



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Criminal Appeal 249 of 2009

MORRIS GIKUNDI

KAMUNDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(LESIIT AND MAKAU, JJ)

(Being an appeal against the conviction and sentence of the SRM's court at Chuka Hon. Ngare Gesora(SRM)

in Criminal case number 1019/2009 dated 12th November, 2009)

J U D G M E N T

The appellant in this case was charged with the offence of robbery with violence contrary to Section 29(2) of the Penal Code. The Particulars of the charge are as follows:-

“On the 24th day of June, 2009 at Kithare sub-location in Murugi location of Maara District within Eastern province jointly with another not before court robbed Emily Njagi of one black handbag, one mobile phone make Nokia 2760, two spotlights and Kshs.200/- cash money all valued at a total of Kshs.7,500 and at or immediately before or immediately after the time of such robbery, wounded the said Emily Njagi.”

After full trial, the appellant was found guilty and convicted by the trial Magistrate. Consequently, the appellant was sentenced to suffer death. Being aggrieved by the judgment and sentence of the learned Magistrate, the appellant filed this appeal while relying on the following grounds:-

1. That the learned trial Magistrate erred in both law and facts in basing the conviction and sentence

upon the evidence of recognition or identification without observing that the circumstances prevailed during the attack were not ideal for a positive identification.

2. That the learned trial Magistrate erred in law and facts when he failed to note that the exhibited item was not found in my possession.

3. That the learned trial Magistrate erred in law and facts when he failed to question the prosecution in absence of vital witnesses who participated in the arrest.

4. that the learned trial Magistrate erred in law and facts when he dismissed the defence which was not disapproved by the prosecution.

5. That the grounds herein have been drafted in absence of certified copy of the trial proceedings, I pray to be served with the same to enhance me draft further firm supplementary grounds of appeal.

During the hearing of the appeal, the appellant opted to produce written submissions to support his appeal. The appellant added that he was arrested on 7th July, 2009 and taken to court on 31st July, 2009.

He referred to the charge sheet which shows 26th July, 2009 as a date of arrest and 31st July, 2009 as a date on which he was taken to court. The appellant submitted that he was detained without any justification.

The appeal is being opposed by Mr. Mungai, who appeared for the Republic. The learned State Counsel submitted that on 24th June, 2009 at 6.30 pm to 7.00 p.m the appellant with another robbed the complainant in this case PW1 Emily Njagi of one black handbag, one mobile phone, 2 spotlights, and Kshs.200/-.

According to the State Counsel, the appellant was at the scene of crime as per evidence of PW1 and PW3. The State Counsel further submitted that PW1 testified that she had been seeing the appellant continuously for three months. That PW2 corroborated PW1's evidence. The State Counsel submitted that PW1 stated that on the material day of robbery the appellant and another passed them before they returned to attack them. The State Counsel further submitted that the appellant was well known before by the complainant as he was a neighbor at the shopping Centre. He submitted the learned trial Magistrate found that this was a case more of recognition as opposed to identification. He submitted that PW7 in his evidence explained how the appellant was arrested after he had ran away. He urged the court to look at the behavior of appellant after PW1 informed police that he had recognized the appellant. According to the State Counsel the appellant had no defence as he opted to keep quiet and not to say anything.

He concluded by urging court to uphold the conviction and sentence. The appellant in reply to State Counsel's submissions stated that PW7 explained to court that on 7/7/2009 the case was assigned to him. According to the appellant he was charged without investigation having been carried out, since by the time PW7 was assigned this case he had already been arrested. That when PW7 was told the suspect was at Katharaka stage, he decided the person was the appellant because he had been arrested at Katharaka stage. According to the appellant, PW5 stated that he got the exhibit from one Gitonga who was not called as a prosecution witness.

Being the first appellate court, we have the duty to reconsider and re-evaluate the evidence which was adduced in the trial court before we make our own independent conclusion.

In addition to the above, we also do appreciate and are alive to the fact that we never saw nor heard the witnesses during the trial and have given due allowance for the same. Those are some of the basic principles which are set out in the case of **ODHIAMBO –V- REPUBLIC(2005) KLR PAGE 565** in which Court of Appeal stated:-

“On a first appeal, the Court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it

did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanor.

The Court is not under any obligation to allow an appeal simply because the State is not opposed to the appeal. The Court has a duty to ensure that it subjects the entire evidence tendered before the trial court to a close and fresh scrutiny and reassess it and reach its own determination based on evidence.”

The facts of this particular case are that the complainant, PW1 namely, Emily Njagi, is a business lady in Chogoria town dealing in clothing. That before the incident she used to see the accused at Katharakabus stage playing pool table game. The complainant recalled that on 24th June, 2009 at about 6.30 -7.00pm she was at Katharaka heading home with her friends Phyllis Mundi(PW2) and Kathambi Gitonga(PW3). According to the complainant, two boys emerge from the bush on to the road. The two boys were behind them at a distance of 50metres when the complainant, and her colleagues, stopped as the boys started acting as if they were drunk. The two approached the complainant and her colleagues and according to the complainant, she looked at them and recognized the appellant. The complainant testified that there was sufficient light at the time. The two boys passed the complainant and her friends and after walking for about 30 metres they turned and came back. That by that time the complainant had parted ways with Kathambi. Complainant met the appellant who cut her on the face with a pangademanding money. According to the complainant, appellant cut her twice on the face and she threw her bag at the appellant and he also cut her on her right hand.

