



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL 126 OF 2009

ANDREW KIRIRIO NJOGUAPPELLANT

VERSUS

REPUBLICPROSECUTOR

(From original conviction and sentence in Cr. case No. 1214 of 2008 at the Senior Principal Magistrate's Court at Kerugoya)

J U D G M E N T

The appellant in this appeal ANDREW KIRIRIO NJOGU was the 1st accused in the trial before the lower court. He and his co-accused faced two counts of **Robbery with Violence** contrary to section 296(2) of Penal Code. The particulars of each of the counts were as follows;

COUNT I

1.ANDREW KIRIRIO NJOGU

2.JOHN MUTHEE NGIGE: On the 26th day of September 2008 at Kiamiciri village Kirinyaga District within Central Province jointly with others not before court being armed with dangerous weapons namely pangas robbed BENSON MUGWERU MUGABI of one mobile phone make MOTOROLA E398 valued at Kshs.14,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said BENSON MUGWERU MUGABI.

COUNT II

1.ANDREW KIRIRIO NJOGU

2.JOHN MUTHEE NGIGE: On the 26th day of September 2008 at Kiamaciri village Kirinyaga District within Central Province jointly with others not before court being armed with dangerous weapons namely pangas robbed SIMON NGUNGU MUGABI of cash ksh.2,500/=and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said SIMON NGUNGU MUGABI.

After the learned trial magistrate heard the entire evidence in the case, he convicted the appellant on both counts and sentenced him to death. His co-accused was acquitted. The appellant was aggrieved by the conviction and sentence and therefore filed this appeal.

The appellant has raised eleven grounds of appeal as follows;

1.The Appellant pleaded not guilty.

2.The learned trial magistrate erred in law and in fact by leading himself to introducing the identifying light by the complainant which was not supported by the witness.

3.The trial court erred in law and in fact by accepting the manner in which the appellant Andrew Kiririo Njogu was identified, yet there was no special mark given during the reporting time or the appellant be paraded for the same since the complaints claimed they were attacked by persons unknown to them, neither was there any evidence adduced in the said court to support the appellant was identified during the alleged incidence.

4.The trial court erred in law and in fact by accepting blood related evidence of father, sons and daughter-in-law, yet there is a claim that independent people came to their rescue and killed one of the robbers, but no Independent witness was called before the lower court to corroborate their evidence.

5.The learned magistrate erred in law and in fact by failing to note that the appellant was not found with anything of the complainants as exhibit after the search was done, yet the person who was found with the exhibits has been set free.

6.The trial court erred in law and in fact by failing to note that the matter was framed and fabricated in that there lived a grudge between the appellant and P.W.4 and that proper investigations were not carried out to unearth those who carried out the alleged robbery but instead the whole blame was directed to the appellant on allegations of P.W.4 who was out to settle old scores.

7.The magistrate erred in law and in fact by accepting unauthenticated documents such as the P.3 which had no stamp as to which police station it had originated from.

8.The evidence adduced by P.W.2, P.W.3 and P.W.4 was inconsistent in spite of them claiming that they were in the same house and the same room they gave a different story of what happened raising doubts as to the credibility of their evidence.

9.The learned trial magistrate erred in law and in fact by accepting uncorroborated evidence of the day the complainant claims he was treated and that of the doctor who claimed that he treated him.

10. The trial magistrate misdirected himself on the identification factor in that the complainants said they did not know me prior to the incident and no identification parade was conducted to support that I was positively identified as the one who was involved in the said robbery.

11. The trial magistrate erred in law and in fact by rejecting the appellant\'s defence without giving out an apparent reason whatsoever.

When the appeal came up for hearing Mr. Igati Mwai argued the appeal on behalf of the appellant. In brief, the counsel for the appellant argued that the evidence by the prosecution witnesses was not clear enough as to the identity of the persons who attacked the complainants. Mr. Mwai submitted that P.W.1 for instance testified that the accused was one of the attackers. That since there were two accused persons, P.W.1 should have indicated which of the accused he was identifying, which he failed to do. , Mr. Mwai urged that P.W.2 on the other hand stated in evidence that he did not recognize one of the attackers, but failed to say if he recognized any, and if so which one. Mr. Mwai urged that P.W.3, who identified the appellant in court as one of those who attacked them at home did not tell the police that she, could identify anyone. Further she did not say what the conditions of light, if any prevailed at the scene.

