



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 23 OF 2008
(LESIIT AND MAKAU,JJ)

SAMMY KARIITHI KIREMANA alias MARINDO 1ST APPELLANT

FREDRICK MWITI 2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

**(Being an appeal from the conviction and sentence of R. N. KIMINGI, PM IN Criminal case
NO.572 of 2004 at Maua Law Courts)**

JUDGMENT

The Appellants SAMMY KARITHI KIREMANA(Alias) MARINDO hereinafter the 1stAppellant and FREDRICK MWITI M'IBWATHO(alias RWANJE), were the first and second 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 the Penal Code. The particulars of the charge were that:-

On 1st day of February, 2004 at Kaelo market in Meru-North District within the Eastern Province jointly with others not before court while being armed with dangerous weapons namely pistols, robbed Jennifer Nchororo of cash Kshs.70,000/- and cigarettes valued at Kshs.30,000/- all valued at Kshs.100,000/0- and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said Ncororo.

After full trial the learned trial Magistrate convicted both Appellants with the offence and sentenced them to death.

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

The Appellants filed two separate petitions of appeal. We have consolidated them having arisen out of the same trial. We have looked at the grounds raised by each of the Appellants and find that all these grounds can be summarized as follows:-

1. ***That the evidence of identification/recognition given by PW1, being a single witness was not***

reliable as the circumstances under which identification was made were not conducive for positive identification/recognition.

2. *That the learned trial magistrate erred in law in failing to comply with Article 50 of the Constitution of Kenya, 2010 and the Appellants did not have a fair trial.*
3. *That the prosecution case was riddled with material contradictions.*
4. *That the Appellants defence of alibi was not rebutted and prosecution case was not sufficient to sustain conviction.*

When the appeal came up for hearing Mr. Otieno appeared for the Appellants. The State was represented by Mr. Moses Mungai, learned State Counsel.

We are the first appellate court. We have followed the applicable principles set out in the EKENO VS REP 1972 EA 32 where court of appeal held;

“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).”

The facts of the case are that PW1, Jennifer Ncororo, a businesswoman operating a shop at Kaleo Trading Centre, was on 1/2/2004 at 8.00 p.m at her shop alone. When she wanted to close her business someone pushed the door from outside and asked her to sell cigarettes to him. PW1 opened the door and returned to the counter. That two people entered her shop. That there was a pressure lamp on in the shop. That PW1 took cigarettes and gave them to 1staccused, who removed a pistol from inside his jacket and ordered her to raise her hands as he pointed the pistol at her. The 1st accused removed PW1’s head-scurf from her head and tied her hands. PW1 was led towards the bed and asked to produce money. By then the shop door had been locked from inside by the.

PW1 was led to the counter whereby the accused took 10 parcels of cigarettes and 10 boxes of batteries and Kshs.70,000/- which PW1 had hidden in the shop, after she had shown them the said amount. That a person knocked the door and attackers left. That people came, shouted thief! thief! and untied PW1. PW1 subsequently went to report to the nearby AP’s who referred her to Laare Police Station. PW1 reported to Laare Police Station the following day and started looking for the attackers. That the attackers were arrested in the evening in the presence of PW1. They took the suspects to Laare Police Station. PW1 stated that a person brought cigarettes at Laare Police Station and reported the accused had given him the cigarettes to go and sell. That person PW1, stated was called Patrick Mwenda. That the police took the cigarettes. PW1 stated the value of stolen property was Kshs.100,000/-.

The Appellants gave unsworn defence. The 1st Appellant stated that in the year 2004 he woke up in the morning and proceeded to work. That at 12.30 p.m. a policeman arrested him and took him to his house and carried search but did not find anything. That he was not told what the Police Officer was looking for. He was subsequently charged with this offence.

The 2nd Appellant in his unsworn statement stated that on 3rd February, 2004 at 9.00 p.m he met with three Administration Policemen who arrested him saying he was drunk and took him to their camp. That he was remanded for 2 days and later taken to Laare Police Station whereby he was detained for 11 days. He was subsequently charged with robbery and was told that he had robbed Jennifer. He denied the offence.

Mr. Otieno C. for the Appellants, during the hearing of the appeal submitted that the trial court erred in failing to comply with Article 50 of the Constitution of Kenya, 2010 in that the Appellants were not given fair trial, in that they were not given sufficient time to prepare their defence. He submitted that prejudiced the Appellants defence.

