



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL CASE NO. 287 OF 2008

(as consolidated with No. 288 OF 2008)

(Appeal from the judgment of L. W. Gicheha [Senior Resident Magistrate, Thika])

PATRICK MWANZIA MAINGI

CHRISTOPHER KYENGO KAUNA.....APPELLANTS

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellants Patrick Mwanzia Maingi and Christopher Kyengo Kauna were convicted by Thika Senior Resident Magistrate of two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. Their appeals against conviction and sentence were consolidated and heard together. The grounds of appeal are that identification was not positive, the evidence was full of contradictions and inconsistencies; that the ingredients of the offences were not proved, the magistrate rejected the defences of the appellants; and that the rights of the appellants were violated under **Section 72(2)(b)** of the former **Constitution**.

Briefly the facts of the case are that in the night of 22nd December 2006, the complainants were sleeping in their homes at Itundumuni village of Machakos District, when they were attacked by several men armed with pangas, arrows and bows and robbed of their property including mobile phones and cash money. The appellants were arrested at different times and charged with the offences. The two were subsequently charged before Thika Chief Magistrate court where the prosecution called seven witnesses. The appellants gave unsworn statements of defence.

The duty of this court on appeal is to evaluate the evidence on record and to reach its own finding. The court also requires to take note of the fact that it did not have the benefit of seeing the witnesses in order to assess their demeanor. This legal principle was upheld by the Court of Appeal in **Criminal Application no.280 of 2004 (2005) 1KLR Odhiambo vs. Republic** and also in that of **Okeno vs. Republic Court of Appeal Nairobi Criminal Appeal no.75 of 1971**. I cite the dictum of the judges in the latter case:

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence and see if there was some evidence to support the lower court’s findings and 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 had the advantage of hearing and seeing the

witnesses.”

The appellants claimed that the witnesses contradicted themselves on what transpired at the scene of crime. PW5, PW6 and PW7 were members of one family. They were attacked in their own home in the same incident but gave different versions of the event. PW5 said that when the 2nd appellant left the house, the 1st appellant was left guarding him and his wife PW7. PW6 said she left her parents PW5 and PW7 guarded by the 2nd appellant while the first appellant went with her outside the house. At some point, the 1st appellant raped PW6. The first appellant was acquitted of the charge of rape. When she returned to the house after the ordeal, she did not find the 2nd appellant in the house. The judgment of the magistrate did not address this contradiction which is a major one going to the root of the case. It touches on the issue of identification as to whether PW5 and PW6 were talking of the same people when they referred to “Mwanzia” and “Kyengo” respectively and the role each one of them played during the incident. The contradiction puts the evidence of the two witnesses into questionable credibility and negates the concept of positive identification.

Regarding the date of the offence, PW5 says it was the 23rd December 2006 at 19.00 hours while the charge sheet gives the date as 22nd December 2006. The time of the incident given by the witnesses was between 10.00 p.m. and 11.00 p.m. PW1 said he was attacked on 22nd December 2006 at 11.00 p.m. PW2 said the incident occurred on 22nd December 2006 at 11.00 a.m. The witness further testified that the attack took place at night. He said he was asleep with his wife and children in their home when he heard noise. As far as the time of 11.00 a.m. is concerned, it appears it was a typographical error since the rest of the evidence explain that the incident occurred in the night of 22nd December 2006. The date of the offence given by PW3 the Assistant Chief as 12th December 2006 was erroneous since the other witnesses including those who informed him of the incident gave the date of 22nd December 2006. PW5 gave the date as 23rd December 2006 which contradicts the date on the charge sheet and that given by his family members as 22nd December 2006. However, his wife and daughter PW6 and PW7 in their testimonies described the same incident as PW5. From the evidence on record, we come to the conclusion that the date of 23rd December 2006 must therefore be erroneous and that the correct date and time is 22nd December 2006 at 11.00 p.m.

The discrepancy on the date of the offence is not fatal to the prosecutions case provided there is evidence by other witnesses to the effect that the incident occurred on the date in the charge sheet and that the evidence of all the witnesses point to the same incident, transaction or series of transactions. We find that the issue of the date does not therefore affect the prosecution's case.

The other prong of the appeal is that the constitutional rights of the appellants were violated in that they were remanded in police custody for over 14 days before being arraigned in court contrary to **Section 72(3)** of the former constitution.

For the 1st appellant, he said was arrested on 23rd December 2006 and was arraigned in court on 9th January 2007. He was therefore in police custody for 15 days instead of the 14 days allowed by the law. The 2nd appellant was arrested on 26th January 2007 and charged in court on 13rd February 2007. This was a period of 18 days in police custody.

