



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 30 OF 2011
CONSOLIDATED WITH CRIMINAL APPEAL NO.29 AND 31 OF 2011
(LESIIT AND MAKAU,JJ)

GEOFREY KAMENCHU MAKAMBA.....1ST
APPELLANT

DAVID MUTUMA KAENGA 2ND
APPELLANT

TITUS MUCHIRI MUCHAMBURA.....3RD
APPELLANT

VERSUS

**REPUBLIC
.....RESPONDENT**

(Being an appeal from the conviction and sentence of P. Ngare, PM, Chuka dated 07/07/2011 in Criminal Case No.1526 of 2010.)

J U D G M E N T

The appellant’s GEOFREY KAMENCHU hereinafter , 1st appellant,, DAVID MUTUMA KAENGA, 2nd appellant, and TITUS MUCHIRI, 3rd Appellant were the first, second and third accused respectively in the trial before the lower court. They were charged with one count of robbery with violence contrary to Section 296(2) of that Penal Code. The particulars of the charge were that on the 1st day of April, 2009 at Mutuati market, Kabachi location in Igembe District within the Eastern Province, jointly with another person not before court while armed with crude weapons namely slashers and stones robbed CYPRIAN MUNG’ATHIA of one mobile phone make Nokia 1100 and cash Kshs.300/- all valued at Kshs.3000/- and at or immediately before or immediately after the time of such robbery used actual violence against the said CYPRIAN MUNG’ATHIA.

After the trial the learned trial Magistrate found the prosecution had proved robbery under Section 296(1)

of the Penal Code and reduced the charge to simple robbery under Section 296(1) of the Penal Code and convicted and sentenced the appellant to serve 5 years imprisonment.

The appellants were aggrieved by the conviction and sentence imposed upon them by the lower court and therefore filed these appeals. The appeals have been consolidated and were heard together since they arose from the same trial of the lower court.

We have looked at the grounds raised by the appellants and find that all these grounds can be summarized as follows:-

1. ***That the evidence of identification given by PW1, PW2 and PW3 was not reliable as the circumstances under which the identification was made was not conducive for positive identification.***
2. ***That the defence of alibi of 3rd appellant was not considered.***
3. ***That the learned trial Magistrate failed to consider 2nd appellant's defence that PW2 owed 2nd appellant Kshs.2,000/-***

When this appeal came up for hearing the 1st appellant requested the court to consider the proceedings, judgment and his grounds of appeal and make a decision. He submitted that the evidence against him was that of the complainant and his wife PW3.

The 2nd appellant relied on his written submissions which he submitted to the court. He urged the court to consider evidence of PW2 and PW3. The 3rd appellant urged us to consider the proceedings, judgment and his grounds of appeal and make a decision.

The State was represented by Mr. Makori, learned State Counsel who strongly opposed the appeal. He urged that there was overwhelming evidence by PW1, PW2 and PW3 against the appellants and that the evidence put all the appellants at the scene of crime.

He urged that PW3 saw the appellants on three occasions that night. That at two occasions they were on hot pursuit of PW3. That later in the evening they waylaid and ambushed PW1, PW2 and PW3 as they walked home. He urged PW1, PW2 and PW3 attested there was electricity overhead light from the hotel at the scene of attack. He submitted that the lighting was sufficient to identify the appellants.

We are the first appellate court and as expected of us, we have subjected the entire evidence adduced before the lower court to a fresh evaluation and analysis while bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance. We are guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are ably set out in the case of **ISAAC NG'ANG'A KAHIGA ALIAS PETER NG'ANG'A KAHIGA V REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** as follows:

“We are first appellate court and as expected of us we have subjected the entire evidence adduced before the lower court to a fresh evaluation and analysis while bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance. We are guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are ably set out in the case of ISAAC NG'ANG'A KAHIGA ALIAS PETER NG'ANG'A KAHIGA VS REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005 as follows:-

“in the same way, a court hearing a first appeal(i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO – V- REPUBLIC(1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

“The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses(See Peters V.Sunday Post,(1958) EA 424).”

