



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NUMBER 145 OF 2011

BETWEEN

FAIZAL KWEYA AMASA.....
.....APPELLANT

AND

THE REPUBLIC OF KENYA.....
RESPONDENT

[An Appeal from the Judgment of the learned Senior Resident Magistrate D. Onyango dated 30th May 2010, in Chief Magistrate's Court at Kibera, Criminal Case Number 4093 of 2010]

Appeal before Justices Monica Mbaru and James Rika

Appellant Faizal Kweya Amasa appearing in Person

Senior Assistant Director of Public Prosecutions Mr. O'Mirera appearing for the Respondent

JUDGMENT

1. Faizal Kweya Amaya was charged with the offence of robbery with violence, contrary to Section 296 [2] of the Penal Code. The particulars of the offence were -:

“ On the 6th day of July 2010 at Kabiru Kawangware within Nairobi area Province, while armed with a dangerous weapon namely a knife, robbed Boss Mulinge Saya of Kshs. 1,000, and at or immediately before or immediately after the said robbery threatened to use actual violence to the said Boss Mulinge Saya.”

2. He was convicted and sentenced to suffer death on 30th May 2010.
3. He filed this Appeal against conviction and sentence, raising four grounds of appeal , which may be summarized as follows:-
 - **The Trial Court improperly accepted evidence of visual identification;**
 - **Essential witnesses who would have offered evidence favourable to the Appellant were left out by the prosecution;**
 - **The Trial Court erred in endorsing the manner through which the Appellant was arrested; and,**
 - **The Trial Court did not give reason in rejecting the Appellant's defence.**

4. The Complainant [PW1], a boy aged about 9 years, gave unsworn evidence on 11th October 2010. He testified he was on his way to School on 6th July 2010, accompanied by his 6 year old brother Moses Bahati. PW1 had Kshs.1, 000, given to him by his Father Elijah Njoroge, to pay to the School as fees. A man [Appellant] approached PW1 from behind. The Appellant had a knife. He demanded that the Complainant gives him the money, or the Appellant would stab the Complainant. The Complainant initially refused to give the money to the Appellant. The Appellant forcefully took some money from the Complainant. According to the Complainant, one Baba Moses [PW3] eye-witnessed the robbery. Baba Moses walked behind the Complainant.
5. The Complainant proceeded to his School and reported to his teachers that he had been robbed of his School fees. The School sent him home to call his Mother Jennifer Kagari [PW2]. Back at the School, several people were paraded, and the Complainant asked to identify his assailant. He was not able to do so. The Complainant testified he then went to a place called Stage 2 within Kawangware, accompanied by another man. There, they found the Appellant. The Appellant wore a yellow T-Shirt and short Jeans. When he saw the Complainant and his companion, the Appellant took out the same knife he had used to threaten the Complainant earlier, and threatened to stab the members of the public. He was arrested and handed over to the Police. The knife was recovered from the Appellant. The Complainant testified he was able to identify the Appellant in Court because of his facial appearance, and also identify the offensive knife because of its pink, plastic handle.
6. PW2, the Complainant's Mother told the lower Court she gave her Son Kshs. 1,000 to pay School Fees. The Boy returned home and reported to his Mother that he had been robbed of the money by a man who threatened the Boy with a knife. A young man who had witnessed the robbery had asked the Complainant to go and call his Mother. The Boy, accompanied by his Mother went to the scene of the robbery and met this young man. The young man said he had seen the Appellant rob the Complainant. A lady named Everline Naliaka joined the group. In due course more young men came to the scene, asked the Complainant for the description of his assailant. The Complainant described his attacker as light skinned, and dressed in a yellow T-shirt and short jeans. After the description, the young men revealed that they knew the assailant. They called Moses who confirmed he had seen the Appellant rob the Complainant. The young men left in search of the Appellant, while PW2 went and reported the matter to the Muthangari Police Station.
7. Moses Tabuley Wakisa [PW3] testified he was on the material day following the Complainant from behind. He saw a young man appear from a nearby house, talk to the complainant for 5 minutes, and then left the boy in tears. The young man had a black thing. PW3 asked the boy what had happened. The Complainant told PW3 that he had been robbed Kshs. 1,000, and the black thing seen by PW3 was a knife used by the assailant to threaten the Complainant. PW3 sent the boy to call his mother. The members of the public were given description of the assailant and traced him at Stage 2 Kawangware. The boy positively identified the Appellant. The Appellant attempted to run away on seeing his pursuers, produced the knife and threatened to stab the members of the public, but was overpowered, arrested and handed over to the Hope Police Post. PW3 knew the Appellant as a person who worked as a Matatu Conductor at Kawangware route number 46. He knew the Appellant by the name Faizal. This evidence was corroborated by PW4 Everline Naliaka, who was part of the group that effected the citizens' arrest.
8. Police Constable Rino Najune [PW5] rearrested the Appellant at Kamitha Police Post. The Appellant was escorted by a group of over 20 persons. He was bleeding in the mouth, having been assaulted by the members of the public. The crowd handed a knife allegedly recovered from the Appellant, to PW5. The Appellant was transferred to Muthangari Police Station. At Muthangari, the Appellant was received by Corporal Joseph Nyasani [PW6]. PW6 recorded the statements of the witnesses, took custody of the knife and charged the Appellant with the offence of robbery with violence. He conceded on being cross-examined by the Appellant that no identification parade was conducted.
9. In his defence, the Appellant gave an unsworn statement. He testified he worked as a Disc Jockey

