REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

Criminal Appeal 194,195 & 196 of 2009

ANTHONY NYAGA NAMU…….....…….…….…….…1ST APPELLANT

DAVID KARIUKI NGUCHU…….....……..2ND APPELLANT

EPHANTUS NJAGI KANAKE….....……..……3RD APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(From the conviction and sentence by M. WACHIRA Chief Magistrate at Embu in Criminal Case No. 1589 of 2008 on 12th October 2009)

J U D G M E N T

The appellants ANTHONY NYAGA NAMU, hereinafter the 1st appellant, DAVID KARIUKI NGUCHU, the 2nd appellant and EPHANTUS NJAGI KANAKE the 3rd appellant were the 1st, 2nd and 3rd accused person in the trial before the lower court. We have consolidated their appeals since they arose out of the same trial. They had been charged with six other accused persons with three counts of **robbery with violence** contrary to Section 296(2) of the Penal Code.

The appellants were acquitted in counts 1 and 3 as the rest of their co-accused were acquitted of all counts. The three appellants were however convicted in Count 2. The particulars of that charge read as follows:

COUNT II

On the 3rd day of September, 20089 at Gitube village, Kithimu sub location Kithimu location in Embu District within Eastern province, jointly with others not before court while armed with dangerous weapons namely pangas, axes, and Rungus robbed off JANE NJERI NJOROGE one TV set make Sony, Radio iii charger make Sony, DVD make Sony, children assorted clothes and shoes, all valued at Kshs.76,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said JANE NJERI NJOROGE.

The appellants were sentenced to death for the offence. Each appellant filed their petitions of appeal

giving several grounds of appeal. In their written submissions they argue them as follows:

In the 1st appellants grounds of appeal and written submissions he argues that the evidence relied upon by the trial Magistrate was full of inconsistency and discrepancies and that therefore it raised reasonable doubt to the Prosecution case. The 1st appellant urged that in her evidence the complainant in Count 2, PW2 said that she had identified the assailants and proceeded to give two names, TONY and KARIUKI. PW6, who was the officer given the names said that PW1 gave him 3 names, ANTHONY MWANGI, DAVID KARIUKI and EPHANTUS NJAGI. The 1st appellant also urged that the same witness claimed that the complainant, PW1 informed him that she had electricity lights on in her house yet in her evidence she said it was a lantern lamp.

The 2nd appellant raised similar issues. The 2nd appellant urged that the light from a lantern lamp was not reliable for a positive identification at night. The two appellants pointed out that the Assistant Chief, PW7, said that the complainant had given a name Anthony Kenyagia, a name not given by PW1 and 6 and wondered who was telling the truth between them. The 2nd appellant urged that he was arrested for this offence because he had a bad reputation of being a village thief, a fact he regrets. However he submitted that he did not commit the offence. He relied on the case of **ERIA SEBWATO VS REPUBLIC [1960] EA.174**for the proposition that since he was well known to the complainant being her neighbor, he could not have robbed her without making an effort to hide his identity.

The 3rd appellant raised similar grounds in his petition. However one ground stands out different from the rest. He urged that he was convicted on the basis of the evidence of identification by the complainant PW2 yet in her evidence, she did not give his name as one of those she identified during the incident.

The appeal was opposed by the State. Ms. Esther Macharia, learned Counsel for the State did not support the appeals. It was her submissions that all 3 appellants were well known to the complainant, PW2 for over 3 years being neighbours, and that they were properly identified. Counsel urged that the complainant, PW1 had ample time to see and identify the appellants with light from a lantern lamp and for reason she struggled with them until the 1st appellant dropped the panga he was carrying. Counsel urged the court to dismiss all three appeals.

The brief facts of the case are that the complainant in Count 2, PW1 was asleep in her house when at 2 a.m. she heard knocking on her door and people who identified themselves as police officers calling her to open the door. She lit a lantern lamp then opened her door. She said that she saw a group of men who started demanding money from her. She said that she saw the 1st, 2nd and 3rd appellants clearly as she knew them before. After struggling with the 1st appellant, PW1 told her daughter to get money from her bedroom which she did and gave to the accused in the case. She gave the names of her assailants to PW6, a police officer and PW7 the Assistant Chief same night of this incident.

