



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 22 OF 2013
(J.A. MAKAU AND W. MUSYOKA JJ)

AMOS MWAKI GIKUNDIAPPELLANT

VRS

REPUBLICRESPONDENT

(Being an appeal against both conviction and sentence in Criminal Case no.508 of 2012 in Chuka Law Courts – before KIRUI R.K. – S.P.M.)

J U D G M E N T

The Appellant AMOS MWAKI GIKUNDI was charged with one count of robbery with violence contrary to Section 296 (2) of the Penal code. The particulars of the offence were that on 10th day of May, 2011 at Chogoria location in Tharaka Nithi county Eastern Province jointly with another not before court robbed JESCA MUTHONI NGAKU of KShs.4,500/= one mobile phone make Nokia and one pair of spectacles valued KShs.8,600/= and key, all valued at KShs.21,000/= and immediately or immediately after such robbery used actual violence by beating the said Jesca Muthoni Ngaku.

After the trial the learned trial magistrate convicted the appellant and sentenced him to suffer death. Being aggrieved by the conviction and sentence imposed upon him by the lower court he preferred this appeal.

The appellant in his petition of appeal listed 4 grounds of appeal being the following:-

1. That the learned trial magistrate erred in law and fact to convict me to suffer death under the charge of Robbery with Violence contrary to Section 296/2 of P.C. wholly relying on a single evidence.
2. That the learned trial magistrate further erred in law and fact by failing to consider that I was not exactly arrested on the spot as alleged.
3. That the learned trial magistrate still erred in law and fact not to comply with law when he ordered me to be taken for hospital as I was sick and the following day forced me to give out my defence and, and he had the knowledge that I was sick and thus my brain was not functioning in the right angle due to sickness.
4. That the learned trial magistrate erred in law and fact by failing to give due consideration.

When the appeal came up for hearing the Appellant appeared in person. The

state was represented by Mr. Jackson Motende, Learned State Counsel.

We are first Appellate court and as expected of us we have subjected the entire evidence adduced before the lower court to a fresh evaluation and analysis while bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance. We are guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are ably set out in the case of **ISAAC NG'ANG'A KAHIGA ALIAS PETER NG'ANG'A KAHIGA VS REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** as follows:

“In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO – V REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala V Republic [1957] EA 570). It is not the function of a first appellate to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own 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 has had the advantage of hearing and seeing the witnesses (see Peters V. Sunday Post, (1958) EA 424)”.

During the hearing of the appeal the Appellant produced written submissions and urged us to allow his appeal.

Mr. Jackson Motende concedes the appeal. Mr. Motende, submitted that PW 1, the complainant was attacked by two people at 11.45 a.m. She did not recall who held her hand when she was attached or who took her handbag which had her mobile phone, cash KShs.4,500/= and electricity bill. That the incident took 3 minutes. That the complainant screamed and by the time people came to her aid the assailants had by then disappeared. That the complainant later heard a lady say a thief had been arrested. She went and found the one person having been arrested alleged to have stolen her items. That the arrest was done almost immediately but no recovery was made from the suspect. He submitted that the complainant in her evidence, stated that she did not know the assailants. He urged the trial magistrate relied on evidence of PW 1, which was not supported by any other witness. He concluded by submitting that the trial magistrate did not warn himself of the danger of relying on evidence of a single witness before convicting the appellant. He concluded by stating that the conditions were not conducive to warrant conviction.

The facts of the prosecution case are that on 10/5/2012 at around 11.45 a.m., PW 1 Jesca Muthoni Ngaku, the complainant was on her way to Chogoria town when near Mutema River about 10 metres to the bridge, she turned back and saw two people running fast towards her direction. That one of the people hit her on her back with his hands and she fell down. That one of the boys held her by her hand and her parcel was taken anyway. The incident took 3 minutes. The attackers ran away. PW 1 screamed and people came, and it is at that time she heard one lady say “mwiziameshikwa”. The complainant was robbed of her Nokia phone valued KShs.6000/=, Keys, KShs.4,500/= electricity bill and her spectacles disappeared. The value of items stolen were KShs.21,000/=.

PW 1 proceeded where there was screaming and found the Appellant having been arrested. She then identified him and told the crowd that the Appellant is one of the robbers. The members of public started beating the Appellant. PW 1 was given a phone by a lady and she called her husband. PW 2, came and told the public to stop beating the Appellant.

During cross-examination, PW 1 testified that she did know the appellant before the incident. She further stated the appellant wore T-shirt and that she recognized his face. On being re-examined PW 1 stated that she identified the appellant because he had a black striped shirt. She claimed to have given the

description to the crowd which had arrested the Appellant.

