



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 146 of 2011

CHARLES BOWEN TOO.....1ST APPELLANT

GEOFFREY ROTICH KIPNGETICH.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against both Conviction and Sentence of Death from the High Court of Kenya at Nakuru (R. Wendoh and W. Ouko JJ) dated 10th June, 2011.

in

HCCRA No. 49 of 2008)

JUDGMENT OF THE COURT

The appellants herein **Charles Bowen Too and Geoffrey Rotich Kipngetich** were charged in the Chief Magistrates Court at Nakuru with the offence of Robbery with violence contrary to section 296(2) of the Penal Code, in that on the 29th day of September,2006, at Nakuru Township in Nakuru District within the Rift Valley Province violently while armed with knives robbed **Noah Komen** of cash Kshs. 15,000.00 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Noah Komen**.

The appellants were tried by the lower court. The prosecution called three witnesses namely (**PW1**) **No.70600 P.C. Noah Komen**, (**PW2**) **No.67637 CPL Lawrence Njue** and (**PW3**) **No.52225 P.C. Safari Chea**. The appellants gave sworn evidence and called no witness. In a judgment by **W. Kagendo** Senior Resident Magistrate dated the 25th day of March,2008, the appellants were found guilty, convicted and sentenced to serve the only sentence known to law for this offence namely death. The appellants were aggrieved by that finding and appealed to the high court at Nakuru vide appeal number 49 of 2008. Vide a Judgment dated the 10th day of June,2011 that appeal was dismissed by **R.P.V. Wendoh and W. Ouko JJ**.

The appellants have now appealed to this court a second time citing nine (9) grounds of appeal in the case of **Charles Bowen Too** and ten(10)grounds of appeal in the case of **Geoffrey Rotich Kipngetich**.

Learned Professor **Tom Ojienda S.C.** appeared for the appellants, while **A.J. Omutelema** Senior Assistant Director of Public prosecutions appeared for the state. In his oral submissions to court, learned counsel for the appellant urged us to allow the appeal on the grounds that the first appellate court failed to re-evaluate and re-assess the evidence that had been tendered before the subordinate court properly. That had the first appellate court done so, it would have noted contradictions in the evidence of the prosecution witnesses with regard to the identity of the assailants. It would also have noted that there was doubt as to whether (PW1) the complainant was sure of the persons who had allegedly robbed him. The learned senior counsel argued further that proof of the alleged commission of the offence was in doubt as the complainant never booked the report of the robbery in any O.B. (Occurrence book), never surrendered the wallet from which the money was allegedly robbed, never tendered the bank withdrawal slips and bank statements as proof that the complainant had in fact just withdrawn the money which was allegedly robbed. Learned senior counsel added that considering the complainant's contradictions on the description of the assailants, an identification parade was necessary and since none was held with respect to the appellants this omission was fatal to the prosecutions case.

We have been invited further by the same learned senior counsel to find that the alleged commission of the robbery is in doubt as it is not possible that a robbery could take place at around 9.00 a.m. in the proximity of a bank from which the complainant had allegedly withdrawn the robbed money, on a public street, and fail to attract the attention of on lookers and or passersby who could have provided corroboration for the complainants evidence. It is the learned senior counsel's argument that on this account, the last two courts made an error when they relied on the evidence of the complaint (PW1) to found a conviction just because he was a police man.

In opposition, learned counsel for the state has urged us to dismiss the appeal on the grounds that the subordinate court properly analyzed the evidence tendered before it and properly found the appellants guilty and convicted them. The first appellate court properly reassessed and re-evaluated the evidence and confirmed both the findings of guilt and the conviction made by the subordinate court. It is further the learned counsel's submissions that there is no rule that the first two courts should have considered and ruled on each and every aspect of the case. It is sufficient to look at and assess and rule on the material aspects of the case and this is what the first two courts did as they took into consideration the fact that the incident took place at 8.30 a.m.-9.00 a.m. meaning that visibility was clear and the possibility of registering the identity of the assailants was high; that there were only three attackers meaning that the complainants view of the attackers was not obstructed in any way; that the complainant spent three minutes with the attackers which was sufficient to enable the complainant register the identity of the attackers and that is why he gave the specific features and the description of each on the day of the arrest. As such there was no contradiction in the prosecutions' evidence.

With regard to proof of the ingredients of the offence charged, learned counsel for the state submitted that all the ingredients of the offence were proved because use of violence was proved by the testimony that the complainant was threatened with a pen knife. It is learned counsel's opinion that the complainant's credibility is unquestionable as he did not know the appellants before the incident and as such he could not have fabricated the offence against them. Lastly that failure to tender exhibits to police is not fatal to the prosecutions case.

