



REPUBLIC OF KENYA

High Court at Embu

Criminal Appeal 79 of 2012

DAVID MWITI KIOME ..... 1<sup>ST</sup> APPELLANT

JAMES MACHARIA MAINA ..... 2<sup>ND</sup> APPELLANT

V

REPUBLIC.....RESPONDENT

*From original conviction and sentence in Cr. Case No. 947 of 2007 at the Senior Resident Magistrate's Court at Siakago by S.M. Mokuu – Senior Resident Magistrate*

**JUDGMENT**

The Appellants David Mwiti Kiome, hereinafter 1<sup>st</sup> Appellant and James Macharia Maina 2<sup>nd</sup> Appellant were the 1<sup>st</sup> and 2<sup>nd</sup> Accused respectively in the trial before the lower Court. They were charged jointly with one Count of Robbery with Violence contrary to section 296(2) of the Penal Code. The particulars of the charge were;

**ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE:**

1. **PETER MUTHEE MAINA 2. JAMES MACHARIA MAINA:** On the 23<sup>rd</sup> day of April 2007 at about 3.00am at Embu Township, Municipality location of Embu District within Eastern Province jointly with others not before Court while armed with dangerous weapons namely pangas and metal bars robbed FRANCIS MUGAMBI of cash money ks.2,500/=, one mobile phone make Nokia 3310 valued at ks.3,800, ½ kg of meat and one belt all valued at ks.6,500/= and at or immediately

**before or immediately after the time such robbery used actual violence to the said FRANCIS MUGAMBI.**

They were both found guilty of the offence convicted and sentenced to death. Both Appellants were aggrieved by the conviction and sentence and therefore filed their respective appeals. We have consolidated the appeal since they arise out of the same trial.

The 1<sup>st</sup> Appellant raised eight (8) grounds of appeal in his Memorandum of Appeal as follows;

- 1. That the 1<sup>st</sup> Appellant pleaded not guilty to the charge.**
- 2. That the learned trial Magistrate erred in law and fact by relying on the evidence of PW1 who didn't disclose to the Court the type of light in use, its position relevant to the suspect or its intensity, time under each per observation point.**
- 3. That the learned trial Magistrate erred in law and fact by failing to note that parade was of no value as the witness PW1 had known the 1<sup>st</sup> Appellant before.**
- 4. That the learned trial Magistrate erred in law and fact by basing a conviction whereby the Prosecution case was surrounded by many contradictions.**
- 5. That the learned trial Magistrate erred in law and fact by basing a conviction without considering that the Prosecution case failed to summon the essential witness at least those who had arrested the 1<sup>st</sup> Appellant.**
- 6. That the learned trial Magistrate erred in law and fact by failing to consider that I had applied the O.B. be produced to enable me raise more questions to PW1.**
- 7. That the learned trial Magistrate erred in law and fact by accepting the evidence of PW5 P.C. Wangombe who alleged to had conducted identification parade without considering that PW1 had known the 1<sup>st</sup> Appellant for long time (three years) as we reside from the same area.**
- 8. That the learned Magistrate erred in law and fact by rejecting the 1<sup>st</sup> Appellant's defence which the Appellant gave out a graphic accountability on the material day.**

The 2<sup>nd</sup> Applicant raised seven (7) grounds of appeal in his Memorandum of Appeal as follows;

- 1. That the 2<sup>nd</sup> Appellant pleaded not guilty to the charge.**
- 2. That the learned trial Magistrate erred in law and facts by accepting the mode of light in use which was not conducive for a proper identification.**
- 3. That the learned trial Magistrate erred in law and fact by accepting and relying by the evidence of PW1 who had not given any description to the police which could have helped him to identify the assailant if he sees him again.**
- 4. That the learned trial Magistrate erred in law and fact by relying and accepting the evidence of identification parade which was of no value regarding identification while PW1 had known the 2<sup>nd</sup> Appellant.**
- 5. The learned trial Magistrate erred in law and fact by basing a conviction on sentence on the evidence of a single identifying witness without warning himself of the dangers ahead.**
- 6. That the learned trial Magistrate erred in law and fact by founding a conviction and sentence whereby PW2, PW3 and PW4's evidence had many contradictions.**
- 7. That the learned trial Magistrate erred in law and fact by rejecting his defence and in addition reasons of its rejection was not disclosed as clearly stipulated by the provisions of section 169(1) Criminal Procedure Code and therefore pray the honourable High Court to consider or re-consider the 2<sup>nd</sup> Appellant's defence.**

The facts of the Prosecution case were that the complainant was going home at 11pm on 22<sup>nd</sup> April 2007 when he was accosted by five people. One man grabbed him by the neck with a piece of wood while another one emptied his pocket of a mobile phone, cash ks.2500/= and also took ½ kg of meat he had carried. They then left him. He reported the matter to the police. Two days later on 25<sup>th</sup> April 2007, the complainant identified both Appellants in identification parades mounted by PW3, IP Muyonga. Earlier on that morning of 25<sup>th</sup> April 2007, PW2 PC Nyaga received the two Appellants from street urchins who reported that they were terrorizing members of the public in the area. One year after the incident the complainant went to PW4 who filled the P3 form. PW4 found healed scars on the head and neck of the complainant and assessed the injuries as harm.

The 1<sup>st</sup> Appellant in his defence denied the offence. He said that the complainant caused his arrest claiming that the day before, he, the 1<sup>st</sup> Appellant robbed him. The 1<sup>st</sup> Appellant said he was a neighbour of the complainant. He stated that the complainant had not given any descriptions of his assailants to the police.