Complainant then screamed and the appellant and his accomplice ran away with her bag containing a mobile phone make Nokia 2760, Cash 200/- and two torches. Kathambi came to complainant's aid. Phyllis who was with complainant at time of the attack was helpless but was not attacked. People gathered at the scene of crime including complainant's husband. The complainant was subsequently taken to Chogoria Hospital where she was admitted for 1 ½ weeks. She later reported the matter to Ntumu Police Station and was issued with P3 form which was filled and she returned it to police. P3 form was marked as Exh.1

According to the complainant on 25-7-2009 she spotted the appellant and reported to police officers. That when they went to arrest the appellant, on seeing them he ran away. On 26/7/2009 the appellant was arrested. Complainant's handbag was later recovered from a tea plantation near the scene of the crime. The panga was not recovered. Complainant's phone was recovered.

She also confirmed appellant's accomplice was not armed and did not attack her. During cross-examination by the appellant, the complainant testified that the appellant was wearing a green short and that she was able to identify the appellant clearly as he was the one who attacked her.

PW2 Phyllis Kanyua, testified that she comes from Katharaka, Maara, where she runs a Medical Clinic at Katharaka market. PW2 explained that she can recall that on 24/6/2009 she was on her way home in company of PW1 and one Kathambi(PW3) when two young boys emerged from a bush behind them. They were 50 metres behind them. PW2 and the other two ladies stopped at Kathambi's gate, when the boys came and passed them and went ahead. PW2 testified that she was able to identify the two boys.

PW2 then in company of PW1 proceeded on their way after Kathambi entered her home. Immediately thereafter the two boys started returning and as they were passing them PW2 heard one saying "Mama leta pesa". One of the two boys jumped on PW1 and took her bag. PW2 administered first aid to PW1 as she had been cut on the forehead and left hand. That members of public came to their aid including Kathambi. Subsequently PW1 was rushed to the hospital. During cross-examination of PW2 by the appellant, PW2 testified that she was able to recognize the appellant at the time of robbery and also the clothes he was wearing. PW2 testified the appellant was with his friend and they pretended to be drunk.

PW3 Mary Kathambi, testified that she comes from Katharaka and sells clothes in Chogoria Town. PW3 testified that she knows PW1 who is her landlady. PW3 said that she usually used to see the appellant at Katharaka Bus stage where he operated as a tout, and that she had seen him working there for the past four years.

PW3 recalled that on 24th June, 2009 at about 6.30 p.m-7.00p.m she was in company of PW1 and PW2 and on getting to St. Augustine Catholic Church she looked behind and saw two boys who were at a distance of 50 metres. PW3 informed PW1 and PW2 of the boys who were moving in a zig-zag manner.

PW3 testified that the two boys came closer and she was able to recognize the appellant. PW3 and her company stopped to let the two pass and as they did so, they were at PW3's gate and she entered her compound. Shortly thereafter PW3 heard screams from PW1 calling PW3 claiming she had been robbed. PW3 also screamed for help and members of public came. They helped PW1 who was bleeding and rushed her immediately to Chogoria Hospital.

PW3 testified that she flashed PW1's phone number and itrung. That she searched for it and managed to recover the handbag, phone and, 2 torches. PW3 called PW1's husband and informed him of the recovery. PW3 later visited PW1 and found that she had been assaulted on the face and right hand. PW3 testified that she had no grudge with the appellant.

PW4, Stephen Ngeere, introduced himself as a medical doctor, attached to PCEA Chogoria Hospital. PW4 produced as an exhibit a P3 form filled by his colleague Dr. Irere Biondo. He testified that he is conversant with her handwriting and signature. The P3 form was in respect of Emily Njagi filled on 27/6/2009.

According to the P3 form PW1's clothes was alcohol free and her clothes blood stained. PW1 had two deep cuts on the face, deep cut on the right hand. The injuries were less than 24 hours old by the time of examination and were caused by sharp object.

PW5 Watson Njagi Mwirichia, introduced himself as a farmer. PW5 recalled that on 24/6/2009 at about 7.00 p.m he was at his home; when he heard screams and rushed to the scene.

On arrival he found people screaming and his wife was bleeding profusely. He was informed that PW1 had been attacked and cut by two boys who ran away with her handbag. PW5 rushed PW1 to Katharaka market, got vehicle and proceeded to PCEA Chogoria hospital. PW5 reported the matter to Ntumu Police Station and action was taken. PW5 testified that PW1 informed him she recognized one of the boys who robbed her.