at a Club called Florida, in Nairobi. He resided at Kawangware. He was at work at this Club and left work for home at 7.45 a.m., arriving at Kawangware at 9.00 a.m., on the 6th July 2010. When he alighted at the Bus-stop, he had barely made several strides when a group of people assaulted him. Some of them in the group wanted to lynch him. He was taken to Kamitha Police Post, and later to Muthangari Police Station, and charged with the offence of robbery with violence. He knew nothing of the offence.

10. The Learned Trial Magistrate concluded that the Appellant's defence was totally unconvincing. He found the Appellant's evidence failed to displace the evidence of PW1 and PW3. The Court was satisfied that the Complainant consistently described his attacker as light skinned and clothed in a yellow T-shirt and short jeans. There was no need to conduct an identification parade. The description led to the arrest of the Appellant soon after the robbery. The Complainant was present at the time of the arrest. The Court found PW3 to be a truthful witness whose evidence corroborated that of the Complainant. Both the Complainant and PW3 positively identified the Appellant as the assailant who, while armed with a knife, robbed the Complainant. The knife was recovered from the Appellant and produced as an exhibit.
11. The Appeal was heard on 16th October 2013. The Appellant submitted that the Complainant told the Police he was attacked by an unknown person who was wearing a yellow t-shirt and short green jeans trousers. He reported to the school that he had been robbed, but was unsure about the identity of his attacker. PW3 said he saw the attacker talk to the boy for about five minutes. This witness was about eight metres behind, and in five minutes, would be expected to have reached where the boy and the attacker were. The Appellant was not arrested while wearing the clothes described by the Complainant. The Appellant gave evidence showing he worked as a Disc Jockey and was arrested by the crowd while on his way home from work. The Trial Court failed to consider his defence of *alibi*. Ms. Nyauncho submitted the Appellant was convicted on sound evidence. He threatened the minor he would stab him, and stole Kshs. 1,000 from the minor. The boy's evidence was corroborated by that of PW3 who walked a few paces behind at the time of the attack. PW1, PW2 and PW3 identified the Appellant. He still had the knife. The Investigating Officer visited the scene of crime. All the ingredients needed to show that the offence of robbery and violence was committed, were demonstrated through the evidence of the prosecution witnesses. The State urged the Court to reject the Appeal and uphold the decision of the Lower Court.
12. The High Court, as the first Court to which appeal has been submitted, has an obligation to re-evaluate this evidence and make its own findings. The Appellant was first arrested by members of the public and handed over to PW5, Police Constable Rino Najune at Kamitha Police Post. He was then forwarded to Muthangari Police Station, where the offence had been reported by PW2 Jennifer Kangari, the Complainant's mother. PW5 Corporal Joseph Nyasani placed the Appellant under custody at Muthangari Police Station, recorded statements from the witnesses and charged the Appellant with the offence. Section 34 of the Criminal Procedure Code Cap 75 the laws of Kenya, permits a private person to arrest any person who in his view commits a cognizable offence, or whom he reasonably suspects of having committed a felony. Section 35 regulates the disposal of persons so arrested; the arresting private person shall without unnecessary delay hand over the person arrested to a Police Officer, or in the absence of a Police Officer take the person arrested to the nearest Police Station. We find manner of the Appellant's arrest to have been lawful and in conformity with these provisions. Ground 3 of the Amended Petition of Appeal fails.
13. The other three grounds raise questions of the accuracy and reliability of the evidence upon which conviction was made. The Appellant according to the evidence of PW3 spoke to the Complainant for only 5 minutes. PW3 says he knew the Appellant by the name Faizal, and that PW3 walked about 8 metres behind the boy. The boy himself testified that after the attack, he proceeded to the School, where the School organized some form of identification parade by placing several persons in a line, and requiring the Complainant to pick out his attacker from those paraded. The Complainant was not able to pick out his attacker from the individuals paraded by the School. It is not clear why this parade by private persons was necessary if PW3 already knew Faizal, and was