Mr. Mwai urged that the evidence of P.W.2 and P.W.4 was contradictory on the issue of the person from whom the Motorola phone was stolen, whether it was from P.W.4 as P.W.2 said, or P.W.2 as P.W.4 stated. They did not agree on its ownership either.

Mr. Mwai relied on his list of authorities on issues of identification. We shall refer to them later in

this Judgment.

Finally Mr. Mwai decried the learned trial magistrate's failure to consider the appellant's defence.

The State was represented by Ms Esther Macharia, learned State Counsel. The learned State Counsel conceded this appeal. Counsel urged that there were discrepancies in the prosecution case on the evidence of identification, the items which were stolen and the persons from whom they were stolen. Ms Macharia highlighted some of these discrepancies. They included failure by P.W.1 to disclose who hit him on the head; fact P.W.3 claimed she did not tell police she could identify any of the robbers yet she confirmed the identity of the appellant at the police station but not in an identification parade as required. Counsel also highlighted the contradiction in the evidence of P.W.2 and P.W.4 in regard to ownership of Motorola phone and from whom it was stolen, and the fact that P.W.3 who was with them further contradicted the evidence of both.

This is a first appellate court. Being a first appellate court we have subjected the entire evidence adduced before the lower court to a fresh analysis and evaluation, while bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance for same. We have complied with the principles applicable to first appeals as set out in the case **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Criminal Appeal No. 272 of 2005**. It was stated 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 vs. 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 conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence 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 that fact that the trial court has had the advantage of hearing and seeing the witnesses.”

The facts of this case are quite simple. The home of Mzee Jackson Mugambi, P.W.1, his sons P.W.2 and P.W.4 and their wives was attacked by a number of people at 9.00pm on the 26th September 2008. P.W.1 heard screams in the home where his sons P.W.2 and P.W.4 were. He went out and found a man armed with a panga who ordered him to return to his house. He went back to the house and returned with a club which he used to subdue the armed man and succeeded to sit on him. P.W.1 was however cut on the head and he released the man. P.W.3, wife of P.W.4 was returning from the market when she met three men outside their door. She was held and thrown into the house. That is when P.W.2, 3 and 4 were robbed before the robbers escaped. Because an alarm had been raised members of public apprehended one of the escaping thugs and beat him to death.

P.W.4 later identified the appellant to police and he was arrested and charged for the robbery at P.W.1's home. P.W.6, a business woman at Kagio market was given a Motorola phone by the 2nd accused in this case to keep for him on the 1st October, 2008. She gave it to her husband P.W.5, who gave it to police and also handed over the 2nd accused to them.

P.W.9 the police officer in charge of Kagio Police Post 200 meters from P.W.1's home, heard screams on the night of the robbery. By the time he reached the scene members of public had beaten one suspect to death. P.W.9 was the one who arrested the appellant on, 1st October 2008 after P.W.4 identified him to him.

The appellant put forward an alibi as his defence. He said that on the material night he was at his home

after spending the day selling miraa, which he does for business. He stated that on the day of his arrest, he had just returned from Mbeere where he had gone to purchase miraa.

The learned trial magistrate considered the evidence of identification of the appellant and had this to say:

“P.W.1 said that he did not recognize anybody. P.W.2 said that he was able to see the 1st accused. He is not the one who led the police to arrest 1st accused. P.W.2 did not attend any identification parade. He could not tell how he recognized him. P.W.3 said that she identified the 1st accused by his cloths and shaggy hair. P.W.4 saw the same hair. He is the one who led the police to arrest the 1st accused. This was 2 days after the robbery. P.W.4 said that when they arrested the accused person he had shaggy hair. P.W.2, P.W.3 and P.W.4 all said that there was electricity light when the robbery took place. That P.W.4 actually gave his money to the 1st accused. The time spent with the robbers was sufficient for P.W.4 to identify 1st accused. When this evidence is taken with(sic) P.W.1, P.W.2 and P.W.3 I am convinced that the 1st accused was properly identified. His defence that he was at his house does not hold. It is a sham and without basis.”

