua Police Station where he was charged for an offence that he never committed. It was the contention of the appellant that he was framed up because he had quarreled with the wife of the complainant on 14th April, 2008.

We have carefully considered the evidence that was adduced in the lower court. It is apparent that the said offence was committed during broad day light at around 6 pm. That meant that the prosecution witnesses were able to clearly see the appellant. In addition to the above we have also taken note that PW1, PW2, and PW3 knew the complainant before the incident took place. That the complainant gave the appellant's name to the APS at Kanuni D.O.'s office in his first report. That means that the 3 witnesses had the advantage of recognizing the appellant during the incident. We are of the considered view that there was no doubt whatsoever about the identity and recognition of the appellant on the material day. The leading case as far as identification is that of **Republic –Vs Turnbull and Others (1976) 3 ALL ER.** The above case set down the basic principle to be considered when the issue of identification came into place. In the Case of **Francis Kariuki Njeru and 7 Others –VS- Republic Criminal Appeal No. 6 Of 200(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 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 it is explicit that the robbery itself took place during broad day light and hence

there was no difficulty on the part of the 3 witnesses to recognize the appellant. As we have stated earlier the 3 witnesses had earlier known the appellant and hence they were able to recognize him during the robbery. This court has carefully considered all the grounds of appeal. We do not find any merit whatsoever in any of the grounds. We are satisfied that it was the appellant who attacked and robbed the appellant cash Ksh.5,000/- on the material day. The prosecution proved all the ingredients of the offence of robbery with violence beyond any reasonable doubt. Given the above circumstances we hereby find that the conviction was safe and well merited. We therefore uphold the conviction and dismiss the appeal since the same has no merit. In the same breadth we hereby confirm the sentence that was imposed by the trial magistrate.

Right of appeal explained.

Those are the orders of this court

MUGA APONDI **J. A. MAKAU**

JUDGE **JUDGE**

Judgment read, signed and delivered in open court in the presence of:

…….. Defence Counsel

……..... State Counsel

MUGA APONDI **J. A. MAKAU**

JUDGE **JUDGE**

18th July, 2012