



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 277 of 2012**

**DUNCAN MAYODI ASENJI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court Kibera*

*Cr. Case No. 4378 of 2009 delivered by Hon. Hon. Wachira, PM, dated 24th October, 2012).*

**JUDGMENT**

**BACKGROUND**

Duncan Mayodi Asenji, the Appellant herein was charged alongside others with committing the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on 25<sup>th</sup> September 2009, in the company of his co-accused, robbed Ester Linda, while armed with dangerous weapons namely pistols and whips, of items valued at Kshs. 30,800/=, namely; a television set make LG, a DVD player make LG, Sony radio, mobile phone make Nokia 1600 and Kshs. 7,000/= cash, and at or immediately before or immediately after the robbery threatened to use actual force against the complainant.

After the trial, the Appellant's co-accused were acquitted but the Appellant was convicted and sentenced to death. He was dissatisfied with the conviction and he lodged the instant appeal. In his Amended Grounds of Appeal filed on 14<sup>th</sup> November, 2016, he was dissatisfied that he was convicted when his identification was not proper. He faulted the learned trial magistrate for finding that his identification was by recognition which in any event was not reliable. He was further dissatisfied that his conviction was based on mere suspicion, that the evidence of the prosecution was not corroborated, that the evidence adduced varied with the charge, that the learned magistrate relied on extraneous issues in convicting him, that his mode of arrest was suspicious and that his defence was not considered.

**SUBMISSIONS**

The Appellant filed written submissions dated 14<sup>th</sup> November, 2016. He challenged his identification which he stated was not full proof. His submission was that although the complainant said she knew him, she did not tell the police her name or give his description at the time of the robbery. Furthermore, although the offence took place on 25<sup>th</sup> September, 2009, at about 11.00 p.m., it was not until the following day at 3.00 p.m. that she recorded her statement. He also challenged his conviction on evidence of a single identifying witness which he noted was dangerous in circumstances of difficult identification. He also challenged the manner in which he was arrested as it was before the complainant recorded her statement. He also took issue with the charge sheet which he submitted was defective. This was in view of the fact that although the complainant was cited in the charge sheet, the evidence did not prove that she lost the items named therein. Finally, he submitted that his defence was not considered in the learned magistrate's judgment. Amongst the cases cited were **REPUBLIC VS TURNBULL [1976] ALL ER, 549, FRANCIS KARIUKI NJIRU & 7 OTHERS VS REPUBLIC [2001] CRIMINAL APPEAL NO. 6 OF 2001, TEREKALI & OTHERS VS REPUBLIC [1952] EACA, 182-186, YONGO VS REP [1983] KLR AND MAITANYI VS REP [1986] KLR 198**. He urged that the appeal be allowed since the prosecution did not prove its case beyond a reasonable doubt.

On behalf of the Respondent, learned State Counsel, Mr. Ongige opposed the appeal. He submitted that the Appellant was identified by recognition in unconducive circumstances. He submitted that when the robbers struck, they found the complainant breastfeeding her child and the electric lights were on. She was able to see how the robbers were armed and the Appellant was specifically armed with a pistol. On the issue of defective charge sheet he submitted that the same was properly drafted and conformed to Section 134 of the Criminal Procedure Code. He also submitted that the Appellant's defence was properly considered but was dismissed as lacking substance. He was of the view

that although the complainant's evidence was not corroborated, that did not make it untrustworthy as she was robbed when she was alone in the house. He urged that the appeal be dismissed.

### **EVIDENCE.**

As a first appellate court, this court must re-analyze the evidence on record and come up with its conclusions but have regard to the fact that it has neither seen nor heard the witnesses. **See Njoroge v Republic (1987) KLR, 19.**

The summary of prosecution's evidence is hinged on the complainant's (**PW1**). She was in her house on the fateful night at about 2.00 a.m. breastfeeding her child. She heard a loud bang on the door and on checking out, recognized the 2<sup>nd</sup> accused Geoffrey Oyanga holding a sword. The accused lived in the same plot with her. She identified him with the help of electric light which was still on. The 2<sup>nd</sup> accused was followed by the Appellant who was holding a pistol. He too lived with her in the same plot and was able to identify him. He placed the pistol on her head and ordered her to lie down which she obliged. Other robbers also set in the house but she was not able to see them as she was already lying down. The robbers took away a radio, TV set, a mobile phone and a deck. She also lost cash. Kshs. 7,000/=. She raised an alarm but reported the incident on the following morning at High Rise AP Camp and thereafter at Kilimani Police Station. At about 5.00 p.m. she called police officer after spotting the Appellant and the 2<sup>nd</sup> Accused. The police searched their house from which they recovered a pistol, a knife and a whip. In total, PW1 lost property worth Kshs. 31,000/=.

**PW2, John Omeri Ayange** the husband to PW1 was not in the house at the time of the robbery. The report was made to him after the robbery. He confirmed that both the Appellant and the 2<sup>nd</sup> accused lived in the same plot with them and that a pistol, penknife and a whip were recovered in their house. **PW3, Douglas Musiyu** was a neighbor to PW1 and he recalled PW1 raising an alarm on the night of the robbery. He learnt later that the Appellant and his co-accused had been arrested and a gun and whip recovered.