This case rests on evidence of identification of the appellants by PW1, PW2 and PW3. Regarding the evidence of identification in the case **of FRANCIS KARIUKI NJERU & 7 OTHERS – V-REPUBLIC CRIMINAL APPEAL NO. 6 OF 2001(UR)** the Court stated as follows:-

“The evidence relating to identification had to be scrutinized carefully, and was only to be accepted and acted upon if the court was satisfied that the identification was positive and free from the possibility of error. The surrounding circumstances had to be considered and among the factors the court was required to consider was whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.”

PW1 in his evidence stated that on 1.4.2010 at 7.00 p.m. he was at his place of work at Mutuati and that he closed his business and told Mung’athia to leave. He is quoted by the trial court as having stated:

“I was with Mungathia and my wife. I was ahead and my wife was behind. We went about 20metres, there was electricity light(security) on and then I heard screams behind. My wife was being beaten. As I looked behind, I saw them beating my wife. Kamenchu then hit me with a stone on the face and I lost three teeth. They were four people. They were still armed. I fell down. I was unconscious as I fell. Kamenchu then took my mobile phone from my left trouser pocket, make Nokia 1100. It was worth Kshs.2,700/-. He also took Kshs.300/- which was in my pocket. My wife was screaming and this attracted people. Mungathia disappeared. My wife was slightly hurt and she is the one who took me to hospital.

PW1 on cross-examination by 1st appellant stated that when he turned back to see what was happening is when he was hit on his mouth. On being cross-examined by 2nd appellant, PW1 stated that he did not know 2nd appellant before and that he came to know him on the day of robbery. He further stated that he did not give 2nd appellant’s name as he did not know him properly. PW1 testified that he wrote his statement after 2nd appellant had been arrested. On being cross-examined by 3rd appellant PW1 stated that the robbers chased people twice, first at 7.00 p.m.and 9.30 p.m but that he was robbed at 10.00 p.m.

PW2, GLADYS NKATHA, testified that on 1/4/2009 at around 9.30 p.m she was at Mutuati and had just left the market and passed at her husband’s work place and stated as follows:-

“When I reached the door, I found people running with pangas. My husband was trying to prevent the thugs from entering the kiosk. The bar belonged to my husband M’igweta is the one who was being chased by the three accused persons. I knew Titus and Kamenchu but I didn’t know the 2nd accused’s name. The 1st and 2nd accused had slasher with them. They were not talking. My husband sent Mwongela to call AP Officers from Mutuati. They disappeared. My husband instructed the workers to close up so that they escort M’Igweta to go to his place. We all went the same direction. It was now my husband and M’Igweta on the footpath. After closing the bar, and just a few metres away. Kamenchu surfaced and hit him on the nose, when I started screaming Titus started beating me with the flat side of the slasher at the hand and legs. I continued screaming and when many people responded, they fled. When my husband fell, I saw Kamenchu remove Kshs.300/- and his mobile phone from his back trouser pocket.”

PW2 further testified that her husband was assaulted by 1st appellant and 3rd appellant. She further stated that it was her first time to see the third appellant. PW2 stated there was security light outside and she saw clearly. On being cross-examined PW2 testified PW1 was 5 metres ahead of her and that they made report at Kamueline after coming from the hospital.

She further stated that Peter Kimathi hit her but in her statement to police she gave the name of PETER KIMATHI and TITUS MUCHIRI as the people who hit her. She further testified that she was about 10 metres from PW1 when he was being beaten. During cross-examination of PW2 by 2nd appellant, she stated that she does not know 2nd appellant yet she said it was 2nd appellant who beat her. She testified that she knows 2nd appellant by face. She testified when she went to police she said it was 2nd appellant who beat her up and gave the name of Kimathi. She stated that the 2nd appellant hit her from behind and that she turned and saw 2nd appellant. That the security light was 10 metres away and she stated it was bright. She continued to state that she saw 2nd appellant ahead of her and further stated her friends were calling 2nd appellant PETER KIMATHI. During cross-examination of PW2 by 3rd appellant she stated that many people came to their rescue but did not record statements with police. PW2 testified that she was not beaten by 3rd appellant but he just followed her.

