Case Number:	Criminal Appeal 171 & 173 of 2012
Date Delivered:	24 Dec 2013
Case Class:	Criminal
Court:	High Court at Embu
Case Action:	Judgment
Judge:	Hedwig Imbosa Ong'udi, Jairus Ngaah
Citation:	Peter Muimi Nzana & another v Republic [2013] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	S.M. Mokua
County:	Embu
Docket Number:	-
History Docket Number:	48 of 2012
Case Outcome:	Appeal Dismissed
History County:	Embu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 171 OF 2012

PETER MUIMI NZANA……...1ST APPELLANT

JOESPH MUSYOKA IRERI…….....……2ND APPELLANT

-VERSUS-

REPUBLIC……...RESPONDENT

(AS CONSLIDATED WITH HIGH COURT CRIMINAL APPEAL NO. 173 OF 2012

JOSEPH MUSYOKA IRERI VERSUS REPUBLIC)

(Being an appeal against conviction and sentence in a judgment delivered in Siakago Senior Principal Magistrate's Court Criminal Case No. 48 of 2012 (Hon. S.M. Mokua) on 14th November, 2012)

JUDGMENT

The appellants were charged with the offence of robbery with violence contrary to section **296(2)** of the **Penal Code**. It was stated in the particulars of offence that on the 24th day of January, 2012, at Karura village in Kindaruma sub-location, Mbeere South District within Embu County, the appellants robbed Celestino Gichoni Ireri of Kshs 2300/= cash and a nokia mobile phone worth Kshs 3200/= and at or immediately after the time of the robbery wounded the said Celestino Gichoni Ireri.

The evidence that was placed before the learned magistrate, as far as we can gather from the record, comprised the testimony of five prosecution witnesses and the unsworn testimony of the appellants themselves.

The first prosecution witness Celestino Gichoni Ireri (PW1) took to the witness stand on 18th June, 2012. The witness who was also the complainant in the case told the court that on 24th January, 2012, he had been doing his work as community health worker 13 kilometres away from his home. While going back home, at around 8.00 pm, he encountered the 2nd appellant standing by a river. The complainant greeted him but he did not respond. As he moved on somebody else whom he recognised as the 1st appellant asked him to stop. He held the complainant by the neck and asked him to surrender the money that he had. The appellants frisked the complainant's pockets and removed Kshs. 2300/=. The 2nd appellant took the mobile phone from the complainant's pocket. The complainant was pushed to the ground and as a result sustained injuries on his back and left arm. The appellants took off thereafter. The complainant picked himself up and walked to his home leaving behind his bicycle at the *locus in quo* until the following day when he came back to collect it.

After the complainant made a report of the robbery to the village elder or headman the following morning, the elder and a person described as a "sub area" apprehended the two accused persons who were then taken two Kiambere police station. The complainant testified that though he was attacked at night, he recognised the appellants because he knew them well and there was moonlight. He described

the 1st appellant as a person he had known for a long time and that he was working at Tarda. On the night in question he was wearing a torn stripped shirt. As for the second appellant, the complainant told the court that he was his pupil at one time and indeed during cross-examination he was emphatic that he had known the appellant since he was young; on the fateful night he was wearing a t-shirt.

When the complainant finally made his report to the police he was given a P3 form and referred for treatment at Mbeere District Hospital where he was examined and treated of the injuries he had sustained. According to the P3 form he was examined six days after he sustained the injuries.

PW2, Samuel Nzuki Ireri, was the person described as the “sub area” by the complainant. He testified that on 25th January, 2012 he was at his home when the complainant came and reported that he had been robbed by the appellants the previous night. Since he knew them, this witness in collaboration with the village elders had the appellants arrested and taken to Kiambere police station.

One of the village elders who helped arrest the appellants is **Alphonce Kizia (PW3)**. On 25th January, 2012, he was informed by **PW2** that there was a robbery suspect in his jurisdiction; with the assistance of the youth in his area he had the 1st appellant arrested and taken to Kiambere police station together with the 2nd appellant. This witness also said that he had known the appellants for a fairly long period.

