



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CORAM: CHERERE-J

CRIMINAL APPEAL NO. 133 OF 2019

BETWEEN

PATRICK KARITHI BARIU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case Number 655 of 2013 in the

Chief Magistrate's Court at Maua by Hon. A.G.Munene (SRM) on 12th August, 2018)

JUDGMENT

Background

1. **PATRICK KARITHI BARIU (Appellant)** was charged with one count of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code committed on 02.03.2013 against one **ISAAC MAORE** and the 2nd count of being in possession of a firearm without a firearms certificate contrary to Section 4 (1) as read with Section 4 (3) of the Firearms Act Cap 114 Laws of Kenya. Appellant was acquitted of the 2nd count but was convicted of the first count of robbery with violence and sentenced to serve suffer death. He now appeals against the conviction and sentence.

The prosecution's case

2. The prosecution called five (5) witnesses in support of the charges. I will summarize the evidence relating to the 1st COUNT as hereunder. **PW1 ISAAC MAORE**, was at his kiosk with **BERNARD MITHAU**, **JULIUS KAUNYANGI** and **JOSHUA KIINGE** on 02.03.2012 at about 07.30 pm. He ran away from the kiosk when he heard gunshots and returned to find Kshs. 30,000/-, a mobile phone and assorted cigarettes valued at Kshs. 1,440/- missing. He led police to arrest the Appellant who was named by **BERNARD MITHAU** as having been among the robbers.

3. **PW2 BERNARD NTOBURU MITHAU** stated that 02.03.2012 at about 07.30 pm, he went to open the complainant's gate to let a customer one **JOSHUA KIINGE** to exit and it was then that he was confronted by three men. He stated that he had a torch and was able to identify Appellant who was in police uniform and was armed with a gun because he used to graze with him in Tharaka, but that he did not identify the other two men who were also armed with guns. It was his evidence that he ran away from the scene after hearing gunshots and upon return was informed by complainant that some goods from his shop had been stolen.

4. **PW3 JACKSOM MUTHAMIA** who was at the scene of crime stated that he did not identify any of the three robbers since each wore a

base caps covering their foreheads. **PW4 JULIUS MINDIRU** upon hearing gunshots on the material night reported the matter to the area chief **PW5 GILBERT KARUTI MUTIA**.

Defence case

5. In his unsworn defence, the Appellant denied the offences.

6. The trial court after considering the evidence found the prosecution case on the 1st count proved, convicted and sentenced the Appellant to suffer death.

The Appeal

7. The conviction and sentence provoked this appeal. In his petition of appeal and written submissions, Appellant raised the following main grounds of appeal:

1) The prosecution case was not proved beyond reasonable doubt

2) The defence was not given due consideration

8. Directions were taken on 26.08.2020 that the appeal be disposed off by way of written submission which were duly filed.

9. The Appellant argued that the prosecution case had not been proved. Ms. Mbithe, learned State Counsel urged the court to find that Appellant had been identified as one of the robbers.

Analysis and Determination

10. As the first appellate court in the instant appeal, I am required and indeed duty bound to subject the evidence tendered in the lower court to thorough re-evaluation and analysis so as to reach my own conclusion as to the guilt or otherwise of the appellant. In doing so I must give allowance to the fact that I neither saw nor heard the witnesses as they testified and therefore cannot comment on their demeanour. (See **OKENO – VS – REPUBLIC (1972) E.A. 32**).

11. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the Appellant and for the State.

12. The state relied mainly on the evidence as adduced by PW2 who stated that he saw the Appellant on the material night.

13. It is trite that evidence of visual identification should always be approached with great care and caution (see **Waithaka Chege v R {1979} KLR 271**). Greater care should be exercised where the conditions for favourable identification are poor. (**Gikonyo Karume & Another v R {1900} KLR 23**). Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See **Abdalla bin Wendo & Another v R, {195} 20 EACA 166; Wamunga v R, {1989} KLR 42; and Maitanyi v R, 1986 KLR 198**).

14. The Court of Appeal in the case of **Joseph Muchangi Nyaga & another v Republic [2013] eKLR** stated that before acting on evidence of visual recognition, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently.

15. The difference in approach between identification and recognition was expressed thus by Madan J.A in **Anjononi and Others vs The Republic [1980] KLR**;

“.....This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

16. That is not to suggest of course, that cases of misrecognition cannot occur (See **Karanja & Anor vs. Republic [2004] KLR 140**) and courts are still duty-bound to examine such evidence with great care.

17. PW2 stated that he had a torch and was able to identify Appellant who was known to him. Appellant denied that he was at the scene of crime. The offence was committed at 07.30 pm. The only source of light according to PW2 was a torch that was in his possession. **PW3 JACKSOM MUTHAMIA** testified that despite the torch light, he was not able to identify the Appellant or any of the other 2 robbers for the reason that each wore a base caps covering their foreheads.

18. That being the case, the trial court had a duty, which it failed to discharge, to test the reliability of identification by recognition at night by considering the intensity of the torchlight, the location of the light in relation to the Appellant and time taken by PW2 to observe the Appellant so as to be able to recognize him. I am of the considered view that the purported recognition and identification of the Appellant who it is stated was wearing a base cap covering his forehead was not free from error.

19. Accordingly, and for the reasons set out hereinabove, I find that the prosecution did not prove its case beyond any reasonable doubt. The conviction and sentence are against the weight of evidence. This appeal succeeds. The conviction is **quashed and the sentence set aside**. Unless otherwise lawfully held, it is ordered that the Appellant be set at liberty.

DELIVERED AT MERU THIS 28th DAY OF *January* 2021

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Kinoti

Accused - Present

For the State - Ms. Mbithe