



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 209 OF 2009

JOSEPH MWANGI WANJIKU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate W N Kaberia SRM delivered on 19/11/2009 in Kajiado Criminal Case No. 1487 of 2008)

J U D G M E N T

The Appellant was tried for the offence of attempted robbery with violence contrary to Section 297 (2) of the Penal Code (Cap 63). He was alleged to have violently attempted to rob ZACHARIA MWANGI of his motor cycle valued at Kshs.75,000/= while armed with a pistol. After the trial in subordinate court, he was convicted and sentenced to suffer death.

Being aggrieved by the decision of the subordinate court, he has appealed to this court against both conviction and sentence. He filed a petition of appeal with grounds. He submitted supplementary grounds of appeal in court on the hearing day. The Appellant also addressed the court in support of his appeal. The State Counsel, Mr Mukofu, opposed the appeal.

The facts of the case are as follows. The complainant Zacharia Mwangi (PW1) was a boda boda (motor cycle for hire) owner and driver. He operated his motor cycle in the Loitokitok area. On 2nd December 2008 at around 7.30 p.m., he was riding his motor cycle from Loikokitok to his home at Kikelelwa. About 100 metres from his home, somebody jumped onto the path ahead of him and aimed a pistol at him. He stopped the motor cycle. The person jumped at the complainant and tried to struggle with him ordering him to surrender his motor cycle. The attacker also hit the complainant on the head and mouth with the pistol. The complainant screamed thus attracting the attention of the public. As neighbours came to the scene, two of them (PW2) Stephen Mwita and (PW4) Harrison Mwaura saw two people running away from the direction of the screams. They managed to restrain one of the two people who were running away. They took him to the scene. He was the Appellant herein, who was later charged and convicted.

At the trial, the prosecution called five (5) witnesses. The Appellant elected to give unsworn testimony.

Indeed, there is evidence that the complainant (PW1) was attacked in an attempt to rob him of his motor cycle. In the process, he was injured. A pistol was produced in court as an exhibit. It was said to be the weapon used to threaten the complainant, and was also used to hit him thus knocking off his two teeth, causing him to bleed. The incident occurred at night and it was dark.

This being a first Appeal, we are duty bound to re-evaluate all the evidence on record and draw our own

conclusions in order to satisfy ourselves that there is no failure of justice – see SIMIYU & ANOTHER – vs- R (2005) 1KLR 192.

This is a case that turns on the adequacy and reliability of the identification of an accused person by a single witness, the complainant. In ODHIAMBO –vs- REPUBLIC (2002) 1KLR 241, Chunga CJ, Lakha and Keiuwa JJ held, *inter alia*, that:-

1.

2. Where evidence rests on a single witness and the circumstances of identification are known to be difficult, then other evidence either direct or circumstantial pointing to the guilt of the accused persons from which, the court may reasonably conclude that identification is accurate and free from the possibility of error is needed. In this case the courts below subjected the evidence of identification to the requisite critical analysis as enunciated by the courts below.

In our present case, the incident occurred at 7.30 p.m. The complainant clearly stated that it was dark then, the only means of visibility for him being the headlamp of the motor cycle. There is no evidence that he gave any description of the attacker to any of the members of the public who came to the scene, before the Appellant was brought by PW2 and PW4. According to the complainant, he was attacked by one person. However, PW2 and PW4 stated that they saw two people running away 100 metres from the scene. It was also the evidence of the complainant that the clothes or jacket of the attacker had blood stains. However, the jacket of the Appellant which was said to have blood stains was not produced in court.

In our view, the circumstances of the attempted robbery were not favourable for positive identification. It was dark at night. The light from the headlamp of the motor cycle could not be efficient to identify a stranger unless flashed for a long time on the face. Secondly, the complainant must have been scared by the sudden and unexpected attack. The only other evidence that could have connected the Appellant with the offence was the alleged blood stained jacket or clothes. No blood sample of the complainant was taken for comparison with the alleged blood stains on the jacket, nor was the jacket produced.

In our view, the investigators slept on their job. The prosecution was required to prove its case against the accused beyond any reasonable doubt. The evidence of identification of the Appellant as the person who committed the offence is totally insufficient. It cannot safely sustain a conviction in a criminal case. We will allow this appeal.

For the above reasons, we allow the appeal, quash the conviction and set aside the sentence. The Appellant will be released, unless otherwise lawfully held.

Dated and delivered at Machakos this **8th** day of **March** 2012.

George Dulu

Joel M Ngugi

Judge

Judge

In presence of:-