



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO.5 OF 2018

(An Appeal arising out of the conviction and
sentence of Hon. Andayi W. Francis (CM)
delivered on 11th December 2017 in Nairobi

CMC. CR. Case No.83 of 2015)

COLLINS WAMBUA MUSILA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Collins Wambua Musila was charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 18th January 2015, along Moi Avenue within Nairobi County, the Appellant, jointly with others not before court while armed with sharp objects robbed Philip Odero Ondengo of a suit case containing the properties listed in the charge sheet which included a HP Laptop, complainant's clothings and identity documents valued at Kshs.190,700/- and immediately before or immediately after the time of such robbery, injured the said Philip Odero Ondengo (hereinafter referred to as the complainant). 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. He was sentenced to death. He was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence of a single identifying witness that was made in difficult circumstances. The Appellant faulted the trial magistrate for convicting him against the weight of evidence. He was of the view that the ingredients of the offence were not established to the required standard of proof. The Appellant faulted the trial magistrate for failing to properly evaluate the evidence particularly by downplaying the evidence that exonerated him and thereby reached the erroneous determination convicting him as charged. The Appellant took issue with the fact that the alibi defence that he had raised was not considered before the trial court convicted him. He was of the view that his defence was such that it raised reasonable doubt on the prosecution's case. He was finally aggrieved that he had been sentenced to serve a sentence that was harsh and excessive. In the premises therefore, he urged the court to allow the appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Olode for the Appellant and by Ms. Atina for the State. Mr. Olode submitted that the Appellant's right to fair trial were infringed in that when the Appellant took plea he was not told that he had a right to appoint an advocate of his choice to act on his behalf. He further submitted that he was not warned of the serious nature of the charge that he faced so as to put him on notice on how he should prepare his defence. Learned counsel was particularly aggrieved that the trial court did not treat the evidence of the complainant as that of a single witness which ought to have been treated with caution. He explained that the complainant gave contradictory evidence regarding the circumstances of the robbery, and further, regarding the circumstances in which the Appellant was arrested.

Learned counsel stated that the prosecution's evidence, taken in totality, did not establish that it was the Appellant who was a member of the gang that robbed the Appellant. He urged the court to find that police failed to properly investigate the case and thereby brought the wrong person to court. He urged the court to allow the appeal. Ms. Atina for the State conceded to the appeal. She was not convinced that the evidence of identification that was adduced by the complainant pointed to the Appellant as one of the robbers to the required standard of proof. The circumstances in which the robbery took place precluded the complainant from being certain that he had positively identified the Appellant as a member of the gang that robbed him. She therefore was not supporting the conviction of the Appellant.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In reaching its determination, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (See **Njoroge –vs- Republic [1987] KLR 19**). In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to secure the conviction of the Appellant on the charge of **robbery with violence** contrary to **Section 296(2) of the Penal Code**.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the oral submission made before this court. It was clear from the judgment of the trial court that the court convicted the Appellant on the basis of the evidence of identification. The trial court recognized the dangers of convicting the Appellant based on the sole evidence of identification that was made especially in the circumstances that were not conducive for positive identification. The leading cases on how a court should treat the evidence of identification are **R –vs- Turnbull [1977] QB 224** and **Wamunga –vs- Republic [1989] KLR 424**. The Court of Appeal in **James Murigu Karumba – vs- Republic [2016] eKLR** held thus in regard to the evidence of identification:

“It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. In Wamunga –vs- R [1989] KLR 424 this court held at page 426 that,

“Where the only evidence against a defendant is the evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully 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 a conviction.”

Where there is doubt that the evidence of identification cannot sustain a conviction, the prosecution may adduce other evidence to establish the Appellant’s guilt. In **Benjamin Mugo Mwangi & Another –vs- Republic [1984] eKLR**, the Court of Appeal held thus:

“In the case of Roria –vs- Republic [1967] EA 583, the predecessor of this court had this to say on identification by a single witness at page 584, letter G”

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing, with the greatest care, the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification was difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error. See also Abdalla Bin Wendo & Another v R (1954) EA CA 187.”

