REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 290 of 2009

RICHARD GATHECHA KINYURU.....1ST APPELLANT

JOHN THENDU NDICHU .....2ND APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 437 of 2008 of the Resident Magistrate's court at Githunguri by Abdul Lorot (Senior Resident Magistrate)

J U D G M E N T

The appellants, **RICHARD GATHECHA KINYURU** and **JOHN THENDU NDICHU,** were convicted for the offence of Robbery with violence **contrary to section 296 (2) of the Penal Code.** Each of them was then sentenced to suffer death.

The 1st appellant, Richard Gathecha Kinyuru, was also convicted for the offence of Being in Possession of Bhang **contrary to section 3(1) (2) of the Narcotic Drugs and Psychotropic Substances Control Act**. As the appellant had already been sentenced to death, the learned trial magistrate directed that the sentence for the offence of being in possession of bhang be held in abeyance until the 1st appellant exhausted all appeals.

In their appeal to this court, both appellants have submitted that the circumstances prevailing at the time when the offence was committed, were not conducive for positive identification.

The offence was committed at about 4.00a.m., when it was dark. The only source of lighting was a torch. And the assailants are said to have attacked the complainant suddenly. They used a rungu to hit the complainant on his head; they also cut him on the head using a panga.

As a result, the complainant lost consciousness for a while. By the time he came to, he had been robbed of his watch, mobile phone and Kshs.4,000/- cash.

It is those circumstances that the appellants described as difficult.

Secondly, as there was only one witness who allegedly identified the appellants, this court was told that the trial court was wrong to have convicted the appellants without first cautioning itself that conviction should not follow in such a situation, unless the court found it safe to rely on the evidence of a single-identifying witness.

Mr. S. Oguk, learned advocate for the 2nd appellant, submitted that the complainant cannot have had a proper opportunity to identify the 2 assailants correctly as they rushed at him. He argued that the complainant had only a fleeting glance at the 2 men, just before they attacked him.

Furthermore, because the complainant said that he held onto one of his assailants, the appellants submitted that he cannot therefore have continued to hold onto his torch. And after letting go of the torch, the complainant did not have any light thereafter.

Although the complainant had grown up in the same village with the appellants, it was submitted that he could have been mistaken in his alleged recognition of the two men.

This court was reminded that both appellants were arrested almost a year after the robbery. Therefore, the appellants submitted that there ought to have been an explanation for the delay in arresting them, since the complainant allegedly named them in his first report. The absence of any explanation for the delay in arresting the appellants is said to indicate that the complainant did not identify them, and also that he did not name them to the police in his first report.

On his part, the 1st appellant also submitted that the complainant's blood-stained clothes and the damaged vehicle should have been exhibited before the trial court.

He further submitted that the report from the Government Analyst should not have been admitted in evidence before the trial court asked him whether or not he consented to the said production.

The 1st appellant complained that the contents of the Occurrence Book (O.B.) were not read out in court. His contention is that the O.B. was not read because the appellants' names were not recorded in it when the complainant made his first report.

Finally, the 1st appellant argued that he was denied his constitutional right when he was not provided with a Kikuyu interpreter.

Ms Mwanza, learned state counsel, submitted that the evidence against the appellants was simply overwhelming. Counsel described the defences by the appellants as bare denials.

As far as the respondent was concerned, the complainant positively identified the appellants.

The respondent took us through a summary of the evidence on record, concluding that the same was cogent and sufficient to sustain conviction.

Even though the learned trial magistrate did not expressly warn himself about the danger of basing conviction on the evidence of a single identifying witness, the respondent submitted that that, of itself, cannot undo the otherwise cogent evidence.

We have re-evaluated all the evidence on record, and have drawn our own conclusions.

On 1st August 2007, at about 4.00a.m., **PW 2** parked his taxi at the Gakoe Shopping Centre, which was 5 minutes away from his home. He parked next to the shops, and then remained inside the vehicle, waiting for potential customers.

He heard one of the shops being opened, and turned around. He saw 2 men emerging from the shop.

PW 2 flashed his torch in the direction of the 2 men. They were about 10 metres away from him. He identified them as Gathecha and Thendu, the appellants, herein. He even called them by name, asking them what they wanted.