Section 72(3) provided:

A person who is arrested or detained -

“(a).....

(b) upon reasonable suspicion of his having committed or being about to commit a criminal offence;

and who is not released, shall be brought before a court as soon as is reasonably practicable,

and where he is not brought before a court within twenty-four hours of his arrest or from the

commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with.

72(5) If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

72(6) A person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person.”

The repealed Constitution required that any person detained for reason of being suspected to have committed a capital offence (punishable by death sentence) be charged in court within 14 days. The appellants herein were detained for more than 14 days before being arraigned in court. According to the appellants, they complain that this was a gross violation of their rights and urge the court to release them.

It is important to note that the matter of over-detention in police custody was not raised during the trial. The appellants were not represented by a counsel in the magistrates court and may not have been in a position to raise the matter. The trial court did not therefore address the issue notwithstanding the fact that it is the High Court which is possessed of the jurisdiction to probe into the violation of constitutional rights. When the issue is raised on appeal, it denies the prosecution the chance to explain the delay in arraigning the accused persons before court.

We are aware that there are several High Court decisions where accused persons had criminal charges against them quashed and were in effect released due to violation of their rights to freedom. The court of appeal settled this issue in the case of **Julius Kamau Mbugua vs Republic Criminal Appeal No 50 of 2008** where it was held that extra-judicial incarceration has no link or effect to the trial process and that it did not cause trial – related prejudice to the appellant. The violation of the right does not in any way affect the validity of the trial.

In the case of **Republic vs David Geoffrey Gitonga Meru High Court Criminal Case no. 79 of 2006** Anyara Emukule, J in dismissing a petition to declare criminal charges a nullity for violation of the right to freedom said:

“Firstly, the principle of nullity presupposes that the process of the trial is void because it is against public policy, law, order, and indeed, the nullity is incurable.....It is, public policy of all civilized states that offenders be subjected to the due process in respect of defined offences and by duly competent courts or tribunals”

This decision of Emukule, J was upheld by the Court of Appeal and also cited by another bench in the case **Julius Kamau Mbugua vs Republic** (sic).

Section 72(6) provides for compensation where the rights of an arrested person who has been subjected to judicial incarceration. The appellants in this matter have a remedy which they can pursue in Civil Proceedings. The incarceration does not in any way justify the nullification of the criminal charges. We therefore reject this ground based on **Section 72(3) (b)** of the repealed **Constitution**.

The accused persons gave unsworn statements of defence and explained their whereabouts at the material time denying the offences. The magistrate considered the defences and came to the conclusion that the prosecution's evidence was more convincing than the explanations given by the appellants. It is not true therefore that the defences merely ignored.

The appellants faulted the evidence of identification terming it unreliable. The trial court relied on the evidence of PW1, PW5, PW6 and PW7. PW1 testified that he was asleep in his house around 11.00p.m. when he was woken up by a scream from his child. He took a torch and went outside. On flashing it, he saw the 2nd appellant who is his neighbour. He was immediately hit by someone from behind him and fell down losing consciousness. Pw1 does not describe the way the attacker was dressed or how far he was from him when he flashed the torch and neither does he give particulars of the intensity of the light from his torch.

PW5, PW6 and PW7 were in the same house when they were attacked. It was around 11.00 p.m. when the incident occurred. PW5 said he was asleep and was not feeling well. He was woken up from sleep by the commotion of the attackers already inside his house.

When he tried to flash his torch, he was slapped and ordered to lie down on the floor. The witness said that he saw the first appellant before he was subdued. He also saw the appellant struggling with his wife as the appellant held a panga. He was aided by the light from the attackers torches. PW6 and PW7 said that they were aided by the light from the torches of the attackers to see the appellants as they flashed their torches around.

These three witnesses claimed that they knew the appellants before the incident. It was their evidence that the 2nd appellant was a distant relative. In their testimonies in court, the witnesses called the appellants by name as “Mwanzia”and “Kyengo”. Yet in their report to the police on the incident and in their statements, the witnesses did not mention the names of their attackers. Neither did they give descriptions of the mode of dress or actual roles played by each of the appellants. The statement of PW7 was produced in evidence on request of the first appellant. The statement does not contain the names of the appellants and does not give any indication that PW7 identified or recognized any of the attackers. The statement is devoid of any narration of the roles played by the attackers.