PW6 Lenna Kesima, introduced herself as a shopkeeper. According to PW6, she recalled that on 24/6/2009 at 7.00 p.m. she was on her way home when she heard screams and rushed to the scene. She found her neighbor Kathambi who told her PW1 had been attacked and robbed. She called PW1's mobile number. That as it was ringing they searched for it and recovered it together with a handbag and two torches.

PW7 No.81736 PC Paul Mukunzi was the Investigating Officer attached to Ntumu Police Station. PW7 testified that on 7/7/2009 he read the Occurrence Book in the station and noted that he had been assigned this matter. The report had been made by PW1 whom he called and recorded her statement together with those of her witnesses.

PW1 told PW7 she would be able to recognize the attackers as he was a regular person at Katharaka bus stage. PW7 testified that he caused the appellant to be arrested at Katharaka stage and preferred the charge of robbery with violence. He testified that the stolen goods were recovered and produced. During cross-examination by the appellant, PW7 testified that no weapon was recovered from him.

After the close of the prosecution case court ruled that appellant had case to answer. Section 211 Criminal Procedure Code was complied with where upon the appellant opted to keep quiet and await court's decision.

This court has carefully considered the evidence which was adduced in the lower court together with the judgment by the learned Magistrate. From the evidence on record it is apparent that the complainant (PW1), PW2 and PW3 who were in her company at the time of robbery were able to recognize the

appellant with the help of the natural light as it was not yet dark and also as a person who PW1 used to see at Katharaka Bus Stage playing pool table games. On 24/6/2009 PW1 saw and recognized the appellant as he passed PW1, PW2 and PW3. PW1 testified there was sufficient light at that time. That when the appellant and his accomplice returned PW1 was able to see the appellant before he cut her with a panga on her face then on her right hand. PW1 threw her handbag at the appellant who ran away with it as PW1 was screaming for help. PW2, was able to recognize the appellant as he passed her, PW1 and PW3.

We are also satisfied that PW3 was able to recognize the appellant as the person who she used to see at Katharaka bus stage where he operated as a tout, for the last four years. We find that PW3 saw the appellant at close range as he passed them and was able to recognize him.

PW1's evidence was that when the appellant saw PW1 and police he ran away and was not arrested until 26th July, 2009. We find the behavior of the appellant to run away upon seeing PW1 in company of Police Officers, is not a behavior of an innocent person.

This court has carefully considered the evidence which was tendered in the lower court. There is no doubt whatsoever that the appellant was arrested two days after the commission of the offence within Katharaka town. The evidence on record show that the complainant and her witnesses had been seeing the appellant at Katharaka bus stage. They were able to recognize the appellant at the time of the robbery. This court concurs with the State Counsel that the circumstances of light during robbery was favourable for positive identification.

The leading case as far as identification is that of **REPUBLIC – VS – TURNBULL & OTHERS (1976)3 ALL ER.549**. The above case set down the basic principles to be had in mind when considering the issue of identification. In addition to the above, in the case of **ROBERT GITAU – V- REPUBLIC CRIMINAL APPEAL 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.”

In the case of **Abdulla bin Wendo V R(1953) 20 EACA 166**, the Court of Appeal for East Africa, stated as follows:-

“It was held in Abdullah Bin Wendo and Another V R1953 Volume XX 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.”

In this case, the trial Magistrate did find that this was a case of recognition rather than identification. Significantly, the appellant was arrested with 2 days after commission of the offence after PW1 saw him within Katharaka market and pointed him to the Police Officers who arrested him.

We have no doubt whatsoever that the appellant was positively recognized. We do hereby agree and

concur with the conclusion made by the learned Magistrate.

In the case of **WILLIAM SEBUSENYI – V- REPUBLIC(1959) EA 411** Court of Appeal for Eastern Africa,(in a case inwhich Amendment of Charge was made after close of prosecution and defence) held:-

“As the magistrate had strictly complied with S.213 of the Criminal Procedure Code when amending the charge, it could not be said that any injustice had been caused to the appellant.”

We have considered the amending of the charge and find that the trial Magistrate complied with the provisions of Criminal Procedure Code in allowing the amendment of the charge and the appellant was not prejudiced in anyway.

Having carefully considered the evidence on record we are convinced that the evidence which was adduced by the prosecution witnesses in the lower court proved the offence charged beyond any reasonable doubt. We have no doubt in our minds that the appellant actually participated in the robbery that took place on the material time. We are of considered opinion that the conviction is safe. The upshot is that we hereby dismiss the appeal as the same has no merits at all.

We therefore uphold the conviction and confirm the sentence that was imposed by the learned trial Magistrate.

Right of Appeal explained.

DATED, DELIVERED AND SIGNED AT MERU THIS 12TH DAY OF JUNE, OF 2012

LESIT,J
JUDGE

J. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

1Mr. MungaiState Counsel

2. Appellant in person

LESIT,J
JUDGE

J. MAKAU
JUDGE