



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 54 OF 2013

PETER MAINA MUCHIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Hon.F.W,Macharia at Othaya delivered

on the 17th April,, 2013 in PMCriminal Case No. 69 of 2012)

JUDGMENT

FACTS

1. The Appellant, **Peter Maina Muchiri**, was charged with the offence of Robbery with Violence contrary to **Section 296 (2)** of the **Penal Code**; the particulars of the charge was on the 16th day of November, 2011 at Kagumo sub-location in Nyeri County, jointly with others not before the court while armed with pangas robbed Agnes Gathoni Waikwa (**PW1**) the complainant of the items listed on the Charge Sheet all valued at Kshs.12,800/-; and immediately before or immediately after the time of such robbery used personal violence on the complainant.
2. The prosecution called a total of five (5) witnesses and after the trial, the Appellant was found guilty and convicted and sentenced to the mandatory death sentence;
3. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and Grounds of Appeal which grounds are summarized as follows;
 - i. The identification was obtained in difficult conditions and circumstances; therefore it was not free from error;
 - ii. The prosecution failed to prove its case to the desired threshold;
 - iii. The trial court erred in rejecting his defence without ascertaining good reasons.
4. At the hearing hereof the appellants were represented by learned counsel Mr. Wahome Gikonyo whereas Mrs Gicheha appeared as Prosecuting Counsel for the State; both counsel made oral submissions.

APPELLANTS' SUBMISSIONS

5. The appellant submitted that;
 - i. At the initial report the witness must give a description of the attacker to the police at earliest opportune time; during cross-examination **PW1** stated that she knew the attacker and that he lived across the valley but gave no name or his nick-name to the police; no features were reported or booked in the Occurrence Book; in the absence of description there is no proof;
 - ii. **PW1** was informed by the Officer in Charge of the Station that the suspect had refused to participate in the identification parade; therefore there was only dock identification; and the Court of Appeal has disallowed this form of identification; dock identification is weak, unreliable and cannot be used as a basis for conviction;

iii. The incident occurred at night and the nature of the light and sufficiency was not tested; the trial court relied on the evidence of **PW1** that she had identified the appellant from the scars she had inflicted on him during the attack and that identification was by recognition; this was a misdirection as in such cases the witness may be honest but mistaken; and greatest care must be taken when the identification is done under difficult circumstances and cannot be said to have been free from error;

iv. The law is clear that the trial court must test the evidence of a single identifying witness and warn itself on the dangers of relying on such evidence to support a conviction; the trial court didn't make any careful enquiry into the nature of the light and also failed to warn itself; there was no testing done;

v. There were blood stains from blood shed by both the attacker and the complainant but no samples were taken to be subjected to forensic testing; it was necessary to take samples for comparison sake and to clear any doubt as to whether the blood was complainant or appellant's; this would have been independent evidence and would have placed the appellant at the scene of crime; it would have also corroborated evidence on identification; the Investigating Officer had the opportunity to call forensic evidence but failed to take it;

vi. Case law referred to Charles Bowen Too & Anor vs R-CA.No.146 of 2011 on first report; **Martin & 2Others vs R- CA. No. 179 of 2010-Eldoret-** on and dock identification; **Antony Murage Kabethi vs R (2012) eKLR** - on forensic evidence;

vii. Counsel urged this court to quash the conviction and set aside the sentence.

RESPONDENTS SUBMISSIONS

6. In response Prosecuting Counsel submitted that;

i. When making her report to the police she had told them that she had recognized two (2) of them; she knew the appellant very well and had directed the police to where he resided; that when the robbers struck she had cut one of them on the face and identified him by the scar; that the court noted the scar;

ii. On the issue of lighting there was sufficient electric light that helped the complainant recognize the appellant; the appellant refused to be paraded because he feared that the complainant was a person known to him and would pick him out;

iii. In his defence the appellant stated that the injury to his face was not inflicted through mob justice; that he had not been subjected to mob justice; that he sustained the injury as a result of a motor bike accident; and that he had been treated at Unjiru Health Centre and he produced a medical card; the appellant and the mother **DW2** failed to convince the trial court on how he got his injuries;

iv. DW3 the nursing officer disowned the treatment card and told the trial court that no such person was treated at the health centre; the treatment card bore no official stamp of the centre or out-patient number; the document was therefore inadmissible as evidence;

v. DW4 testified to have been with the appellant loading cabbages on 15/11/2015 but incident occurred on the 16/11/2015 and the witness could not account for the appellants whereabouts on that date;

vi. The evidence of **PW1** was clear, unshakeable and unchallenged; she knew appellant very well; he was placed at the scene of crime on that date; he tried to exonerate himself by giving a false alibi; the trial court considered all the evidence and warned itself on the dangers of convicting the appellant based on the evidence of a single witness; the identification was by recognition, there was no mistaken identity;

vii. Counsel prayed that the appeal be dismissed and the conviction and sentence be upheld.