The learned Advocate further submitted that the Appellants were not sufficiently identified as the offence took place at night and there was no sufficient evidence whether there was sufficient light at the material time. Mr. Otieno C, learned Advocate referred us to our own judgment in Meru HCCRA NO.48 of 2011 in which we held that the trial Magistrate did not carefully evaluate the complainant's evidence in regard to the conditions of the light and what it was that enabled the complainant to make recognition of her attackers.

The learned Advocate submitted that the Appellants were not clearly identified. Mr. Otieno C, urged that the evidence of prosecution was full of contradictions. PW1 talked of there being two assailants whereas PW4 contradicted herself and stated PW1 reported of there being 4 attackers. He also submitted that the evidence of a single witness should be treated with a lot of caution before the court relies on the same. On the defence he submitted that the Appellants' defence of alibi was not rebutted by the prosecution. On the names given by PW1 of the attackers he submitted that they were not Appellants names nor were the Appellants known by such aliases names.

Mr. Moses Mungai, learned State Counsel, who represented the State opposed these appeals. He submitted that this was a clear case of recognition and not identification as the Appellants were known to the complainant as workmates and she knew them physically and their nicknames and that led to their arrest. That Pw1 reported to AP and gave the Appellants names.

Mr. Moses Mungai, learned State Counsel, urged that although the offence was committed at night, the duration of commission of the offence was reasonable for recognition of the assailants and the complainant described what each of the Appellants did. He urged that the assailants talked to the complainant and there was pressure lamp which enabled the complainant to see and recognize the assailants who had come as customers only to turn to rob her. He referred us to the case of **SIMON MBELLE V REPUBLIC(1982) 1 KAR 578** on voice recognition in which court held:-

“ What one must consider is:-

- 1. Whether it was accused voice***
- 2. Whether witness was familiar with the voice and***
- 3. Whether witness was able to recognize the voice.”***

He submitted the Appellants were recognized physically and by voice and that the conditions were favourable for the recognition. He urged that it was not fatal to convict on evidence of a single witness but what is important is the credibility of the witness. He submitted that the evidence of PW1 was corroborated by PW4. He submitted that the Appellant's defence, was considered and found not to be convincing.

He urged that the court evaluated the whole evidence and came to the correct decision.

Mr. Otieno C, for the Appellants in reply urged that on recognition the complainant did not know the Appellants' and the commission of the offence took 5 minutes. He urged the complainant did not clarify on the intensity of light and that evidence of single witness was not credible.

The case rests on evidence of recognition by a single prosecution witness PW1. There was no other evidence of circumstantial evidence in this case. As regards evidence of a single witness in the case of **ABDALLAH BIN WENDO & ANOTHER V REPUBLIC(1953) EACA 166** the Court Stated as follows:-

“There was a need for testing with the greatest care the evidence of a single witness respecting identification, especially when it was known that the conditions favouring a correct identification were difficult. In such circumstances what is needed was other evidence, whether it be circumstantial or direct, pointing guilt, from which a Judge or Jury could reasonably conclude that the evidence of identification, although based on the testimony of a single witnesses, can safely be accepted as free from the possibility of error.”

Besides the above-case in **FRANCIS KARIUKI NJIRU & 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 her evidence stated as follows:-

“I opened the door. I returned to the counter. The person entered into the shop. They were two-the accused in the dock. There was pressure lamp in the shop. I took the cigarettes. I removed the sticks. As I gave them the 1st accused removed a pistol from the inside of his jacket. He told me to raise up my hands. He pointed it at me. He told me to produce money. He hit me with it on the head. He told me I will produce money. I told him I do not have money. The 1st accused removed my headscarf from my head. He tied me with it on the hands. They led me towards the bed. They told me I produce money. I told them I had no money. The door was locked from inside. It is the accused who had locked it. They also led me toward the counter. They took cigarretes-10 parcels and 10 boxes of batteries. They took cash 70,000/-. I had hidden it in the shop. I showed them where it was. A person knocked the door. They left me.”

PW1 in her evidence in Chief referred to her assailants as accused in the dock and that they were two. PW1 in her evidence in Chief did not mention whether she had known the assailants before and for how long. She simply referred to them as accused in the dock and that she told police who they were. She did not mention her assailants by their names or give description of how they looked like or how they were dressed.