The 2<sup>nd</sup> Appellant in his defence also denied the charge. He stated that he fought with a friend over money on 24<sup>th</sup> April 2007. That on the 25<sup>th</sup>, the next day some youth took him to the police station where the complainant saw him inside the office of the OCS.

We have carefully considered this appeal and have analysed and evaluated afresh the entire evidence adduced before the lower Court. We have drawn our own conclusions while bearing in mind that the we neither saw nor heard any of the witnesses who testified in this case and have given due allowance. We are guided by the Court of Appeal case of *OKENO -V- REPUBLIC 1972 EA 32, 36*;

**An Appellant on a 1<sup>st</sup> appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*PANDYA -VS- REPUBLIC [1957] EA 336*) and to the appellate Court's own decision on the evidence. The 1<sup>st</sup> appellate must itself weigh conflicting evidence and draw its own conclusions (*SHANTITAL M. RUWALA-VS- REPUBLIC [1957] EA 570*).**

The Appellants were unrepresented. Each of them filed their written submissions which we have considered.

The State was represented by Mr. Miiri, learned Counsel for the State. He opposed the Appellants' appeal. We have also considered his submissions.

The Appellants both raised issue with the evidence of identification both at the scene of crime and in the identification parades. Dealing first with the identification of the Appellants at the scene, there is only one eye witness, the complainant in this case. He was attacked at 11pm. Regarding the evidence of identification by a single witness the Court has emphasized time and again the importance of careful scrutiny of such evidence before basing any conviction in reliance of it.

In the case of *REPUBLIC -V- ERIA SEBWATO[1960] EA 174* Lyon Judge held;

***“Where the evidence alleged to implicate an accused in entirety of identification, that evidence must be absolutely watertight to justify a conviction”.***

In other cases the Courts have set out the manner in which the evidence of identification should be tested in order to determine whether it was safe to found a conviction. The Court of Appeal, in *MAITANYI - VS- REPUBLIC [1986] KLR 198* held;

**1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.**

**2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.**

**3. The Court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the Court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.**

**4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support the conviction.**

The learned trial Magistrate analysed the complainant's evidence respecting identification thus;

***“The Prosecution witnesses gave testimony regarding the incident herein. The complainant stated that the incident took place at a well lighted place and did recognize two out of five of his attackers. The evidence herein demonstrates that the complainant was robbed of his mobile. The evidence herein is quite straight forward such that I have no doubt in my mind that the complainant was robbed of his belongings. The injuries sustained demonstrates that force was used herein. This is as per the evidence of the complainant and P3 form produced herein together with the evidence of the medic. According to investigating officer, the complainant stated that he could identify the attackers. Effectively an identification parade was organized and the complainant picked on Accused 1 and Accused 2 herein.*”**

The analysis of the evidence of identification of the Appellants fell far too short of a careful scrutiny as expected of such evidence, even from the cases we have cited in this Judgment. There was no inquiry as to the nature of the light which enabled the complainant to identify his assailants. The complainant stated that street lights and the lights from a nearby supermarket, Jatomy, was what enabled him to see and identify the Appellants. The complainant testified thus;

***“As I walked up, two people came and grabbed me. I identified the two who held me. I identified one by name and that is Mwiti who is the Accused 1. I also identified Accused 2 too. They were in a group of more than five people but I only identified these two accused. There were street lights on and also*”**

***lights from Jatomy supermarket”.***

There was absolutely no evidence given of the nature and intensity of the lights which enabled identification. There was no description of the distance the lights were in relation to both the complainant and his attackers.

We noted that the complainant's evidence was that he was grabbed by the assailants. The complainant did not disclose from which direction the assailants approached. We are not clear whether he had an opportunity of seeing the face of those who attacked him.

The police mounted identification parades in which the Appellants were identified by the complainant. It is trite law that before identification parades are mounted, an identifying witness must be asked to give a description of those people he claims he can identify. This was a Court of Appeal holding in the case of ***AJODE -VS- REPUBLIC [2004]2 KLR 81*** where the Court observed thus;

***It is trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then conduct a fair identification parade.***

We think that holding identification parades where the complainant admitted he gave no descriptions of any of the suspects was not a worthwhile exercise. The complainant admitted this on cross-examination by the 2nd Appellant where he said;

***“I gave the police names..... I did not give the description but I knew the attackers”.***

If the complainant knew his assailants before the attack, the identification parades were not necessary. We are not satisfied the complainant knew the Appellants as he gave no details of how and for how long he had known them. Besides we are satisfied from the evidence that the complainant had no opportunity of seeing those who attacked and robbed him because the attack was executed swiftly and suddenly. He said he was held by the neck with a wooden stick. Meaning he must have been held from behind, and secondly his head was tilted upwards. He was then frisked by someone. We believe he had no opportunity to see the second person either.

We think that even without going into the various other issues which arise in this case, the issue of identification is sufficient to determine this appeal.

We have come to the conclusion that the complainant's evidence of identification was not safe and that the conditions and circumstances of identification were not positive for a correct identification. We find

that the convictions entered against both Appellants were unsafe and ought not to be allowed to stand.

In the result we allow the Appellants appeal, quash the convictions and set aside the sentences. The Appellants should be set at liberty unless they are otherwise lawfully held.

**SIGNED AND DATED THIS 17<sup>TH</sup> DAY OF MAY 2013 AT EMBU.**

**LESIIT J.**

**J U D G E**

**H.I. ONG'UDI**

**J U D G E**

**Delivered in open Court in the presence of;**

**..... for State**

**Both Appellants**

**Njue – C/c**