



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.20 OF 2017

*(An Appeal arising out of the conviction and sentence of Hon. Juma- SPM*

*delivered on 7<sup>th</sup> February 2017 in Kibera CMC. CR. Case No.1166 of 2015)*

DOUGLAS JIVEET OBIERO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Douglas Jiveet Obiero was charged alongside two others with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 14<sup>th</sup> March 2015 at Kawangware within Nairobi County, jointly with others not before court while armed with a pistol, robbed Richard Kipuchi of cash Ksh.9,200/-, a Samsung Bravio 32” TV, an iPad, a HP laptop, one mobile phone make Samsung, a Samsung Chat C222 digital camera, all valued at Ksh.155,000/- the property of Richard Kipuchi, and immediately before such time of robbery threatened to use actual violence on the said Richard Kipuchi. When the Appellant was arraigned before the trial magistrate’s court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to death. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition for appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that his conviction was based on a defective charge sheet which failed to disclose particulars of the dangerous weapon. He took issue with how the trial was conducted and asserted that the same violated his rights under **Article 50(2)(a)** of the **Constitution**. He faulted the trial court for convicting him yet the prosecution failed to discharge its burden of proof. He was aggrieved that the trial court relied on contradictory evidence adduced by the prosecution. He complained that the prosecution failed to call material witnesses to adduce evidence. In the premises, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submissions in support of his appeal. He urged the court to allow his appeal. Ms. Sigei for the State opposed the appeal. She made oral submissions to the effect that the evidence presented by the prosecution established the ingredients of the offence of **robbery with violence** against the Appellant. She asserted that the Appellant was positively identified. The Appellant and his accomplices referred to each other by their nicknames during the robbery. The complainant stated that the Appellant was referred to as **‘Dougie’**. The Appellant did not wear any disguises. The assailants were at the house for about forty-five (45) minutes. PW1 had seen the Appellant within the neighborhood prior to the material day. The Appellant used to visit his brother who also lived within the same estate. Learned state counsel averred that the Appellant’s defence was a mere denial. The same did not rebut the prosecution case. She therefore urged the court to dismiss the Appellant’s appeal.

The facts of the case according to the prosecution are as follows. PW1 together with his wife were at their house on the material day of 14<sup>th</sup> March 2015. They heard a knock on the door. His wife opened the door. One man forced his way into the house. He called his accomplices who were outside and asked them to come in. A second man came in. PW1 stated that the second man was the Appellant herein. The third assailant declined to enter the house. He stood outside at the corridor. The men ordered them to lie down. They had a gun. PW1 lay on the sofa while his wife lay on the floor. The men demanded from him his ATM card and pin number. He obliged but gave them a false pin. The Appellant left the house with the ATM card. The man who was left in the house ransacked the place. After about half an hour, the Appellant came back. They threatened to kill PW1’s wife if he did not surrender the correct ATM pin number. Out of fear, PW1 gave them the correct pin number. The Appellant then left with the ATM card. He came back after half an hour. He told his accomplices that he had withdrawn Ksh.30,000 from PW1’s account. The men left the house with PW1’s belongings including a Samsung TV, HP laptop, iPad, Kodak camera, three mobile phones and two wallets. PW1 stated that the assailants referred to each other by their nicknames during the robbery. The Appellant was referred to as “Dougie”. He reported the robbery at Muthangari Police Station the following day of the robbery. He averred that he had known the Appellant for about a month prior to the material day of the robbery. The Appellant used to visit his brother who lived in the same neighborhood. When the Appellant was arrested, PW1 identified him as one of the assailants at Muthangari Police Station.

PW2 is PW1's wife. She described the events of the material day as narrated by PW1. She stated that she did not know the Appellant prior to the robbery. PW3 was the investigating officer herein. He stated that he interrogated PW1 and PW2. They had informed him that they were able to identify their assailants. The electricity light in their house had been switched on during the robbery. They also heard the nicknames that the assailants used to refer to each other during the robbery. PW3 stated that the Appellant was arrested following a tip from an informer as to his whereabouts. The Appellant was known by his nickname "Dougie".

When the Appellant was put to his defence, he testified that on 21<sup>st</sup> March 2015, he was on his way at work. He decided to stop by a bar and have a glass of illicit brew. Police officers arrived and arrested him for drinking the illicit brew. He was taken to Muthangari Police Station. He was later arraigned before the trial court and charged with the present offence. He denied having any part in the robbery as narrated by the complainant.

This being a first appeal, this Court is mandated to re-evaluate afresh the evidence presented before the trial court afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge –vs- Republic (1982 – 88) 1 KAR 1134** stated this on the duty of the 1<sup>st</sup> Appellate court;

***“It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this.”***

In the present appeal, the issue for determination is whether the prosecution established the charges of robbery with violence contrary to Section 296(2) of the Penal Code to the required standard of proof beyond any reasonable doubt.

