



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 493 OF 2008

JAMES MACHARIA MBAU..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in criminal case Number 1779 of 2006 in the Chief Magistrate's Court at Makadara – Mrs. E Ominde (P.M) on 17/12/2008)

JUDGMENT

1. The appellant, **James Macharia Mbau** faced one count of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, and a second count of rape contrary to **Section 3(1)** of the **Sexual Offences Act No. 3 of 2006**, with the alternative charge of indecent assault contrary to **Section 144** of the **Penal Code** (repealed) as read with **section 11(6)** of the **Sexual Offences Act No. 3 of 2006**, before Ms. E. Ominde, Principal Magistrate, at Makadara law courts (as she then was). The appellant was convicted and sentenced to suffer death as by law provided in **count I** and acquitted in **count II**.
2. The particulars of the charge in which he was convicted were that on the 9th February 2006 at Eastleigh Section III Nairobi within the Nairobi Area, jointly with others not before court while armed with dangerous or offensive weapons namely a pistol, they robbed James Maina Macharia of cash Kshs.16,050/=, one mobile phone make Siemens A35, one Radio cassette make Sonny, three trousers and a travelling bag all valued at Kshs.29,450/=.
3. On appeal the appellant raised three grounds in which he averred that the charge sheet was defective, the evidence of identification was insufficient, and his defence was not adequately considered.
4. The appeal was opposed by the state through the learned counsel M/s. Maina. Miss Maina urged us to dismiss the appeal on grounds that the evidence was sufficient to support both conviction and sentence, since the arrest was immediate and the appellant was found with **PW1**'s mobile phone in his pocket at the time of arrest.
5. This being the first appeal we have perused the lower court record and re-evaluated the evidence tendered at the trial to make our own findings and draw our own conclusion as to whether the evidence was sufficient to form a basis for the appellant's conviction. We took care in our re-evaluation to give allowance for the fact that we did not have the advantage that the trial court had

of seeing and hearing the witnesses as they testified.

6. The prosecution case briefly stated was that on the 9th of February, 2006 **PW1** and his wife **PW2** were asleep in their house in Eastleigh Section III at about 3.00 a.m., when a gang of three men burst into their house armed with pangas and a gun. They had torches which they used to find their way around after smashing the single light bulb with a gun. The said men robbed the complainants of money, phones and clothes, and left with their booty.
7. The evidence of **PW2** is that the robber who remained behind when the others left, pulled her away from her husband and inserted his fingers inside her vagina ostensibly to search for any hidden money, then he proceeded to rape her. He later ran off locking them in from outside. They banged on their door attracting the attention of a neighbour who called the police, and other neighbours to rescue them. The police responded immediately and came to the scene. On his way out the appellant saw the police at the gate to the plot and ran back into the plot. He scaled the wall and climbed on to the roof in a bid to escape, with **PW1** together with the neighbours and the police in hot pursuit.
8. He was finally arrested and thoroughly beaten before the police rescued him and took him to Shauri Moyo Police station. At Shauri Moyo police station he was searched and a mobile phone make Siemens 135 which **PW1** and **PW2** positively identified as belonging to **PW1**, was recovered from one of his pockets. The report was booked and the appellant escorted to hospital for treatment before he was later charged.
9. The appellant in his first ground of appeal contended that the charge sheet was defective due to the variance in the description of the phone in the evidence and in the particulars of the charge sheet. The particulars of the charge sheet read, *inter alia* “**one mobile phone make Siemens A 35**”, while the proceedings described the phone as “**mobile Siemen 135**”.
10. **PW1** testified that among the property that the intruders took from his house were two mobile phones make Siemens, and that when the appellant was arrested and taken to Shauri Moyo Police Station, he was searched and a Siemens mobile phone recovered from him. When **PW1** first testified in court on 27th June 2006 the recovered phone was not in court. He told the court that the phone was still at Shauri Moyo Police Station. He was stood down from the witness stand and on 25th July 2006 when he was recalled to testify, the phone was produced in court whereupon he identified it, as one of those stolen from him.
11. In our humble view this was an error in the proceedings of the kind that is curable under **Section 382** of the **Criminal Procedure Code**. By the provisions of the aforementioned section no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.
12. The test therefore is whether the error herein occasioned a failure of justice. It is our humble opinion that the error in identifying the number on the phone did not occasion failure of justice since the particulars stated the date, place, complainants and what the appellant was alleged to have done which constituted the offence with which he was charged. There was also no dispute that the complainant lost a phone during the robbery, and it was the evidence of **PW1**, **PW2** and **PW3** that the complainant's phone was found in the appellant's pocket when he was searched at Shauri Moyo Police Station upon arrest.
13. This offence, occurred at night and the robbers broke the light bulb using a gun when they came in. That gun was also used to threaten **PW1** into submission. It is plain from the evidence that **PW1** and **PW2** were in great distress during the time of the robbery. When **PW1** became aware of the intruders he was immediately ordered to face the wall and a mattress and items of clothing

were piled upon him. He only got up when the last man left his house. In such circumstances it was not possible that he identified any of them. **PW2** on the other hand, said she got a good look at the appellant when he was raping her because he pulled her to the edge of the bed and was standing as he raped her, all the while holding a torch whose light she used to identify him. This is therefore, a case of a single identifying witness whose opportunity of identifying the appellant was difficult.

