



REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 152, 153 & 151 of 2010

ANDREW KAILEMIA KIREMANA.....1ST APPELLANT

REUBEN KIBURI KANG'ORO.....2ND APPELLANT

BENSON SERIMAKI MBURUGA..... 3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Criminal Appeal against both conviction and sentence by Hon. M. T. KARIUKI SRM at Tigania PM Criminal Case No. 1390 of 2009 delivered on 9TH AUGUST, 2010)

J U D G M E N T

The Appellants **ANDREW KAILEMIA KIREMANA** hereinafter the 1st Appellant **REUBEN KIBURI KANGORO**, the 2nd Appellant and **KANGORO BENSON SERIMAKI** third Appellant were charged together for various offences in count 1 all 3 Appellants were charged with count of attempted robbery with violence contrary to section 296(2) of the Penal Code. The offence is alleged to have been committed on 24th September, 2009 against Seremaki Mutwiri Machata. In count 2 all 3 Appellants were charged with attempted robbery with violence contrary to section 297(2) of the Penal Code. The offence was allegedly committed on 24th September, 2009 against Hassan Kayoyi Thithura.

In count 3 all Appellants are charged with attempted robbery with violence contrary to section 297(2) of the Penal Code. The offence is alleged to have been committed on 24th September 2009 against Cyprian Muthomi Mukono. The Appellants were found guilty in all four counts of offences and convicted. The learned trial magistrate sentenced each Appellant to death in each count. Being aggrieved by the conviction and sentence they filed this appeal. The Appellants were represented by Mr. Rimita. They relied on 8 grounds of appeal in their petition of appeal as follows:

In count 4 all 3 Appellants are charged with attempted robbery with violence contrary to section 297(2) of the Penal They were convicted of the offence and sentenced to suffer death. Being aggrieved by the conviction and sentence they filed their appeal.

- 1. The learned trial magistrate erred in law and in fact in failing to consider and find that Section 72(3) of the Constitution had been contravened.**
- 2. The learned trial magistrate erred in law and in fact in that he based his conviction on defective charges.**

3. **The learned trial magistrate erred in law and in fact in finding that the Appellant was positively identified or recognized under the circumstances.**
4. **The learned trial magistrate erred in law and in fact in that he shifted the burden of proof to the Appellant and in process failed to consider or sufficiently consider the Appellants defence.**
5. **The judgment of the learned trial magistrate is against the weight of evidence and the law.**
6. **The learned trial magistrate conviction and sentence on all the counts was illegal and bad in law.**
7. **The charges on which the Appellant was convicted were not proved on the required standard.**
8. **The learned trial magistrate's sentence is illegal and bad in law.**

The facts of the case are that at about 7.30 pm on the 24th September, 2009 a group of four people entered a kiosk owned by Hassan, the complainant in count 2. They were armed with pangas, rifle and an axe. They robbed Seremaki of 500/- and a pair of shoes. They also injured Seremaki, Hassan and other. Hassan ran out of his hotel and raised an alarm. Members of public went to their rescue leading the robbers to run away. The Appellants were eventually arrested and charged.

The 1st Appellant denied the charge. He stated that Hassan had a grudge against him over a miraa deal gone sour.

The 2nd Appellant saw that Hassan who was his uncle had framed him as a result of a grudge over a land case between the 2nd Appellants father and Hassan. He gave the Land Adjudication File Number and said that the grudge developed because the complainant Hassan lost the case to his, 2nd Appellants father.

The 3rd Appellant also denied the charge and alleged that he too was framed by Hassan because a brother of Hassan had sold a piece of land to 3rd Appellants father. That after his father died, he left the land to him and that Hassan was bent on taking it from him. He said that Hassan filed his claim with the Land's Office but that he lost that case.

We have subjected the evidence that was adduced before the trial court to a fresh evaluation and analysis while bearing in mind that we neither saw nor heard any of the witnesses and have given due allowance.

