



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 541 OF 2010

(An Appeal arising out of the conviction and sentence of MRS.KASERA - SRM and D.O. ONYANGO - SRM delivered on 5th October 2010 in Kibera CMC. CR. Case No.4205 of 2009)

JAMES NDIVA MUNGAI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, James Ndiva Mungai, was charged with the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 12th September 2009 at Ongata Rongai Township in Kajiado North District, the Appellant, jointly with others not before court, while armed with a dangerous weapon namely a knife, robbed Peter Kamau Muya of cash Kshs.7,000/-, a mobile phone and a wallet containing his identity card and at or immediately before or immediately after the time of such robbery, wounded the said Peter Kamau Muya. When the Appellant was arraigned before the trial magistrate’s court, he pleaded not guilty to the charge. The prosecution called five (5) witnesses in its bid to establish the charge against the Appellant. The Appellant was put on his defence. He gave an unsworn statement in his defence. He denied committing the offence. After evaluating the evidence, the trial court found that the prosecution had established its case against the Appellant on the charge of **Robbery with Violence** to the required standard of proof beyond any reasonable doubt. It convicted the Appellant and sentenced him to death as is mandatorily provided by the law. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

The Appellant raised several grounds of appeal challenging his conviction and sentence. The grounds essentially touched on the evidence of identification that was adduced by the complainant. The Appellant was aggrieved that the trial court had convicted him on the basis of the evidence of identification which was made during the night when circumstances conducive for positive identification were absent. He faulted the trial magistrate for relying on the evidence of a single identifying witness to convict him when the evidence cannot be said to have been free of the possibility of error. The Appellant was aggrieved that the trial magistrate had failed to take into consideration the fact that the complainant and the investigating officer adduced contradictory evidence which brought into question the veracity of the testimony of the complainant touching on his alleged identification. The Appellant faulted the trial court for failing to take into account the totality of the evidence adduced and especially his defence before arriving at the decision to convict him. In the premises therefore, the Appellant prayed that the appeal be allowed, his conviction be quashed and the sentence imposed on him be set aside.

At the hearing of the appeal, the Appellant presented to the court written submission. He also made oral submission urging the court to allow his appeal. Mr. Karuri for the State submitted that the prosecution did establish to the required standard of proof that indeed the Appellant had robbed the complainant. He

urged the court to dismiss the appeal. This court shall consider the grounds of appeal put forward by the Appellant after briefly setting out the facts of this case.

The complainant in this case Peter Kamau Muya (PW1) is a resident of Ongata Rongai. He testified that on 12th September 2009 at about 9.00 p.m. he left his house to buy airtime from a nearby shop. About 50 metres from the house, he was accosted by three men. One of them held him. They demanded that he gives them money and his phone. They tied his mouth with a piece of cloth. One of the men pointed a knife at him. The knife was placed on his back. The complainant told the court that he surrendered his phone together with a sum of Kshs.7,000/- which was in his pocket. He testified that he was able to recognize one of his assailants as a tout who used to ply his trade at Ongata Rongai. He was able to do this by the light from the security lights at a nearby gate. He told the court that after the robbery, he spoke to the Appellant and asked him:

“Diva why don’t you give me my money or phone.”

According to the complainant, his assailants took him to a forest which was about 100 metres from where he was robbed. He was told to say his last prayers. He managed to escape. He was chased by his assailants. One of them stabbed him on the right side of his head. He was able to seek assistance from his neighbours. They who took him to the police station on the same night. He told the police that he had been robbed by a gang of robbers who included the Appellant. He was able to identify the Appellant to the police by his name Diva. He told the court that he had known the Appellant for a period of three (3) years prior to the robbery because he used to meet him every day at the bus stage.