PW 2, Phineas GakuMurungi, stated that on 10.5.2012 at 12 noon he received a call from unknown person, asking him to rush to Mutema River as his wife had been robbed. PW 2 drove to the scene and before the river he met a large crowd coming from a private residence. PW 1 was also in the crowd. The witness also found the Appellant who was bleeding as he had been beaten. PW 2 told the crowd to stop beating the Appellant. He took the complainant, the appellant and 3 other people to Chogoria police station. He later took his wife to Chogoria hospital for treatment. PW 1 told PW 2 that she was beaten and KShs.4,500/= stolen from her. That her mobile phone and spectacles were also stolen.

PW 3, Bedford MutembiMbaka, a clinical officer, Chuka district Hospital produced P3 forms for Jesca Muthoni who had been attended at the hospital on 11/5/2012. He testified that PW 1 had tenderness on the upper arm. He filed the P3 form and classified the degree of injury as harm. He produced treatment notes as exhibit 1 (a), and P3 form as exhibit 1 (b).

PW 4, No. 69324 P.C. Lawrence Mutiso was investigating officer in this case. He stated that on 10/5/2012 at 12 noon, he was within Chogoria police station, when PW 1, and PW 2 brought the appellant to the station. That O.C.S. directed him to investigate the matter. That as the appellant was injured he organized for him to be taken to the hospital and commenced his investigation. That on conclusion of his investigation he charged the appellant with the offence of robbery with violence.

The appellant gave sworn defence. He stated that on 10/5/2012 he had gone to Chogoria to buy shoes for riding as he is motorcycles rider. That as he was buying a coat he heard people shouting “mwizi, mwizi”. That one person came to where the Appellant was and said it looks like him. The appellant told them he was not a thief for he had come to buy some items. The shopkeeper said that the Appellant was her customer. The appellant was then arrested, taken to police station and charged with this offence. He testified that the police officer refused to listen to him. During cross-examination the appellant stated that he did not know the complainant Jesica Muthoni. He stated that the complainant mistook him and made a mistake.

The evidence of identification of the Appellant is that of a single witness PW 1, the complainant. The appellant was not known to PW 1 before. The issue for our consideration in this appeal is whether PW 1 was able to identify her assailants.

The leading case as far as identification is concerned is that of **Republic – Vs – Turnbull & Others(1976) 3 ALLER.** The above mentioned case sets down the basic principles to be considered when issue of identification comes into place. In addition to the aforesaid case, in the case of **ROBERT GITAU – V- REPUBLIC CRIMINAL CASE NO.63 OF 1990(Nakuru)**, the Court of Appeal held as follows:-

“It was held in Abdullah Bin Wendo and Another V R 1953 Volume KXX 166 and Cleophas Otieno Wamunga V R(Criminal Appeal No.20/89) that evidence of identification should be tested with great care especially when it is known that the conditions favouring a correct identification were difficult. The witness who testified that they could identify the Appellant in circumstances of shock and fear could easily be mistaken because the duration of observation was short. We are doubtful whether the witnesses could have identified the Appellant’s face in the manner described by the witness. We are also doubtful how the witnesses were able to identify the Appellant in the identification parade. In this respect, the Appellant complained that it was easy for him to be picked up because in the parade he was only one from the cell.”

Besides the above-mentioned case, in the case of **Abdala bin Wendo&Ano –V-Republic(1953) 20 EACA 166**, the court stated as follows:

“There was a need for testing with the greatest care the evidence of a single witness respecting identification, especially when it was known that the conditions favouring a

correct identification were difficult. In such circumstances what is needed was other evidence, whether it be circumstantial or direct, pointing guilt, from which a Judge or Jury could reasonably conclude that the evidence of identification, although based on the testimony of a single witnesses, can safely be accepted as free from the possibility of error.”

In addition to the above, in the case of **Francis Kariuki Njiru & 7 others –V-Republic Criminal Appeal Case NO.6 of 2001**(UR) the court stated as follows:-

“The evidence relating to identification had to be scrutinized carefully, and was only to be accepted and acted upon if the court was satisfied that the identification was positive and free from the possibility of error. The surrounding circumstances had to be considered and among the factors the court was required to consider was whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.”

In the instant case we note with a lot of concern that the trial magistrate even before he had complied with **Section 169 of the Criminal Procedure Code** which provides;-

- “(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.**
- (2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.**
- (3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.”**

He had found the Appellant guilty as charged. We find such finding was prejudicial and contrary to how judgment should be written and all the trial court was doing, was therefore to justify its finding which was contrary to the law.