This being a second appeal, we are reminded of our role as a second appellate court namely to steer clear of issues of facts and deal only with issues of law. See **section 361 of the Criminal Procedure Code**. We have revisited the content of the record as placed before us and considered the same in the light of the rival arguments advanced herein as well as principles of case law cited to us and we proceed to make findings on the same. The appellants faced an offence of robbery with violence which occurred on the 29th day of November, 2006. The ingredients required to be established before a conviction for such an offence can hold are now well crystallized by case law. First and foremost there should be demonstration that the offence occurred; 2ndly that theft termed robbery took place; thirdly that violence was used in the execution of the theft termed robbery either immediately before or immediately after the commission of the offence; and 4thly that the assailant was in the company of one or more other person or persons. See the case of **Ganzi & 2 others versus Republic (2005) 1KLR52.**

When the afore set out ingredients and or elements of the offence of robbery with violence are applied to the rival arguments herein, we find that the ingredient of use of violence is established as a pen knife was allegedly involved. Also the ingredient of being in the company of one person or other persons as the assailants are alleged to have been three in number. The ingredient of demonstration of theft termed robbery having been executed in the course of the robbery had not been demonstrated to have existed. Our reason for saying so is that the complainant (PW1) who was infact a police officer admitted on oath in his testimony that he did not report the incident to police on the 29th day of September, 2006, the date it was alleged to have occurred. The incident was instead purportedly reported on the 14th day of October,2006 the day of the arrest. Proof of withdrawal of the cash which was allegedly robbed was not also established by production of bank documents such as bank withdrawal slips for both normal counter withdrawal and ATM withdrawal and bank statements not withstanding the complainants' assertions that he had just withdrawn the cash from the bank at the counter and through the ATM before it was robbed from him. Further doubt of the commission of the offence is evidenced by the fact that the robbery was alleged to have taken place at 8-9 .00.a .m. in broad day light, on a street in Nakuru Town at a time when movement of human traffic was expected to be pronounced and yet it is surprising that no human soul witnessed the incident. The complainant himself never raised any alarm to attract attention of on lookers and or passersby. It is also surprising to us that the complainant being a police officer never even put to use his most ready companion a whistle to attract attention as he chased after the assailants. He never even attempted to give any chase of the assailants.

On the issue of visual identification, from the complainants account of the attackers, he referred to them by way of their complexion and heights only. We wish to refer to a persuasive decision in the case of **R. versus Turn Bull (1976) 3A11ER549** where in the court held inter alia that:

“Recognition may be more reliable than identification of a stranger but even when the witness purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made”

In **Wamunga versus Republic KSMCA. No.20 of 1989 (UR)** The Court of Appeal observed that:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extend on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”

In **Njoroge versus Republic (1987) KLR 19** it was held inter alia that:-

“when considering the evidence of identification, the court is enjoined to consider the circumstances in which the identification was made, the length of time the victim had the assailant under observation, the distance between the victim and the assailant during the period of observation, the nature of light, impediment to the vision if any, whether the victim and the assailant are familiar to each other or not and lastly whether there were any material discrepancies noted in the description of the assailants by the victim.

Lastly in **Maitanyi versus Republic (1968) EA 198** the predecessor of this court, the Court of Appeal for Eastern Africa added a caution to the effect that

“where identification or recognition is based on the evidence of a single identifying witness such evidence must be subjected to intense testing”.

We have accordingly considered the afore set out case law principles and applied them to the rival arguments herein on the issue of visual identification. We are satisfied that the complainant's identification of the appellants in connection with the commission of the offence of robbery with violence of 29th day of September, 2006 does not hold because firstly both the victim and the alleged assailants were strangers to each other. Secondly PW1 the complainant did not anticipate the attack. It

happened suddenly. The alleged first assailant engaged the complainant in a conversation and therefore distracted him from paying attention to his surroundings. When the other two alleged assailants arrived, they also engaged the complainant in a conversation before a pen knife was allegedly pulled out and pointed at the complainant and then his wallet snatched and the trio walked away and boarded a matatu. To PW1, the incident took 3 minutes. In the circumstances displayed above, it is our considered view that registration of the appearance of the assailants was doubtful. Thirdly it is evident from the testimony of the complainant that his identification of the assailants was by height and complexion. Features which are common. Features which were not reported to the police and booked in an OB at the earliest opportune time. In the absence of such reporting and booking in the OB, there is nothing to rule out the possibility of the complainant having coined these descriptions at the moment he was apprehending the appellants. This is further fortified by the complainants remarks when he saw the first alleged assailant and then remarked; **“aren’t you one of those who robbed me”**. This is clear evidence of the victim not being sure of the identity of the assailant at the time of the robbery”

Once visual identification of the alleged assailants at the scene of the alleged robbery is ousted, and doubt created as to whether the right assailants had been arrested in connection with the alleged robbery of 29th day of September, 2006 committed against the complainant, what the first two courts were left with was evidence of dock identification. It is now trite that evidence of dock identification is weak, worthless, unreliable, and cannot be used to found a conviction. See the case of **Ajode versus Republic (2004) 2KLR81.**

The net result of the afore set out reasoning is that we are convinced that had the first subordinate court assessed and analyzed the evidence before it, properly and first appellate court reassessed and reanalyzed the same evidence and applied principles of case law to it along side the above lines, we have no doubt that both courts would have arrived at an acquittal of the appellants by the subordinate court and a quashing of the conviction and discharge of the appellant by the first appellate court.

On the basis of our reasoning above we allow this appeal, in its entirety, set aside the order of the first appellate court confirming the conviction and sentence by the subordinate court and substitute thereto with an order quashing the finding of guilt and conviction of the appellants by the subordinate court. We order the appellants to be set at liberty forth with unless otherwise lawfully held.

Dated at Nakuru this 12th day of April, 2013

R.N. NAMBUYE

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JUDGE OF APPEAL

M.S.A.MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

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DEPUTY REGISTRAR