The complainant's daughter was PW4. She was 13 years old. After *voire dire* examination, the Court took her evidence on oath. Her evidence was consistent to that of PW1. In addition she said she saw and identified 1stand 2nd appellants and the 8th accused. She also said she pleaded or commanded the assailants not to kill her mother because her father was lying in a grave outside their house.

The 1st appellant in his unsworn statement said he was woken from bed before day break and arrested on same night of the incident. He denied committing the alleged offences.

The 2nd appellant said in his sworn statement that on the material night he was sleeping when police arrested him at 3 a.m.

The 3rd appellant in his unsworn defence put forward an alibi as his defence. He said he travelled to Kenyariri on 1st Sepember 2008 to buy cereals and returned after 4th September 2008.

We are a first appellate Court. As a first appellate court we are mandated to reconsider the entire evidence

afresh. We have therefore subjected the entire evidence adduced before the trial court to a fresh analysis and evaluation, while giving due allowance for reason we did not see or hear any of the witnesses. We are guided by the case of **OKENO V. REPUBLIC [1972] EA 32** where the role of a first appellate Court is given as follows:

"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic [1957] EA 336] **and to the appellate Court's own decision on the evidence. 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 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 the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

The appellants were convicted on the basis of the evidence of a single identifying witness, PW2. The learned trial magistrate considered her evidence and observed:

"The circumstances of identification may appear difficult since robbery occurred in night time. But in Wafula and 3 others vs Republic [1986] KLR 627, it was held that identification at night time by a single witness is to be treated with great caution and there has to be a basis for concluding that the circumstances were conducive to a positive identification. In the present case the basis of a positive identification is the fact that PW2 knew the three accused persons very well. They were her neighbours and she knew them for over 3 years. The evidence on record is that when she went with the police officers coming to her home, she gave them the names of the accused persons because she knew them…"

We have tested the evidence adduced by PW2. What constitutes a careful testing of evidence of identification, particularly that of a single witness made in difficult circumstances is discussed in the following case which we have followed. In the case of **MAITANYI VS REPUBLIC [1985] 2 KAR 75** it was held:-

" **Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.**

When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.

The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision; it must do so when the evidence is being considered and before the decision is made.

Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction."

First of all the light she had in her house was from a lantern lamp. The witness did not in her evidence describe the brightness of the light it illuminated and the distance the light could cover. Secondly PW2 did not detail which part of which appellant she saw, what they did during the robbery and how far each was from the light. None of these factors were considered by the learned trial magistrate. We find that lack of answers to the questions we have posed in this paragraph puts to doubt the ability of the complainant to correctly and properly identify those who robbed her on the material night.

There is yet another matter which raises further doubts on the evidence of identification by PW2 and the

reliability of that evidence. PW2 said in her evidence that she gave two names to the police as those of the people she identified and she proceeded to give the names TONY and KARIUKI. That report was not accompanied by any descriptions of the persons she knew by the names she gave. PW6 the police officers who received the names from PW2 testified that PW2 gave him three sets of names which he gave as ANTHONY MWANGI, DAVID KARIUKI and EPHANTUS NJAGI. PW7 the area Assistant Chief said that he received a phone call from the complainant who reported that she knew one of those who robbed her and proceeded to give him the name of ANTHONY KENYAGIA as the one she recognized during the robbery.

What comes out clearly that the complainant in her own evidence said she gave only two names. These are very common names. We noted from evidence that PW2 was not present during the appellants arrests. That means that the names she gave without any descriptions could not possibly have been what led to the appellants arrests. Further, both PW6 and 7 had each different names from those PW2 mentioned in her evidence. It leaves one to wonder where PW6 and 7 could have gotten those names.

We have carefully considered this appeal and find that the circumstances under which PW2 saw the assailants were not conducive to positive and correct identification. The conviction entered by the learned trial magistrate was in the circumstance unsafe and should not be allowed to stand. We accordingly find merit in the appellants' appeals. Consequently we allow their appeals quash the convictions and set aside the sentences. The appellants should be set at liberty forthwith unless otherwise lawfully held.

Those are our orders.

DATED AT EMBU THIS 27th DAY OF JULY 2012.

LESIIT J. **H.I. ONG'UDI**

J U D G E **JUDGE**

READ, SIGNED AND DELIVERED,

In the presence of:-

……for State

……Appellant

……..Court Clerk