In the present appeal, the complainant testified that he was accosted by a gang which robbed him of his suitcase while he was at the Ambassador Bus Stop waiting for a bus to take him to the airport. The time was between 5.00 a.m. and 5.30 a.m. He recalled that he was accosted by a gang of between eight and twelve men who accused him of being a member of Al Shabaab. They inquired from him whether he was the owner of the suitcase that he had placed on the ground beside him. When he answered in the affirmative, he was surrounded by the group before he was assaulted. He realized that his life was in danger. He ran to a nearby cafe’, where a security guard at the door allowed him in before locking the door. He told the court that while inside the cafe’, he saw his suitcase being taken away. He decided to chase after the gang. A few metres from the bus stage, he caught up with them. This time, he was beaten until he lost consciousness. When he regained consciousness, he discovered that he was bleeding from an injury inflicted on his head. He did not give up. He ran towards the direction the gang had escaped to. This was in the direction of Cross Road. He told the court that he met with the Appellant, whom he identified as being a member of the gang that robbed him. With the assistance of members of public, he took the Appellant to Central Police Station where he was detained and later charged with the current offence. None of the items that were robbed from the complainant were recovered.

It was on the basis of this evidence of identification that the Appellant was convicted. On re-evaluation of this evidence, this court makes the following observations: the complainant’s evidence of identification was that of a single witness. The circumstance in which the identification was made was for all intents and purpose, difficult. The complainant was at pains to explain how he was able to isolate and identify the Appellant from the gang of more than ten (10) assailants that accosted him. He told the court that there was sufficient light from the florescent tubes along the verandah that enabled him to identify the Appellant. From his testimony, it was evident that there were two crucial breaks in respect of his narration of the chain of events that took place on the material day. The first break was when he was first assaulted and sought refuge in the cafe’. During this period, he lost contact with the robbers. When he saw that they had taken away his suit case, he got out of the café and chased after them. He made contact with them. They assaulted him for a second time. This time they injured him. He lost consciousness. When he regained consciousness, he had lost contact with the gang. This was the second break in the chain of events.

For the complainant’s evidence of identification to have credibility, he had to establish that he did not lose sight of his assailants from the moment they robbed him to the time of the Appellant’s arrest. The complainant told the court that he lost consciousness for about 2 minutes. This was sufficient period for his assailants to make good their escape. When he regained consciousness, he could no longer see them. He decided to follow the direction that he presumed they followed. He was not therefore in hot pursuit of the robbers. At Cross Road he met with the Appellant and pointed him out as a member of the gang that robbed him. The Appellant explained that he was at Cross Road at the time because he was waiting for a public service vehicle to take him home after a night out. This was a reasonable explanation for the Appellant’s presence at the scene.

The complainant did not have continuous sight of the robbers prior to pointing out the Appellant as being a member of the gang. In that regard, the complainant’s testimony regarding his identification of the Appellant as one of the robbers cannot be said to be watertight. The circumstances favouring positive identification were absent. The complainant’s testimony regarding how he identified the Appellant from a group of between eight and twelve assailants is not credible. He was scared. He had been injured. He had lost consciousness. It was dark.

Although the complainant testified that the place was well lit, it was not clear from his evidence if the entire stretch from Ambassador Bus Stage to Cross Road (a considerable distance) was well lit to enable the court have assurance that the complainant indeed positively identified the Appellant.

The circumstances of this case precludes this court from reaching a finding that the Appellant was positively identified as one of the robbers who robbed the complainant on the material morning. Since no other evidence was adduced by the prosecution to connect the Appellant to the robbery, this court holds that the prosecution failed to establish to the required standard of proof beyond any reasonable doubt that the Appellant was a member of the gang that robbed the complainant. The prosecution, correctly in the view of this court, conceded to the appeal. The evidence of identification does not stand up to legal scrutiny.

The Appeal is allowed. The conviction is quashed. The Appellant is acquitted of the charge. He is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 20TH DAY OF JUNE 2018

L. KIMARU

JUDGE