The officer who investigated the case was police constable **Cyrus Kinyua (PW4).** He confirmed that on 26th January, 2012 at around 4.15 pm the complainant made a report that he had been robbed at Kiogaro seasonal river by the appellants. The officer testified that the complainant specifically mentioned the 1st appellant by name as the one who threatened the complainant and wrestled him to the ground. The officer confirmed that the complainant reported to have lost Kshs. 2300/= during the robbery and a nokia phone worth Kshs 3200/= and that he also sustained injuries when he was pushed to the ground. The investigations officer visited the scene of crime on 27th January, 2012 in the company of the “sub area” and the OCS but he did not make any recoveries. The witness confirmed that the appellants were arrested by their respective “sub areas”.

The last witness for the prosecution was a clinical officer at Mbeere District Hospital. The officer, John Mwangi (PW5) confirmed that on 31st January, 2012 he filled a P3 form in respect injuries that the complainant had sustained. He confirmed having examined the complainant whom he found to be in a general fair condition though he had a bruised left elbow. The witness produced the P3 form which was admitted in evidence as a prosecution exhibit. According to that form the complainant was injured on the right elbow and the probable type of weapon which caused the injury was described as “blunt”.

When the appellants were put on their defence, they opted to give unsworn testimony. The 1st appellant’s position was that the charge against him was trumped up and he was targeted because of a land dispute apparently between him and the complainant. Indeed when he was arrested, the village elder allegedly told him that he was being arrested because of the dispute. The 2nd appellant denied having been at the scene of crime on the material day; his evidence was that he was away at Matuu where he was working. He also said that he had been framed because of a land dispute between his family and that of the complainant.

Upon consideration of this evidence, the learned magistrate found the appellants guilty, convicted them and sentenced them to death as by law provided. The appellants have appealed to this court against the conviction and sentence; they filed separate appeals which, they agreed, could be consolidated when they came up for hearing on 5th November, 2013. They relied on their respective hand written submissions.

The appellants' grounds of appeal are largely common to both their appeals; they are that, the learned magistrate erred in law and in fact for failure to consider that they pleaded not guilty to the charge; that he also erred in law and in fact when relied on inconsistent and uncorroborated evidence and more particularly the evidence of the first three prosecution witnesses and that the prosecution did not prove its case beyond reasonable doubt; that the learned magistrate erred in law and in fact for convicting the appellant without considering the fact that the investigation officer neither visited the crime scene nor appellants' premises and that none of the exhibits or any weapon was recovered from the appellants; that there was not enough moonlight to identify anything on the material night; The appellants have also contended that their fundamental rights were violated when they were detained well beyond the constitutional timelines before they were charged. In the appellants' view, had the learned magistrate considered the appellants' defence they would have been acquitted.

The state, on its part has opposed the appeal; Mr Wanyonyi representing the state urged the court to uphold the decision of the subordinate court and dismiss this appeal. According to Mr Wanyonyi there were no contradictions or inconsistencies in the evidence by the prosecution witnesses as alleged by the appellants. The learned state counsel also urged that the appellants were positively identified as the conditions were favourable. He relied on the **High Court decision in Criminal Appeal No. 713 of 2006 Boniface Khayumba Katumanga versus Republic** on the question of single identification witness. Counsel urged the court to find that the ingredients of the offence of robbery with violence were proved regardless of whether exhibits or weapons were recovered or found in the appellants' possession. On the question of breach of the appellants' constitutional rights counsel argued that there was no such a breach as the appellants were arrested on a Friday and taken to court the following Monday. In any event, assuming that the appellants were detained in police custody beyond the required period the appellants' remedy lay in damages and not in an acquittal. On this particular question counsel cited the **High Court decision in Criminal Appeal No. 482 of 2007 Peter Sabem Leitu versus Republic.** Counsel asked this court to find as the subordinate court found that there was no evidence of a land dispute between the appellants and the complainant and therefore the learned magistrate was right to reject the appellants' defence.

