



REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL NO. 147 OF 2011

BETWEEN

SILAS GITONGA SIMON APPELLANT

AND

REPUBLIC OF KENYA RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 387 of 2011 at Chief Magistrate's Court at Embu, Hon. Lucy Mbugua SPM delivered on 20th September 2012)

JUDGMENT

1. The appellant, **SILAS GITONGA SIMON**, was charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the offence were that on the 14th February 2011 at Nembure Village, Nembure sub-location, Gaturi South location in Embu within Embu County, the appellant jointly with others not before court while armed with dangerous weapons namely *rungus* and metal bars robbed one GKJ of money Kshs. 250/- and at or immediately before or immediately after the time of such robbery used actual violence against the said GKJ.
2. The prosecution called six witnesses. The complainant, PW1 testified that on 14th February 2011 at about 4.00 am, she was woken up by a bang at her door. The door was hit a second time and flung open. Three men entered and when she screamed, she was hit on the head with a metal bar and ordered to hand over the proceeds of sale of macadamia nuts. She called PW2 to get the money from her bag. PW2 only got Kshs. 250/- which she gave to the men.
3. She recounted that she identified one of the three men as the appellant by his voice as he kept demanding money. She added that she saw the appellant, '*Onesmus*' using moonlight since the window curtain was clear. She stated that the appellant had the same clothes he had on at the time she sold her macadamia nuts. She also stated that she had sold him macadamia nuts on several occasions. After the men left, she was taken to Embu Provincial General Hospital by a neighbour. She was later issued with a P3 form, examined by a doctor and recorded a statement with the police.
4. Upon cross-examination by the appellant, PW 1 stated the light was off and she only identified him by the moonlight through the window whose curtain was undrawn. She also stated that the appellant wore a red jacket.
5. PW 2, PW 1's granddaughter, testified that on the same day at 3.00 am, she heard the door to the house being hit whereupon she rushed to PW1's room and found her awake. They switched on the light.

The door was hit again and it flung open. Three men including the appellant, whom she recognised, entered into the house and ordered them to switch off the light and they complied. She testified that the assailants demanded the proceeds of sale of macadamia nuts. As she rushed back to her room, she saw PW 1 being pushed to her room. Shortly thereafter PW 1 called her and asked her to get Kshs.250/- from her bag. The robbers demanded more money but they left as there was none. She stated that PW1 was hit and injured on the head. PW 2 stated that she knew the appellant as *Gitonga* and he wore a red jacket which she identified in court.

6. When cross-examined by the appellant, PW 2 she switched on the lights after hearing the first bang. She stated that she was in sitting room with PW 1 when she switched on the lights and that when the door sprung open the lights were on. She also confirmed she knew the appellant for over a year as he bought nuts from them. She also stated that she heard that a suspect known as *Gitonga* had been lynched around the same time.

7. PW3 and PW4 gave an account of how they arrested the appellant. They stated that they received a report on 14th February 2011 that PW1 had been robbed at her home by someone known to her, the appellant. They proceeded to the appellant's home where they found him. He was arrested and taken to Nembure AP Post then to Embu Police Station. A red jacket was recovered from the appellant at the time of arrest. PW 4 stated that the jacket had blood stains. PW 3 stated that he learnt that a suspect *Gitonga* had been identified at the scene. After making inquiries they were shown the appellant's home. He was arrested and the jacket he wore recovered. In cross-examination he stated that PW 2, in her statement to the police, stated that the assailant wore a red jacket.

8. PW5, a doctor from Embu Provincial General Hospital, testified that PW1 who he examined suffered a cut wound scar on the head which had injured margin and stitch marks and swollen tender right hand below the elbow. He concluded that the injuries had been caused by a blunt object. He produced the P3 form.

9. PW6, the investigating officer, testified that he visited the PW1's house and confirmed that the door to her house had been forced open. He recorded statements and issued PW1 with a P3 form. He was given the jacket by PW 3 which was identified as the jacket the appellant wore at the time of the robbery. He stated that he investigated the matter and charged the appellant. In cross-examination he stated that he was aware that a person known as *Gitonga* was lynched in the neighbourhood.