The 2 men told him to shut up otherwise they would kill him. The men then descended on **PW 2**,

instantly. He was hit on the heard, using a rungu.

PW 2 grabbed the rungu as well as Gathecha. Clearly, therefore, when **PW 2** was holding Gathecha by his neck, whilst also holding the rungu, he cannot still have been holding to the torch.

Gathecha screamed, and his colleague responded by breaking the window on the passenger side of the vehicle. Thendu used his panga to cut **PW 2** twice, on the head.

The learned trial magistrate noted that **PW 2** showed the healing scars to the court, during the trial.

When **PW 2** was cut with the panga, he released Gathecha. Thendu used the panga to also cut **PW 2** on his hands. And the trial court was shown the scars on both hands.

PW 2 was assaulted with the rungu and the panga, until he lost consciousness.

When he came to, shortly thereafter, he realized that he had been robbed.

PW 3 lives next to Gakoe Shopping Centre. He had woken up early to check on his vehicle, in readiness to start work. When he was checking on the vehicle, he heard screams from the direction of the shopping centre. He armed himself with a metal rod and drove to the centre. When he got there, he found **PW 2** inside his car, wounded.

PW 2 told **PW 3** that he had been attacked by the appellants.

PW 3 helped to drive **PW 2** to the police station, and also to the hospital where he was treated.

According to **PW 3**, he had known the appellants very well, as they grew up together, in the same village.

PW 1, **DR. CAROLINE NJERI NGUNU,** was a Medical Officer of Health, who was the In-charge at Githunguri Health Centre.

When **PW 2** arrived at the health centre, he told the doctor that he had been assaulted by persons known to him.

The doctor noted that **PW 2** had multiple cut wounds on the scalp and other multiple cuts on both hands. The cuts were all bleeding.

PW 4 is an Administration Police Officer attached to the District Commissioner's Office, Githunguri. On 7th June 2008, **PW 4** was on patrol duties, when he (and his colleagues) met 3 people who were running. The said 3 people told the officers about some 4 men who were harassing people.

PW 5 was with **PW 4**. They went to the area described by the 3 men, and the officers encountered the 4 men. On challenging the men to stop, all 4 of them ran away. However, **PW 5** and **PW 4** pursued and arrested the 1st appellant, Gathecha.

When the 1st appellant was escorted to the Githunguri Police Station, and he gave his name, the officers present recalled that they had previously received a report from **PW 2**, in which the name Gathecha was given.

The Administration Police Officers (i.e. **PW 4** and **PW 5**) did not know the 1st appellant before. And after escorting him to the police station, they left the matter to the regular police.

PW 6 is the police officer who was at Githunguri Police Station when **PW 2** first reported that he had been assaulted and robbed.

PW 6 was again the officer who was on duty when **PW 4** and **PW 5** took the 1st appellant to the police station on 7th June 2008.

PW 6 was therefore able to quickly recall that **PW 2** had given the name of one of the persons who robbed him, as Gathecha.

Thereafter, **PW 2** attended at the police station and identified the 1st appellant.

Meanwhile, the 2nd appellant was arrested in Ruiru. **PW 6** sent **PW 2** to Ruiru, in the company of some police officers from Githunguri Police Station.

PW 2 also identified the 2nd appellant as one of his assailants.

During cross-examination, **PW 6** made it clear that when **PW 2** made his first report, he gave the names of his assailants as Gathecha and Thendu. **PW 6** further pointed out that the complainant's statement also had the names of his assailant, together with details of what each of them did.

It is noteworthy that the said details are wholly consistent with the evidence tendered by the complainant when he testified in court.

From the appellants' defences, it is clear that they hailed from the same village as **PW 2** (the complainant), and **PW 3**. This was therefore a case of recognition.

However, as was made clear by the Court of Appeal in **WAMUNGA V REPUBLIC [1989] KLR 424**, recognition may be more reliable than identification of a stranger, but mistakes in recognition of close relatives and friends are sometimes made.

In that case, the appellant was a neighbour to the complainant. The appellant is said to have been recognized by the complainant and other eye-witnesses, during the robbery.