PW3, MOSES MUNG'ATHIA testified that he knew the three appellants. He testified that on 1.4.2000 at 9.30 p.m. he was alone on his way home when he met 1st appellant and 3rd appellant in a group of four. He testified that the 1st appellant stopped him and asked him about his money which he had after selling 1st appellant's miraa being Kshs.300/-. That when PW3 said he had no money 1st appellant threatened to cut him with a panga and he ran to PW1's house.

PW1 pleaded with 1st appellant and 3rd appellant to leave PW3 alone but they insisted they wanted to leave with PW3. PW1 refused to release PW3 to 1st and 3rd appellants. That PW3 later left with PW1 and at about 20 metres away, they found 1st appellant hiding behind a corner of a house. That 1st appellant threw stones at PW1 and hit his mouth. That PW3 fled away. He stated that he saw what happened from a distance of 20 metres. He stated that they had left PW2 behind. That PW2 started screaming. PW3 testified that after 1st appellant hit PW1 with a stone he ran away. PW3 testified that he did not witness the 1st appellant take anything from PW1 but PW1 told him the assailants took things from him. PW3 stated at the scene of the incident there was security light. PW3 could not remember how 1st appellant was dressed but he said that he had no cap and had a slasher. PW3 testified that he did not see 3rd appellant.

During cross-examination of PW3 he stated that after he ran away he came back. PW2 stated that he did see 2nd appellant when PW1 was being attacked.

PW4 No.44762 PC Jackson Makori testified that he was on duty at Mutuati Police Station when 1st appellant was brought by 2AP Officers and members of public on 2/4/2009 on allegation that on 1/4/2009, the 1st appellant and others assaulted and robbed the complainant of one mobile phone Nokia 1100 and cash Kshs.300/- and the case was minuted to him for investigation. PW4 and PC Kirui visited the scene and later visited PW1 who was admitted at Maua Methodist Hospital. He issued PW1 with a P3 form. PW4 did not organize for identification parade as the complainant alleged to know his attackers. The stolen items were not recovered. During cross-examination PW4 testified that the report was made by SAMMY MUNG'ATHIA, who did not record statement nor was he a witness.

During cross-examination, PW4 stated that only at the time of reporting he was given the name of the 1st appellant but names of other appellants were given on 6th April, 2009. PW4 further stated that the complainant gave him the names of TITUS ISAAC/ISEKA and the name of TITUS MUCHIRI.

PW5 No.84004125 APC Mwaki Njagi testified that on 2/4/2009 some people from Mutuati market reported that somebody by the name Mungathia had been assaulted by Kanagui. That Kanagui had

locked himself in a house within the market. That PW5 in the company of other police officers proceeded to the house of Kanagui. That they found the said Kanagui and arrested him and booked him with an offence of assault. PW5 stated that the said Kanagui is the 1st appellant.

PW6 BERNICE MUTILE produced a P3 form filed by Dr. ALI GABABA on CYPRIAN MUNG'ATHIA. The degree of injury was grievous harm. P3 form was produced as exhibit 1.

The 1st appellant gave a sworn statement in his defence. The 1st appellant stated that he had given Moses Mungania, PW3 an order to cut for him miraa at 7.00a.m and paid him Kshs.2,000/-. That PW3 refused to cut the miraa and when 1st appellant met PW3 and called him he ran to PW1's bar. That the 1st appellant who was with the 2nd appellant were stopped by PW1 from getting into the bar and told them to go away. That the 1st appellant and 2nd appellant then left and went to buy more miraa. This was around 7.30 p.m. That they prepared the miraa and it was dispatched to Garissa and they went to sleep at their houses which were at the same place at Mutuati.

