



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CR. APPEAL NO. 302 OF 2010
(CONSOLIDATED WITH 301 OF 2010)

JOSPHAT ALI SIMON.....1ST APPELLANT

JOSHUA MWANZIA MATIVO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the conviction and sentence in Criminal Case No. 198/2012 in the Principal Magistrate's Court at Kitui (Hon. E. M. Juma, PM))

Judgment

1. The two Appellants – Josphat Ali Simon (“1st Appellant”) and Joshua Mwanzia Mativo (“2nd Appellant”)—were charged in the Senior Principal Magistrate’s Court at Kitui with two counts of robbery with violence contrary to Section 296(2) of the Penal Code.
2. The particulars of the first count were that, on the 23rd day of April, 2008, at around midnight, as Sekea village, Kathuganthi Sub-location, Kisasi Location in Kitui District of the (former) Eastern Province, jointly with others not before the Court and while armed with offensive weapons namely pangas, iron bars, bows and arrows, robbed Joseph Muilu Mumo of one mobile phone of the make Nokia 1100 valued at Kshs. 4200; one radio make Sonitec valued at Kshs 2,800; and cash Kshs. 1850; all valued at Kshs. 8,850 and immediately before or immediately after the time of such robbery used actual violence to the said Joseph Muilu Mumo.
3. In the second count, the Appellants were charged that on the 23rd day of April, 2008, at midnight, at Sekea Village, Kithungathi sub-location, Kisasi location, Kitui District of the (former) Eastern Province, jointly with others not before the Court and while armed with offensive weapons namely pangas, iron bars, bows and arrows, robbed Betty Mwendu Joseph of one mobile phone of the make Nokia 2300 valued at Kshs. 5000 and immediately before or immediately after the time of such robbery used actual violence to the said Betty Mwendu Joseph.
4. The Appellants denied the charges. The Learned E.M. Juma convicted both of them after a fully-fledged trial at which the Prosecution called seven witnesses and the Defence called three. The Learned Trial Magistrate sentenced the two Appellants to death. The two Appellants have appealed against both conviction and sentence.
5. The two Appellants raised and argued identical grounds of appeal thus:
 - a. That the Learned Trial Magistrate erred in law and in fact in convicting them on the evidence of visual identification by recognition by PW1 and PW6 which, they contend,

was not free from error.

- b. That the Learned Trial Magistrate erred in law and in fact in convicting them on reliance of inadequate, inconsistent and contradictory evidence from different witnesses.
 - c. That the Learned Trial Magistrate erred in law and in fact in failing to consider the defence put forth by the Appellants.
6. We begin by observing that as a first appellate court, we have an obligation to re-evaluate all the evidence given at trial and come to our own independent conclusions. We are not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, we must be acutely aware that we never saw nor heard the witnesses as they testified and, therefore, we must make an allowance for that. See **Okeno v R [1972] EA 32** and **Kariuki Karanja v R [1986] KLR 190**.
 7. An exhaustive re-evaluation of the record yields the following results. It is beyond doubt that the two complainants were attacked at their house at Kisasi Location on 23rd April, 2008 at around midnight. Betty Mwende Joseph (“Betty Mwende”) who testified as PW1 and who is a daughter to Joseph Muilu Mumo (“Joseph”), who testified as PW6, were the victims. The robbery happened at their house at Kisasi.
 8. Both Betty Mwende and Joseph testified that they were at their house at the material time when Betty heard glass shattering. She saw three men outside the house armed with pangas, bows and arrows. She woke up his father and when they both listened, it became clear that a robbery was afoot. The thugs who were busy shattering the glass panes of the house to gain ingress, demanded that Joseph opens the house and gives them “construction money” or else they would set the house ablaze. At the time Joseph was supervising the construction of his brother’s house.
 9. In the midst of all this, Betty Mwende says that he could clearly recognize the three assailants. “Recognize” is advertently used because her testimony was that he knew each of the three assailants before the incident. Betty Mwende testified that as the thugs threatened her father to open the door, they had flashed lights on. Through the glare of the flashlights she was able to identify each of the three assailants.
 10. Eventually, Joseph opened the main door to the house and the three assailants came in. They first attacked Joseph and robbed him of several items. They tied him up in a store in the house and went about robbing Betty Mwende. However, Joseph was able to untie himself and confront the assailants who were still in the house. It was at this time that Joseph says he was able to identify the assailants using the lantern lamp which was on the corridor; it is used to illuminate the corridor if anyone wanted to use the bathrooms at night since the house did not have electric power yet. He was also able to identify their voices since these were people known to him.
 11. Upon noticing that Joseph had succeeded in untying himself and was confronting them with the iron bar, the assailants ran away and Joseph gave chase. He was not successful in catching up with them. Meanwhile, Betty Mwende had raised alarm and Good Samaritans showed up to assist. Among those who showed up were PW3 and PW4 who both testified about how they heard about the SOS alarm and ran to the scene. Both PW3 and PW4 are Security Officers at the nearby Center and they rushed to the scene. There, they learnt about the robbery and the identities of those involved. They quickly arranged for a “rescue” mission which culminated in the homes of the two Appellants. That is how the Appellants got apprehended. The evidence of the Investigating Officer corroborates this narrative.
 12. In the face of this Prosecutorial narrative, the Appellants raised a defence based on denial. Both denied being involved in the robbery. The 1st Appellant claimed that he was bed-ridden ailing with a toothache on the material day and was, thus, incapable of that crime. The 2nd Appellant equally denies being anywhere near where the robbery occurred.
 13. The Learned Trial Magistrate presided over the entire trial. At the end, she convicted the two Appellants and sentenced them to death.
 14. The Appellants’ appeal is basically formulated against the argument that it is not possible to say that the circumstances were free from an error of identification owing to the circumstances and the physical conditions at the time of the robbery.
 15. Both of these issues are intensely factual in nature but, our case law has come up with very specific rules for analyzing when it is safe for a Trial Court to convict on identification evidence. Our case law calls for caution in receiving identification evidence because of the grave possibility of a miscarriage of justice occasioned by misidentification. The predecessor to the Court of