REJOINDER:

7. The appellants counsel submitted that;

i. The complainant '**she was able to recognize two of them**'; she ought to have told the police that the appellant was well known to her; as well as his name PM short for Peter Muchiri; the evidence could have been cooked;

ii. An identification parade is conducted only when the accused is unknown; means that **PW2** the OCS didn't have details of the attacker; **PW1** didn't give names therefore it was not recognition but identification; the two ought not to be confused;

iii. PW2 and **PW4** none of them stated in their evidence that the police visited the appellants home severally and didn't find him; **PW1** did not also state that she had accompanied the police to the appellants home severally;

iv. Counsel prayed that the evidence be re-evaluated and an independent conclusion be reached.

ISSUES FOR DETERMINATION:

8. After taking into consideration the submissions made by counsels for the Appellant and the Respondent this court finds the following issues for determination;

- i. Whether the appellant was positively identified;
- ii. Whether the prosecution proved its case beyond reasonable doubt;
- iii. Whether the trial court rejected the appellant's defence without giving good reasons.

ANALYSIS

9. 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. Refer to the case of **Okeno vs Republic (1972) EA 32**.

Whether the appellant was positively identified;

10. The appellants' submission was that no description of the robber(s) was made in the initial report made to the police; that the conviction was based on identification by a single witness and that the trial court failed to caution itself on the dangers of relying on such evidence.

11. The respondent submitted that even though the incident occurred at 12.30pm the conditions for identification were favorable; that there was sufficient light from electric lights in the house; that the appellant and the complainant had wrestled with each other; the period of attack was lengthy and which ended with both the complainant and appellant inflicting injuries on each other; and that the appellant was a person known to the complainant and that he lived across the valley and was also a relative.

12. The issue of identification herein is two-fold; namely the first report and the identification evidence of a single witness; on the first leg which is the first report; this court has re-analyzed the evidence of **CIP No.233065 Andrew Kivindyo (PW2)** who was the OCS attached to Witima Police Station where the Complainant made her report; it is noted that his evidence does not disclose whether the complainant gave any description of the appellant when she made her report;

13. The evidence of Sgt.No.35833 Hermes Misoi (**PW4**) was that when making her report to the police she had told them that she had recognized two (2) of the robbers; that when the robbers struck she had cut one of them on the face;

14. This court finds that there may have been no name or nick-name given by the complainant in the first report but there is evidence of **PW2** that was corroborated by **PW4** that she had informed the police of the special marking in the form of a cut wound on the face of the robber that she had inflicted on him; that this cut wound would help her identify the appellant; indeed the appellant when invited to attend an identification parade declined to participate due to the cut wound on his face which he stated would have enabled the complainant to identify him;

15. Going to the second arm which relates to identification by a single witness; the complainant's evidence on identification can be summarized as follows; that she was attacked when she had gone outside to answer a call of nature at 12.30 pm; the robbers struck as she left the bathroom and she was led into the main house; whilst in the bedroom she wrestled with one of the attackers and managed to grab his panga and she cut him on the face; she stated that there was electric lighting in the room and that she was thus able to see the appellant very well;

16. That she recognized the attacker whom she referred to by his nick-name PM which was short for Peter Muchiri; that his home was across the valley; she made a report to Witima Police Station and told them that the appellant was a person known to her; the police made several visits to the appellants with the intention of arresting him but to no avail;

17. The appellant was arrested three (3) months after the incident; the evidence of the complainant and that of **PW2** CIP Andrew Kivindyo the OCS Witima Police Station was that the appellant refused to participate in an identification parade; the appellant had told the OCS the reason for refusing to attend was because the complainant would have been able to identify him due to the cut wound he had on the face; therefore no identification parade was conducted;

18. This court notes that the court record reflects that in its judgment the trial court acknowledged the fact that the evidence on identification was by a single identifying witness and that there was need to caution itself and stated as follows;

'In Roria vs Republic the Court of Appeal cautions against relying on the evidence of identification by a single witness unless the court satisfies itself in all circumstances that it is safe to act on such identification.....'

19. After cautioning itself the trial court proceeded to examine the complainants evidence carefully and satisfied itself on the sufficiency of the electric lighting and on proximity and found that the complainant had ample opportunity to look at the robber as they wrestled with each other during the robbery;

20. It found that the evidence on recognition was overwhelming and made the finding that **'.....The accused therefore was properly identified at the scene of crime.'**

21. This court is satisfied that the trial court carefully examined the evidence on identification and is satisfied that the trial court when making its finding on identification took into consideration in its judgment the source of the lighting and the positioning of the complainant and that she had ample time to observe at the appellant at length and she narrated with clarity the actions of the appellant throughout the incident; all these principles on identification are laid down in the renowned case of **R vs Turnbull and others [1976] 3All ER**.

22. The question that arises is whether this evidence on identification was reliable and whether the conviction based on such evidence was safe and free from any possibility of error as contended by the appellant; reference is made to the case of **Abdala bin Wendo and Anor vs R [1953] 20 EACA 166**; where it was held that;

‘Other evidence whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, though based on the testimony of a single witness, can safely be accepted as free from the possibility of error.’

23. In this instance the other evidence that was circumstantial that the trial court considered that lends credence to the evidence of the complainant is that of the cut wound inflicted by her; **PW2** and **PW4** made reference to it and gave reasons why the appellant was uneasy about attending the identification parade due to the injury; the nursing officer from Unjiri Health Centre watered down the evidence of the appellant which was that he had sustained injuries from a motorbike accident and that he had been treated at the health centre; the witness disowned the treatment card and the fact that the accused was ever registered as a patient in the facility; the evidence on the injury led the trial court to reasonably conclude that **‘the accused sustained the injuries as a result of the attack by the complainant at the scene of crime was overwhelming against him’**;

24. This court is satisfied that the trial court carefully tested the evidence presented from the scenario and satisfied itself that the circumstances of identification were favorable and that the evidence of this single witness on identification was reliable and free from error before it made it the basis of the conviction.

25. Any evidence on the identification parade whether conducted or not would have been inconsequential and of no probative value as the appellant was a person known to the complainant as well as being a relative;

26. This court finds no reason to interfere with the trial courts finding that the appellant was positively identified;

27. This ground of appeal on identification of the appellant is found lacking in merit and is disallowed

Whether the prosecution proved its case beyond reasonable doubt;

28. Section 296(2) of the Penal Code sets out clearly the essential ingredients of the offence of robbery with violence as follows;

- a. The offender is armed with any dangerous and offensive weapon or instrument; or
- b. The offender is in the company with one or more other person(s); or
- c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes , or uses other personal violence to any person;

29. The trial court in its judgment specifically elaborated in detail on the three (3) key ingredient(s) that had been proved by the prosecution; it gave a narrative of the evidence and then made the following observations;

‘...The panga qualifies as a dangerous weapon.....’

‘....The accused was therefore in the company of another person at the time of the commission of the offence.’

‘The accused inflicted cut wounds upon the complainant.....He had also threatened to cut her after he said the money given was too little. The injuries sustained are shown in the P3Form produced as an exhibit.’

30. And went to make a finding that;

‘The 3 ingredients of robbery with violence have been proved in this case.’

31. From the above evidence this court is satisfied that the prosecution tendered evidence to prove the key ingredients of robbery with violence; which were that the appellant was in the company of other robbers; there was also evidence of a dangerous weapon that was used to inflict injuries upon the complainant; the complainants evidence on the injuries she sustained was corroborated by the evidence of **PW3**;

32. The prosecution is found to have proved its case to the desired threshold;

33. This ground of appeal is found lacking in merit and is hereby disallowed.

Whether the trial court disregarded the appellant’s defence without giving good reasons.

34. It is noted that the trial court fully elaborated on the defence put forward by the appellant and made the following conclusion in its judgment;

“.....the defence that the accused sustained the cut injuries from an accident was watered down by the evidence of the Unjiru Health Centre nursing officer as she disowned the treatment card, and the fact that the accused was ever a patient in the facility. The evidence that the accused sustained the injuries at the scene of crime is overwhelming against him. The evidence by his mother did not assist much as her evidence as inconsistent. DW4 talked of spending the night with the accused on 15/11/11 and he left for Nyeri the following day. He could not tell what happened on 16/11/11.....”

35. From the above text this court finds that the trial court did in fact take into consideration the appellants alibi defence but was unmoved by the defence as it did not cast doubt on the prosecutions' case; the trial court went on to make the finding that;

‘Their defence statements did not raise any reasonable doubt against the prosecution’s case.’

36. This court is satisfied that the trial court did not disregard the appellant’s alibi statements of defence and after weighing it against the prosecution’s case made the above finding and gave good reasons for disregarding it;

37. There is no merit found on this ground of appeal and it is disallowed.

FINDINGS

38. In the light of the forgoing this court makes the following findings;

i. The appellant was positively identified by a single witness; the trial court warned itself on the dangers of such evidence; it is found to have been properly tested; and the trial court considered other evidence presented which was sufficient to make the identification free from the possibility of error;

ii. The prosecution proved its case to the desired threshold;

iii. Lastly that the trial magistrate had good reasons for rejecting the appellants defence.

DETERMINATION

39. The appeal is found lacking in merit and is hereby dismissed.

40. The conviction and sentence are both hereby upheld;

It is so Ordered.

Dated, Signed and Delivered at Nyeri this 19th day of April, 2018.

HON. A.MSHILA

JUDGE