



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 239 OF 2010

PETER KAMAU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Honourable W. K. Korir Principal Magistrate in Nakuru Criminal Case No. 3630 of 2009)

JUDGMENT

1. The Appellant was charged before the lower court with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.
2. He was convicted of the offence and sentenced to death.
3. Aggrieved by the finding of the court, he preferred this appeal and listed the following grounds in his petition of appeal:

GROUND OF APPEAL

1. That the trial magistrate erred in law and fact in convicting the Appellant on the basis of hearsay evidence
 2. That the trial court erred in law and fact in convicting the Appellant whereas the stolen items were not found in his possession
 3. That the trial Magistrate erred in law and fact in convicting the Appellant in the absence of an identification parade
 4. That the trial Magistrate erred in law and fact in rejecting his alibi defence
5. At the hearing of the appeal, the appellant relied on his written submissions and the Prosecution Counsel made oral submissions which we have taken into consideration.

FACTS

6. The prosecution's case was that on 7/5/2009, PW1 Humphrey Matoke Mukono who worked for an Gap Marketing Agency was at Pivot Hotel round about. He had just escorted a visitor to a nearby hotel and decided to head home. At the roundabout, he hailed a *bodaboda* which was being ridden by the Appellant to take him to his house in Langa Langa Nakuru Town. On reaching a certain area they took a murrum road and went to an open ground where motor cyclists are trained. They had stopped as the motor cycle was about to fall when suddenly they were joined by 2 other cyclists. One of the cyclists drew a panga and hit the complainant on the back. The robbers took the complainant's wallet which had Kshs.

3,600/= and his phone make Nokia E61, serial number. After the assault, the robbers went away leaving the complainant at the scene. He was rescued by another motor cyclist about 5 minutes later who took him back to Pivot Hotel.

7. The Complainant reported the matter to the police the following day and informed them that the phone had a tracker. PW1 testified that he saw the man who was carrying him as he had talked to him for about 4 minutes before leaving the roundabout and could see using the light from Manyatta Hotel which was nearby. He however could not recall the clothes that he was wearing and did not give his description to the police, for they did not ask him.

8. On 20/7/2009, PW1 was called to the CID Office by Officer Ndungu and informed that they had received information from Safaricom that since the robbery, 3 SIM cards had been used on the phone. The Police called one of the numbers and summoned the owner of the same to the CID office. This man, did not have the complainant's phone in his possession. The complainant had a phone similar to the one that had been stolen from him earlier and when he showed it to the man he confirmed that the same had been given to him by a friend for a day. He offered to take the police and the complainant to the friend.

9. PW1, PW2 No. 77515 and CPL Ndungu proceeded to Race Course. On reaching there, they found Maingi who was in possession of the phone that had been stolen on the night of the robbery. The complainant was able to identify this phone by the serial number which he had given the police earlier and was confirmed by court upon pressing number X=60=. There was also a special software called Eleader that had been installed in the phone, which could only be accessed using the password Jeremy PW1's name and this was also demonstrated before court. Maingi however denied that the phone was his and alleged that the same had been given to him by a friend in exchange of Kshs. 15,000/= to enable the friend take his wife to hospital. He then led the police to the location of the man, Peter Mwangi who had given him the phone at Embu Street. On seeing the police, Peter Mwangi attempted to flee but was apprehended. The complainant who was with the police at the time of arrest identified Peter Mwangi, the Appellant herein, as one of the robbers who had attacked him on the fateful night. He was then arrested and charged in court with the offence of robbery with violence. None of the complainant's stolen items were found in the possession of the Appellant.

10. The investigating officer, PW3 confirmed the testimony of PW1 and PW2 and further testified that Maingi informed him that he had been given the phone by the Appellant on 8/05/2009 a day after the robbery. He took Maingi's statement and treated him as a witness.

11. The trial magistrate found that the Appellant had a case to answer and placed him on his defence. He gave unsworn statement and denied having committed the offence alleging that one of the officers who had arrested him was in fact suspected of having stolen a phone and had been locked up for 5 days before being released on bribing the officers.

ISSUES FOR DETERMINATION

12. upon consideration of the appellants written submissions and oral submissions made by the prosecuting Counsel, we find the following issues for determination:

1. Possession
2. Identification. Was the Appellant among those who robbed the complainant on the material night

Analysis

13. This being the first appellate court it must reconsider the evidence, evaluate it itself and draw its conclusions in order to satisfy itself that there was no failure of justice. It is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusions. We were guided by the cases of **Ngui v Republic** (1984) KLR 729 and **Okeno v Republic** (1972) E.A 32

14. The first issue relates to possession.

15. PW1, PW2 and PW3 testified that Maingi was found with the phone. Maingi who was found in possession of the complainant's phone and who alleged that the same had been given to him by the Appellant a day after the robbery, was not called to testify. The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. If the prosecution calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general rule of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution. (see **Bukenya vs. Uganda** [1972] E.A. 549)

The testimony of Maingi was crucial as he was the only one who could link the Appellant to being in possession of the stolen phone. However, failure to call him was not fatal to the conviction and the court may rely on the evidence of identification by the complainant as long as it is satisfied that it is safe to do so.

16. The next issue relates to identification. The incident occurred at night and the test for identification under unfavorable conditions and circumstances is set down in the renowned case of **Republic V Turnbull & others** (1976) E.A 32

17. Section 143 of the Evidence Act, Cap 80 provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact. Therefore a court can convict on the evidence of a single witness even in the absence of any other direct or circumstantial evidence to corroborate such testimony. This evidence however, calls for greatest care before basing a conviction upon it (see **Abdalla Bin Wendo & Another v R** (1953) 20 EACA 166, **Roria v R** [1967] EA 583 and **Kamau v R** [1975] EA 139)

18. The test which this evidence should be subjected was laid out by the Court of Appeal in **Tetu Ole Sepha vs. Republic** [2011] eKLR where it held that the court should be guided by and look at the lighting situations as well as the demeanor of the witness as he testifies on the identity of the accused person. It stated:-

“There is no rule of thumb for all situations and in our view a proper guide is to look and judge the lighting situations intelligently so as to ascertain that the identification is safe. It is sufficient for the courts to be good listeners and observers of the witnesses as they tell their stories from the standpoint of those situations and first ascertain why they say they were able to identify or recognize people, the confidence they radiate when describing the identification or recognition and the reasons for the confidence. It is on this basis that the court is able to assess the credibility of a witness or whether there exists a reasonable doubt. As long as a reasonable and intelligent approach is adopted in assessing the lighting conditions, the courts should never shy away from doing justice on the basis of it.”

19. We find after re- evaluating the evidence, the conditions were conducive to enable the complainant see and observe the appellant and enable him positively identify and recognise the appellant two months later. In this case although the robbery occurred at night, the complainant was standing just outside the gate of Manyatta hotel and there was sufficient light from the hotel. The complainant and the appellant talked outside the gate for about 4 minutes before the complainant boarded the bicycle. The appellant and the complainant then conversed all the way until they reached an open ground. This in our view was sufficient time within which the complainant could observe the Appellant. In addition, when he reported the matter to the police he told them that he clearly saw the cyclist who carried him and did not give the description of his assailants at the time of making the report because the police did not ask for the description. We agree with the trial court which found that the complainant was positive on his identification of the Appellant and do not see any reason to doubt him

FINDINGS:

20. It is our view that the evidence submitted was sufficient to convict the Appellant on identification and possession .

We find that the conviction was safe.

CONCLUSION

21. The appeal has no merit and is dismissed.

We confirm both the conviction and sentence imposed by the lower Court.

It is so ordered.

Dated, signed, and Delivered at Nakuru this 24th day of January 2014

ANYARA EMUKULE

JUDGE

L.N WAITHAKA

JUDGE

PRESENT

Mr Peter Kamau: Appellant

Mr Marete for the state/Respondent

Emmanuel Maelo: Court Assistant

ANYARA EMUKULE

JUDGE

L.N WAITHAKA

JUDGE