10. The appellant gave a sworn testimony. He denied committing the offence. He stated that on 14th February 2011 at 5.00 am when he was at his house asleep, the police came to his house, interrogated him and searched his house then arrested him. He was taken to Nembure AP Post then to Manyatta. The appellant denied knowing PW1 and PW2 before or that PW 1 sold macadamia nuts to him. He contended that he was booked vide OB 17/14/2/2011 before the report of robbery was made and that OB 19/14/2/2011 shows that PW1 reported to the police while he was in custody. He also denied ownership of the red jacket.

11. The learned trial magistrate considered the evidence before her and came to the conclusion that the appellant was one of those who robbed PW1 on the material day. Upon conviction, the appellant was sentenced to life imprisonment.

12. Being dissatisfied by the conviction and sentence, the appellant filed this appeal supported by written submissions. He attacked the judgment and conviction on three broad grounds; that he was not properly identified, that the prosecution evidence was contradictory and that his defence was not considered by the trial court.

13. The appellant submitted that although PW1 and PW2 claimed to have identified him, the conditions were not conducive for positive identification. He contended further that PW1 testified that she used to sell nuts to him yet no receipts were produced to prove that fact. He argued that PW1 did not identify him since she referred to the robber that she knew as '*Onesmus*'. The appellant submitted further that there was doubt as to whether he was the '*Gitonga*' that robbed PW1 considering that there was a '*Gitonga*'

that had been lynched for robbery in the neighbourhood and attributed his arrest to mistaken identity. He also submitted that no identification parade was carried out to identify him. He relied on the cases of; **Stephen Kaveta and 2 Others v Republic [1987] eKLR**, **John Siro Kalume v Republic C.A. No 41 of 1998 (Unreported)** and **Suleiman Juma alias Tom v Republic [2003] eKLR**.

14. Ms Ingahidzu, learned counsel for the State, opposed the appeal. She submitted that PW1's house was forcefully broken into and she was injured during the attack. That PW1 positively identified and recognized the appellant as the man who used to sell macadamia nuts to. She maintained that the prosecution witnesses were credible and consistent and urged the dismissal of this appeal.

15. This court sitting as the first appellate court is under a duty to examine and evaluate all the evidence adduced in the lower court afresh with a view to arriving at its own independent conclusions. In discharging that duty, the court is alive to the fact that it did not have the advantage of hearing or observing the witnesses testify (see **Okeno v Republic [1972] EA 32**).

16. The evidence that a robbery took place at where PW1's house was broken into and PW 1 injured is beyond doubt. The central issue for resolution in this appeal is whether the appellant was part of the gang that raided PW1's house and whether he was indeed identified. The Court of Appeal in **Wamunga v Republic (1989) KLR 424, 426** stated, "*where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.*" Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently (see **Abdalla bin Wendo & Another v R, [1953] 20 EACA 166** and **Maitanyi v R [1986] KLR 198**).

17. The evidence of PW1 and PW2 is critical in this regard. PW 2 stated that the electric light to the house was on just before the three robbers entered the house. They ordered PW1 and PW2 to switch off the lights. She stated that it is at the point of entry to the house that she recognised the appellant. On the other hand, PW1 evidence is that she was woken by a loud bang whereupon three men entered the room. In her evidence she does not mention the issue of the electric light but that she was able to identify the appellant through moonlight illuminating the room. Upon cross examination by the appellant, she stated, "*My house has electricity but which were off then ... I only identified the accused by the moonlight through the window whose curtains were undrawn.*" PW 2 testified that she rushed to PW 1's room and switched on the lights and that it only when they were ordered to switch off the lights by the robbers that they complied. PW 2 stated that it is at this time she identified the appellant. Upon cross-examination PW 2 stated, "*I was in the sitting room with my grandmother the complainant and when I switched on the light. The door sprung open when the lights were on.*"