The principles which apply in a first appellate court are well established and we have observed them. They were ably set out in the case of **ISAAC NG'ANG'A KAHIGA ALIAS PETER NG'ANG'A KAHIGA VS. REPUBLIC CRIMINAL APPEAL NO. 272 OF 2005** 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 the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

Mr. Rimita for the Appellants abandoned ground 1 of the Appeal. Counsel urged that the most important ground in respect of all three Appellants was ground No. 3 which deals with identification through recognition of the all the three Appellants. Mr. Rimita submitted that the incident took place at 9 pm which agreeably was dark. Counsel submitted that there was lack of clarity of how many rooms there were in the premises where the incident took place. Also not clear was how the lamp served the rooms. Counsel urged that the lamp ought to have been made an exhibit. He also said that the evidence before the court was that there were 15 to 30 at the scene of the incident. And that therefore the scene must have been chaotic. Counsel urged that the circumstances for recognition were not proper. Mr. Rimita submitted that PW1 said that he went beneath a pool table and wondered how from that position he could have been able to identify the attackers as he did not have a clear view. Counsel also raised issue with the inconsistency with the number of robbers involved in the attack with some witnesses saying they were 5 and others saying they were 6. The State was represented by Mr. Moses Mungai learned State Counsel. He opposed the appeal. Counsel urged that he supports the conviction by the learned trial magistrate. Mr. Mungai submitted that the learned trial magistrate considered the issue of identification and found that the Appellants were well known by the witnesses because they came from the same place and that they also spoke at the scene during the robbery when they said that they wanted Hassan. Counsel submitted that the trial court found that there was light in the room where the incident took place and that when he considered the entire evidence of identification he found that it was that of recognition. Mr. Mungai submitted that the light which was at the room where the incident occurred according to PW5 was bright enough to cover an area of 8 meters.

We have evaluated and analyzed the evidence regarding the identification. There were 4 identifying witnesses. PW1, PW2, PW3, and PW5. Their testimony was that they knew the Appellants before the incident. The evidence of identification was therefore that of identification.

In the case of **ABDULLAH BIN WENDO VS. REX 20 EACA 166**, the Judges of Appeal emphasized the need for careful scrutiny of the evidence of identification especially by a single witness, before basing any conviction on it. The Court held as follows:

“Subject to certain well known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this rule 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. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”

Mr. Maitai Rimita relied on several cases however he did not highlight most of them so it was difficult for us to know what portions in those cases he was relying on. Mr. Rimita relied on the Ugandan case of **R VS ERIA SEBWATO 1960 EA.174** where 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.

We also wish to quote a celebrated case in the issue of identification and recognition this is the case of **Republic VS TURNBULL (1976) 3 All ER** where the court held:

“Whenever the case of an accused person depends wholly or substantially of the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. He should instruct them as to the reason for that warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken”.

What the above cases all have in common is the emphasis of the need to scrutinize the evidence of identification especially where the accused persons have challenged the correctness of the identification.

That scrutiny is required whether the identification was that of strangers as well as where the identification was by recognition. Such evidence is required to be watertight in order to sustain a conviction. There is another case quoted by Mr. Rimita, STANSLAUS OPIO WANDERA VRS REPUBLIC (2006) EKLK where a court of Appeal case is quoted and ANJONONI AND OTHERS VRS REPUBLIC (1980) KLR 50 where the court of Appeal observed.

“The proper identification of robbers is always an important issue in a case of capital robbery emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favorable. This was, however, a case of recognition, not identification, of the assailant; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya vs Republic” (unreported).

The four eye witnesses of the incident who are also the complainants did not describe the nature of the brightness of the light at the scene. The witnesses were also very shallow and did not give detail in their evidence. PW1 for instance stated **“the robbers had no disguised themselves and there was a light from a lamp”**. That is all he said about lighting in his examination in chief. He talked about it further during cross examination by the 3rd Appellant where he stated **“it was 7.30 pm. There was light in the kiosk. The lamp was on. It was a hurricane lamp”** on his part PW2 had this to say about lighting **“there was light in the kiosk and the shop there was a lamp”** PW3 on his part stated **“ there was a lamp in the hotel which was on”**. I saw them through this light. It was a hurricane lamp. It was only one spotlight.

