



REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL NO. 78 OF 2016

BETWEEN

SAMUEL ASHIBABI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. E. Malesi, SRM dated on 13th September 2016 in Criminal Case No. 2172 of 2015 at the Chief Magistrate's Court at Kakamega)

JUDGMENT

1. Before the subordinate court, the appellant, **SAMUEL ASHIBABI**, was charged, together with his co-accused, with four counts of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the offence were that on 22nd July 2015 at HQ Bar and Restaurant in Kakamega Township within Kakamega District of Kakamega County, jointly with another person before the court while armed with dangerous weapons namely iron bars robbed **JEREMIAH ATEKU** of one phone make Itel worth Kshs. 1,500/- and Kshs. 300/- cash all valued at Kshs. 1,500/- and immediately before the time of such robbery, used actual violence on the said **JEREMIAH ATEKU**. The appellant denied the charges but after a full trial, he was convicted and sentenced to death.

2. The appellant now appeals against conviction and sentence on the grounds set out in the petition of appeal filed on 27th September 2016. The appellant's case centres on the issue of identification. He contended that the trial magistrate erred in law and fact in placing inordinate weight on the evidence of identification by PW 1 and PW 2 and holding that their testimony was truthful considering that the circumstances were not favourable for identification and free from error and doubt. He further contended that the identification parade was conducted in a manner contrary to the **Force Standing Orders**. In addition, he filed written submissions to support his case.

3. The respondent opposed the appeal. In its written submissions, it contended that the prosecution proved all the elements of the offence of robbery with violence. The respondent further submitted that the appellant was identified in circumstances that were favourable to positive identification and that the identification parade was done in accordance with the law.

4. The elements of the offence of robbery with violence **under section 295 as read with 296 (2) of the Penal Code** were elaborated by the Court of Appeal in **Ganzi & 2 Others v Republic** [2005] 1 KLR 52 as follows:

The offence of robbery with violence under section 296(2) of the Penal Code is committed in any

of the following circumstances namely:-

(a) The offender is armed with any dangerous or offensive weapon or instrument; or

(b) The offender is in company with one or more other person or persons 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.

5. For the offence to be established, the prosecution need only prove any of the elements set out as “or” in the **section 296(2)** of the **Penal Code** is to be read disjunctively (see ***Oluoch v Republic [1985]eKLR***).

6. The fact that a robbery took place on the early morning of 22nd July 2015 at HQ Bar is not in dispute. Jeremiah Ateko Mulando (PW 1), a watchman at HQ recalled that at about 2.45am, he was in the bar with two other people. As he was watching TV he saw two strangers come in from behind the bar. One of them shouted at him lie down. The appellant was holding an empty beer bottle and was standing behind the co-accused who was holding a twisted iron rod with which he hit him on the head. The assailants told everyone in the bar to lie down whereupon they started ransacking the place. The appellant saw them taking money from others. They also took the mixer and computer from the DJ booth and a generator. After they had left, the police arrived about 15 minutes later. PW 1 was taken to hospital where he was treated. Patrick Mambiri (PW 5), a clinical officer at the Kakamega County Hospital, testified that PW 1 was treated on 24th July 2015 for injuries sustained after a robbery. He observed that PW 1 had cut injuries on the head and bruises on the back and chest. He opined that the injuries had been inflicted by a blunt object.

7. The barman, Ignatius Lwichi Musina (PW 2), was in the DJ booth when the assailants arrived. He heard the attackers demanding money. They took from him Kshs. 1,100/- being the proceeds of sale together with the mixer, computer and generator. Since he had hidden his phone, PW 2 retrieved it and called his employer who then communicated with the police who arrived shortly.

8. One of the officers who arrived at the scene was Inspector George Ongei (PW 5) who confirmed that the police received a distress call on the material day at about 3.00am. He proceeded to the scene with another officer and when he arrived, he noted that the gate and other doors had been broken. At the bar he found people including PW 1 and PW 2. PW 1 had an injury on the head and was lying in a pool of blood. He also collected the iron rod used to assault PW 1 and which he produced in evidence. He took PW 1 to Kakamega General Hospital where he was treated. In the course of investigations, an informer directed him to the appellant as one of the people involved in the incident. He caused the appellant to be arrested and arranged for an identification parade to be conducted by Chief Inspector Samson Kipruto (PW 4) where PW 1 and PW 2 identified the appellant as one of the assailants.

9. In his sworn defence, the appellant denied the charge against him. He recalled that he went to work as usual on 22nd July 2015 and as he was going home, he met police officers who asked him to accompany them for investigations. He was taken to the police station where he slept until the next day when he was taken for the identification parade. He stated that one of the people he saw waiting at the bench was brought to the parade and identified him.