**PW4, AP CPL Daniel Ndubi, PW5, PC Felix Muteti and PW6, Senior Sergeant Morris Ndiema** participated in the recovery of the robbery weapons and the arrest of the Appellant and his co-accused. PW4 testified that a report of the robbery was made by PW1 on 25<sup>th</sup> September, 2009 at High Rise AP post where he worked. He was accompanied by PW6 and an AP officer John Kiplagat to the house of the Appellant where the knife, pistol and whip were recovered behind a sofa set. He also arrested the Appellant. PW5 was requested by his senior to reinforce PW4 APC Ndodi and APC Kiplagat in the arrest of the Appellant and his co-accused. PW6 on the other hand corroborated the evidence of PW4 and 5.

At the close of the prosecution case, the trial court ruled that the Appellant had a case to answer and was put on his defence. He gave a sworn statement of defence in which he denied being involved in the robbery. He testified that he worked as an office messenger at a project called Turning Point. On 25<sup>th</sup> September, 2009, he went to work as usual and returned home in the evening. It was while he was at home when some people went to his house and requested to be shown the house of Mayodi. He led them to his house. He was ordered to lie on the ground as they searched the house. After the search, he was ordered to look behind the sofa set where a toy pistol was. He was thereafter escorted to a police station where other people were also brought and charged together with him. He testified that the sofa set from which the pistol was recovered did not belong to him but to a former tenant one Olade. Furthermore, he could not have stayed within the plot where the robbery took place if he knew he had participated in it. He stated that he was framed for the robbery.

### **DETERMINATION.**

After summarizing the evidence and the respective submissions, I find that the issues for determination are whether the case was proved beyond a reasonable doubt and whether the Appellant's defence was considered. On proof of the case, the first issue to interrogate is the identification of the Appellant. According to PW1, she knew the Appellant and the 2<sup>nd</sup> accused who lived in her plot. As to the residence of the Appellant, there is no doubt that he lived in the same plot with PW1. The question that begs is whether she identified him as one of the attackers. She made her report on the following morning at High Rise AP Camp. Thereafter, she was given a telephone number which she would call if she saw her assailants. That is how at 5.00 p.m. she called the police and informed them that she had spotted the Appellant and the 2<sup>nd</sup> accused. It would be expected in the circumstances, that having known the Appellant by name, she gave his name and his physical description to the person she reported to. From the evidence, this person was PW4. While testifying, he did not state that PW1 gave the name of the persons who attacked her. She also did not describe the physical appearances of the attackers. That begs the question of how she later identified the Appellant as one of her assailants.

It is trite to note that PW1 recorded her statement at 5.00 p.m. which was approximately 12 hours after the robbery. Incidentally, the statement was recorded after the arrest of the Appellant. It is in the statement that she indicated who robbed her. The said statement was produced as defence Exhibit No. 1. It was specific that her assailants were the Appellant (Dan) and his friend. This turn of events ought to have raised an eye brow in the eyes of the learned trial magistrate. I say so because it was only after the arrest that PW1 was able to state emphatically who her assailants were. If she knew them, she ought to have given their names or their physical appearances or other means by which she recognized them to PW4. That would have given an assurance to the arresting officers that the persons that they were arresting were indeed the persons involved in the robbery. I find guidance in the case of **TEKERALI VS SON OF KORONGOZI & OTHERS V. REGINA [1952] EACA 259**, in which the Court of Appeal held that:

**“Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishments or the deliberately made-up case. Truth will often out in a first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.”**

From the foregoing, I am more inclined to believe in the defence of the Appellant. His case was that when the police were conducting the search, he was ordered to lie down, and it is only after the search was complete he was asked to look at what had been recovered. Moreover, after the police made a search, they did not recover a pistol immediately safe for the knife and the whip. As the arresting officers walked out of the compound, PW6 testified that they were called by neighbours back and informed that there was a gun in the house of the Appellant.

That is when they returned in the house and recovered the pistol. This sharply contrasted the evidence of PW1, 4 and 5 to the effect that the pistol was recovered instantly during the search. It follows then there is doubt as to whether the pistol was in the Appellant's house or was planted on him so as to frame a charge against him. That doubt must definitely be resolved in favour of the Appellant.

It must be emphasized that the burden of proving a case always lies with the prosecution. It never can shift to the accused person to prove his innocence. Besides, the degree of proof is beyond a reasonable doubt. See **Miller v Minister for Pensions [1947] 2 All ER 372**, in which the court delivered itself as follows:

**“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remove possibility in his favour which “can be dismissed with the sentence “of course it is possible, but not in the least probable”, the case is proved beyond reasonable doubt, but nothing short of that will suffice.**

Finally, is the issue of whether the Appellant's defence was considered. I have looked at the judgment of the learned trial magistrate and it is clear that she considered the Appellant's defence but dismissed it for want of credibility.

On the whole, I find that the prosecution did not prove its case beyond a reasonable doubt. The appeal must succeed and the same is allowed. I quash the conviction, set aside the death penalty and order that the Appellant be and is hereby forthwith set free unless otherwise lawfully held. It is so ordered.

**Dated and Delivered at Nairobi this 13<sup>th</sup> December, 2016.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Appellant present in person.*
2. *M/s Sigei h/b for M/s Aluda for the Respondent.*