From the foregoing it is clear that the witnesses did not give detail nor describe the light sufficiently in order to enable the court test whether the lighting conditions at the scene were sufficient for correct identification. It is however very clear to us that there was more than one room, the hotel and the shop. It is also very clear from the evidence that there was only one lamp being used at the premises just before this attack. We are not told where that lamp was but PW1 indicated that it was mounted. The evidence of PW3 was that he was in charge of the pool table where he had 15 people playing. Those people did not include the other complainants in the case and the people that were taking tea or seated at the hotel. The size of the room is not described. It is not clear therefore whether the patrons were crowded in one small room or whether it was spacious. All these factors are important for identification purposes the prosecution needed to establish that the eye witnesses had clear view of the assailants and that they had an opportunity to see them. These were not established to the required standard. We also think that in a room with one mounted lamp at a position that is not disclosed where there were at least 20 people that the conditions of lighting and the circumstances of identification were not positive for a correct identification. We think that the fact that the witnesses knew the Appellants before the court before does not give an assurance from the circumstances of this case but the people they saw during the incident were the Appellants and there was no possibility of a mistake.

There were other weaknesses in the prosecution evidence. We found that there was discrepancy in the evidence. We shall quote from NJUKI V. REPUBLIC [2002] 1KLR 771

“In certain criminal cases, particularly those which involve many witnesses’ discrepancies are in many instances investable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused...however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused”.

We are guided by the above authority. We shall consider the discrepancies in the prosecution evidence and decide whether the discrepancies were of such a nature as to create a doubt as to the guilt of the Appellant.

PW1 described the scene as where people bust into the hotel shouted **“Waria wote walale chini na**

watoe pesa.” He then says that PW2 tried to lock the door which was blocked by a gun that was caught between the door and the frame they still gained entry. PW1 said that the 3rd Appellant who had gun shouted that the gun had jammed. PW2 on the other hand said that he saw some 6 people outside the kiosk and that they were beating people and robbing them. He said that he closed the door and that the robbers broke the door with an axe. He said that as they entered the kiosk he threw a panga which hit them and when he started screaming the robbers fled. PW3 on his part said that he witnessed some people pushing PW2 back into the kiosk and that they told him. **“It is you we want”** he then heard them order everybody to lie down. PW3 said that they did not hid the command and that he was hit with a jembe and then heard a gunshot after which he lost consciousness. PW5 on his part saw men enter the kiosk and heard them order people to lie down. He say Hassan being pushed back into the hotel by one of the gun men while three of the accomplices beat and robbed people. He said that the robbers fled when people started screaming.

There was discrepancy about the number of people that were involved in the robbery that is whether they were five as PW1 and 5 saw or whether they were six as

PW 2 and 3 saw. That in our view is not very material and does not go to the substance of the case. What goes to the substance of the case is the manner the robbery was executed. The scene described by PW1 is different from the scene that PW2 described. PW1, 3, and 5 said that the robbers entered the hotel while PW2 was emphatic that they did not succeed. What the witnesses heard was also different. PW1 and 3 said that they heard the group saying that it was him they wanted. IN Addition PW1 said that all Waria should lie down and give their money. None of the other witnesses heard anything nearer to the statement PW1 claims to have heard. What disturbs us however, is the issue of where the incident took place. PW2 was very emphatic that he prevented the robbers from entering his hotel and that even when they broke the door he hit them with a panga and at the same time he was screaming and he claims as a result people came to the scene and the robbers ran way. PW3 who was present through out the incident did not talk of the attack and the theft from PW1. PW2 also did not witness any shooting of PW3. In fact PW’2 testimony was that no shots were fired just like PW1 said. The sequence of events and the execution of the robbery were so different from the account of each witness that we were not satisfied that the prosecution had established their case. We find that the discrepancies are of such a nature that they create a doubt as to the witnesses’ credibility including their ability to identify those involved. We did not lose sight of the fact that the report of the incident was made a day after the incident and that at the time it was made no descriptions of those involved in the attack were given to the police.

We have come to the conclusion that there was no proper identification of the appellants as the conditions of lighting at the scene of the incident were not conducive for positive identification. We have also come to the conclusion that the discrepancies in the evidence of the prosecution witnesses went to the substance of the charge against the appellant and that they created a doubt as to the guilt of the appellant. We find that the convictions entered against the 3 appellants are unsafe and accordingly we allow the appellants appeal, quash the conviction and set aside the sentence. We direct that the appellants should be left at liberty forthwith unless they are otherwise lawfully held.

DATED AT MERU THIS 22ND DAY OF NOVEMBER, 2012.

**LESIIT, J
JUDGE.**

**J.A. MAKAU
JUDGE.**