It took almost one month to arrest the 2nd appellant, yet the witnesses say he is their relative and know him well. PW3 the area chief re-arrested the first appellant from PW4 and other members of public about six hours after the robbery. He was found sleeping in a bush about 100 metres from PW5's house. Nothing was recovered from the first appellant. If the witnesses had recognized their assailants, it would be expected that they would have informed the police and the area chief and given particulars of the persons who attacked them including their places of abode. The suspects would therefore have been arrested within a few hours after the incident. Assuming that the witnesses had identified their assailants, the most logical thing for them to do was to give their particulars to the police as they recorded their statements. None of the witnesses did so.

PW5 and PW6 gave the name of the first appellant and that of the 2nd appellant interchangeably in their testimonies as the persons who guarded PW5 and PW7 while the other appellant went outside the house with their daughter PW6. PW5 said:

“I was left with the 1st accused (1st appellant) for 30 minutes. My wife wanted to follow the child (PW6) but 1st accused threatened her. As my daughter was coming back she was raped.”

PW6 said:

“I was left with Mwanzia (1st appellant) to protect me from running home. When we left with 1st accused, he dropped me on the ground and raped me.”

The question which arises is who was left guarding PW5 andPW7 and who went outside with their daughter (PW6) for 30 minutes.

This discrepancy is an indication that PW5 and PW6 did not recognize the attackers and did not take note of what role each played.

We take judicial notice of the fact that the torches of robbers are normally flashed at their victims and it

is highly unlikely that the light from one or two of the torches would help the victim to see their assailant, unless in very exceptional circumstances. There was no evidence from PW5, PW6 and PW7 to show that there were any exceptional circumstances. Apart from the torches of the assailants, there was no other light in the house. The incident took place between 10.00 to 11.00 p.m. when it was dark.

The appellants argued that the circumstances and conditions prevailing at the time of the attack did not favour positive identification.

The magistrate in this case said in her judgment:

“I have considered indicatory of identifying using light from torch but I find that PW5, PW6 and PW7 had ample time to identify the first accused before and PW1, 5, 6, 7 were also able to recognize 2nd accused who is a neighbour.”

With respect, we disagree with the finding noting that there was no evidence as to the period of time the witnesses observed their assailants, on the size of torch used or the intensity of the light. The witnesses did not even tell the court at whom the direct beams of the light were aimed at what stage the light aided each one of them to see their assailants. None of the witnesses described his position in relation to the assailant at the time he saw them. It should be noted that PW5 was lying down on the floor and was unwell at the time of the attack.

PW1 said in cross-examination that he did not identify the 1st appellant and further that:

“I did not see you in the robbery.”

However, the trial court proceeded to convict the 1st appellant on count II where PW1 was named as the complainant without giving reasons for the decision.

In regard to the 2nd appellant, PW1 said in his evidence in chief:

“It was the 2nd accused I was able to identify.”

In cross-examination PW1 said:

“I was able to identify you.... I know you well.”

The witness admitted that he did not give the police the name and particular of the 2nd appellant despite having identified him. This is very unusual if the witness identified the 2nd appellant. PW1 said he was aided by light from a torch without giving the intensity of the light or the distance. PW1 said that he was cut with an axe on the head, back and on the leg. He also admitted in cross-examination that he had very poor vision as a result of an eye problem. In our considered view, these circumstances were not conducive to positive identification. Had PW1 identified the 2nd accused, he would have given his name and other particulars to the police since he knew him before the incident as a distant relative.

The Court of Appeal in **Mbui John Mwaita vs. Republic (2010) eKLR** held that in a case where the prosecution case was solely dependent on the identification of the appellant ***“it is trite law that where the evidence relied on to implicate an accused person is entirely of identification, the evidence must be water tight to justify conviction.”*** The court upheld the principle laid down in the case of **Kiarie vs. Republic 1984 KLR 739**. It is also trite law that where the conditions for identification are not favourable, the evidence should be tested with the greatest care.

In the Court of appeal case of **Michael Ochieng Odongo vs. Republic Kisumu criminal appeal no. 208 of 2006** which had similar facts regarding light from the torches of the assailants, the court held in allowing the appeal:

“...the evidence of identification on which those two courts relied is completely incredible and

cannot sustain the appellants conviction.”

Having narrated the circumstances under which the incidents took place, we have no doubt that the findings of the trial magistrate on identification was not supported by cogent evidence and lacked depth in the analysis of the evidence.

It is our finding that the evidence of identification in this case was an afterthought, unreliable and unworthy of credit. The convictions in both counts are unsafe and are hereby quashed and the sentences set aside.

The appeal is therefore allowed and the appellants released forthwith unless otherwise lawfully held.

F. N. MUCHEMI

JUDGE

G. ODUNGA

JUDGE

Judgment dated and delivered on the **26th** day of **November, 2013** in the presence of the appellants and the State counsel Ms Gichohi.

F. N. MUCHEMI

JUDGE