That they went to sleep at 10.00 p.m. That the following day when the 1st appellant went to call the 2nd appellant he found people taking traditional liquor. That AP Officers ambushed them, arrested them and took them to the D.O's office. That each was asked to pay Kshs.300/- and as the 1st appellant had no money he was placed in cells and taken to Kamulwene Police Station. The 1st appellant testified that he was framed that he had robbed Cyprian. During cross-examination the 1st appellant testified that it was not him who had assaulted PW1. The 1st appellant called DW2, Martin M'Ikiao who stated that he was with 1st appellant the whole day and that they met PW3 who was contracted by the 1st appellant for miraa bundle of Kshs.2,000/-. That later they went looking for PW3 and when he saw them he took off and they followed him to PW1's bar who told them PW3 was too drunk and they should look for him the following day. That they left and went to prepare their own miraa till 10.00 p.m and then went to sleep. That the following day the 1st appellant, DW2 and others were arrested at DW2's home for taking traditional liquor. That each was asked at D.O's office to pay Kshs.300/- , all paid but the 1st appellant did not so he was taken to the Police Station. During cross-examination he denied that they waylaid anyone.

The 2nd appellant gave unsworn statement and called now witness. He stated that he was arrested when taking traditional liquor and framed up. That he was kept at police station for 3 days and later charged with this offence. He stated that PW1 in his evidence stated that he did not know the 2nd appellant and PW2 referred to him as Peter Kimathi whereas his name is David Mutuma. He denied that he is Peter Kimathi as stated by PW2.

The 3rd appellant gave sworn statement and called no witnesses. He testified that on the day PW1 was robbed he had gone to Rwanda at about 8.00 a.m where he stayed till 5th April. That on 25th April, the Community Policing Officer came to the market and asked him to accompany him to check on someone who was locked up. That on arrival at the D.O.'s Office he turned and said 3rd appellant is the one of the people who had robbed PW1. He was arrested and taken to Kamweline Police Station. That on 29th he was taken to court and charged with the offence. He stated that he was not involved in the robbery and stated if he was involved the complainant would have mentioned his name but he made his report on 6th after coming from the hospital.

We have carefully and cautiously considered the evidence of identification. The trial Magistrate did not consider the type of electricity bulb that was in use, the intensity of light and how far PW1, PW2 and PW3 were from the assailants and the position they were at the time identification was made. PW1 stated that at the time of the attack he was 20 metres from the electricity light.

PW2 stated that there was electricity outside but did not state how far it was from her and the assailants. PW3 stated that the 1st appellant was 20 metres away from him when he saw him. He only stated that there was security light outside the building when PW1 was hit.

In a matter of identification it is important for a court to consider exactly how the identification came to be made considering at one time the appellants had been said to have been seen earlier on chasing PW3, who ran into PW1's bar. The evidence on record is that PW3 had earlier on pursued by the 1st and the 2nd appellant as he had been contracted to cut miraa for the 1st appellant and upon being paid Kshs.2,000/- he failed to carry out the contract.

The evidence of PW1, PW2 and PW3 lack details on how they were able to identify their assailants. No description of how assailants were dressed was given and what they saw that made them know the assailants. There was lack of details in PW1's, PW2's and PW3's evidence and it is difficult to test the evidence of identification with such scanty details on identification. When PW1 made his statement to the Police he did not give the description of his attackers. Similarly, PW2 and PW3 did not give the description of the attackers of PW1. PW4's evidence is that 2 AP Officers in the company of members of public took the 1st appellant to the Police Station on the allegation of assaulting and robbing PW1. PW1 gave PW4 the name of the 2nd Appellant after his arrest. PW1 in his evidence in Chief stated that:-

“Kamenchu then hit me with a stone on the face and I lost consciousness. I fell. Kamenchu then took my mobile phone from my left trouser pocket.”

