



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CRIMINAL DIVISION

CRIMINAL APPEAL NO. 643 OF 2006

PAUL CHEGE NGUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 6963 of 2003 Republic Vs Pau lChege Ngugiin the Chief Magistrate’s Court at Kibera by Mrs. Wasilwa Principle Magistrate dated 25th October 2006)

JUDGMENT

The appellant who was then the accused was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. Particulars were that on the 21st day of September, 2002 at Kandisi village, Ongata Rongai Township in Kajiado District with the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely pistols and swords, robbed Paul Omenyi of his wrist watch make omega valued at Ksh. 600/= and cash Ksh. 350/=, all valued at Ksh. 950/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Paul Omenyi.

He was convicted and sentenced to suffer death. Upon being aggrieved and dissatisfied with both the conviction and sentence, he preferred to appeal.

On the date of the hearing, the appellant submitted that he wished to rely on the Supplementary Grounds of Appeal dated 25th May, 2015. In summary, he was dissatisfied that the trial magistrate erred in law and fact in failing to evaluate the entire evidence afresh, that the evidence on record regarding his identification/recognition was of poor quality and that the trial magistrate erred in law and in fact by acting upon inconsistent, contradictory and unreliable evidence. In his written submissions, he argued the grounds severally. On the issue of identification, he argued that the circumstances of identification were not conducive particularly so because the complainant was attacked suddenly. He further submitted that the complainant did not mention his name or description in the first report as was evidenced by the Occurrence Book shown to the trial court. He also submitted that after his arrest he was not found with anything linking him to the offence.

The prosecution opposed the appeal. Counsel for the prosecution Ms. Aluda stated that this was a case of recognition by a single witness. PW1 was attacked by people who beat him and who, having had toy pistols claimed to be police officers. PW6 supported his evidence. PW1 was taken to the bush but he managed to untie himself and reported to the police on the following day. He reported that Chege, his neighbour who used to do casual jobs was responsible. The said Chege went underground for one year. He was arrested by PW3 and PW4 when he reappeared. Counsel further argued that there was sufficient

moon light and prayed that the appeal be dismissed.

This being the first appellate court, it is our duty to re-evaluate the evidence and come up with independent conclusions. See the cases of **PANDYA V REPUBLIC [1957] E.A 336, RUWULLA V REPUBLIC [1957] EA 570, NJOROGI V REPUBLIC [1987] KLR 19, OKENO V REPUBLIC [1972 EA 32, KARUIKI KARANJA V REPUBLIC [1986] KLR 109.**

The trial commenced on 27th October 2003. After three witnesses testified a new magistrate took over the conduct of the trial. It was heard *de novo* from 23rd December, 2004. After five witnesses testified another magistrate took over the conduct of the trial and on 15th May 2006 the trial commenced *de novo* once again. Six witnesses were called by the prosecution.

PW1, Administration Police Sergeant Omenyi testified that on 21/9/2002 he left work and took a matatu to go to Ongata Rongai where he was staying. He alighted and took the route going to Kandisi. As he was about to cross the river, he saw 4 people on the other side of the road who were speaking Kikuyu. He crossed the river and reached them where he found a person seated down. He was also ordered to sit down by the four people who said they were police officers. PW1 noticed that they had a toy pistol. They beat him and demanded for money. They robbed him of Ksh.350/- and a watch worth Ksh.600/-. They took PW1 and the other man to the bush and tied him with the other man who he had found sitting down with a rope. PW1 and the other man managed to untie themselves and escaped. The next day, he reported the matter to Ongata Rongai Police Station and also got treatment. He stated that the suspect was later arrested and that he was the appellant by the name Chege Paul. He stated that there was enough moonlight which enabled him to identify the appellant by his appearance.

PW2, Joseph Ganita, then a retired Assistant Chief of Limuli Sub- Location testified that on 22/9/2002 at 8:30 a.m. PW1 went to his home with his child and told him that he was robbed on 21/9/2002 and that one of the robbers was Chege. PW1 had an injured leg and a torn trouser. He accompanied PW1 to get treatment. He then went to the police station with PW1 where he was issued a P3 form. The Police told him to report if he happened to see the appellant. In September 2003, PW1 saw the appellant with two others. He called the police who arrested the appellant.

PW3, Police Constable Andrew Lumulu formerly of Ongata Police Station testified that on the 26/4/2003 at 10:00 am, while at the crime office with PC John Kirap, he received information that three strangers were sitting along Kandazi Road at a kiosk and that they were suspected to be the ones involved in a robbery that took place on Muiga Road on 21/4/2002. He went with PC Kairapat to the scene and found three suspects, among them the appellant. He arrested them, took them to Ongata Rongai Police Station and booked them as robbery suspects.

