REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

Criminal Appeal 29 of 2009

SILAS KIMATHI KIRERA…….…… APPELLANT

VERSUS

REPUBLIC…….…….RESPONDENT

(From the conviction and sentence by S.N. RIECHI Chief Magistrate at Embu in Criminal Case No. 1232 of 2006 3rd March 2009)

J U D G M E N T

The Appellant was charged with SILAS KIMATHI KIRERA was charged with three counts of **robbery with violence** contrary to section 296(2) of the Penal Code. The particulars of each count were as follows:-

COUNT 1

SILAS KIMATHI KIRERA: On the 22nd day of June 2006 at Majimbo village, Kamiu sub location, Municipality location in Embu District within Eastern Province, jointly with others not before court while armed with dangerous weapons namely a pistol, an axe, a panga and a knife robbed PEETER NJERU NJIRU of Shs.1,800/= and a mobile phone make SIEMEN C-25 valued at KShs.12,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said PETER NJERU NJIRU.

COUNT II

SILAS KIMATHI KIRERA: On the 22nd day of June 2006 at Majimbo village, Kamiu sub location, Municipality location in Embu District within Eastern Province, jointly with others not before court while armed with dangerous weapons namely a pistol and a knife robbed EUSTACE NYAGA NJERU of Shs.170/= and sports shoes valued at KShs.1,200/= and at or immediately before or immediately after the time of such robbery used actual violence to the said EUSTACE NYAGA NJERU.

COUNT III

SILAS KIMATHI KIRERA: On the 22nd day of June 2006 at Majimbo village, Kamiu sub

location, Municipality location in Embu District within Eastern Province, jointly with others not before court while armed with dangerous weapons namely a pistol and a knife robbed EMMANUEL NYUMBA MAYAU of Shs.200/= and a mobile phone make SAGEM 820 valued at KShs.7,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said EMMANUEL NYUMBA MAYAU.

The appellant was convicted in all three counts and sentenced to death in each of them. The appellant was aggrieved by the conviction and sentence and therefore preferred this appeal.

He relied on his amended grounds of appeal for this petition in which he raised the following seven grounds:-

1.That the learned trial Magistrate erred in both law and facts and misdirected himself by basing his conviction on the purported identification evidence (visual) by PW1, PW2, PW3, PW4, PW6 and PW10 by holding that they managed to identify their attacker whereas evidence is too apparent to the effect that immediately soon after attack PW11 visited the scene of crime, met them all but THEY NEVER gave him the descriptions of their attacker NB: PW1 was known to the appellant even by names BUT the same were not given to PW11.

2.That the learned trial Magistrate erred in both law and facts and misdirected himself by relying on the above mentioned witnesses purported visual identification evidence without first of all ruling out altogether as to the possibility for the existence of an error or mistake on the part of their identification.

3.That the learned trial Magistrate erred in both law and facts and misdirected himself by relying on the identification parade evidence without observing the same was unacceptable as was conducted contrary to chapter 46 Forces Standing orders Rule 6(iv) letters "a", "c" , "d" and "k".

4.That my arrest was not satisfactory as the link to the same was not established and the entire case for the Prosecution was not proved beyond reasonable doubt as the law requires.

5.PW1 is not a trust worthy witness if his evidence is considered in the light of PW2's evidence and PW11's evidence.

6.That the learned trial magistrate erred in law and facts and misdirected himself by relying on the inconsistent and contradictory evidence by the Prosecution witnesses by failing to resolve the same in favour of appellant.

The brief facts of the case are that PW1, complainant in Count 1 was in his house with his child and house maid when PW2, Muriithi, his neighbor called him. When he did not enter the house, PW1 heard another person call him. He went out to find Muriithi with four men who had a pistol and who identified themselves as police officers. He was taken back to this house where he has a solar lighting which was on. He was robbed of cash and a mobile phone before the men left. He said he was able to identify two people. The appellant was one of them. He said he identified him because he knew him for three years as a prisoner while he, PW1 was a Prison officer. PW1 identified the appellant in an identification parade 4 days after the robbery.

PW2 was in the kitchen with his wife when he saw 8 men enter. The kitchen was separate from the rest of the house. He was asked for money. He said he had none. He was asked for a mobile phone, when he said he had none he was asked to lead the group to PW1's house which he did. He witnessed PW1 being robbed of cash and mobile phone. He said PW1's house had solar lighting and that he was able to identify one short and stout man. He said he did not see that man in the identification parade. He said he also identified the appellant in Court and said he did not know him before.

PW3 Lucy Wawira said that at 7.30 p.m.(according to the hand written notes) she was at her shop when people who identified themselves as police officers confronted her demanding that she surrenders the

goods her husband had taken to her. She called her husband and the men told him that they were thieves and that they wanted money. He was held and stabbed as they demanded money. They entered their house cum shop where electricity lights were on.

PW3 said she gave her sagem mobile phone. PW3 said that she heard her mother approaching with some people. She warned her not to enter as there were thieves. That is when the robbers left. PW3 later saw her mother unconscious on the ground bleeding. She was treated in hospital as was PW3's husband. PW3 said she saw the appellant in the group but was not called for identification parade.

PW5, Provincial Medical Officer confirmed PW3's evidence in regard to the injuries on the mother PW7.

