



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 46 OF 2015

(FORMERLY MERU HCCRA 40 OF 2015)

WILLINGSON NTWIGA ALIAS TOSHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment and conviction of B.N. IRERI - made on 12/3/2015 in Chuka Principal Magistrate's Criminal Case No. 1365 of 2011).

J U D G M E N T

1. Willingson Ntwiga alias Tosha, the Appellant herein, was on 21st December, 2011 charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code in the Chuka Principal Magistrate's Court Criminal Case No. 1365 of 2011 wherein he was the fourth (4) accused. It was alleged that on 6th November, 2011 at Kiereni trading centre in Mugwe Location, Tharaka Nithi, the Appellant, with six (6) others, jointly while armed with dangerous and offensive weapons namely, knives, pangas and metal bars, robbed Denis Muchiri Karere of one mobile phone make Nokia, one wallet, one Equity Bank ATM Card, one national identity Card, 10 Safaricom Sim Cards, assorted documents and cash Ksh.33,000/- all valued at Kshs.37,700/- and at the time of robbery, injured the said Dennis Muchiri Karere and murdered Salome Sharon Mwendu.
2. The Appellant denied the charge but after trial, he and his co-accused were, convicted of the offence and sentenced to suffer death. All those convicted, including the Appellant, appealed against the said decision. However, at the hearing of the appeal, each of those convicted applied that his appeal be heard separately. Accordingly, although the appeals emanated from the same conviction and sentence, this court decided to hear each appeal separately and write separate judgments as per the wishes of the Appellants.
3. In his Petition and Supplementary Grounds of Appeal, the Appellant contended that; the trial court failed to consider that the complainant gave contradictory and conflicting testimony contrary to Section 163 of the Evidence Act; that the trial court failed to consider that the prosecution failed to call vital witnesses being the informers through whose information the Appellant was arrested; that the trial court erred in not considering that the identification parade did not comply with Chapter 46 of the Police Force Standing Orders; that the trial court failed to consider that no description or names of the Appellant were given to the police in the first report; that the trial court failed to consider that no exhibit was recovered from the Appellant and that the trial court wrongly rejected the defence of the Appellant. This being a first appeal, it is incumbent upon this court to review and re-examine the evidence afresh and draw its own independent conclusions and findings. See **Okeno -v- Republic [1972] EA 32**. However, in doing so, the court must at all times consider that it did not have the advantage of seeing the witnesses testify.

4. The prosecution case was that on 6th November, 2011 at about 8.30 pm, Dennis Muchiri Karere (PW2 and complainant) was in his house with his wife, Sharon Salome Mwendu and son watching television. There was a knock at the door and he asked his wife to open. On opening the door, about seven (7) male persons entered armed with knives, iron bars and whips. They cut him with a knife and demanded money and whereby the complainant gave them Kshs.33,000/-. They ransacked the house and took away his national identity card (PEXh3), Equity A.T.M card (PEXh 4) and assorted cards (PEXh 5 (a) – (g)). They also robbed him of his phone. His wife was all along calling for help but because it was raining outside, there was no help that came their way. The complainant's wife sustained injuries from which she later succumbed to at Chuka District Hospital. After the robbers had left, his brother came and assisted in taking the complainant and his wife to Hospital. The complainant was treated and discharged the following day (PEXh 8) but his wife died. The complainant was later called to Chuka Police Station where on various days he attended identification parades whereby he identified the seven accused, including the Appellant herein.
5. On cross-examination, the complainant told the court that there was electric light on that material night; that his was a single room; that he did not give any description of the robbers to the police; that before the identification parade, he was kept in a private room. That he identified his attackers in the parades out of their physical appearance. He indicated that the attackers took about 30 minutes during the robbery. That at the parade, he identified those who had attacked him and that the police did not describe to him the people he was to identify.
6. Dr. Justus Kitili (PW1) produced the Post Mortem Report (PEXh 1) for Sharon Salome Mwendu. The report indicated that the body of the deceased had a deep cut on the neck and that she died of massive hemorrhage. PW3 Bonface Mugendi recalled that in the morning of 7th November, 2013(sic), he was going to work when he found a mobile phone and papers strewn on the road, including the national identify card for the complainant. He notified the area assistant chief (PW5) who collected and surrendered them to the police. Loyd Mugambi (PW4) told the court that on 6th November, 2011 at about 8.00pm, he went to the complainant's shop after he had heard screams from there. He had however delayed in responding to the screams because it was raining. He saw the deceased lying in a pool of blood while the complainant looked confused at the time. When going home, PW4 collected about ten mobile sim cards and a 500 note S/No. BN 8724408 which he surrendered to PW5.
7. Bedford Kinyua Mukiri (PW5) the Assistant Chief told the court how the brother of the complainant came to his house on 6th November, 2011 at around 8.p.m. and told him that the complainant had been attacked by robbers. He went to the complainant's home and found the complainant's wife being put in a vehicle while bleeding profusely. He called the police from the Chuka Police Station. When they arrived, he and the police entered the complainant's house, saw blood on the floor. The complainant did not mention their names of his attackers.
8. S.S.P Benjamin Marua (PW6) was the O.C.S Chuka Police Station at the time of the incident. He recalled how he was requested by the Investigations Officer to carry out inspection parades for, inter alia, the Appellant. That on 28th November, 2011 at about 11.50 a.m., he filled the identification forms for an offence of robbery with violence. He organized eight people for the parade; he called the Appellant and warned him of the offence; that the Appellant willingly agreed to participate in the parade; he signed the forms but said that he did not have a friend to witness the exercise. That the Appellant stood between the 8th and 9th person in the parade. That at the time, he had kept the complainant, in the crime office. That when he called, the complainant, the witness identified the Appellant by touching him. That the Appellant signed the parade form but stated that he was not satisfied with the parade because he had not changed his clothes and he was tall. The identification parade form was produced as PEXh 12. When cross-examined by the Appellant, PW6 denied ever knowing the Appellant before the date of the parade.
9. PW8, Corporal Benson Sindani was the investigating officer. He recalled how on the morning of 7th November, 2011, he was informed of the robbery by his superiors who had visited the scene the previous night. He visited the scene that morning whereby he found PW5 and members of the public. He recovered from PW5 the documents that had been stolen but had been collected from the road (PEXh 2-8). He found the household items scattered all over the room and there was blood on the floor. He then visited the complainant at the hospital who narrated to him how a