10. The main issue for consideration in this appeal is whether the appellant was the assailant. The prosecution case was grounded on direct evidence of identification by the witnesses in difficult circumstances. On this issue the Court of Appeal has given guidance on how evidence of a single witness is to be approached in a plethora of authorities (see ***Abdalla Bin Wendo & Another v R [1953] 20 EACA 166***, and ***Anjononi & Others v Republic [1980] KLR 59***). In ***Francis Kariuki Njiru & 7 others v Republic NRB CA Cr. Appeal No. 6 of 2001 [2001]eKLR***, the Court of Appeal summarized the approach as follows:

The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinised carefully, and should only be accepted and acted upon

if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R. v. Turnbull [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuya & Another v. R. Criminal Appeal No. 22 of 1996 (unreported), held that, “ ... It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence.

11. Turning to the evidence, PW 1 testified that on the material night the appellant came together with his co-accused from behind the bar where there was light from the television, coloured lights and fluorescent bulbs. The appellant was standing behind his co-accused. PW 1 recalled that he described the attackers to the police and was able to identify him at the identification parade. When cross-examined, he stated that he described the appellant as short and fat and gave this description to the police.

12. PW 2 also testified that he was attacked while he was at the DJ booth and one of the attackers who pulled him was short. He also stated that there was light from one television, one fluorescent light and disco lights. After the attack he gave the police the description of the attackers. He pointed out that the appellant has a swelling on the head which he identified in court. Further, when he was called to attend the identification parade, he pointed out the appellant. When cross-examined about the description of the appellant, he insisted that the appellant was short and had a scar on the forehead and was able to see him during the attack.

13. I am satisfied that from the totality of the evidence, the lighting at HQ Bar on the material morning was sufficient for positive identification. Both PW 1 and PW 2 could see the assailants clearly from the television light, the fluorescent bulb and disco lights. Additionally, at the time of reporting to the police, they gave a description of the assailants to them. Since the assailants were strangers to the witnesses, it was appropriate for the police to conduct an identification parade as the witnesses had seen the assailants clearly.

14. The identification parade in respect of the appellant was conducted by PW 4. The appellant attacked the identification parade on the ground that it was not done in accordance with the **Force Standing Orders** and the standards laid down in **Rex v Mwangi s/o Manaa**[1936] 3 EACA 29 amongst other cases. Some of the relevant instructions contained in the **Force Standing Orders** are as follows;

1. The Accused person is always informed that he may have an Advocate or friend present when the parade takes place.

2. The officer in charge of the case, although he may be present, does not carry out the identification parade.

3. The witness does not see the accused before the parade.

4. The accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.

5. The accused is allowed to take any position he chooses, and he is allowed to change his position after each identifying witness has left, if he so desires.

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10. *The witness is to touch the person he identifies.*

11. *At the termination of the parade or during the parade the accused is to be asked if he is satisfied that the parade is being conducted in a fair manner and a note is to be made of his reply.*

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15. Regarding the usefulness of an identification parade, the Court of Appeal in ***Njihia v Republic [1986] KLR 422*** observed that:

If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.

16. PW 4 was requested to conduct an identification parade on 23rd July 2015. He testified that he informed the appellant of the rules and asked him whether he wanted his witness present. The appellant answered in the negative. While witnesses were in the report office away from the suspects, he gathered 8 participants of similar height and weight. The appellant accepted a position between number 3 and 4. PW 1 identified the appellant by touching him and gave his reasons for doing so. PW 4 once again gave PW 1 the opportunity to change positions before he called PW 2 to identify the suspect. PW 1 chose the position between 5 and 6. PW 2 identified the suspect and told him that he did so through the scar on the suspect's face which he saw on the material night as there was sufficient light. When cross-examined about where witnesses were located, PW 4 stated that they were waiting in the report office which was far from where the parade was being conducted. At no time did the appellant express any objection to the parade or indicate that he had seen one of the witnesses who had come to identify him.

17. Having considered the manner in which the identification parade was conducted, I am satisfied that it was done in line with the ***Force Standing Orders*** I have detailed elsewhere in this judgment.

18. The totality of the evidence against the appellant is that there was sufficient light at HQ Bar on that fateful early morning. The lights from the television, fluorescent tube and disco lights within the confines of the room was sufficient to illuminate the appellant. Moreover, the time of interaction between the appellant and the witnesses and his unique features which PW 1 and PW 2 described to the police provided a level of assurance that the circumstances of identification were free from the possibility of error. The conduct of the identification parade and the appellant's identification by two independent witnesses provided sufficient weight to the prosecution case that the appellant was among the persons who committed the robbery.

19. For reasons I have set out, I affirm the appellants' conviction and sentence.

20. The appeal is dismissed.

SIGNED at KISUMU

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KAKAMEGA this ___13th ___ day of ___ October___ 2017.

R. N. SITATI

JUDGE

Appellant in person.

Mr Ng'etich, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.