



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANGA
CRIMINAL APPEAL NO. 68 OF 2013
(Originally Nyeri Criminal Appeal No. 34 of 2009)

MOSES NGUGI NJOROGE alias KANAME

APPELLANT

v

REPUBLIC

RESPONDENT

(Appeal from conviction and sentence by M. W. Mutuku, Senior Resident Magistrate in Kigumo Senior Principal Magistrate's Court Criminal Case No. 2630 of 2007 on 12 January 2009)

JUDGMENT

1. Moses Ngugi Njoroge alias Kaname (Appellant) was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code and arraigned in court on 14th August 2007. The particulars were that the Appellant on the 6th day of August 2007 at Gakoigo village within Muranga District of the Central Province jointly with others not before court being armed with pangas robbed Rahab Njeri Njuguna of clothes and a mobile phone Motorola C118 valued at 2500/- and immediately after the time of the said robbery wounded her.
2. On 12th January 2009 the Appellant was convicted as charged and sentenced to death.
3. The Appellant was dissatisfied with the conviction and sentence and on 20th February 2009 he lodged an appeal before the High Court in Nyeri. That appeal was later transferred to Muranga High Court for hearing.
4. The grounds of appeal outlined in the Petition of Appeal related to evidence on identification.
5. When the appeal came up for hearing on 14th October 2013, the Appellant sought time to go through the record of proceedings and to file written submissions. The appeal was therefore adjourned to 17th October 2013 and on which date the Appellant filed Amended Supplementary Grounds of Appeal.
6. The Amended Grounds of Appeal listed two main grounds and these were identification, conflicting evidence/no evidence of stolen property.
7. The role of this Court in an appeal of this nature was stated in the case of *Okeno v R* (1972) EA 32. We will discuss the appeal bearing in mind the role of this court as a first appellate court.

Identification

8. In his written submissions, the Appellant contends that the prevailing circumstances during the alleged robbery were not good enough to enable his identification by PW 1 Rahab Njeri Njuguna (the complainant). The Appellant further submitted that PW 1 admitted in cross examination that her recorded statement did not state any details of the lights used to identify him.
9. Further the Appellant submits that whereas PW 1 testified that,

I told my husband that I had identified one of the suspects. I even gave him your names,

the husband, PW 2 Francis Njuguna Kimani testified that,

She never told me as to whether she had identified the attackers. I heard her mention that she knew one of the attackers. It was dark inside the house. Even outside was dark

And therefore *the* trial court should have disregarded the evidence on identification.

10. Mr. Naulikha in reply on the issue of identification submitted that the robbery took place around midnight and the attackers had a torch and PW 1 was able to identify the attackers and that PW 1 even showed the Appellant to PW 3 Peter Kamande (Chief) and PW 4 PC Benard Kimanzi (assisted in arresting Appellant).
11. In our re-evaluation, we need to look at the evidence on identification. That evidence primarily came from PW 1 and PW 2. PW 1 stated that the robbery took place at midnight and the Appellant had a torch on and she knew the Appellant previously. She further stated that she gave the Appellant's name when she made a report to the police at midday the next day after the robbery but she did not give details on the lighting in her statement. She also stated she informed her husband PW 2 that she knew the attackers and gave him the names of the attackers.
12. PW 2 in his testimony confirmed a robbery took place at around midnight when it was dark and that there were no lights except the torches the attackers had, he did not identify any of the attackers and that nothing was stolen. He categorically denied PW 1 telling him that she had identified the attackers.
13. The trial court came to the finding that PW 1 identified the Appellant very well. Before making our determination on the issue of identification we need to briefly refer to the guidelines on identification from decided authority.
14. In *Anthony Muchai Kubiika v R* (2013) eKLR the Court of Appeal made reference to its decision in *Waithaka Chege v R* (1979) EA 271 that

One always needs to approach the issue of visual identification with great care and caution... and the guiding principles laid in Simiyu and another versus Republic (2005) 1 KLR 192 that in every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by a person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given

15. In the appeal under discussion, PW 1 who allegedly identified the Appellant testified that she informed and even gave names of the attackers to her husband PW 2. PW 2 on the other hand categorically denied what PW 1 stated in this respect.
16. As to the lighting, it is not clear from the evidence what type of torch or torches were in use, the intensity of the light and even how long the attack took. The Investigating officer was not availed to testify on whether PW 1 gave any description of the attackers when the initial complaint/report was made to the police although it appears the Occurrence Book was produced.
17. In our considered view, the trial Court erred and misdirected itself in relying on the evidence of PW 1 to reach the finding that she had identified the Appellant very well. The Court ought to have warned itself of the danger of relying on the identification evidence of PW 1 in the circumstances of the case bearing in mind the testimony of PW 2..

Conflicting evidence/nothing stolen

18. On this ground, the Appellant made reference to the particulars in the charge sheet that PW 1 was robbed of clothes and a phone. PW 1's testimony was that the Appellant opened a box and took clothes and that the Appellant demanded the witness to give him her phone. The testimony of PW 2 however was that the attackers did not take anything from his residence and that he did not know what PW 1 may have lost.
19. Mr. Naulikha's response on this score was that the evidence was consistent and not contradictory and the charge was not defective. He further submitted PW 1's phone was stolen.
20. It cannot be doubted that there were inconsistencies between the evidence of PW 1 and PW 2, wife and husband about whether any items were stolen or not and on what type of information about the identity of the attackers the two shared. These inconsistencies were material.

Conclusion and Orders

21. In our view, the evidence on identification was not sufficient to connect the Appellant to the robbery and the trial court erred and misdirected itself in not considering the circumstances prevailing for identification and the material inconsistencies in the testimonies of PW 1 and PW 2. The conviction and sentence of the Appellant was not safe on the material which was placed before the Court.
22. In the circumstances we allow the appeal and reverse the conviction and sentence of the Appellant and acquit him of the charge and order that he be released forthwith unless otherwise lawfully held.

Delivered, dated and signed in open court in Muranga on this 28th day of November 2013.

A. Mbogholi Msagha

Judge

Radido Stephen

Judge

Appearances

Appellant in person

Mr. Solomon Naulikha, State Counsel for Respondent