The incident took place at night, and the only source of light was the torches being flashed by the robbers.

All the victims were being woken up from sleep in their respective houses.

Notwithstanding the alleged recognition by 2 eye-witnesses, it was not until after 5 days that the appellant was arrested.

Before the appellant was arrested, other suspects were arrested. Secondly, the complainant did not report to the Assistant Chief or the Chief that the appellant was one of the robbers. Thirdly, the arresting officer said that the appellant's name was given by an informer; not the complainant.

In the light of those factors, the Court of Appeal concluded that there was a possibility of error in the alleged identification of the appellant.

However, we hold the considered view that that case is wholly distinguishable from the case before us.

In this case, the complainant named the appellants in his very first report. He named the appellants to the person who came to his rescue. And thereafter, he named the appellants to the police officer who recorded the complaint in the O.B.

But, we also take note of the holding by the Court of appeal at page 426 of the law report in Wamunga's case, which reads as follows;

*"**It is trite law that where the only evidence against a defendant is of identification or***

recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."

So, whereas the complainant named the appellants in his first report, could his alleged recognition be deemed to be free from the possibility of error?

PW 2 used a torch as the source of light. And he saw the 1st appellant holding a rungu. The said 1st appellant was ahead of the 2nd appellant, who was holding a panga.

Was the lighting sufficient?

PW 2 described his torch as follows;

"I flashed my torch, an electric-charged torch. It was well charged and could light a large area. There was no other light."

It therefore appears to us that there was sufficient light to enable the complainant clearly see the appellants, who were only 10 metres away from him.

After the complainant recognized the appellants, he called them out by name. That confirms that he saw them clearly.

In **JOSEPH NGUMBAO NZARO v. REPUBLIC [1991] 2 KAR 212,** the Court of Appeal reiterated the importance of a trial court warning itself of the inherent dangers of accepting visual identification as a basis for a conviction.

And in **OBWANA & OTHERS V. UGANDA [2009] 2 EA 333**, the Court of Appeal of Uganda stated the position thus, at page 337;

"It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it. The rational for this is that a witness may be honest and prepared to tell the truth, but he might as well be mistaken. This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence"

In that case, the Court of Appeal found no other evidence that corroborated the evidence of visual identification. But the Court did state, at page 341, the following useful holding;

"***What is needed in the instant appeal is 'other' evidence direct or circumstantial, which goes to support the correctness of identification and to make the trial Court sure there was no mistaken identification by PW 3 and PW 6. Other evidence may consist of a prior threat to the deceased, naming of the assailant to those who answered the alarm and a fabricated alibi etc."***

In our case, the complainant definitely named his attackers to **PW 3**, who went to his rescue. He also named the appellants as soon as he got to the police station, to make the first report. Therefore, if 'other' evidence was required, it was provided by **PW 3** and **PW 6**, to whom the complainant provided the appellants' names.

The convictions are therefore sound.

As regards the language used in court, it is clear that when the 1st appellant first took plea, he told

the court that he understood the Kikuyu Language. That was on 17th June 2008.

Thereafter, his case was consolidated with that of the 2nd appellant, and a fresh plea was taken on 21st October 2008. The said fresh plea was taken before Hon. Abdul Lorot SRM (as he then was). Meanwhile, the original plea had been taken before Hon. L.K. Mutai SRM.

Therefore, unless the lst appellant drew the attention of Hon. Abdul Lorot to the need for him to be given a Kikuyu interpreter, the learned magistrate could not have become aware.

In any event, a perusal of the record of proceedings reveals that the 1st appellant participated effectively in the trial. He demanded the production of the O.B. before the trial could start. And he cross-examined all the witnesses. His said cross-examination of the prosecution witnesses can only be described as detailed. It was definitely not wishy-washy.

We therefore find that the absence of a Kikuyu interpreter did not prejudice the 1st appellant.

Accordingly, there is no merit in the appeal. We dismiss the appeal, and uphold both conviction and sentence.

Dated, Signed and Delivered at Nairobi, this 4th day of December, 2012

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FRED A. OCHIENG	**LYDIA A. ACHODE**
JUDGE	**JUDGE**