- gang of six to seven (6-7) people had attacked him and his wife the previous night. That he had identified the attackers by way of lamp light that was on. He identified one of the suspects by name and that he used to see the others at the stage which was near where he worked. PW8 then circulated the names of the suspects and commenced investigations. He later learnt that the Appellant was one of those who had been arrested. He interrogated him and arranged for an identification parade that was conducted by PW6 whereby the Appellant was positively identified. That there had been a wave of robberies within Chuka. One informer was killed as a result of which many people feared to testify in this case. He caused the body of the deceased to be photographed which photographs he produced as PExh 18 (a), (b) and (c) and a report of scene of crime as PExh 19.
10. On cross-examination, PW8 stated that the complainant had not given the description of the Appellant. That he had informers to whom he gave information which led to the arrest of the suspects. He denied having photographed the Appellant before the parade. He indicated that PW2 had told him that he could identify the Appellant if he saw him. He confirmed that he had not recovered anything from the Appellant's house. Inspector Gilbert Ngao (PW10) told the court that on 6th November, 2011 at about 4 pm, he was in Chuka Town with two (2) other officers when he was called by the O.C.S (PW6) to go and meet an informer at Maras Bar who would then lead him to a suspect called Tosha. That he and the other officers went and met the informer as he had been told. The informer then led them to Moi Girls Estate at a bar called Promise bar. That they found the Appellant at that bar, and after introducing themselves they arrested him. He did not however recover anything from the Appellant.
 11. When the Appellant was placed on his defence, he offered to give sworn evidence but called no witness. He told the court that he was arrested at Promise Bar on 26th November, 2011 at about 3 p.m. That PW8, PW9 and a Mr. Rutere came and searched him. The said Rutere took the Appellant's Kshs.1,500/- and told the Appellant that he will be charged with robbery with violence. That Rutere had framed him for demanding his Kshs.1,500/-. He asked for the OB relating to his arrest and when it was read to him he said nothing about it.
 12. At the hearing of the appeal, the Appellant made oral submissions and further relied on his written submissions. He submitted that the prosecution did not prove its case as required by law. That since the complainant was injured immediately the robbers entered the house, the circumstances regarding identification were difficult considering that the parade was held about two (2) weeks later. That the complainant did not give any names or description of his attackers to the police. That the Appellant was arrested as a result of information by informers and not the complainant; that since nothing was recovered from him, there was nothing to connect him to the offence. That the evidence of the complainant, PW5 and PW8 was contradictory and uncorroborated. That the identification parade was contrary to Chapter 46 of the Police Force Standing Orders. That there was contradiction as to the type of light used to identify the robbers. That PW8 and PW2's testimonies as to the weapons used contradicted each other. He concluded that his defence was not considered thereby violating Section 169 (1) of the Criminal Procedure Code.
 13. Mr. Ongige, Learned Counsel for the state opposed the appeal. He submitted that the prosecution evidence was consistent and was not contradictory; that although not corroborated, the only person who would have corroborated the same was killed during the robbery. He further submitted that the prosecution called all the necessary witnesses; that the trial court had properly warned itself of convicting on the evidence of a single witness and had properly relied on the evidence adduced to find a conviction. Counsel relied on the case of **Shadrack Omwaka -v- Republic [2016] eKLR** to support of his submissions.
 14. The first ground was that the trial court relied on the contradictory evidence of the complainant, PW5 and PW8. This court has considered the record. The evidence of the complainant, the eye witness was that six to seven (6-7) men attacked him and his wife on the night of 6th November, 2011 at about 8pm. There was an electric light at the time; that the attack took place in a one roomed house and that the robbers took about 30 minutes ransacking the house. The foregoing in my view were good conditions for identification. The complainant further told the court that the robbers were armed with knives iron bars and whips. There was no other eye witness who gave any evidence that contradicted the evidence tendered by the complainant. Neither was his testimony seriously challenged. In my view, the alleged contradiction of the evidence of PW5 and PW8, who were not eye witnesses to that of the complainant as to the lighting and type of

weapons used by the robbers was not material as to vitiate his unchallenged evidence. As regards corroboration, there was the Postmortem Report (PEXh 1) and P3 Form (PEXh 8) which corroborated the evidence of PW2 as to the use of violence upon the victims by the attackers. That ground in my view fails.

