REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 487 of 2007

PAUL NDERITU MWAI …….....…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

JUDGMENT

The Appellant was charged, tried and convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. Upon conviction he was sentenced to the mandatory sentence of death. Being aggrieved by the said conviction and sentence he filed this appeal. The appeal was heard by Warsame J and Khaminwa J on 2nd June, 2010 and Judgment reserved for 20th July, 2010. Regrettably however, the judgment was never written and both learned judges are no longer available to do so.

At the instance of this court the appellant was produced and asked whether or not he would want any other judges to deal with his appeal. He intimated to this court that his judgment could be written by any other judges. We have accordingly gone through the record to come up with this judgment.

In his petition of appeal the appellant stated that the charge sheet was not signed and that he was not adequately identified as the person who committed the offence. He also complained that the learned trial magistrate shifted the burden of proof and that his defence was not considered. P.W. 1 the complainant, was alone at the residence of her employer on the date of the alleged offence. She was just about to wash some clothes when some people she did not know accosted her. In the house she was beaten, tied and the people who entered the house stole several household goods and money. These people were armed with knives and threatened to kill her.

After the robbers had left, she raised an alarm and neighbours came to her aid. On the same evening the appellant was arrested. Some of the goods were recovered. Subsequently, P.W. 1 was called for an identification parade to identify the suspect. However, the appellant refused to come out for the parade. The police who arrested the appellant as well as the employer of P.W. 1 gave evidence during the trial.

At the end of it all the learned trial magistrate believed the prosecution witnesses and ended up convicting the appellant. We note that the learned trial magistrate relied on the evidence of a single identifying witness to arrive at the conviction of the appellant. It is important to quote the relevant section of the judgment of the learned trial magistrate in that regard. It says as follows,

“Can the court believe the single eye-witness P.W. 1 – Nekesa?

One – it was during the day when the robbery took place at about 8.00 a.m. – broad day light so to

say.

Two- she (P.W 1 – Nekesa) spent quite some time with the robbers. She was tied, spent time from the kitchen to the bathroom. She untied herself and was tied again.

Three – at no time was P.W. 1's sight interfered with. Her face/eyes were not closed – only her mouth.

Four – the robbers had no masks on their faces. The faces were naked so to state.

Five – it was accused who spent quite some time tying the girl.

Six – P.W. 1 (Nekesa) described the accused vividly both to the police and the court.

Seven – The pair of mud stained jeans trouser found on the accused told a hill of a story. He got the mud, the court was told as he crossed a river as the blood – angry mob gave chase.

Eight – Accused was arrested the same day of the incident. Memories were fresh.

Nine- Accused has no duty to prove his innocence/guilt. However, the fact he refused to participate in the identification parade cannot be brushed aside given his admission and flimsy explanation for that kind of action.

Ten – Accused was not previously known to P.W. 1 - Nekesa. No history of bad blood.

Eleven – P.W. 1 – (Nekesa) appeared a credible and consistent witness in her testimony. She never cowered under the impressive cross-examination she was subjected to by the accused.

From the above circumstances, I find the evidence of P.W. 1 – Nekesa though not corroborated, truthful and safe to rely on.

It is a finding of fact that accused was positively identified by P.W. 1 – Nekesa as one of the robbers who attacked her on the fateful day.

I find the accused guilty as charged. I convict him under section 215 of the Criminal Procedure Code."

It is our duty as the first appellate court to go through the entire record of the lower court, evaluate the evidence and come to an independent conclusion. This we have done. The alleged offence took place during day time at about 8 a.m. The attackers did not conceal their appearances and going by the evidence of P.W. 1, they took some time in the house. During that time they communicated with P.W. 1. They also moved from place to place in the said house. It is the appellant who in fact held P.W. 1 by the neck and tied her. At the first opportunity, P.W. 1 gave a description of the assailants to the Police. P.W. 1 was cross-examined at length by the appellant but remained firm about his identification.

There is always a danger of founding a conviction on the testimony of a single identifying witness. That is not however to say that a conviction cannot be solely based on such evidence. In the instant case, the learned trial magistrate warned himself of the danger of relying on the evidence of such a witness. At the end, he was satisfied that such evidence was sufficient to sustain the conviction. In so doing, he cited the cases of **Oluoch V Republic (1985) KLR 549, Arizaya V Republic (1989) KLR 236 and Wafula & 3 others V Republic (1986) KLR 627.** The defence of the appellant was mentioned in the body of the judgment by the learned trial magistrate. However, it was not analyzed to assess its evidential value.

We have looked at his defence which presents an alibi. That is to say, at the time the offence was alleged to have been committed he was nowhere near the scene. That cannot be true when weighed against the evidence of the only witness P.W. 1 who positively identified the appellant in court as the person who

robbed her on the material day. It may be said that is dock identification, but P.W 1 was consistent about the presence of the appellant among the people who robbed her. Additionally, when the appellant was summoned to come out for an identification parade, he refused to submit himself and that conduct can only be attributed to his guilt not innocence. Therefore, even if the learned trial magistrate had considered his defence, weighed against the prosecution evidence a conviction would still be sustained.

We have seen nothing on record that would amount to shifting the burden of proof to the prejudice of the appellant. Finally, the charge sheet on record was signed by the officer in charge Githurai/ Kimbo Police Station and it is not true as the appellant alleges that it was not signed. On the evidence on record therefore, we are satisfied that the charge against the appellant was proved beyond any reasonable doubt and that the conviction was well founded. The sentence imposed is the mandatory sentence provided under the law and we have no reason to interfere with the same. This appeal is therefore dismissed.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of February, 2013.

A. MBOGHOLI MSAGHA
JUDGE

L. A. ACHODE

JUDGE