PW2 Bernard Wakahiu Muireri is a neighbour of the complainant. He recalled that on 12th September 2009 at about 10.30 p.m. he was woken up by the complainant. The complainant was bleeding from an injury on his head. He told him that he had been attacked by a gang of thieves. PW2 escorted the complainant to Ongata Rongai Police Station where a report of the robbery was made. He also assisted the complainant to the hospital. PW2 recalled that the complainant told him that one of the people who had attacked him was Diva. PW5 PC Francis Gitonga was at Ongata Rongai Police Station on 12th September 2009 when the complainant made the report of the robbery. He recalled that the complainant had reported that three people had attacked and robbed him of Kshs.7,000/- and his mobile phone. They robbed him after they had threatened to injure him with a knife. The complainant reported that he knew one of the persons who had robbed him. He described him as a person who worked at the Rongai Bus Stage. PW5 gave the complainant his mobile number and asked him to call him if he saw the Appellant. On 18th September 2009 at about 6.30 p.m. the complainant saw the Appellant. He made a report to PW4 APC Kiplosh Kotkash who then worked at the Rongai Chief’s Office. PW4 arrested the Appellant and took him to Ongata Rongai Police Station where the Appellant was detained and subsequently charged.

PW3 Dr. Z. Kamau examined the complainant on 22nd September 2009. He testified that the complainant had a small wound on the lateral aspect of the right forehead. The wound had been inflicted by a sharp object. He filled the P3 form which he produced as an exhibit in evidence.

When the Appellant was put on his defence, he testified that he worked as a conductor in Route 125 at Ongata Rongai. He narrated the circumstances of his arrest on 18th September 2009. He denied that he had robbed the complainant. He told the court that he was surprised that he had been arrested because he had not committed any offence.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences

and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the Appellant on the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

We have re-evaluated the facts of this case. We have also considered the grounds put forward by the Appellant in support of his petition of appeal. We have also considered the submission made before us on this appeal. It was apparent from the evidence adduced, and the submission made that the Appellant is challenging his conviction on the basis of the evidence of identification. This identification was made by a single identifying witness. None of the items which were robbed from the complainant were recovered from the Appellant. The robbery took place at night. The complainant testified that he was able to identify the Appellant by the security lights from his gate. He testified that he was attacked about 50 metres from his gate. The Appellant disputes that the circumstances then prevailing were conducive for positive identification. It is his case that he is a victim of mistaken identity because the complainant could not possibly have identified him in such circumstances.

This court is aware of the danger of convicting an accused person on the basis of the evidence of a single identifying witness. Before this court can convict an accused person on the basis of the evidence of a single identifying witness, it must be satisfied that such identification was watertight and free of the possibility of any error or mistaken identity. As was held in **Maitanyi –Vs- Republic [1986] KLR 198 at P.200:**

“Although the lower courts did not refer to the well-known authorities Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166 followed in Roria vs Rep (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error”.

Upon re-evaluation of the evidence, it was clear that although the robbery took place at night, the complainant was able to recognize the Appellant. The evidence of the complainant in relation to the identification of the Appellant was that of recognition. The complainant testified that he had known the Appellant three years prior to the robbery incident. In fact, he called out the name of the Appellant after the robbery incident requesting him to return his money and his mobile phone. It was then that the Appellant stabbed him on his head with the knife that had earlier been used to threaten him. The Court of Appeal in **Anjononi –Vs- Republic [1980] KLR 54 at P.60** held thus:

“Being night time the conditions for identification of robbers in this case were not favourable. This was however a case of recognition not identification of assailants; recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because he depends upon personal knowledge of the assailant in some form or other.”

In the present appeal, it was clear that the complainant had recognized the Appellant during the robbery. Immediately after the robbery, he told PW2 that he had been attacked by a gang of three robbers who

included the Appellant whom he referred to by the name Diva. He repeated this statement when he made the first report to the police. In that regard, PW5 testimony corroborates the complainant's. Having warned ourselves of the danger of convicting the Appellant on the basis of the evidence of a single identifying witness, we are satisfied in the present appeal that indeed the complainant recognized the Appellant and therefore his identification of the Appellant can be said to be watertight and free of the possibility of mistaken identity. We have considered the Appellant's defence and the submission he made on this appeal. It was evident that the said defence did not exonerate the Appellant from the strong evidence that had been adduced against him by the prosecution witnesses. We therefore hold that the prosecution proved its case on the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. The Appellant, in company of two others, robbed the complainant of his mobile phone and cash of Kshs.7,000/-, and in the course of the robbery used a knife (which is a dangerous or offensive weapon) firstly to threaten the complainant and later to stab him on the head thus causing him to suffer injury.

The appeal lodged by the Appellant is hereby dismissed. The conviction and the sentence of the trial court is hereby upheld. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF DECEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE