



REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 47 of 2011

PETER MWITI MIRITI..... APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the judgment/Conviction and sentence of Mr. P. Ngare, Principal Magistrate in Chuka Criminal Case No.1610 of 2010)

J U D G M E N T

The appellant PETER MWITI MIRITI was charged with one count of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on 4th November, 2010 at Mwiria market, Kariakomo sub-location the appellant robbed the complainant GITONA GATUMO M'MBIUKI A Nokia 1100, an ID/Card and a purse all valued at Kshs.2500/= and at or immediately before or immediately after the time of robbery wounded the said complainants. The appellant was convicted and sentenced to death. Being aggrieved by the conviction and sentence the appellant filed this appeal setting out 6 grounds of appeal being as follows:-

1. *That I pleaded not guilty during trial.*
2. *That the learned trial Magistrate erred in law and facts in failing to make a finding that the alleged identification/recognition was not free from possibility of error.*
3. *That the learned trial Magistrate erred in law and facts in failing to find that the presentation of the exhibited money fell short of the required standard in law.*
4. *That the learned trial Magistrate erred in law and facts in not noting that the prosecution witnesses gave contradictory and conflicting testimonies.*
5. *That the learned trial Magistrate erred in law and facts in conducting the trial partially and irregularly.*
6. *That the learned trial Magistrate erred in law and facts in dismissing the preferred defense without sufficient reasons for the same.*

During the hearing of the appeal the appellant handed over the amended grounds of appeal. The same are as follows:-

1. *That the learned trial Magistrate erred in law and fact by convicting me on contradictory, uncorroborated and unreliable evidence.*

2. *That the learned trial Magistrate erred in law and fact in applying the wrong standard of proof thereby arriving at a wrong decision.*
3. *That the learned trial Magistrate erred in law and fact by failing to give my sworn defence adequate consideration and further failed to enforce provisions of Section 169(1) of the Criminal Procedure Code by disowning the said defence.*
4. *That the learned trial Magistrate erred in law and fact by shifting the burden of proof to the accused thus jeopardizing the case.*
5. *That the learned trial Magistrate erred in law and fact by basing his conviction on extraneous evidence which had not been adduced by either parties.*

During the hearing of the appeal the appellant informed the court that he had prepared written submissions which he was relying upon. He handed over the said written submissions to the court.

On the other hand, Mr. Mungai, the learned State Counsel conceded to the appeal as there was no evidence on identification and the evidence did not prove the charge of robbery beyond reasonable doubt and that PW1 did not describe the intensity of the light which was 100 metres from the scene of crime. That no ID parade was conducted to connect the appellant with the offence and that the conditions prevailing were unsatisfactory for identification of the robbers. In conclusion the learned State Counsel did not support the conviction and sentence.

Being the first appellate court we have the duty and obligation to re-evaluate and re-analyse the evidence that was adduced at the lower court to enable us reach our conclusions. When doing the above we have to bear in mind that we never had the opportunity to observe or hear the witnesses give evidence and observe the manner and demeanor of the witnesses. Those basic principles were set down in the case of **OKENO – V- REPUBLIC(1972) 32 EA** where the Court of Appeal set out the duty of the first appellate court in the following terms:-

“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 filed written submissions. His contention is that the conditions at the time of robbery were not conducive to positive identification and the prosecution did not prove their case beyond reasonable doubt. That the court did not consider the appellant’s defence and the court shifted the burden of proof to the appellant which resulted into miscarriage of justice.

In this particular case the prosecution availed five witnesses before the prosecution closed its case. Subsequently the appellant was placed on his defence. The appellant defended himself on 19th September, 2011.

The facts of the prosecution case are very simple, the complainant PW1 was walking on foot at 10.30 p.m when he heard footsteps from behind. PW1 stopped and looked behind and recognized appellant KELVIN MUGAMBI, who was known to him, trailing him. The appellant was about 100 metres behind PW1. PW1 testified there was electric light from the shopping centre and there was a barber shop near where the complainant was. PW1 testified that the two assailants caught up with him, hit him with a blunt object and he fell down. They frisked him and took his mobile phone and personal effects. The assailants took complainant’s I/D card and asked him to give them his M-Pesa account number that is 1969. The

assailants ran away after beating the complainant thoroughly. The complainant testified the incident took about 10 minutes.

PW2 testified that on 4/11/10 he met PW1 at about 8.00 p.m and they had a couple of drinks of beer before they parted. That at about 10.30 p.m at a distance of 100 metres he heard severe groaning on side of the road and on looking he realized that it was the complainant. Complainant told him he had been attacked by two people.

PW3 testified that on 27/12/2010 at 10.00p.m his colleague PC Bunyasi informed him that the suspects in a robbery matter he was handling had been spotted at Mweria Market. That they proceeded to the said place and arrested the appellant and took him to the Police Station.

PW4 testified that the complainant reported the incident to him on 5/5/10, that at 10.30 p.m he was attacked by two people. That the source of light was 100metres from the scene of crime. PW4 stated that PW1 identified appellant PETER MIRITI and one KELVIN. That the robbers stole PW1's mobile phone and wallet. PW4 testified that they found that complainant's money had been withdrawn at Chuka Town after sum had been transferred to one KELVIN MUGAMBI MUTUMA. That Kelvin is still at large. That when appellant was arrested nothing was recovered from him. PW5 produced P3 form for the complainant in which his injuries were classified as harm.

The appellant in his defence testified that he was a stranger to the charge with which he was charged and termed the same as a frame up. He alleged on the date of alleged offence he was in Nairobi.

The conviction of the appellant was based on evidence of a single identifying witness. It is important in assessing evidence of a single identifying witness to examine the conditions of lighting at the time of identification is made in order to satisfy oneself that the conditions prevailing at the time of identification or recognition that conditions were conducive for a positive identification of the culprits.

The Court of Appeal set out what one has to look for in such evidence. In case **of CLEOPHAS OTIENO WAMUNGA-V-REPUBLIC(1989)** the Court of Appeal stated:-

“The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery CJ. In the well-known case of R. VS Turnbull 1976 (3) All E.R. 549 at pg. 552 where he said:

‘Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.’ ”

In the case of **PAUL ETOLE & ANOTHER –V-REPBLIC C.A. 24 OF 2000** page 2 and 3

“The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.”

We have closely examined the evidence of the complainant and the basis upon which he claims he saw and recognized the appellant. The complainant gave the name of the appellant as one of the attackers to PW2 and Police Officers. The complainant knew the appellant before as he hailed from his neighborhood. Complainant recognized appellant and Kelvin Mugambi who were trailing him when they were 30 metres behind him.

Further the light that enabled the complainant to recognize his assailants was electricity light from shopping centre and a barber shop near where the complainant was. The complainant continued walking for another 100 metres before the two caught up with the complainant. The appellant held complainant by neck and both accused ordered complainant to give his pin number of M-pesa which he gave as "1969". The whole incident took 10 minutes. Complainant gave appellants name to Pw2 and PW4 the Police Officer. PW2 confirmed that the complainant gave him the particulars of his attackers as the two people they had spotted in a bar being the appellant and Kelvin Mugambi. PW4 confirmed the complainant gave him the name of the appellant. PW4 testified that the investigation revealed that complainant's money was transferred to another line and withdrawal made at Chuka Town. That the transfer was made to one Kelvin Mugambi Mutuma, who the complainant identified at the time of his attack in the company of the appellant.

We remind ourselves that it is important in assessing evidence of a single identifying witness the importance of examining the conditions of lighting at the time the identification is made in order to satisfy oneself that the conditions prevailing at the time of identification or recognition that conditions were favourable for a positive identification of the culprits. The complainant's evidence is clear that there was electricity light from the shopping centre and a nearby barber shop from where he was. The complainant was able to see and recognize appellant and Kelvin Mugambi trailing him from a distance of 30 metres. He walked for 100 metres before appellant and his accomplice caught up with him. He recognized the appellant and his accomplice as his neighbor and the person he had known for many years with aid of the electricity light. He had earlier seen the appellant at the bar with his accomplice. The attack on the complainant took 10 minutes and during which time there was discussion for some time when the appellant and his accomplice were demanding that the complainant give his M-Pesa pin number. The complainant during such incident had sufficient time for identification of the appellant during the exchange between himself and his attackers for 10 minutes under which complainant was being harassed to give his pin number. We find there was sufficient time for safe identification. Indeed there is evidence that complainant's money was transferred through use of his pin number which he had given the appellant and one Kelvin Mugambi who is still at large. That Kelvin Mugambi's line was used to withdraw complainant's money at Chuka town.

We therefore find and are satisfied that there was correct recognition and identification of the appellant. We also find that the circumstances of recognition and identification were conducive for positive identification of the appellant.

We are convinced that the evidence of single witness in this case was safe to found conviction. We do not agree that the learned State Counsel correctly conceded to this appeal.

We accordingly dismiss the appeal, since the same has no merits. We hereby uphold the conviction and confirm the sentence that was imposed by the learned trial Magistrate.

Right of appeal explained.

DATED, SIGNED AND DELIVERED AT MERU THIS 29th DAY OF NOVEMBER, 2012.

J. LESIIT

J. MAKAU

JUDGE

JUDGE

Delivered in open court in presence of:

Mr. Mungai State Counsel – For State

Appellant in person - present

J. LESIIT

JUDGE

J. MAKAU

JUDGE