PW4, Police Constable William Mwangi recalled that he was at the Police Station when Inspector William called and informed him that there were 3 men who had been arrested by police having been involved in a robbery. He asked PW4 to investigate the case and charge them. He recorded the statement of the complainant who informed him that the robbers attacked him and that after some time one of them who is the appellant was spotted in the company of two others and was arrested. The two men who were arrested with the appellant were vindicated but the appellant was charged.

PW5, Stanley Moses Kinuthia testified that on 21/9/2002, he was coming from Kikuyu. As he crossed Kandisi road he saw people walking towards him. When they met, the men who claimed to be police officers ordered him to sit down. Two of the men checked his pockets and took his cap. He then saw another person walking towards them. Four men then emerged from the bush and started questioning the other man. They beat him and asked him for money which he gave. The two who were with PW5 had a pistol and they threatened to kill him. One of the robbers removed PW5's shoe lace and tied him together with the other man and ordered them to lie in the bushes. They later untied themselves and each went his way. He testified that he did not know the robbers and that they wore black clothes and caps which hid their faces. On the following morning the other person told him that he had identified one of the robbers.

PW6, Doctor Z. Kamau who worked with police at Nairobi Area examined PW1 on 15th October 2002

on claims of having been injured. He was tender on the upper part of the right scapula while the right knee was swollen and had a healing wound. He also had a tender left knee. The injuries were 24 days old and were inflicted by a blunt object.

The appellant gave a sworn statement of defence in which he recalled that on 26/1/2002, he was at his kiosk when he was confronted by two people who were police officers. They told him that the chief had asked them to have him arrested. He was arrested with two other boys, interrogated and asked if he had robbed a police man. He denied the allegations. As the men interrogated him, another man who claimed to be the complainant arrived. The complainant identified the appellant as the assailant who had robbed him in the company of two other men. He was arrested and detained in police custody for two days while the other two suspects were released. He was thereafter then charged.

Having considered the evidence on record and the submissions by the appellant and those by the prosecution, we shall begin by addressing ourselves to the issue of identification.

In the present case, only PW1 testified to have identified the appellant and that he identified him by his appearance. PW5 who was robbed the same night with PW1 stated that he did not know any of the robbers. He further stated that the robbers were wearing head marvins and caps which hid their faces. The incident took place at night but PW1 testified that on the material date, there was moonlight and that he was able to identify him by his appearance.

We are minded that the evidence of a single identifying witness should be evaluated with due caution. Considering the circumstances of the case, being that it was night time, and the appellant's face was hidden, we think there was a possibility of mistaken identity. The fact that PW1 claimed to have identified the appellant only by his appearance but failed to specify the appearance itself, leads us to conclude that the appellant could have been a victim of mere suspicions.

The Court of Appeal at Nairobi in **John Muriithi Nyagah V Republic Criminal Appeal No. 201 of 2007** stated that **“evidence of a single identifying witness especially where the conditions for positive identification are difficult must be tested with greatest care especially where the life of an accused person is at stake.”**

The court went on to state that **“and the predecessor of this court in the case of Abdala Bin Wendo And Another V R [1953] EACA 166, held that what is needed in such circumstances is “other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, though based on single testimony of a single witness, can safely be accepted as free from the possibility of error.”**

Besides, PW1 did not give the description of his assailant when he reported that matter to the police. In his cross examination he indicated that he knew the appellant as one of the area residents. It was therefore important that he described the physical appearance by identifying significant features of his attacker. This would have convinced the arresting officers that the person they arrested was none other than the attacker himself. That then would have been identification by recognition which is more convincing and assuring. Given the difficult circumstances of identification and the failure by the complainant to describe his attacker, doubts arise as to whether the person who was arrested is indeed the person who attacked the complainant.

In the case of **Rv Turnbull [1989] All ER 549** Lord Widgery CJ pointed out **“recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made...all these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger.”**

Referring to the judgment of the trial court, the learned trial magistrate noted that PW1 stated that he mentioned the accused's name to the police. She confirmed that that was not the case since the O.B

extract which was brought to court did not prove so. The judgment read;

“OB extract however does not mention accused’s name.”

This fact, in addition to the contrast in the testimonies of PW1 and PW5 with regard to what happened at the scene further casts doubts in our mind as to whether indeed the appellant was one of the assailants. According to PW1, himself and PW5 were tied up with a rope while seated down. PW5 on the other hand testified that one of the robbers removed his (PW5) shoe lace and tied him up with the other man on his toes. That we think is a material contradiction that may not be wished away.

We have no doubt that a robbery against PW1 was committed as he lost his personal belongings in the process. He was also robbed by a gang of more than one person and was injured in the process. But as noted in the foregoing we are not convinced that the evidence on record links the appellant to the offence. We shall give him a benefit of doubt.

In the end, we quash the conviction and set aside the death sentence. We order that he be and is hereby set free unless otherwise lawfully held.

DATED and DELIVERED at NAIROBI this 27th day of July, 2015

L.K. KIMARU

JUDGE

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Appellant in person**
- 2. M/S Aluda for the respondent**