18. The circumstances of identification narrated by PW 1 and PW 2 we have outlined above contradictory. Were the lights on at the time of when the robbers entered the house or were they off? If indeed both PW 1 and PW 2 were in the room at the same time when the robber broke in, we find it baffling that PW 1 would have missed such an important fact as being told to switch off the light. On the other hand, even if we were to believe that PW 1 identified the appellant. The nature of and intensity of the moonlight, whether the curtains were open or whether it was just a sliver of light, the location of the light in relation to the appellant and time taken by PW 1 to observe the appellant in that light was not proved in evidence.

19. Another area of contradiction is that PW 1 did not allude to PW 2 being with her the moment the robbers entered the room yet PW 2's testimony is that they were together in the room with lights on when they entered. In our view the prosecution evidence on the state of lighting of the room and the circumstances of identification are less than satisfactory and indeed contradictory. This evidence cannot sustain a conviction as there remains doubt as to whether the appellant was identified in those circumstances by either PW 1 or PW 2.

20. Another issue we have anxiously considered is that PW 1 identified one of the robbers as *Onesmus*. PW 2 identified him as *Silas Gitonga*. The testimony of PW 2, PW 3 and PW 6 point to the fact that there was another person known as *Gitonga* in the neighbourhood who was lynched at about the time the incident is said to have occurred. In light of the possibility that there were three different persons being referred to, it was the duty of the prosecution to prove beyond reasonable doubt that the appellant was the person known as *Onesmus* or that the person lynched could not have been the one involved in the felonious act subject of the charge or even that a person known as *Onesmus* could not have been involved in the robbery. We find and hold that there is doubt as to the identity of the appellant which doubt must be resolved in his favour.

21. The learned magistrate grounded the appellant's conviction on evidence of recognition. She relied on the evidence of PW 1 that she has sold him macadamia nuts previously and that she recognised his voice as he kept demanding money. Recognition of assailants, as has been held by the Court of Appeal, is more satisfactory and reliable. In ***Karanja v Republic (1985) KLR 290***, the Court held, "*Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions favouring safe identification.*" In light of the evidence we have outlined above, we also find that the evidence of recognition is not necessarily free from error in light of the possibility that PW 1 knew an *Onesmus* who was a customer and whose voice she recognised. Such a possibility also excludes the possibility that the appellant was an assailant.

22. The learned magistrate considered whether the red jacket could be connected to the appellant. She analysed the evidence as follows, "*This jacket was apparently retrieved from accused's house. The evidence of the jacket doesn't hold. Firstly it is not clear at what point it was retrieved from accused's house. PW 4 avers the jacket was given to PW 3. However PW 2 says "we recovered nothing then but the jacket which the suspect wore." PW 6 who produced the jacket as an exhibit said he got it from PW 3. Both PW 3 and PW 6 don't mention the issue of blood on the jacket. Only PW 4 does. In light of the foregoing contradictions this court is no able to connect the jacket to accused.*" We have evaluated the evidence and have no reason to depart from the reasoning of learned magistrate.

23. In conclusion, we cannot shake the doubt created by the fact that the two principal prosecution witnesses gave contradictory evidence on the material facts. PW 1 identified *Onesmus* by moonlight. PW 2 identified *Silas Gitonga* when the electric lights were on. PW 1 did not allude to PW 2 being with her the moment the robbers entered the room yet PW 2's evidence is that they were together in the room with lights on when they entered.

24. Having evaluated the evidence, we are of the view that the evidence identifying the appellant and tying him to the felonious act is not water tight. The conviction is not safe and free from error. We accordingly allow the appeal and set aside the conviction and sentence. The appellant is set free unless otherwise lawfully held in custody.

SIGNED at EMBU this 29th day of MAY 2014

D.S. MAJANJA

H.I. ONG'UDI

JUDGE

JUDGE

DATED and DELIVERED at EMBU this 29th May 2014.

H.I. ONG'UDI

JUDGE