



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 7 & 8 OF 2008

JAMES MAINA RIKONDO 1ST APPELLANT

PHILLIP MBURU RIKONDO 2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case Number 946 of 2007 in the Chief Magistrate's Court at Thika - L. W. Gicheha (SRM) on 8th January 2008)

JUDGMENT

These appeals are consolidated. The two appellants who are brothers were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. After the full trial they were convicted and each sentenced to death. Aggrieved by the said convictions and sentence, they lodged these appeals.

Their grounds of appeal are similar in nature and content. Both were dissatisfied with the learned trial magistrate for convicting them without cautioning or warning herself on the dangers of relying on the evidence of a single witness. They have also faulted the learned trial magistrate for relying on the evidence of a single identifying witness whereas there existed difficult circumstances unfavourable for positive identification. They have also taken issue with the fact that no doctor was summoned to testify in their case and finally that their respective defences were rejected on weak reasons.

As required of us, we have a duty to assess the evidence adduced in the lower court and arrive at independent conclusions. The offence took place at night at about 7.40 pm. The complainant was walking home through a coffee plantation when two people emerged and attacked him, robbing him of some money and mobile phone. It is his evidence that he identified the appellants as his attackers as they talked to him and in particular appellant Phillip Mburu ordering him to say his final prayers. In addition there was moonlight which aided him in identifying the two appellants.

On being attacked he lost consciousness and after he had recovered he went home and told his brother and his brother's son about the attack. Together with some young men they went to the homes of the alleged attackers and found James Maina. His brother was not there. On asking Maina about his phone and money he was told that Phillip had taken them. Maina was escorted to Kandara police station. When Phillip was eventually traced, he did not have the property of the appellant alleged to have been stolen.

There is some suggestion that the two brothers went to the appellant with their mother with a view to repaying the appellant but other than that allegation there is no evidence to sustain the same.

The rest of the evidence in support of the prosecution case was what the appellant alleged and therefore belongs to the province of hearsay. Under cross examination, the complainant PW1 said that he was drunk and when he was robbed he was alone. However, he told the court that he recognized his assailants because he had known them before.

It is true that the learned trial magistrate relied on the evidence of a single identifying witness to convict the appellants. In so doing, she did not caution herself of the danger of relying on such evidence. The evidence of a single identifying witness maybe relied upon to sustain a conviction. However, it must be tested with a lot of caution because, even in ordinary circumstance one may allege that he or she knows the particular person yet be mistaken. Indeed, even close relatives and friends have been found to be mistaken about the identity of one another.

The evidence of the complainant that there was moonlight stands alone. The brightness is not attested to and considering the fact that the assailants emerged from the coffee plantation and the attack was sudden, some doubt emerges in the circumstances of the case.

The complainant allegedly became unconscious on being attacked yet, in that state he says he was able to feel the removal of money from his pocket as he lay down and also heard his phone ring at the

same time. If in his own words he was drunk, then his degree of appreciation of the images before him were indeed impaired.

There cannot be any certainty that he identified the assailants to link the two appellants with this serious offence.

The two appellants on being arrested were not found with anything incriminating belonging to the complainant. That alone casts more doubt on the evidence of the complainant.

These appeals can therefore be disposed off by the discrepancies of the evidence of the complainant which as we have observed had several shortcomings. Even if the learned trial magistrate had warned herself of the danger of relying on the complainant's evidence, we find that that evidence would not have met the threshold required to sustain a conviction. There existed credible doubts in the prosecution case which should have been accorded to the appellants.

We find that the convictions were unsafe and therefore these appeals are allowed, convictions quashed and sentences set aside.

The appellants shall be released forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 25th Day of July 2013.

A. MBOGHOLI MSAGHA

FRED A. OCHIENG

JUDGE

JUDGE