



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 71 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. H.M.Nyaga – CM

delivered on 20th June 2017 in Makadara CMC. Cr. Case No.3725 of 2014)

PETER KYALO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Peter Kyalo was charged with two (2) counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offences were that on 3rd August 2014 at Githurai 44 within Nairobi County, the Appellant, jointly with others not before court while armed with offensive weapons namely a firearm, a panga and a rungu robbed Francis Njuguna Njoroge and Christine Diana Saka of their mobile phones, makes Samsung and ITEL and Kshs.6,020/- and during the time of such robbery, used actual violence to the said Francis Njuguna Njoroge and Christine Diana Saka. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted of one (1) count of a lesser charge of **robbery with violence** contrary to **Section 296(1)** of the **Penal Code**. He was sentenced to serve ten (10) years imprisonment. The Appellant 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. He was aggrieved that he had been convicted on the basis of the evidence of identification that was made in circumstances that were not conducive for positive identification. In particular, the Appellant pointed out that no descriptions of the robbers were made in the first report that was made to the police nor was an identification parade held to confirm the identity of the robbers. The Appellant faulted the trial magistrate for failing to properly evaluate the evidence of identification and thereby reached the erroneous determination that he had been positively identified as one of the robbers. The Appellant took issue with the fact that he was convicted on the basis of prosecution's evidence whereas no stolen items were recovered in the Appellant's possession nor were any weapons used in the robbery found in the Appellant's possession. The Appellant was aggrieved that the trial court had failed to consider the fact that the police had conducted shoddy investigations which had erroneously connected him to the crime that he had not committed. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, this court heard rival oral submission made by the Appellant and by Ms. Akunja for the State. The Appellant submitted that at the material time, he was employed as a guard in a security firm. On 10th August 2014, he met with the complainant by the road side at Huruma Corner. At Ruaraka, he boarded a matatu for his Githurai 44 home. The complainant saw him and screamed. Members of the public came to the scene. The complainant was alleging that he had robbed her of her mobile phone on the previous week. The Appellant produced his mobile phone and showed it to the complainant. The complainant said that it was not her phone. He was taken to Kasarani Police Station where he was detained and later charged. He was shocked to be told that he had been identified by the complainant as one of the men that had robbed the complainants. The police beat him up with a view to having him disclose the whereabouts of his accomplices. The police did not want to hear his plea that they should contact his employer to confirm his *bona fides*. The Appellant submitted that he was a victim of mistaken identity and therefore his appeal should be allowed.

Ms. Akunja for the State opposed the appeal. She submitted that the Appellant was properly identified by the complainants. The complainants, a man and his wife, were attacked by a gang of three (3) robbers while they were walking home. They were forced into a bush before the 1st complainant was ordered to disclose his Mpesa PIN. He complied. The money that he had in his electronic wallet was transferred to the account of one Ephantus Ngure. The complainants were robbed of their mobile phones after they had been tied and later abandoned in the bush. Ms. Akunja submitted that the evidence of identification that was adduced by the prosecution witnesses was cogent as the complainant recognized the Appellant when he saw him again and raised the alarm. When the mobile phone of the Appellant was checked, the name of Ephantus Ngure was found. The Mpesa statement produced by the complainants showed that the money was sent to this person. She urged the court to find that the prosecution had established a proper case for the Appellant's conviction on the charge that was brought against him.

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 two (2) charges of **robbery with violence** contrary to **Section 296(1) 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.”

