REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 50 of 2011

LEONARD KINYUA ……..…….. APPELLANT

VERSUS

REPUBLIC……...……...RESPONDENT.

(Criminal Appeal against both conviction and sentence by Hon. M. MAUNDU PM at ISIOLO PM Criminal Case No. 349 of 2011 delivered on 6.10 .2011)

J U D G M E N T

The Appellantwas charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence are that on night of 24th day of June, 2011 at Bula-pesa area in Isiolo County within Eastern Province jointly with others not before court while being armed with a dangerous weapon namely a rifle robbed Anthony Kimathi of cash Ksh.6000 and a mobile phone make Nokia 1600 valued at Ksh.2000/- and at or immediately before or immediately after the time of such robbery threatened the said Antony Kimathi. The appellant was tried and convicted of the offence and sentenced to death. He was aggrieved by the conviction and sentence and therefore file this appeal as follows:

1. That the pundit magistrate erred in law and facts when he fully relied on the evidence of purported identification yet failed to find that the same bore no evidence in the instant case.

2. That the learned magistrate erred in law and fact when he relied on insufficient evidence that could not base and sustain a conviction.

3. That the trial magistrate erred in law and facts when he rejected my defence contrary to the provisions of section 169(1) of the CPC.

4. THAT the trial magistrate erred in law and facts in accepting prosecution witnesses evidence as safe and whereas the evidence was insufficient and incredible.

The facts of this case were that the complainant PW2 and PW4 were inside Abed's Wines and Spirit Shop taking alcohol at inside that bar and the accused person was sitted without taking any drinks. At around 9.30 pm two people arrived in a motor cycle one of them carrying a gun. They entered the bar. The gun man stood at the door. The accused stood up from his table and ordered everybody in the bar to lie down he was joined by one Muchui and one Kanyiri in addition to the two new comers. The complainant said that the Appellant was the one who ransacked his pockets and took his phone and 6,000/- the accused Kanyiri and Muchui and the man who was with the gun robbed other people in the bar before leaving.

The following morning PW3 who was the owner of the bar after getting a report of the incident went and arrested the Appellant and took him to the police.

The Appellant in his statement in defence admitted that he was at Abed's shop on the material night. He bought some drinks for a lady and they sat to drink together. That he later fought with the complainant in this case inside the bar when the complainant accused him of entertaining his wife. The Appellant denied the offence and made no reference to the robbery incident.

Those were the facts of the case. The Appellant was unrepresented. Mr. Montende learned State Counsel appeared for the state. We have considered the submissions by both the Appellant and the learned state counsel. The appeal is opposed. We have also subjected the evidence that was adduced before the trial court to a fresh evaluation and analysis while bearing in mind that we neither saw or 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."

The evidence against the Appellant is that of identification. There are 3 eye witnesses who have identified the appellant as one who with four others robbed patrons of Abed's bar at 9.30 pm on the material night these were the complainants PW1, PW2 and 4 they say they knew the Appellant and two of the other assailants very well and even gave their names. All of them described how the robbery was executed and the role that the Appellant played during that robbery. That evidence appears very good on the side of the prosecution however, there is one very important fact which was overlooked by the prosecution and also by the court. The incident took place at 9.30 pm inside a bar. People were having drinks so there must have been some form of lighting inside the bar that night. PW1 in his evidence did not say what form of lighting there was inside the room. The only light he mentioned was the television which was on and which he was watching when the robbers struck. There is no other description of the lighting. PW2 also made no mention of the form of lighting at the bar that night. He only mentioned there was a television set which people were watching. PW4 on the other hand went a little further when he mentioned that there was electricity light in the bar. He did not describe what type of bulbs or lighting there was at the time.

In the case of **Paul Etole and Another vrs Republic CA 24 of 2000(UR) pg 2 & 3** the court of appeal considered what a court should bear in mind when examining the sufficiency of identification as follows:

"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 are guided by this authority. The learned trial magistrate did not scrutinize the evidence of identification by the prosecution witnesses. He did not consider the nature and the strength of the light at the scene at the time the incident took place. There was also no consideration of the distance at which each of the eye witnesses saw and recognized the Appellant. These were fatal omissions which went to the substance of the charge. Without the details alluded . it is impossible to test the correctness or otherwise of the evidence of identification by the witnesses. In the circumstances we find that the conviction entered against the Appellant was unsafe and cannot be allowed to stand.

Accordingly we allow the Appellant's appeal, quash the conviction and set aside the sentences. The Appellant should be set at liberty forthwith unless he is otherwise lawfully held.

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

LESIIT, J
JUDGE.

J.A. MAKAU
JUDGE.