The learned trial magistrate was convinced that because P.W.3 and P.W.4 said that they identified the appellant by shaggy hair or dreadlocks, then that was sufficient identification of the appellant. We think that the learned trial magistrate should have investigated the conditions of light at the scene of robbery in order to test whether the identification was proper.

Mr. Mwai on this point relied on several cases. We shall quote a few which we think bring out the issue well. In **PAUL ETOLE AND ANOTHER -VS- REPUBLIC C.A. NO.24/2000**, the court of appeal observed;

“All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In the present case, neither of the two courts below demonstrated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. There was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. It was essential that there should have been an inquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size, and its position vis a vis the accused would be relevant. In the absence of any inquiry, evidence of recognition may not be held to be free from error”.

The learned trial magistrate made a passing remark that P.W.2, 3 and 4 all said that there was electricity lights when robbery took place. We have re-examined the evidence of all three witnesses. Nowhere did P.W.2 and P.W.3. talk of electricity lights being on during their evidence. It is only P.W.4 who mentioned that there was sufficient light from electricity and added they were watching nine o'clock news. The evidence of P.W.4 was the only one where the conditions of lightening were given.

That was however not all which needed inquiry into. There was a need to find out how long P.W.4 had the appellant under observation, from what distance and in which circumstances. The learned trial magistrate did not consider all these issues.

We have looked at P.W.4's evidence once again. His evidence was that he went under a table when the robbers entered and that he remained there until the robbers left the room. We are not satisfied that in a squatted and therefore obstructed position P.W.4 had demonstrated sufficiently his ability to identify anyone. He did not say from what distance he saw him, at what angle he saw him, and which part of his body he saw. His evidence was not watertight to sustain a conviction. We are guided by the case of **REP. Vs ERIAS SEBWATO [1960] EA.174**, the court held:

“Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely water tight to justify a conviction.”

The issue of shaggy hair being a basis of identification is quite a dangerous and misleading conclusion.

In order to rely on hair as a basis of identification, the prosecution had to demonstrate that it was unique to the suspect identified through it. There was nowhere to show that only the appellant had shaggy hair of the kind he is alleged to have adorned to the exclusion of all others. Alternatively the prosecution needed to show that it was remarkable or unique and easily identifiable. There was no such evidence.

The evidence of P.W.1, 2 and 3 was that of dock identification. Mr. Mwai relied on the case of **NJOROGE -VS- REPUBLIC [1987] KLR 19** as cited in **Embu HCCCR appeal No.11 and 12 of 2009** thus;

“A dock identification is worthless and a court should not rely on such an identification unless it has been preceded by a properly conducted identification parade. A witness should be asked to give a description of the accused and then a fair identification parade should be arraigned”.

Actually the Court of Appeal has recently qualified the proposition set out in the cited case and has said that dock identification is not worthless subject to other evidence rendering credence or support to such evidence.

In this case the evidence of P.W.1, 2 and 3 was of visual identification. This evidence was weak for good reason. P.W.1, 2 and 3 did not give any description of the appellant to the police at the time they wrote their statements. In fact P.W.2 and 3 admitted that they did not state that they could identify anyone in their statements to police. P.W.3 went even further by contradicting her own evidence so that it was difficult to know whether or not she went to the police post to see and identify the appellant, and whether or not she saw the appellant at the scene of incident. We think that the reason why no identification parades were conducted for P.W.1, 2 and 3 to identify the appellant was because they never told the police that they could identify any of those who attacked them. For these reasons the evidence of dock identification by these witnesses was of little probative value.

The appellant in his grounds of appeal had raised issue with the fact all the prosecution witnesses were from the same family. We do not think it is of any importance to this case as it is clear they were the only people at the scene when the incident took place.

We think that we have said enough to demonstrate that the evidence by the prosecution did not establish the charge against the appellant. We therefore find that the conviction reached was unsafe to sustain the conviction.

Having come to that conclusion we allow the appellant's appeal, quash the conviction and set aside the sentence. We order that the appellant should be set free forthwith unless he is otherwise lawfully held.

DATED AT EMBU THIS 27th DAY OF JULY 2012.

LESIT, J.
J U D G E

H.I. ONG'UDI
J U D G E

READ, SIGNED AND DELIVERED,

In the presence of:-

.....**for State**

.....**Appellant**

.....**Court Clerk**