PW10 was the husband of PW3. He confirmed PW3's evidence. He also said he called PW9 the OCS and reported the incident to him. The OCS went to the scene almost immediately because he was within that area. PW10 said he was guarded by two robbers while one of them took the wife to the bedroom to get some things. He said he could identify the one who robbed his wife and the one who was armed with a gun. He said that one who was armed with a knife and who hit him very hard on the head was the appellant. PW10 stated that the OCS ordered a search within the prison farm nearby. He said that he accompanied the OCS to prison gate where they found appellant already handcuffed. He said he was the one armed with a knife who also hit him on the head as he guarded him while his colleague while a third robbed his wife.

PW4 was also robbed at his house same night. He is a neighbor of PW10. He also struggled with the appellant when he stared touching his pregnant wife PW6 on her body. He described appellant as bearded at the time of incident. He said appellant guarded them for five minutes before he left. PW4 later saw his mother PW7 lying down bleeding on the head. PW7 confirmed the evidence and said she heard struggling in her son's (PW4's) house. On going to check, her daughter Lucy, PW3 told her to run away. There were 3 people she saw outside. She ran back to her house but fell down unconscious before reaching there.

PW5, Dr. Njiru examined PW8, Agnes Muringo one year after the incident. She was wife of PW1. She said she was in the kitchen with her brother in law during the incident. One man demanded money and mobile phone but she said she had neither. He cut her with a knife and went away. She could not identify him.

The police officers who testified in this case were PW9, C.l.P. Katan and PW11 PC Nderito. PW9 conducted identification parade on 26th June 2006 3 p.m. on request by PW11. His evidence was the identification witness was PW1 who identified the appellant.

PW11 received a call from radio Room Embu on 22/6/2006 at 8 p.m. It informed them that there were robbers at Ngomano village near GK Prisons Embu. He proceeded there and found victims of the robbery, some with injuries. The robbers had escaped. He said he mounted a search in the nearby maize plantation with help of prisons officers, police officers and members of public. One person, appellant herein was arrested.

The Appellant gave an unsworn statement. He said he was a mason and that he lived at Koi Mugo Estate situated 50 meters from the prison gate. He said he worked on 22/6/2006 at a construction site. He left work at 6 p.m. and entered a bar. He bought beer and food. He then walked towards home. He said he was arrested upon reaching the prison gate. He denied the charge.

This is 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 appellant was convicted on the basis of evidence of visual identification. The learned trial magistrate observed:

"PW1 testified that he was able to recognize the accused as one of the robbers because he stayed near him and had earlier seen him as an inmate in prison. On the material day he stood near him in the house and was armed with an axe. He spent 15 minutes with him in the house which had light from the bulb provided by a solar panel. He was also able to pick him at our identification parade… in the present case the witnesses have testified that light was from electricity bulb and from solar therefore providing bright light for them to see the robbers…I have considered the whole evidence, I am satisfied that the complainants and witnesses had ample light. Had as much time where they were able to see the accused as one of the robbers, and identified him in conditions which I find were free from error…"

The learned trial magistrate tested the evidence of identification by PW1 very ably. The mode of testing evidence of identification made in difficult circumstances was set out by the court of appeal in the case of 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."

The learned trial magistrate also considered the evidence of PW3 and found that although the lighting in her house was from electricity light, she was not called to an identification parade. The magistrate was impressed by the evidence of PW4 because he had been with the appellant and as the group robbed them of money for 10 minutes as they lay on the floor. PW4 said that the appellant was left to guard them for five minutes under electric light but that he struggled with him when he started touching his wife's breasts.

The police investigations carried out in this case are not impressive. Only one identification parade was held for PW1 to identify the appellant. Yet there were many witnesses who should have participated for instance PW3, 4, 7and 8. PW10 saw the appellant so the decision not to involve him in the parades was well informed. For the others there is no reasonable excuse not to mount parades for them to identify the suspects.

The evidence against the appellant was that of PW1. We are satisfied his evidence was subjected to

the proper test. We too have tested this evidence and are satisfied that PW1's evidence of identification of the appellant was positive as it was made under good lighting conditions, was positively tested in an ID parade and was therefore safe.

The evidence of PW3 and 4 is of support to the entire evidence against the appellant. They were able to see the appellant with the aid of electricity lighting. They were with the appellant for sufficient time to enable identification. We find that their evidence lends credence to the prosecution case against the appellant even though it was dock identification, given the robberies were committed within the same neighborhood which included PW1's home. And in view of sequence of events given by the victims of the robberies which tallied, we are satisfied that the appellant was in the group which robbed the complainants in this case.

We find that the learned trial magistrate carefully evaluated the evidence adduced in this case and drew the correct conclusions in the case. We find the conviction and sentence proper.

We have carefully considered this appeal and have come to the conclusion that the same has no merit. We accordingly dismiss this appeal, uphold the conviction and confirm the sentence.

Those are our orders.

DATED AT EMBU THIS 27TH DAY OF JULY, 2012.

LESIIT, J.
JUDGE

H.I. ONG'UDI
JUDGE

READ, SIGNED AND DELIVERED,

In the presence of:-

……for State

……Appellant

……..Court Clerk