



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL 22 OF 2008

EDWARD CHESEREK.....APPELLANT

AND

REPUBLIC.....RESPONDENT

[Being an appeal from the judgment of the Senior Resident Magistrate, G.A. Mmasi, dated 19th May, 2008 at Eldoret Chief Magistrate's Court in Criminal Case No. 8669 of 2007]

JUDGEMENT

The appellant, **Edward Cheserek** (hereinafter “the appellant”), was charged in Eldoret Chief Magistrate’s Court with six (6) counts of robbery with violence contrary to Section 296(2) of the Penal Code. He was convicted on counts 1, 4 and 6 and sentenced to death. The appellant was not satisfied and he filed this appeal against both conviction and sentence. He represented himself in this appeal as he did at the trial whilst **Mr. Kabaka**, Learned State Counsel, appeared for the respondent State.

In count one (1), it was alleged that the appellant, in the night of 7th and 8th April, 2007 at Chesoi Trading Centre in Marakwet District of the Rift Valley Province, jointly with others not before the court, while armed with a gun, robbed **Richard Kipkech** (hereinafter “the 1st complainant”) of a cash sum of Kshs. 4,000/-, one radio cassette-make visia valued at Kshs. 8,000/- and five bottles of Tusker beer valued at Kshs. 300/- all valued at Kshs. 12,300/- and, at, or immediately before, or immediately after, the time of such robbery used actual violence to the said 1st complainant.

It was alleged, in the 4th count, that the appellant, while in the company of others not before the court while armed with a gun, on the same date and in the same place, robbed **William Kanda** (hereinafter “the 4th complainant”) of one National Identity Card, one voting card and one KCB Bank plate and, at, or immediately before, or immediately after, the time of such robbery, used actual violence to the said 4th complainant.

In the 6th count, it was alleged that the appellant, while in the company of others not before the court, while armed with a gun on the same date and in the same place, robbed **Henry Tanui** (hereinafter “the 6th Complainant.”) of one mobile phone-make Nokia 1110 valued at Kshs. 4,000/- and, at, or immediately before, or immediately after, the time of such robbery used actual violence to the said 6th complainant.

The Learned Senior Resident Magistrate did not find proof to the required standard in respect of counts 2, 3 and 5, she therefore accorded the appellant the benefit of doubt and acquitted him on those counts. With respect to counts 1, 4 and 6 the Learned Senior Resident Magistrate found that the prosecution had discharged its burden as required and convicted the appellant. After considering what the appellant had said when asked to mitigate, the Learned Senior Resident Magistrate pronounced the death sentence upon him.

In his petition of appeal the appellant raised the following issues:-

- 1) *Unsatisfactory identification.*
- 2) *Failure to call an essential witness.*
- 3) *Failure to adduce medical evidence.*
- 4) *Reliance on a single identifying witness.*

During the hearing of the appeal, the appellant relied upon pre-written submissions. **Mr. Kabaka**, on his part, orally submitted that the appellant was positively identified by recognition and that the appellant was convicted on sound evidence.

As the first appellate court, it is our duty to analyse, re-examine and re-evaluate the evidence upon which the appellant was convicted and arrive at our own independent conclusion, bearing in mind that we had no advantage of seeing and hearing the witnesses testify and should give allowance for that **(See Okeno - Vs- Republic [1972] E.A. 32 and Ngui -Vs- Republic [1984] 729).**

The prosecution case was that the complainants were enjoying evening drinks at the 1st complainant's bar christened **Kasarani** at Chesoi Trading Centre in Marakwet District, when, at about 8:00p.m., thugs broke into the bar and shot one of the patrons dead and wounded the 1st and 6th complainants. They stole the items stated in the charge and then escaped. The complainants allegedly identified the appellant during the robbery using solar bulbs. The 1st and 6th complainants testified that they recognised the appellant as he was well known to them.

Police were informed and they visited the *locus in quo* and those who were receiving treatment at Cheson Health Centre. **PC Francis Busienei** (PW4) of Kapswor Police Station was one of the officers who visited the scene the following morning. He recovered three spent cartridges and attended the post-mortem examination which was carried out at the scene. Later the appellant was arrested and PW4 charged him with the offences herein.

