



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL APPEAL NO. 748 OF 2006

JACKSON MWAURA KARANJAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 107 of 2006 of the Chief Magistrate's Court at Kibera by Mrs. Wasilwa - Principal Magistrate

JUDGEMENT

The appellant was charged with four counts of robbery with violence contrary to section 296(2) of the Penal Code and one count of malicious damage to property contrary to section 339(1) of the Penal Code. After full trial he was convicted on all the counts and sentenced to suffer death in count one. The trial court ordered the sentence on other counts to be held in abeyance hence this appeal.

In convicting the appellant, the trial court relied on the evidence of PW3 who allegedly identified the appellant with the help of strong security lights with a sensor shone on him at the time of the robbery. It is alleged PW3 shared the information with PW1, PW2 and PW6. In essence the only evidence against the appellant is the evidence tendered by PW3. As rightly pointed out by the trial court, the identification parade adds no value to the prosecution case as PW3 knew the appellant being a neighbour. From the evidence of PW3 she saw the accused five metres away with the help of a powerful light coming from security lights.

After analyzing the evidence of the prosecution, the trial court concluded that there were favourable circumstances for identifying the appellant who was known by PW3. In determining whether the condition prevailing at the scene was favourable, it is important to understand and appreciate the evidence tendered by all the prosecution witnesses. It is clear from the evidence of PW1, PW2, PW3 and PW5 that the incident took place around 1.30 a.m. It is important that none of the complainants were able to recognize the appellant as one of the robbers who attacked them during the night. The only person, who connected the appellant to the robberies subject of this appeal, is PW3.

According to PW3, on the material night she was informed by PW2 that there were people outside trying to come into the house. She woke up and peeped through the window as the security lights were on. She then saw the appellant hiding behind a tree five metres away from where she was standing. She contended that she knew the appellant as she used to pass outside their home while heading to the shops. Later the appellant was arrested and charged with four counts of robbery with violence and one count of malicious damage to property.

This is a first appeal and it is our duty to re-evaluate the evidence afresh in order to determine whether the appellant was convicted properly. In a case such as this one which depended solely on identification by a single witness, there was an obligation on the part of the trial court to assess and analyze the evidence of identification with meticulous care. The law is that when faced with recognition evidence of one witness, it is the duty of the court to satisfy itself that, in all circumstances it would be safe to act on such evidence. What is needed, in such a case, is other evidence whether circumstantial or direct pointing to guilt from which a court can reasonably conclude that the evidence although based on the testimony of a single witness, can be safely accepted as free from the possibility of error.

In this case, it is clear the conditions for identification of the appellant were difficult since the incident happened during the night and that the person identifying was inside the house while the appellant was standing five metres away from the witness.

In **Roria versus Republic (1967) EA 583** the Court of Appeal held;

“The danger is of course greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of the court to satisfy itself that in all circumstances it is safe to act on such evidence.”

In the instant case, it has not been demonstrated that the conditions for identification of the appellant was free from the possibility of error. We think that PW3’s recognition of the appellant was not categorical as to how she was able to identify the appellant who was standing five metres away and who was hiding behind a tree. We think the trial court allowed that point to escape its attention although it claimed to have examined all the evidence. With the greatest respect, that was a serious misdirection and failed to analyze an issue going to the root of the conviction.

There is no evidence to show that PW3 had ample opportunity to observe the appearances of the robbers and gave details to the police who on account of this details arrested the appellant. It is not clear to us how PW3 was able to recognize the appellant as she had just woken up from sleep and that the alleged robbers were trying to access the house. We think that the circumstances existing at the time were of poor quality thus making the danger of mistaken identity even greater. We think that the possibility of mistaken identity was not eliminated before accepting the evidence of PW3 as the basis of convicting the appellant. It falls upon the trial court to be absolutely certain that the recognition was perfect and free from any possibility of error or mistake.

In view of the reservations we have expressed concerning the quality of the evidence of PW3, we do not share the conviction by the trial court can be safely accepted as true and free from the possibility of error.

In **R versus Turnbull** it was held;

“All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused’s case the danger of a mistaken identification is lessened but the poorer the quality the greater the danger.”

We think the trial court did not address its mind to the quality and the circumstances prevailing at the scene before believing the evidence of PW3. There is no evidence to illustrate that the appellant was the only one seen by PW3 and that there exists no possibility of error or mistake.

We think the evidence of PW3 is insufficient to sustain the conviction entered by the trial court. Consequently, we conclude that the prosecution did not prove its case beyond reasonable doubt. There are material doubts as to whether the appellant participated in the subject robberies and whether he was properly recognized by PW3. We are therefore minded to conclude that the appellant’s conviction was unsafe hence appeal allowed, conviction quashed and the sentence set aside. We order for the immediate release of the appellant unless lawfully held.

Dated, signed and delivered at Nairobi this 15th day of February, 2011.

J. KHAMINWA
JUDGE

M. WARSAME
JUDGE