15. The second ground was that the identification parade was in breach of the Police Force Standing Orders. The record shows that according to PW6 who conducted the parades for all the seven (7) accused persons, he told the court that he kept the witness at the crime office when he was arranging the parade; he warned the Appellant of the offence and asked him if he objected to the parade. The Appellant willingly agreed to participate in the parade and he stated that he did not have a friend. PW6 had nine (9) persons in the parade as required by the regulations. He testified that he tried to comply with the regulations as much as possible. The trial court believed the testimony of PW6. On the part of this court, there is nothing that has been pointed out to show that the parade as conducted by PW6 was in breach of the Police Force Standing Regulations. That ground also fails.
16. The other ground was that PW2 did not give any description of the Appellant to the police and that no exhibits were recovered from the Appellant. The pertinent issue in this appeal turns on the sufficiency or otherwise of evidence of the single identifying witness. It is clear from the record that the only eye witnesses to the robbery was the complainant and his wife. After the wife died, it was only the evidence of PW2 that remained. The Court of Appeal for Eastern Africa in **Abdalla Wendo v- Republic [1953] 20 E.A.C.A 166** held that:-

“Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this 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, were 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.”

18. Further, in **Roria v-Republic [1967] EA 573**, the Court of Appeal for East Africa also held that:-

*“ A conviction resting entirely on identity invariably causes a degree of uneasiness,
.....*

That danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification.”

19. It is clear from the foregoing that a court can still convict on evidence of a single identifying witness if the evidence is sufficient and the court properly warns itself of the danger of relying on such evidence. In this case, the trial court properly warned itself of the danger of only relying on the evidence of the complainant who was the single identifying witness. In concluding that the testimony of the complainant was sufficient, the following is important to note. The robbery took place at night inside a single room; there was electric lighting; the robbers took about 30 minutes ransacking the house; they frisked the complainant and asked him for more money after he had given them Kshs 33,000/=; the identification parade of the Appellant took place on 28th November 2011 which was approximately three (3) weeks after the incident which period was not too long. In my view, the foregoing circumstances were favourable for identification and the trial court cannot be faulted for having relied on the evidence of the complainant. The complainant may have been shocked by the sudden attack but considering the long time which the attackers took in the operation and the lighting at the time, there was ample time for the complainant to have sufficiently recollected himself and identify his attackers. Further, at the parade he identified the Appellant without hesitation. That ground also fails.
20. As regards the contention that police informants were not called to testify, this court does not

think that was necessary. The complainant had positively and firmly identified the Appellant on favourable circumstances. When dealing with an issue of information obtained from informants in the case of **Kigecha Njuga v- Republic [1965] E.A 773**, the court stated that:-

“ Informants play a useful part no doubt in the detection and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desire the courts to hear the details of the information an informer has given to the police clearly the informer must be called as a witness.”

21. Further, in the case of **Joseph Otieno Juma Vs Republic [2011] eKLR** the Court of Appeal observed as follows:-

“ Finally, whether the informers should have been summoned to testify, we are aware of the fact that their protection springs from public interest considerations, because were they to testify, their future usefulness in the same role could be extinguished or their effectiveness in their work considerably impaired!

However, all the same, in the circumstances, we think there was no need for any additional witnesses to testify since the trial court had already found that the evidence of PW1 was credible and sufficient having identified the Appellant at an identification parade.....”

22. In the present case, there was evidence of PW8, the investigating officer that after the short release of one of the Appellant's co -accused, one of the police informants whose name PW8 disclosed was killed. In this regard, it is crucial that the identity of such informants be kept privileged. The necessity of their being called to testify can only arise where there are gaps in the prosecution evidence and that it is only the information or evidence of such informers that can clear the innocence of an accused person. In the present case, the court's view is that the firm and unshaken evidence of the complainant was sufficient and there was no further need to call the informants whose information had led to the arrest of the Appellant.

23. As regards the defence of the Appellant, the trial court found that the Appellant had not challenged the evidence of the complainant. The Appellant dwelt only on how he was arrested. He did not explain or contradict the evidence of the complainant that on the night of 6th November 2011, he was one of those who attacked the complainant at Kiereni trading centre. I see no reason to fault the trial court in rejecting the Appellant's defence.

24. In the premises, I find that the prosecution did prove its case against the Appellant to the required standard and that the conviction was safe and the sentence merited. I find the appeal to be without merit and dismiss the same.

Dated and delivered at Chuka this 21st day of April, 2016

A.MABEYA

JUDGE