It is imperative that, in the light of the appellants' contentions and the state counsel's submissions, and more importantly in the light of the fact that this is the first appellate court, we analyse the evidence afresh and come to our own conclusions; in taking this course we shall always bear in mind that we are limited in this task to the extent that, as the appellate court, we lack the benefit of seeing and hearing the witnesses and therefore, unlike the magistrate's court, we do not have the advantage of, say, assessing the witnesses' demeanour, amongst other things. This has always been the path that this court has followed, sitting in its appellate capacity, since the court of appeal decision in the case **Okeno versus Republic (1972) EA 32** where it was stated 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).

In analysing the evidence we must make our own findings, at least on two primary issues; the first issue is whether indeed it was proved to the required standard that an offence of robbery with violence was committed. The second issue is whether the prosecution proved beyond reasonable doubt that it is the

appellants who perpetrated this crime. In answer to the second issue, the question of identification of appellants at the time of the alleged robbery will, as a matter of law, come to the fore considering the conditions under which the appellants are said to have been identified.

Answers to all these questions revolve around the evidence of the victim of the alleged robbery, the complainant in the case against the appellants; the rest of the witnesses only related what the complainant had told them and the actions they took on the complainant's information. This then means that the decision on the fate of the appellants was going to be more or less based on the evidence of a single witness and so it was incumbent upon the learned magistrate to be cautious of the danger of relying on the evidence of a single witness more particularly so when the question of identity of the appellants and the circumstances under which they were identified arose.

The complainant was attacked at night. His attackers relieved him of his property - money and a cell phone. Though the attackers were not armed he was injured and the injury or injuries were a direct consequence of the violence that he had been subjected to. There is nothing on record to suggest that the complaint's evidence in this respect was doubtful and looking at the answers given in cross-examination we can conclude that this piece of the complainant's evidence was not shaken. We agree with the learned magistrate's finding that the complainant was violently robbed of his property. As a finding of fact, there is no basis and none has been shown to us to merit our intervention at this stage. As an appellate court we can only interfere with the learned magistrate's finding of fact if it can be demonstrated that no reasonable tribunal could have reached that conclusion or that the learned magistrate was grossly mistaken. (See the decision of the court appeal in the case **M'Riungu versus Republic (1983) KLR 455).**

The offence of robbery is defined in **section 295** of the Penal Code, **Chapter 63 Laws of Kenya** but the ingredients of a crime of robbery with violence and the penalty thereof are prescribed under section **296(2)** of the Code.

Section 295 of the Penal Code states;

"295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

Section **296(2)** of the Code defines when robbery as defined under **section 295** graduates into robbery with violence; it says:-

"296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

It is apparent from this section that an accused person will be convicted of the offence of robbery with violence if the prosecution will prove that the robbery victim was not only robbed but also that at the time of the robbery any of the following circumstances were brought to bear:-

a. The accused was armed with any weapon or instrument that may deemed to be dangerous or offensive;

b. The accused was in the company of one or more persons;

c. Immediately before or immediately after the time of the robbery, the accused wounded, beat up, struck or used violence to any person.

In our view, the facts as established in the magistrate's court fit squarely within any of the circumstances or conditions prescribed in section **296 (2)** of the **Penal Code**, more particularly parts (b) and (c) thereof; that being the case our conclusion is that the offence of robbery with violence was proved to the required standard.