PW1 did not state how long the 1st appellant was under his observation and how far he was from him and what enabled him to recognize him. He stated he fell unconscious after he was hit. So how was he able to know that Kamenchu took his mobile phone from his trouser pocket and Kshs,300/- from his pocket? We do not believe that PW1 witnessed Kamenchu take his mobile phone and Kshs.300/-. PW3 did not witness the assailants take PW1's mobile phone and Kshs.300/-.

PW2 testified that she witnessed Kamenchu remove Kshs.300/- and a mobile phone from PW1's back trouser pocket. This is not correct as PW1 claimed Kamenchu removed a mobile phone from his left trouser pocket and Kshs.300/- whereas PW2 talked of back pocket.

We are not satisfied that the conditions were favourable for positive identifications of the appellants. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt of the accused from which a Judge could reasonably conclude that the evidence of identification, can safely be accepted as free from possibility of error. We find none in this appeal.

Another point of interest is that the evidence of PW1, PW2 and PW3 contradicts each other on how the attack was executed and on the date of commission of the offence.

PW1 stated that the date of attack was on 1/4/2010 and at the time of attack he was ahead of PW2 at a distance of 20 metres when he heard screams from behind as his wife was being beaten. That Kamenchu hit him with a stone on the face and he lost three teeth. PW2 contradicts PW1 on date of attack stating it was on 1/4/2009 and also she stated Kamenchu surfaced and hit PW1 on the nose and when she started screaming Titus started beating her. She further contradicted PW1 by stating those who assaulted PW1 were Kamenchu and Titus.

PW2 further contradicted herself on being cross-examined by 2nd appellant by stating that she was beaten by Kimathi. PW2 further contradicted herself on being cross-examined by 3rd appellant by stating that Titus did not assault PW1. PW2 also denied being beaten by 3rd appellant. PW2 contradicted PW1 who stated he heard screams first from PW2. PW3 contradicted PW1 and PW2 as he stated they found Kamenchu hiding behind a corner of a house and that he threw a stone at PW1 and hit his mouth. That PW2 started screaming when PW1 fell down.

The inconsistencies and contradictions in the prosecution witnesses, make us find and hold that the conditions were unfavourable for seeing and identifying the attackers. The inconsistencies are fatal to the prosecution case.

The appellants gave defence of alibi. The trial court stated as follows in respect of the 1st appellants

defence:

“On the 1st accused’s defence, I do not find it incredible and unworthy of being relied upon. He has not indicated why the AP Officers who apparently ambushed them in a drinking den would want to frame him up. He raised an alibi that he was with DW2 the whole evening, but less than 3 prosecution’s witnesses saw him shortly after he had stormed PW1’s hotel, a fact which he does not deny.”

On the 2nd appellant the court stated:

“The 2nd accused also claims to have been arrested while taking brew and he reported the names of Peter Kimathi. I do not find it as credible either.”

On the 3rd appellant the court stated:

“The 3rd accused raised the defence of alibi; that he was away from 1st to 5th April. He also claims to have been framed up but I do not find his version truthful. No reason emerged as to why the community policing would want to arrest him for a grudge unknown. I dismiss his defence as lacking in candour.”

We believe and rightly so that it is settled law that an accused person bears no burden of proving his defence is true or of proving his innocence. That once a defence of alibi is given the burden of proof shifts to the prosecution and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable (see **KIARIE V REPUBLIC (1984) KLR 729**).

Having carefully considered this appeal we have come to the conclusion that the evidence adduced against the appellants fell far too short of proof to the required standard in criminal cases. We find that the conviction against appellants was unsafe and should not be allowed to stand.

Accordingly we quash the conviction and set aside the sentence. We order the appellants should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 20th DAY OF JUNE, 2013.

J. LESIIT

JUDGE

J KAMAU

JUDGE _

Delivered in open court in presence of:

1. Mr. Makori State Counsel – For State

2. Appellants in person – present

J. LESIIT

JUDGE

J. MAKAU

JUDGE