



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 96 of 2014

RICHARD MUTISO KALOKI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 4884 of 2013 delivered by Hon. E.K.Nyutu, Ag. PM on 7th July,2014.)

JUDGMENT

BACKGROUND.

The Appellant, Richard Mutiso Kaloki, was charged for committing the offence of robbery contrary to Section 296(1) of the Penal Code. The particulars of the offence were that on 12th October, 2013, at Umoja Estate Zone Eight, in Nairobi within Nairobi County, jointly with another not before court robbed Christine Mwikali Wambua of her property, namely; Kshs. 4000/- in cash and mobile phone make Bird valued at Kshs. 4,000/-.

The Appellant was found guilty for the offence charged and sentenced to 7 years imprisonment. Being dissatisfied by the decision of the trial court he preferred this appeal. He has raised four grounds of appeal which can be consolidated into one, namely that he was not properly identified.

SUBMISSIONS.

The Appellant filed written submissions as his primary way of canvassing the appeal while the State, represented by learned State Counsel Ms. Sigei gave oral submissions.

The Appellant submitted that the complainant did not get a sufficient look at the assailant as to make a positive identification given the short period between the time the second man greeted the first man and the time she was attacked. He submitted that PW1 identified him as the second man who arrived at the scene. This man was at the scene for a very short time before the theft took place. As such, his identification could not be credible as PW1 did not have sufficient time to look at the assailant. He thus submitted that he was a case of mistaken identity in the circumstances.

Ms. Sigei submitted that although the Appellant was charged with robbery contrary to Section 296(1) the facts of the case proved robbery with violence contrary to Section 296(2). She stated that there was no mistaken identity and the Appellant was one of the people who attacked the complainant. She further

submitted that PW2 as a member of the public had the powers to arrest the Appellant and had therefore not acted against the law in effecting arrest against the Appellant. She urged that the appeal to be dismissed and the conviction upheld.

EVIDENCE.

This being a first appeal, the court is under an obligation to weigh the evidence as a whole and reach its own independent conclusions. See the case of **Njoroge v Republic(1987)KLR 19.**

The prosecution case was that the Appellant was approached by a man seeking directions. As she tried to explain to the man that she did not know the place he was enquiring about another man approached them. He greeted the man seeking directions. They seemed to know each other. They suddenly attacked the lady dispossessing her of her money and mobile phone. The next day as she was walking around the same area she saw the man again and went up to him and asked him why he had robbed her. The man remained mum and she moved on. She informed her husband of the sighting. The next day as she took her daughter to school she saw the men again and this time she called her husband who arrived and effected arrest on one of them whilst the other escaped. They took the man to Buruburu Police Station after which he was charged. .

PW 1, CHRISTINE MWIKALI testified that she was a resident of Kayole and worked at a salon at Umoja Innercore. She recalled that on 12th October 2013 at about 10:30 am she was heading to work and while walking near Manyanja road she came across a man. The man asked her for directions to a school in Kasarani. She informed the man that she did not know the school. She continued walking but another man joined the first man. The men shook hands with some familiarity. She identified the Appellant as the second man. The two men suddenly attacked her by throwing her to the ground. They then took her phone and money and then ran away. She borrowed a mobile phone and called her husband to inform him of the incident. On the following day, 13th October, 2013 she went and reported the matter to the police. Police advised her to be on the look-out for the perpetrators and to inform them if she saw them. On 15th October, 2013 she saw the Appellant as she was taking her child to school. She quickly notified her husband and he came to the place where the perpetrators were. With the help of members of the public the Appellant was arrested but his accomplice escaped. She never recovered her money and mobile phone.

PW2, KALEKEZI ETIENI, testified that he lived in Kayole and that the complainant, PW1, was his wife. He entirely corroborated the evidence of PW1. He added that the Appellant was not known to him prior to the date of his arrest.

PW3, SGT JANE SASI attached to the Buruburu police station was the investigating officer. She recalled that she was on duty on 16th October, 2013 when a report of robbery with violence was made by Christine Mwikali, PW1. She reported that she had been robbed of her phone and money. She also informed her that the suspect had been arrested and was in their cells having been arrested on 15th October, 2013. She recorded the witness statements and charged the Appellant. She said it was police officers from Soweto Police Station who arrested him.

