



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIIAYA

CRIMINAL APPEAL NO. 110 OF 2016

CORAM: D. S. MAJANJA J.

BETWEEN

ELIAS YUMA GAITANO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. R.M. Oanda, SRM dated 22nd December 2015 at the Senior Resident Magistrates Court at Ukwala in Criminal Case No. 405 of 2014)

JUDGMENT

1. The appellant, **ELIAS YUMA KAITANO**, was charged with two co-accused with the offence of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Penal Code)*. The particulars of the offence were that on 4th August 2014 at Luthehe market in Kathieno C Sub-location of Ugenya District within Siaya County, jointly with others not before court while armed with a dangerous weapon namely firearm robbed **SYLVESTER SIDWAKA WARURAKA** of Kshs. 50,000/- and immediately at the time of such robbery used actual violence on the complainant.
2. The appellant was convicted and sentenced him to suffer death while his co-accused were acquitted. The appellant has now appealed and in his amended petition of appeal dated 11th August 2016, he faulted the trial magistrate for allowing the prosecution to flout the rules of evidence and procedure by introducing new evidence during re-examination. He complained that the trial magistrate erred by convicting based him based on flimsy and contradictory evidence and shifting the burden of proof to him. He contended that the trial magistrate erred in failing to consider his defence. The respondent opposed the appeal and supported the conviction on the ground that the prosecution had proved the offence beyond reasonable doubt.
3. This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction bearing in mind that I never heard or saw the witnesses' testimony so as to make an assessment of their demenour (see *Njoroge v Republic [1987] KLR 19*).
4. The prosecution case was as follows. Sylvester Lidwaka Waruraka (PW 1) testified that on the material day at around 7:30pm he was at his shop at Luthehe market. Two people suddenly entered into the shop and ordered everyone in the shop to lie on the ground. One of the assailants, who had a gun, entered the inner side of the shop and ordered PW 1 to give him all the cash. PW 1 gave him Kshs. 50,000/- and the assailants both left after firing in the air. PW 1 testified that he was able to clearly see the appellant's face because even though he wore a hat he took it off when he got into the inner part of the shop and there was light in the shop. He was thus able to positively identify the appellant at the identification parade organised by Chief Inspector Mark Bundi (PW 5).
5. David Ochieng Odongo (PW 3), a farmer, testified that on the material day, the appellant called him at around 9:30pm and informed him that he was at Luthehe market where he got caught in a robbery and run away. PW 3 called a colleague, Okumu who assisted the appellant.
6. The investigating officer Corporal Benson Ndambuki (PW 7) testified that after he received information about the robbery, he went to the scene and interrogated PW1 and collected the spent cartridge of the shot fired at the scene. Later Administration Police from Luthehe AP camp arrested three suspects and took them to Ukwala Police Station. PW 7 testified that PW 5 organised an identification parade with respect to the appellant and PW1 identified him as the robber who entered the shop. After thorough investigations PW 7 charged the three accused.
7. When put on his defence, the appellant gave a sworn statement and denied being involved in the robbery.

8. There is no doubt that a robbery took place on the material day as PW 1 was attacked by more than one assailant armed with a gun in the course of stealing. The facts fall within the definition of the offence of robbery with violence under **section 296(2)** of the **Penal Code**. The offence is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see ***Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR, *Oluoch v Republic* [1985] KLR 549 and *Ganzi & 2 Others v Republic* [2005] 1 KLR 52).**

9. Since the incident took place at night in difficult circumstances, the resolution of this appeal turns on the issue of identification. In several authorities; ***Maitanyi v Republic* [1986] 2 KLR 75, *Karanja & Another v Republic* [2004]2 KLR 140 and *Wanjohi & Others v Republic* [1989]KLR 415) In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal has held that reliance on evidence of identification in difficult circumstances must be “*absolutely watertight*” to justify conviction. In ***Wamunga v Republic* [1989] KLR 424** the Court of Appeal warned that;**

[W]here 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 be the basis of a conviction.

Before acting on such evidence, 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 (see ***Maitanyi v Republic* (Supra) and *R v Turnbull* [1967] 3 ALL ER 549**).

10. The testimony of PW 1 in this case was rather threadbare. He testified that the appellant was a stranger and he was able to identify him but he did not state what the nature of light was, its intensity, how long he was able to see the appellant. I find that the prevailing circumstances were not favourable for positive identification. Further, it is not clear from the evidence of the other witnesses that PW 1 was able to give a description of the suspect to the police. PW 7 told the court that three suspects were arrested but only the first accused was subjected to an identification parade. It is not clear under what circumstances the appellant was arrested to tie him to the robbery. The prosecution case is further undermined by the fact that the he was the only suspect to be subjected to an identification parade yet PW 1 did not give any description that would set him apart from the other suspects.

11. I am far from convinced that the prosecution proved the identification of the appellant was free from error. The conviction is not safe. I therefore allow the appeal, quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

SIGNED AT KISUMU

D.S. MAJANJA

JUDGE

DATED and DELIVERED at SIAYA this 20th day of April 2018.

J. A. MAKAU

JUDGE

Mr Namatsi, Advocate for the appellant.

Mr Okach, Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.