In the present appeal, the complainant’s wife, who was the 2nd complainant in the case did not testify in the case. It is only the complainant, Francis Njuguna Njoroge who testified before the trial court. He told the court that on 3rd August 2014, while he was walking with his wife from Kiambu towards Githurai Kimbo, he was accosted by a gang of three robbers who dragged him into a nearby bush, before undressing both of them and then robbing them. The complainant told the court that the incident took place sometime after 6.00 p.m. After he had been subdued, he was ordered to surrender his Mpesa PIN. He complied. He had Kshs.5,000/- in his electronic account. The money was transferred to mobile No.0700*****. They were then robbed of their mobile phones. After the robbers had left, they were able to untie themselves before making a report to Kiamumbi Police Station. The complainant replaced his SIM card and then went to Safaricom shop where he was able to obtain his Mpesa statement. From the statement it was indicated that the sum of Kshs.5,000/- had been transferred to one Ephantus Ngure. On 10th August 2014, while passing at a place called Mirema, he saw the Appellant. He recognized that he was a member of the gang that robbed him. He raised alarm. Members of the public assisted him to have the Appellant arrested and taken to the police station. According to the investigating officer, PW3 PC Salome Kimilu, when he scrolled through the Appellant’s mobile phone contacts, he found that the Appellant had the contact of Ephantus Ngure whose mobile phone was 0700*****. It was on the basis of this evidence and that of identification by the complainant that she decided to charge the Appellant.

For the prosecution to sustain the conviction of the Appellant on the basis of the evidence of identification, there are certain prerequisites that must be considered. The first issue is the circumstances that the identification was made. *Was it conducive for positive identification?* In the present appeal, the complainant testified that the robbery took place sometime after 6.00 p.m. It was not clear from his evidence whether there was sufficient daylight that enabled the complainant to be positive that he had identified the Appellant as one of the robbers. The prosecution must also adduce evidence of the period that the victim was exposed to the robber. In the present appeal, it was not clear how long the complainant was exposed to the robbers to enable him to be positive that he had identified the Appellant during the course of the robbery. The third issue is in regard to the first report that the complainant made to the police. *Did the complainant give the description of his or her assailants in the first report that was made to the police?*

In this appeal, it was evident that the complainant did not give the description of the persons who robbed him in the first report that was made to the police. No description of the robbers’ physical or facial features was made to the police. The colour or the type of the clothes that the robbers wore on the material day of the robbery was not stated in the first report that was made to the police. In the absence of such description in the first report made to the police, this court cannot verify or believe the assertion by the complainant that he was able to identify the Appellant as one of the persons who robbed him a week after the robbery incident. It is well known that an identifying witness can be mistaken. He can be so mistaken that his mind can play tricks on him that he is positive that he has identified the person who robbed him.

Taking into consideration the fact that the complainant, as a victim of the robbery, may have been traumatized during the robbery incident, it cannot be ruled out that the complainant may honestly be mistaken that he had identified the Appellant as a member of the gang that robbed him. Finally, for the evidence of identification to stand, where the identification is made at night, the source and intensity of light that enabled the victim identify the robber must be stated. In this appeal, no such evidence was adduced.

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 other evidence that the prosecution adduced was that of the investigating officer who testified that upon the Appellant's arrest, and on scrolling through the Appellant's mobile phone, she found the contact of Ephantus Ngure to whom the Mpesa funds in the complainant's electronic account were transferred to. *Was this sufficient evidence to connect the Appellant to the robbery?* This court does not think so. The investigating officer was required to look for Ephantus Ngure through his mobile contacts and establish if the said Ephantus Ngure had any connection or link with the Appellant. The complainant testified that the funds were transferred from his mobile phone to the mobile phone of Ephantus Ngure. There is no evidence to connect the Appellant to the transfer of the said funds in the manner described by the complainant. In the absence of the evidence from Ephantus Ngure linking the Appellant to the transfer of the funds from the complainant's phone to his mobile phone, this court cannot make a finding that the prosecution had established a link or a connection between the said Mpesa funds transfer and the Appellant. A court correctly applying its mind to the facts of the case cannot reasonably be expected to reach a finding that this evidence supports or corroborates the evidence of identification that was adduced by the complainant.

The upshot of the above reasons is that the Appellant's appeal is for allowing. It is hereby allowed. The Appellant's conviction is quashed. He is acquitted of the charge. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 20TH DAY OF JUNE, 2018

L. KIMARU

JUDGE