following the Complainant 8 metres from behind. PW1 testified that Baba Moses followed the Appellant after the attack, as the Complainant himself proceeded to the School. The evidence of PW3 was that after “*descriptions, some people decided they knew where the young man [Appellant] could be found.*” PW2 the Complainant’s mother, was told by PW3 that PW3 had seen the man who robbed the Complainant of the money. Young men asked the Complainant to give them a description of the attacker. It was after they received the description that they went to Stage 2 and arrested the Appellant. The Appellant was unknown to the Complainant before the alleged robbery. The trial Court did not carefully examine the circumstances under which the Complainant identified his attacker to the arresting crowd. The Complainant had only been with his attacker for 5 minutes. There was no familiarity between the Complainant and his attacker. Evidence of identification must be as accurate as possible, and properly gathered by appropriate criminal justice agencies. The Court must always caution itself of the danger posed by the vagaries of human recollection and perception. Victims of crime may suffer memory distortion, and in certain cases their evidence of identification may result from suggestibility.

14. PW3 who claimed to have been an eye witness did not give any description of the attacker to the Police to corroborate the description given by the Complainant that the attacker wore a yellow T-shirt, short jeans and was light-skinned. None of the over 20 persons who arrested the Appellant, gave evidence of the clothes he wore on arrest. The Complainant’s brother, who accompanied him to school, was not questioned by the Police, or called as a witness. There were several gaps in the prosecution’s case, which cannot be said to be so minor as to have no effect on the reliability and accuracy of the evidence used by the trial Court to convict the Appellant. PW1 alleged the Appellant had a kitchen knife with a plastic pink handle. PW3 who was 8 metres behind, testified he saw the Appellant holding a black thing, which was confirmed by the Complainant to be a knife. On being arrested by the crowd at the Stage 2, the Appellant was said to have produced a knife and threatened to injure the arresting members of the public with it. It was not shown to be the same knife used in the robbery, and it was not stated who recovered the knife from the Appellant. It was not indicated in the evidence of the prosecution whether there was a search carried out on the person of the Appellant, and whether the stolen money was recovered from the Appellant. The evidence on record does not say who in the worked up crowd, recovered the knife from the Appellant, or if indeed this was the weapon used in the robbery. The Complainant was not even sure about the money taken from him, testifying simply that the Appellant forcefully took some money. There were numerous loose ends in the prosecution’s case.
15. The defence of *alibi* raised by the Appellant was not negated by the prosecution. It is the burden of the prosecution throughout, to negate the defence of *alibi* raised by an accused person as stated in the ***Court of Appeal of Kenya Criminal Appeal Number 157 of 2007 between Anthony Kinyanjui Kimani v. The Republic of Kenya [2011] e-KLR*** and similarly in the Ugandan case of ***Kibale v. the Republic of Uganda [1999] 1 E.A. [SC]***. The Appellant told the lower Court he worked as a Disc Jockey at Florida Club. He left his place of work at 7.45 a.m. and arrived at the Kawangware Stage 2, at 9.00 a.m. It was upon arrival at Stage 2 that he encountered the crowd who threatened to lynch him before arresting him. The prosecution did nothing to negate the *alibi*. There was nothing to challenge the Appellant’s evidence that he worked at Florida Club; left his workplace at 7.45 a.m.; and arrived at Kawangware Stage 2 on his way home at 9.00 a.m. on the material day. The lower Court gave no reason at all for disbelieving this evidence, particularly as there was no material presented before the Court to negate such defence.
16. Whereas private citizens are allowed to arrest criminal suspects, criminal investigations must be left to the police. Weak eye-witness evidence poses the risk of wrongful conviction. There was in this case a serious risk of misidentification, particularly because the central witness was an impressionable minor, backed by a passionate crowd of human beings, who had no regard to identification instructions. The evidence of identification relied upon by the trial Court was uncounseled. There was a likelihood of misidentification. The Complainant’s mother, teachers, charged crowd, and policemen were involved in an identification process that did not rule out suggestibility. The burden of proof in prosecution extends to every element of the crime charged, including proving beyond reasonable doubt the identity of the accused person, as the perpetrator of

the crime for which he stands charged. The Court must always be alert to the dangers of misidentification. Identification evidence is notoriously fallible, and the result of it can be, and has sometimes been the conviction of the wrong man. The Court must find, beyond reasonable doubt, that it was the Appellant, who committed the acts alleged. The evidence tendered by the prosecution against the Appellant was not overwhelming as to displace his defence of *alibi*. Evidence of identification placing the Appellant at the scene of the crime, was of very poor quality. It was quite unsafe for the trial Court to return a verdict of guilty, in a charge of robbery with violence, which carries a death penalty. ***Accordingly, we allow the Appeal. The Conviction by the Lower Court is quashed and sentence set aside. The Appellant shall forthwith be set free, unless otherwise held for lawful reasons.***

Dated and delivered at Nairobi this 20th day of November 2013

Monica Mbaru

Judge

James Rika

Judge