



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 16 OF 2017

CHARLES NDERITU JULIETA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Hon. J. Wambilyanga at Nyeri

delivered on the 28th March, 2017 in Criminal Case No. 762 of 2016)

JUDGMENT

FACTS

1. The Appellant, **Charles Nderitu Julieta**, was charged with the offence of Robbery with Violence contrary to **Section 296 (2)** of the **Penal Code**; the particulars of the charge are that on the 22nd day of July, 2016 at Majengo area in Nyeri County jointly with others not before the court; while armed with a dangerous weapon namely a metal bar robbed **Purity Gakii Mberia (PW1)** of cash in the sum of Kshs.850/-, a mobile phone make Huawei 360Y and a wallet all valued in the total sum of Kshs.8350/-; and immediately before such robbery injured the complainant.

2. The prosecution called at total of four (4) witnesses to support its case; the Appellant was found guilty and was convicted and sentenced to the mandatory death sentence;

3. Being aggrieved by the conviction and sentence, the Appellant filed the instant Petition of Appeal and the Grounds of Appeal are summarized as follows;

(i) No description of the appellant was given in the first report; the complainant was drunk at the time of the alleged robbery and could not have positively identified the appellant;

(ii) The trial court failed to consider that nothing was recovered from the appellant at the time of arrest;

(iii) The trial court erred in rejecting the appellant's defence.

4. At the hearing hereof the appellant was represented by Learned Counsel Mr. Kimunya whereas Ms Gicheha was the Prosecuting Counsel for the State; both counsel made oral submissions; hereunder is a summary of their respective submissions;

APPELLANT'S SUBMISSIONS

5. The appellant submitted mainly on the issue of identification by recognition; **PW1** did not give any description of the appellant when she reported to the police immediately after the incident; and did not indicate in her evidence that she had known the appellant prior to the incident; therefore, there was no basis for the identification by recognition;

6. **PW2** had stated in his evidence that he did not know the appellant prior to the incident; no identification parade was conducted for **PW2** who then identified the appellant in the dock; that dock identification is valueless in law;

7. Even if the trial court believed the evidence of **PW1** on identification it ought to have been guided by the rules of identification on conditions and circumstances; the following factors were not considered by the trial court;

(i) That the incident occurred at 10.30pm when it was dark;

(ii) There were allegedly five attackers who attacked **PW1** from behind;

(iii) **PW1** and **PW2** had both been drinking before the incident;

8. The prosecution had the onus of demonstrating that there was light; the intensity of such light and the positioning of the light vis-a-vis the complainant and the appellant; case law relied on **R vs Turn bull & Others [1976] 3 ALL ER 549; CA at Nyeri James Chege Wanja & Anor vs R CR.App.No.323 of 2011;**

9. Counsel submitted that **PW1** and **PW2** were both intoxicated; there were five assailants whom she said attacked her from behind her back; and the incident is said to have occurred at night and took only five (5) minutes; the prosecution led no evidence to determine the alcohol level in **PW1's** system to demonstrate that she was capable of recognizing her assailants;

10. There was an element of doubt in the identification; which doubt should be resolved in favour of the appellant;

11. Counsel urged this court to allow the appeal and set the appellant at liberty.

RESPONDENT'S SUBMISSIONS

12. In response the respondent conceded the appeal solely on the issue of identification; that there were gaps in the evidence of **PW1** on identification; she had stated that she had interacted twice with the appellant before the incident but it was not clear where and when the two had interacted and whether the interactions had been done during the day or night; it was not at all clear whether **PW1** and the appellant knew each other before the incident; the name of the appellant was not mentioned in **PW1's** evidence; and she only stated that she could identify the assailant physically;

13. The evidence on record indicates that the attackers attacked **PW1** from behind; no evidence of the light or its intensity was in either of the testimonies of **PW1** and **PW2**;

14. There were discrepancies in the testimonies of **PW1** and **PW2**; the evidence of **PW1** was that she called the police when she saw the appellant at Co-operative Bank, Nyeri; whereas **PW4** the Investigating Officer stated she ran to the police station when she saw the appellant; **PW2** stated that he had never seen the appellant at the club and identified him at the police station; **PW1** stated that the attacker had rastas and the head was shaved on both sides; whereas **PW2** stated that the attacker had a black cap;

15. Counsel submitted that in the circumstances the conviction was unsafe.

ISSUES FOR DETERMINATION:

16. After taking into consideration the submissions made by both counsel this court has framed only one (1) issue for determination;

(i) Whether the appellant was positively identified by the complainant; whether the identification by recognition could sustain the conviction.

ANALYSIS

17. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified; reference made to the case of **Okeno vs Republic (1972) EA 32**.

18. The main ground of appeal lies in the issue as to whether the appellant was properly identified; where no stolen property is found in the possession of the robber, like in the instant case, the issue of proper identification takes centre stage and becomes the central and important issue;

19. The evidence of the prosecution witnesses points to incident having taken place at night at 10.30pm; being night time and there being no evidence of any lighting or its intensity either in the testimonies of **PW1** and **PW2** this court is satisfied that the conditions for identification of the appellant was not favourable; case law referred to **R vs Turn bull & Others [1976] 3 ALL ER 549;**

20. Nevertheless, in this instance it was not identification, but a case of recognition of the appellant as being one of the robbers and assailants; recognition is usually more satisfactory and reliable than identification of a stranger because it is dependant on personal knowledge of the attacker/robber;

21. But in the present case **PW1** did not give any description of the appellant and when she reported the matter to the police immediately after the incident; nor did she report or give the name of the appellant to the police as the robber who had robbed her; and did not indicate in her evidence that she had known the appellant prior to the incident; therefore, there was no basis for the recognition;

22. There were also discrepancies in the evidence of **PW1** and **PW2**; **PW1** had stated that the attacker had rastas and that his head was shaved on both sides; whereas **PW2** stated that the attacker had a black cap; **PW1** and **PW2** had both been at the club drinking; **PW1** stated the appellant was also at the club and she had interacted with him thereat; **PW2** stated that he had never seen the appellant at the club and only identified him at the police station;

23. The case law relied on in this instance is the case of **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739**

where the Court of Appeal held that evidence of identification or recognition at night must be absolutely watertight to justify a conviction;

24. Upon having re-examined the evidence on record this court has doubts as to whether **PW1**, after the interaction at night and after a drinking spree, that she could have positively recognize the appellant; and it is this court's considered view that the identification of the appellant based on recognition may not have been free from error; the non-recovery of the stolen items also makes the conviction unsafe;

25. This ground of appeal is found to have merit and it is hereby allowed.

FINDINGS & DETERMINATION

26. In the light of the forgoing this court makes the following findings and determinations;

(i) This court finds that the appellant was not positively identified by the complainant; that there was insufficient evidence presented from the scenario to make the identification by recognition free from the possibility of error; the conviction is found to be unsafe;

(ii) The appeal is found to have merit and is hereby allowed.

(iii) The conviction is hereby quashed and sentence on the offence of robbery with violence is hereby set aside; the appellant be set at liberty unless otherwise lawfully held.

It is so Ordered.

Dated, Signed and Delivered Electronically at Nyeri this 26th day of November, 2020.

HON. A.MSHILA

JUDGE