The trial Magistrate did not give a careful and cautious consideration of evidence of the recognition and specifically when it was clear that the conditions favouring a positive recognition was difficult. The trial Magistrate did not consider the type of light that was in use, the intensity of light and how far PW1 was from the assailants and whether there was any impediment at the time the recognition was made.

We have said time and again in cases of recognition or identification it is important for the court to consider exactly how the recognition or identification came to be made. In this case the assailants were in the shop and were armed with PW1 alone. PW1 must have panicked.

In the instant case there was no inquiry as to the nature of light the alleged pressure lamp had or its brightness or otherwise or where it was placed in relation to the position of the assailants. It was essential that there should have been an inquiry as to the nature of light available that assisted PW1 in making the recognition. We are of the view that in absence of inquiry evidence of recognition may be hard to be free from error.

There was lack of detail in PW1's evidence and it is difficult to test the evidence of recognition with such scanty details on recognition. When PW1 made her report to Administration Police and Police Officers she did not give description of her attackers but PW4 stated that PW1 gave the names of her attackers to PW2 as MAIDO AND RWENJE. There was no evidence from PW1 to explain whether MAIDO AND RWENJE were the same as by PW1 to PW3 were appellants alias names. None of the names corresponds with the Appellants' name in the charge sheet either as their names or aliases. The alias names in the charge sheet are MARINDO and RWANJE and not MAIDO AND RWENJE. PW2 claimed the names MAIDO and RWENJE referred to Appellants and that they were their nicknames. We regret we cannot find any connection between the alleged names and the Appellants.

We have found that the circumstances prevailing at the time of commission of the offence were not favourable for positive identification.

PW1 in her evidence stated that the assailants were two whereas PW2 stated that PW1 reported that four people two of whom were armed with pistols robbed her of Kshs.70,000/- and shop goods worth Kshs.30,000/-. She testified that she identified two as MAIDO AND RWENJE. PW1 stated that 1st appellant removed her headscarf from her head and tied her hands. During cross-examination however she stated she told the Police each of the assailants produced pistols, one pointed a pistol at the front and the other from behind. PW1 testified that one collected Kshs.10,000/- from the counter. She further stated she mentioned the name MAIDO AND RWENJE. PW1 changed her story during cross-examination and said that her hands were tied by 2ndAppellant. PW1 further on being cross examined by 2ndAppellant stated that 2ndAppellant took Kshs.60,000/- and Kshs.10,000/-. She admitted in her statement to police that she did not state who took the money but said the two took the money. PW1 also admitted that she did not tell the neighbours that it was Appellants who stole from her.

We have analyzed the complainant's evidence in chief and during cross-examination and find that the same had material contradictions, on identification of the assailants either by their names or otherwise, and the role played by each of the assailants. We find the material contradictions in this case to be fatal to the prosecution case and find that the conditions were as earlier on stated, not conducive for positive identification or recognition of the assailants, hence the contradictions in complainant's evidence.

On the issue the Appellants were denied fair trial because that court did not comply with Article 50 of the Constitution of Kenya, 2010 we have perused the court record and at no time did the Appellants apply for time to prepare their defence and were denied by the court.

We find no basis on that ground and the same is dismissed.

On Appellants defence each denied having been at the scene of crime or having robbed the complainant. 1stAppellant stated that he was arrested and taken to his house where a search was carried out. He stated that he was not told what the Police Officers were looking for. The 2ndAppellant stated that he was arrested on allegation of being drunk and taken to Administration Camp where he was detained for 2 days before being held at Laare Police Station for 11 days. He denied the offence.

The Appellants ought to have been informed the reason for their arrest with sufficient details to answer the charge. The Appellants denied the offence and gave their defence of alibi. Alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge he/she is faced with do not assume any burden to proof the alibi is true. It is sufficient if an alibi introduces doubt into the mind of a court that is not unreasonable (see *Kiarie V R*(1984) KLR 739.

We are therefore not satisfied that there was correct recognition of the Appellants. We find that the circumstances of recognition were not conducive for positive identification of the Appellant's.

We accordingly allow these appeals, quash the conviction and set aside the sentences. We order that the Appellants should be set at liberty forthwith unless they are otherwise lawfully held.

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

J. LESIIT

J. MAKAU

JUDGE

JUDGE

Delivered in open court in presence of:

1. Mr. Makori State Counsel – For State

2. Appellant in person – present

J. LESIIT

J. MAKAU

JUDGE

JUDGE