



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 52 OF 2011

SAMUEL KUNGU KAMAUAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 4705 of 2009 in the Chief Magistrate's Court at Makadara – T. Muriigi (PM) on 18th February 2011)

JUDGMENT

Introduction

1. The Appellant **Samuel Kungu Kamau** was charged for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to suffer death in accordance with the law.
2. Brief particulars of the offence that led to that conviction were that on the 15th day of November 2009 at Githurai Kimbo, jointly with another not before court and while armed with dangerous weapons namely pistol, they robbed Mary Wangui Muchira of cash Kshs.4,000/= and at, or immediately before, or immediately after the time of such robbery they threatened to use actual violence against the said Mary Wangui Muchira.

Grounds of Appeal

3. He subsequently filed a petition of appeal grounded on arguments that:
 1. *The circumstances of identification were not favourable;*
 2. *The evidence was inconsistent and not believable;*
 3. *The burden of proof was shifted to the appellant;*
 4. *The case was not proved beyond reasonable doubt, and*
 5. *The defence was disregarded for no good reason.*

Respondent's grounds of Appeal

4. The appeal was opposed. Learned state counsel Miss Maina responded on behalf of the state and stated that the identification was positive. She submitted that the rest of the grounds referred to the evidence and urged us to re-evaluate it and find that it was sufficient to sustain the conviction.

Summary of the Case

5. The complainant testified that she was going back to her house from the butchery on 15th November 2009 at about 8.45 p.m, when she heard a voice say “bring your money and mobile phone”. She turned round and saw two men pointing a pistol at her head. It is her evidence that since she did not have any money, she asked them to accompany her to her house where she would give them the money. The men agreed and went to her house where she pointed out some Kshs.4,000/= which was on top of the TV. The men took the money and left warning her not to scream or look at them.
6. Through her own investigations she found out where one of the men lived and led the police to his house for purposes of arrest the following day. The money was not recovered.
7. In rebuttal the appellant testified without oath and talked about what happened on the date of his arrest. He told the court that he went to Gikomba market to buy curtains and returned to Githurai where he hawked them till 5 p.m. That he then went to Toiz Bar where he had a drink of beer until 8.00 p.m. before he went home.
8. At home he found his brother in the house. He went to bed early and told his brother to lock the door from outside so that he would not disturb him upon his return as he would be able to open the door for himself. That at about 9.00 p.m. he heard a knock on his door and he saw people with torches. They turned out to be the police and they arrested him.

Issue for Determination

9. The issue for determination is whether the evidence was sufficient and credible enough to form a basis for the conviction.

Analysis

10. This being the first appeal, we are mandated to look at the evidence adduced during the trial afresh, re-evaluate and re-assess it and reach our own independent conclusion. However, in doing so we have warned ourselves that we did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot comment on their demeanour. See **Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR.**
11. We consolidated and considered all the grounds together, since in essence, they all attack the weight and credibility of the evidence upon which the conviction was founded. We observe that the conviction was predicated on the evidence of a single witness. We were alive to the fact that the evidence against the appellant rested on the testimony of **PW1** and that as observed in **Abdalla Bin Wendo v Republic (1953) 20 EACA pg 166,**

“Subject to certain exceptions a fact is capable of proof by the testimony of a single witness.”

12. We also warned ourselves in line with **Roria v Republic (1967) EALR at 584** that:

“There was indeed a danger in basing a conviction on the identification of a single witness and this Court had a duty in a case where this has been done to satisfy itself that in all the circumstances the conviction was safe.”

Having so laid a basis we examined the circumstances under which the appellant was identified for possibility of error.

13. **PW1** testified that she first saw the appellant and another emerge from Sunton Pub and pass by as she stood at the butchery waiting for her meat. She saw him a second time when she was stopped

on her way home, by a voice which ordered her to hand over her money and mobile phone. On the second occasion she turned round and came face to face with the appellant and his cohort, and one of them was pointing a pistol at her head.

14. She had a brief conversation with them, in which she said she could give them the money if they came with her to her house, because at that moment she had neither money nor phone with her. The appellant and his cohort in turn agreed to go with her, if she promised not to scream for help. Having come to an understanding they went to the complainant's house together. She pointed out where the money was, on top of the T.V. and they took it. They departed with another warning to her not to scream or look at them.

15. We observe from the evidence that there was sufficient light and that identification was by recognition. According to **PW1** she was able to see her assailants because there were security lights outside and her house was also very well lit. She also said that she recognised one of the two men as a fellow trader who sells curtains and table cloths at Githurai market where she too plies her trade.

16. We also observe that the certainty of her identification was demonstrated the next morning. She testified that at 6.00 a.m the following morning she saw and followed the appellant into a bar called Blue Lico. She found him settling down to a drink of beer with several companions. She confronted him and demanded her money back.

17. We also noted that his demeanor when confronted by the **PW1**, was not compatible with his innocence. He did not seem to be surprised or wonder what money she was talking about nor did he ask how much it was. Rather than come with her to the police and protest his innocence, he instead took her to his sister whom he said would lend him the money to pay the **PW1** back. Both the appellant and his sister disappeared and left **PW1** at the sister's place.

18. **PW2** who was the only other witness that testified for the prosecution told the court that he received the report of the robbery from **PW1**. His testimony was that **PW1** told him that she had identified one of the two attackers as a fellow trader at the market and said that he had been dressed in a blue and white sweater and a white pair of trousers.

19. **PW2** also testified that **PW1** found out where the appellant lived and that they accompanied her to the appellant's house and arrested the appellant whom they found locked in from the outside. **PW2** further testified that he recovered the blue and white sweater and the white trousers which **PW1** had referred to. He produced them in evidence.

20. The judgment shows that the learned trial magistrate considered and discredited the appellant's defence as a mere denial and that it was not truthful. We also considered the statement of defence in the context of the rest of the evidence on record, and agree that it is a mere denial. It does not create any doubt in the prosecution evidence.

21. **PW1** testified that the appellant was with another during the robbery and that they were armed with an implement which looked like a gun. The said implement was not recovered. However, the fact that there were two robbers satisfied one of the ingredients of robbery under **Section 296(2)** of the **Penal Code**.

22. In the circumstances we find that the appellant was properly identified and that the evidence was sufficient to form a basis for his conviction.

SIGNED DATED and **DELIVERED** in open court this **11th** day of **December 2013**.

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MUMBI NGUGI

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L. A. ACHODE

JUDGE

JUDGE