Upon the close of the prosecution case, the appellant was called upon to answer the charge and gave an unsworn statement in which he set up the defence of alibi.

At the end of the trial the Learned Senior Resident Magistrate concluded that the appellant had been recognised by the 1st and 6th complainants and had been positively identified by the 4th complainant.

From the above account, it is clear to us that the main issue for determination is whether the appellant was positively identified as one of the participants in the robbery. In this regard, the evidence of the three complainants is pertinent. The 1st complainant testified that he knew the appellant prior to the robbery and recognised him during the robbery as the bar was well lit. He also testified that he gave the appellant's name to the police when they visited the scene.

The 1st complainant did not testify that the robbers were disguised. Indeed if they were, he would have had difficulty in identifying, let alone, recognising the appellant. Yet the 6th complainant testified that the robbers were disguised. In his own words:

“The person who shot me, I identified him from his appearance, he had smeared mud on his face. The person I identified is the accused in the dock, he has a scar on the face I had known him for 3 years, he was nicknamed ‘Kadilo’.”

So, according to the 6th complainant, the appellant had disguised himself by smearing mud on his face. This testimony is significant as it casts doubt on the alleged positive identification of the appellant by both the 6th complainant and the rest of the witnesses. If the appellant was disguised in the manner described by the 6th complainant, how could he or the 1st complainant identify, let alone, recognise him. Both the 6th complainant and the 1st complainant did not explain how they would still recognise the appellant notwithstanding the disguise. The 6th complainant further purported to recognise the appellant because of an alleged scar on his face. His testimony, suggested that the said scar was a permanent feature on the person of the appellant. Yet, when the appellant appeared before us at the hearing of this appeal, we could not see any scar on his face.

The testimony of the 4th complainant, **William Kanda** (PW2), is not included in the record prepared by the Deputy Registrar. We had to revert to the original record of the Learned Senior Resident Magistrate to find it. In that record, PW2’s name was recorded as **William Chepkor**. He testified that he did not know the appellant prior to the robbery. He did not describe how he indentified the appellant. His, therefore was dock identification which required confirmation through an identification parade. The record does not show that any identification parade was ever conducted.

In **Fredrick Ajode -Vs- Republic [CR Appeal No. 87 of 2004] [UR]**, the Court of Appeal had this to say about identification and specifically dock identification:-

“It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a property conducted identification parade. It is also trite that before such a parade is conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”

In view of the above decision, we have come to the conclusion that the identification of the appellant purportedly made by the 4th complainant could not be safely relied upon.

The testimony of the 4th complainant was further weakened by one other fact. The record shows that on 8th February, 2008, the appellant applied to have the said complainant recalled for further cross-examination. That application was allowed by the Learned Senior Resident Magistrate. However, the record does not show that the said complainant was ever recalled for the intended cross-examination. We have also not traced the appellant’s withdrawal of the desire to so cross-examine that complainant. There was therefore non-compliance with Section 208 (2) of the Criminal Procedure Code and we cannot rule out the possibility that the appellant may have been prejudiced.

We are puzzled that the Learned Senior Resident Magistrate made no reference to the evidence of disguise and the complete absence of the scar on the appellant’s face which factors, in our view, discredited the evidence of the complainants on identification.

The upshot is that we agree with the appellant that his identification as having been a member of the gang which attacked the 1st, 4th and 6th complainants as charged was not positive. That being our view of the appeal, we do not find it necessary to consider the appellant’s other complaints. His conviction cannot safely stand. We allow the appeal, quash the conviction of the appellant on the three counts of robbery with violence and set aside the sentence of death imposed upon him. The appellant is accordingly set free forthwith unless he is otherwise lawfully held.

Before concluding this matter, we observe that the Learned Senior Resident Magistrate did not indicate upon which count the appellant would serve the sentence she imposed. If we had upheld the conviction and the sentence we would have ordered that only the sentence on count I be executed and the sentences on the other two counts be held in abeyance since a person cannot be executed more than once. That is

however academic since we have allowed the appeal.

DATED AND DELIVERED AT ELDORET

THIS 28TH DAY OF JUNE, 2012

F. AZANGALALA
JUDGE

ABIGAIL MSHILA

JUDGE

READ IN THE PRESENCE OF :-

F. AZANGALALA
JUDGE