It was evident from the facts of the case that the prosecution relied on direct evidence of identification by recognition to secure the conviction of the Appellant. This court has a duty to examine thoroughly the evidence on identification before confirming a conviction based on the same. In the case of **Wamunga vs Republic [1989] eKLR 426** the Court of Appeal stated as under;-

***“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 conviction.”***

In the present appeal, the alleged robbery took place at about 7.00pm at the complainant's house. PW1 and PW2 were present at the said house on the material day. PW1 stated that the Appellant was the one who took his ATM card. He however gave him an incorrect pin number. The Appellant left the house with the card. After about half an hour, the Appellant came back and threatened to kill his wife if he did not surrender the correct ATM pin number. He reluctantly gave him the correct pin number. The Appellant left and came back after about twenty minutes. He withdrew Ksh.40,000 from PW1's bank account. PW2 corroborated PW1's testimony. The investigating officer (PW3) stated that the complainant informed him that he was able to identify the assailants since there was sufficient light from the electricity light in the house.

The Appellant was arrested approximately seven days after the alleged robbery occurred. This court notes that PW1 and PW2 did not give a description of their assailants in the first report they made to the police. PW2 in her testimony stated that she did not know the Appellant prior to the material day. His associates however referred to him as 'Dougie' during the robbery. Again, this was not included in the first report made to the police. She identified the Appellant in court. In the absence of a description of the Appellant in the first report, as well as the evidence of an identification parade, her identification of the Appellant amounted to dock identification. It therefore follows that the evidence of identification by recognition was that of a sole witness, i.e. PW1.

PW1 stated that he had known the Appellant for about a month prior to the material day. The Appellant used to visit his brother, who lived in the same estate as PW1. He stated that the Appellant's associates referred to the Appellant as 'Dougie' during the robbery. From the evidence presented by PW1, this court is not able to find with certainty that PW1 knew the Appellant prior to the alleged robbery. In his testimony, PW1 referred to the Appellant as a stranger. The first report made to the police does not indicate whether PW1 mentioned the said nickname of the Appellant or his description. In addition, there is no indication in the charge sheet that the Appellant had such a nickname. There is therefore no initial description of the Appellant by either PW1 or PW2 when the report of the robbery was made to the police.

Identification through recognition is deemed more reliable than the identification of stranger. However, even in cases of recognition, the court is required to exercise caution and warn itself before basing a conviction on such evidence. In the case of **Paul Etole & Another vs Republic [2001] eKLR**, the Court of Appeal stated the following with regard to identification through recognition. -

***“Evidence of visual identification can bring about a miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness on one or more identifications of the accused, the court should warn itself of the need for caution before convicting the accused.***

***Secondly, it ought to examine closely the circumstances in which the identification by each of the witness came to be made.***

***Finally, it should remind itself of the specific weaknesses which had appeared in the identification evidence.***

***It is true that recognition may be more reliable than identification of a stranger – but even when a witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence.“***

In the present appeal, PW1 and PW2 did not give a description of the Appellant in their first report made to the police. They also failed to give the alleged Appellant's nickname in the said first report. There is no indication in the charge sheet that the Appellant had such a

nickname. PW2 stated that she did not know the Appellant prior to the material day. PW1 at some point referred to the Appellant as a stranger in his testimony. He thereafter stated that he had seen the Appellant in the neighborhood prior to the robbery. His testimony was contradictory. The Appellant was arrested about a week after the alleged robbery occurred. The investigating officer did not give an explanation as to how PW1 identified the Appellant as one of the robbers after he was arrested. It was not clear from his testimony if he had acted on information received from the complainant to arrest the Appellant.

This court notes that in the first report made to the police, PW1 indicated that he recognized one of his assailants. He therefore needed police assistance in recovering the stolen items. When he was cross-examined by the 1<sup>st</sup> accused in the trial court, PW1 stated that the police declined to accompany him to arrest the 1<sup>st</sup> accused, after he reported the robbery. The assailant being referred to in the first report was the 1<sup>st</sup> accused person in the trial court. PW1 failed to mention to the police that he recognized the Appellant as one of the assailants. The Appellant was the 3<sup>rd</sup> accused before the trial court. If he indeed knew the Appellant, PW1 would have mentioned the same when he first reported the matter at the police station.

The evidence of PW1 and PW2 on identification of the Appellant is not different from dock identification. It did not reach the threshold of a positive identification. Dock identification is deemed worthless in the absence of the evidence of an identification parade.

In the circumstances of this case, this court is of the view that it cannot sustain the conviction of the Appellant on the basis of the evidence of identification adduced by a sole identifying witness. Reasonable doubt has been raised regarding evidence of identification. The Appellant in his defence, denied being involved in the robbery. He stated that he was arrested for drinking illicit brew. No other evidence was given before this court connecting the Appellant to the robbery. None of the stolen items were recovered in the Appellant's possession.

From the foregoing, the evidence of identification, taken into totality, is not water-tight and free of error to support the conviction of the Appellant. This court cannot reach a determination with certainty that the evidence of identification was free from the possibility of mistaken identity.

In the premises therefore this court finds merit in the appeal lodged by the Appellant. The Appeal is hereby allowed. The conviction is quashed. The Appellant is acquitted. The Appellant is set at liberty forthwith and ordered released from prison unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MARCH 2019**

**L. KIMARU**

**JUDGE**