The evidence of a single witness respecting identification, especially when it is clear from the evidence of the prosecution that the conditions favouring correct identification were not favourable should be testified with the greatest care. In the instant case PW 1 did not know the Appellant before. The attack was from the back and suddenly. The robbery took about 3 minutes. PW 1 did not see the faces of the attackers nor did she give the description of her attackers to members of public who came to her aid or to the police. The Appellant was arrested in absence of PW 1 and none of the people who arrested the Appellant witnessed the attack. PW 1 in her evidence did not describe how the attackers were dressed.

She gave the description of how the attackers were dressed in her re-examination, blocking the Appellant's chance to cross-examine her. It should not have been allowed by the trial court to form part of the court records as it prejudiced the appellants defence.

In such circumstances what was needed was other evidence, other than the evidence of the single identifying witness, whether circumstantial or direct, pointing guilty from which court could reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from possibility of an error.

We have considered the evidence in this appeal and find no other evidence pointing to the guilty of the Appellant.

We note that when the Appellant was arrested by members of the public, PW 1 was not there, and she had not even given the description of her assailants, nor had any of the members of the public witnessed the attack. The appellant incidentally was arrest shortly immediately after the robbery. He was not found with any of the stolen items.

We have doubt whether the Appellant was a member of the gang as he was not found with any of the stolen items and he had not been identified by PW 1 before his arrest. We think his arrest was a case of mistaken identity. The appellant we think was an innocent citizen mistaken for a gang.

We are therefore not satisfied that the identification of the appellant was positive and free from error. The Appellant is possible was an innocent citizen who was mistaken for a robber and we extend the benefit of doubt to the Appellant.

The appellant defence is that he was mistaken for a robber and he gave explanation as to what he was doing at the time of his arrest. The trial court rejected the defence on the ground that the complainant adequately identified the appellant as she saw him from the time he was standing at the kiosk to the time they held her hands and robbed her. PW 1 in her evidence said she saw two young men standing. She wenton to say after she was hit by the one of the boys she fell down and the other boyheld her handstogether.

We note from the evidence of PW 1 she didnt give the description of the alleged young men or boys. She did not give their names and this could mean any man or boy from Chogoria and not necessarily the Appellant.

We find that the trial court misapprehended the evidence and as pointed out on the set, the court was out to justify its unwarranted finding of the appellant guilty as is evidenced from the opening remarks in its judgment.

We feel that we cannot conclude the judgment without dealing with Appellants ground of appeal to the effect that the appellant was ordered to be taken to the hospital as he was sick and the following day forced to proceed on with the defence when he was not well.

We have perused the court proceedings, and did note that when the appellant appeared before the trial court he complaint of stomachache and its trial court directed the Appellant to be taken to the hospital and at 3.00 p.m. the same day the accused was explained of the requirements of Section 211 of the Criminal Procedure Code. The appellant was then put on his defence.

Article 50 (2) (c) of the Constitution Provides-

“ Every accused person has the right to a fair trial, which includes the right-

a) to be presumed innocent until the contrary is proved;

b) to be informed of the charge, with sufficient detail to answer it;

c) to have adequate time and facilities to prepare a defence”

We note though the Appellant did not raise any complaints as regards proceeding with the defence after he had just come from hospital, it was against the constitution for the trial court to fail to give the Appellant adequate time to prepare for his defence. The courts in delivering of justice should ensure that trial is fair to all parties and especially the accused persons who should be accorded sufficient time to prepare for their defence depending on the circumstances of each case, whether a request is made or not.

MR. Jackson Motende conceded the appeal and, we find that he was right in conceding the appeal.

Having considered this appeal and having come to the conclusion we have, of this appeal we find that the prosecution failed to prove the charge of robbery with violence, against the Appellant to the required standard of proof beyond any reasonable doubt. We find that this appeal is meritorious and should be allowed.

We accordingly allow the Appellant’s appeal, quash the conviction and set aside the sentence. We order that the appellant should be set at liberty forthwith unless he is otherwise lawfully held.

DATED SIGNED AND DELIVERED ON 3rd DECEMBER, 2013

J.A. MAKAU

W. MUSYOKA

JUDGE

JUDGE

DELIVERED IN OPN COURT IN PRESENT OF

Appellant in person present

Mr. J. Motende for State present/absent

J.A. MAKAU

W. MUSYOKA

JUDGE

JUDGE