The next issue is whether the appellants were the architects of this crime and in order to answer this question we have to go back to the complainant's testimony. The complainant said that because there was moonlight on the material night, he was able to tell who his attackers were; they are people he knew prior to this incident and that he was able to tell who they were before they attacked him that night. When he was cross-examined by the appellants he went further and described the kind of clothes they were wearing that night. Before they even attacked him, he had greeted the 2nd appellant, who for some reason did not answer back. The first appellant demanded for more money from him. The complainant therefore saw them and he at least heard from one of them. When he reported the robbery the complainant gave their names. The conclusion that one can legitimately draw from these facts is that the complainant knew his attackers by recognition. We have not found anything from the evidence of the complainant at any stage of the proceedings that would lead to a conclusion different from that which the learned magistrate arrived at which is that the complainant's evidence was truthful and credible.

The 1st appellant's defence is that he was in his shamba throughout the 24th day of January 2012. The 2nd appellant on the other hand claimed to have been at Matuu on the material day. However, since the appellants did not call any witnesses, their evidence was not corroborated and could not be tested by way of cross-examination since it was unsworn. In a nutshell, the prosecution evidence was not shaken. In these circumstances we have reached the inevitable conclusion that the appellants were positively recognised as the people who attacked the complainant.

In arriving at this decision, we are cognisant of the well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In a recent court of appeal decision in of **Peter Mwangi & another Jackson Kimaru Maina versus Republic, Nyeri Criminal Appeal No. 389 of 2009** the court of appeal reiterated this position and held that a court must always satisfy itself that in all circumstances, it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult. The court made reference to the case of **Wamunga versus Republic (1989) KLR 424** where the same court had held at page 426 that,

"…it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that

the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

What is clear from these decisions is that, despite the danger of causing a miscarriage of justice by convicting on the basis of evidence of visual identification, a court can still convict so long as that evidence has been properly tested. Such test would involve, for example, conducting an identification parade where the victim had not seen the attackers before but can give the physical or vocal impression they left on his mind immediately before, during or after the attack. In a case of recognition rather than identification all that the court needs to be certain about is that the circumstances were favourable and that the victim had the opportunity to recognise his assailants.

In the case of **M'Riungu versus Republic (1983) KLR 455** the court of appeal had occasion to address this issue; it held at page 461 that where the accused persons were known by their victim before the crime, it was a case of whether the victim had recognised them and not whether he had identified them. In rejecting the appellant's appeal the court proceed to hold that though the robbery had taken place at night the circumstances for positive recognition were favourable especially as the robbers were persons previously known to their victim, more like in this case.

More pertinent to this case also, the court of appeal held at page 461 that a question of recognition is a question of fact and as noted there would be no basis for an appellate court to upset a finding of fact by the trial court unless it is clear on the evidence that no reasonable trial could have reached that conclusion. The totality of the evidence of the complainant in this case shows that it was not unreasonable for the learned magistrate to come to the conclusion that the appellants were positively recognised.

One final issue that can quickly and briefly be disposed of here is the question of violation of the constitutional rights of the appellants on the ground that they were held in police custody for more than twenty-four hours. The counsel for the state denied any such violation because the appellants were arrested on a Friday and taken to court the Monday following. We agree with the state counsel that even if the appellant's rights were violated in this respect, it is now settled that the remedy for such violations lies not in an acquittal but in compensatory damages. Following its decision in case of Julius **Kamau Mbugua versus Republic 2010 eKLR** the court of appeal recently said in the **Criminal Appeal No. 482 of 2007, Peter Sabem Leitu versus Republic (2013)eKLR 6** that;

"…even if it is found by a court, that the extra judicial detention was unlawful and that it is related to the trial, we consider an acquittal or a discharge to be disproportionate, inappropriate and draconian seeing that the public security would be compromised. If by the an accused person makes an application to the court, the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as invariably is the case, then the only appropriate remedy under section 84 (1) would have been an order for compensation for such breach."

In conclusion we are of the opinion that in the light of the reasons we have given, there is no merit in any of the grounds upon which the appellants' appeal is based. Accordingly, we uphold the conviction and sentence of the subordinate court and dismiss the appeal. That is our order.

Signed, dated 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**