The prosecution closed its case and the court being satisfied that a prima facie case had been established put the defendant on his defence. The Appellant chose to give an unsworn statement and called no witnesses in support of his defence. He stated that on 15th October, 2013 he was on his way to Kasarani International Sports Center and while heading to the bus stage he met 3 people whom he did not know. One of the men said that he had wronged his wife which was not true. He told him to go to the police station to report the matter. They went to Soweto Police Station and he explained to the police the incident and the husband also made a report. The husband was told to summon his wife who came and said she had been robbed. PW1 also recorded her statement. He was charged and later on the complainant came and told him to pay her so she could drop the case. He refused as he was innocent. He said that the evidence of the complainant was false since she said she had been robbed at Umoja Zone 2 at Manyanja Road and evidence was never corroborated. The investigating officer contradicted her evidence by saying

that the offence occurred at Umoja Innercore. He said that the person who arrested him did not know him and therefore it was a case of mistaken identity.

DETERMINATION.

The main issue for determination is whether the Appellant was positively identified as the person who robbed PW1. This was a case of a single identifying witness. The evidence of such a witness must be treated with caution so as to assure the court that an accused was not mistaken for somebody else. In so doing, the court must be satisfied that the conditions for identification were favorable and pointed only to the guilt of the accused. See **Abdallah bin Wendo & Sheh Bin Mwambere v Reginam** in which it was held that;

“Although subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such a witness respecting the identification, especially when it is known that the conditions favouring a correct identification are difficult. In such situations other evidence, circumstantial or direct, pointing to guilt is needed,

The Appellant further contended that he was mistakenly identified. The case of **R v Turnbull and others[1976] 3 All ER** citing **Nzaro v Republic (1991) 2 KAR 212** gives conditions that should be satisfied in upholding the evidence of identification where the accused claims he was mistakenly identified.

“First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent observation to the police? Was there any material discrepancy between the description to the accused given to the police by the witness when first seen by them and his actual appearance.”

This court has considered the evidence and it is clear that the complainant did not have sufficient time to observe the assailant who was described as the Appellant. She was walking away from the man who was seeking direction when the man she contended was the Appellant walked up to the first man and they shook hands. They told her to hang on and then attacked her. This does not appear to be a long time sufficient to have properly identified the Appellant. The issue is further complicated by the fact that PW1 made a statement to the police after the Appellant's arrest. Therefore, reliance on a description of the Appellant based on what she told the police after the arrest of the Appellant was tainted as the description was bound to match that of the Appellant whom she had already seen.

On circumstances leading to the arrest of the Appellant, PW1 testified that she saw the Appellant while taking her child to school. She then notified her husband who came to the place where she was. PW2 stated that PW1 returned home with the child and told him she had seen the two men and they rushed to the scene, arrested the Appellant and took him to the police station. However, according to the Appellant

in his unsworn statement PW2 took him to Soweto Police Station and when they got there they had to summon the complainant to come and make a statement. The question that begs is; If the complainant was with the husband when he made the arrest would she not logically escort them(Appellant and PW2) to the police station as the complainant? This did not happen. It appears PW1 left it to PW2 to report the robbery which was unprocedural. This account of events then vindicates the fact on record that PW1 recorded her statement after the Appellant was arrested which then may have aided her to identify him. I am therefore, not satisfied beyond a reasonable doubt that the Appellant perpetrated the crime.

On the whole having re-evaluated the evidence on record it is my view that on ground of lack of sufficient evidence on identification, this appeal must succeed. Although PW1 was robbed, it was not established to the satisfaction of this court that one of the perpetrators was the Appellant. Indeed the ingredients proved were those of the offence of robbery with violence as the robbers used force against PW1, they were more than one in number and did steal from her. But doubt is cast on whether the Appellant was involved in the robbery.

In the result, I quash the conviction, set aside the sentence and order that the Appellant be and is hereby set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi this 26th July, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.
2. Miss Akuja for the Respondent.