Appeal plainly stated in *Roria v R* [1967] EA 583, that “**a conviction resting entirely on identity invariably causes a degree of uneasiness.**” And, the Court of Appeal reminded us in *Kiarie v Republic* that “**it is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken.**” Finally, the famous *Charles Maitanyi v R* [1986] 1 KLR 198 admonished courts to exercise the greatest caution and circumspection before convicting on testimony of identification especially where the evidence is that of a single identifying witness.

16. To aid in the exercise of this “*circumspection*” our courts have adopted the guidelines for receiving and considering identification evidence set out in the famous English case of *Regina v Turnbull* [1976] 3WLR 445 are considered very comprehensive. They are nine in number and they instruct a judicial officer who is considering evidence on identification to ask the following questions:

- a. How long did the witnesses have the accused under their observation?
- b. What was the distance between the witnesses and the accused person?
- c. What was the lighting situation?
- d. Was the observation impeded in any way, as for example, by passing traffic or press of the people?
- e. Had the witnesses ever seen the accused person?
- f. If the witnesses knew the accused prior to the current transaction, how often?
- g. If the witnesses had seen the accused only occasionally prior to the current transaction, did the witness have any specific reason for remembering the accused?
- h. How long elapsed between the original observation and the subsequent identification to the police?
- i. Was there any material discrepancy between the description of the accused given to the Police by the witnesses when first seen by them and his actual appearance?

17. In the instant case, we are persuaded that after exercising circumspection, the evidence of recognition given by Betty Mwendu (PW1) even as corroborated with the evidence of Joseph (PW6) who were arrested the same night of the robbery is sufficiently watertight to establish the guilt of the Appellants beyond reasonable doubt and that it is the two Appellants who attacked the complainants the 23rd day of April, 2008, at around midnight.

18. We note that the evidence in this case was one of recognition not just mere identification and that the case of identification by recognition, generally, evidence of recognition is more reliable; more satisfactory; and more assuring than identification of a mere stranger (see *Anjononi v R* [1980] KLR 59).

19. Betty Mwendu, PW1, and Joseph, PW6, are the main identifying witnesses. She testified that she recognized the two Appellants when she peeped through the window of the room she was in. She admitted that it was dark outside and there was no moonlight. However, she testified that she was able to see the two Appellants because a third person, a Kabelu Masila, had a flash light which he was directing at the faces of the two Appellants. She described the flash light as being very bright. Her father corroborated the identification evidence. When he was able to untie himself during the ordeal, Joseph picked a crow bar and confronted the assailants. The confrontation took place in the corridor. However, on realizing that Joseph had recognized them, the assailants fled the scene. Joseph was categorical that he was able to recognize the assailants in the illumination provided by the lantern lamp. As the Learned Trial Magistrate noted, the following factors confirm the identification evidence:

- a. First, this was identification evidence of two independent witnesses which remained unshaken through cross-examination.
- b. Second, at some point during the ordeal, both identifying witnesses were at extremely close contact with the Appellants.
- c. Third, that the lighting was aided by the flashlights and the lantern lamp in the corridor. In addition, Joseph was able to identify the Appellants through voice recognition.
- d. Fourth, that the observation was not impeded in any way.
- e. Fifth, that the identifying witnesses knew the Appellants and they often used to see them around the village.
- f. Sixth, the arrest of the Appellants was immediate.
- g. Seventh, independent corroborative evidence is provided by the fact that the Good Samaritans who arrived at the scene were able to follow foot prints all the way to the

respective houses of the Appellants.

20. In our view, this evidence of recognition remained unshaken through cross-examination. We are unable to say that the Learned Trial Magistrate committed any substantial errors in her analysis or conclusions. We think the evidence on record justifies the conclusions reached by the Learned Trial Magistrate that the two Appellants were part of the 3-person gang that attacked and robbed Betty Mwende and Joseph on 23rd April, 2008.

21. Consequently, we find the appeals by the 1st and 2nd Appellants unmeritorious. We dismiss the same and affirm the decision of the lower court on both conviction and sentence.

DATED, SIGNED AND DELIVERED this 10th day of December 2013.

JOEL NGUGI, Judge

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B. T. JADEN, Judge

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