14. We warned ourselves of the dangers of relying on the evidence of a single identifying witness and submitted the evidence in this case to the test in the much cited decision of **Maitanyi v Republic [1986] KLR 198**. In the stated case Nyarangi, Platt and Gachuhi JJA held as follows:

“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.

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.

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.

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

15. In the case before us the evidence of arrest was also crucial in connecting the appellant to the offence besides the evidence of identification. Both **PW1** and **PW2** testified that when the appellant reached the gate on his way out, he saw that the police had arrived. He jumped behind the house and scaled the wall to get onto the roof. By then a neighbor had opened and let out the complainant. He together with the police chased the appellant on the roof and into the next plot into which he jumped.
16. These events were taking place at 3.30 a.m. according to **PW4**, PC. James Karanja of Shauri Moyo Police Station who was one of the police officers to respond to the distress call. This is hardly a time when many people will be going about so as to cause confusion as to who was being chased. Further, the appellant's demeanor itself was quite telling. Upon seeing the police he bolted even before they saw him and went to the trouble of scaling the wall and climbing onto the roof hardly the actions of an innocent person. **PW4** said that by the time they caught up with him he had already been arrested and thoroughly beaten by the irate members of the public. The officer did not state that he first saw the appellant at the gate. Lastly, the complainant's mobile phone taken from his house in a robbery only minutes before, was recovered in one of the appellant's pockets when he arrived at the police station.
17. We note that the complainant was not struck or wounded in the robbery but, as stated by Justices of Appeal Chesoni, Nyarangi and Platt JJA in **Oluoch v Republic [1985] KLR 556**, under **section 296(2)** of the **Penal Code** robbery with violence is committed in any of the following circumstances:

- “1. The offender is armed with any dangerous or offensive weapon or instrument, or**
- 2. the offender is in company with one or more other person or persons or**
- 3. at or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.**

In the foregoing case the trial magistrate had found the appellant guilty under **Section 296(1)** of the **Penal**

Code even though he was charged under **Section 296(2)** of the **Penal Code** because he argued that the robbers did not strike or use their gun on the complainant. The court of 1st appeal upheld the conviction but on second appeal the Judges of Appeal having set out the circumstances in which robbery under **Section 296(2)** of the **Penal Code** applies as above, went on to state as follows:

“So, it is not the degree of actual violence used that differentiates the two offences as the senior resident magistrate stated.”

18. According to the appellant in his unsworn testimony, he was the hapless victim of mob justice by people who concluded that, since he was a taxi driver, he must be one of those used by robbers to whisk away property stolen from them. He told the court that, in fact he was going home after he had returned the taxi and the proceeds of his night’s labour as a taxi driver, to his employer at Mirangi and had only moved 20 metres when he ran foul of the mob. He denied the offence and denied that any exhibit was recovered from him.
19. Although this was a criminal trial which placed no burden on the appellant to explain his innocence or at all, we found it surprising that his said employer did not come forward to explain to his neighbours that the appellant was there on legitimate business since he had barely covered a distance of 20 metres when he was stopped. In any case **PW1** and **PW2** looked through the window as they waited for their door to be opened from outside and saw him run towards the get, see the police and run back into the compound and from there scale the wall, onto the roof. By then **PW1** had come out and chased him right onto the roof.
20. There was therefore, no break in the chain of events from the time he ran out of **PW1**’s house to the time he was arrested. **PW1** did not lose sight of him. The learned trial magistrate examined the appellant’s evidence together with that of the other witnesses on record and found that it was the evidence of the prosecution witnesses which was credit worthy. She summed it up thus:

“I am satisfied that this evidence is credible. I also note that the same was not denied and/or challenged at all in cross-examination. It therefore stands as uncontroverted.”

21. We too have subjected the evidence in this case to the test in the Maitanyi case and find that no doubt exists in our minds as to the correctness of the identification of the appellant, and that his defence was adequately considered in the context of the rest of the evidence. The appellant was therefore properly convicted, and sentenced.
22. The upshot of the foregoing is that the appeal is lacking in merit and is dismissed.

SIGNED DATED and DELIVERED in open court this 12th day of August 2013.

A. MBOGHOLI MSAGHA

L. A. ACHODE

JUDGE

JUDGE