



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 65 OF 2007
CONSOLIDATED WITH CRIMINAL APP. NO. 64 OF 2007.

DAUDI AHMED YUSSUF.....1st APPELLANT

KHALIF HASSAN.....2nd APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From: Original PM Criminal case No. 747 of 2005 at Garissa; J.G.Kingori-PM.)

JUDGMENT

The appellants DAUDI AHMED YUSSUF (hereinafter the 1st appellant) and KHALIF HASSAN (the 2nd appellant) were arraigned before the SRM'S Garissa court with one count of robbery with violence contrary to section 296 (2) of Penal Code. It is alleged that on 25th June 2005 at Garissa town they jointly robbed ANAB OSMAN ISSACK of cash Kshs. 24,000/= 2 mobile phones model Nokia 1100 and a handbag all valued at Kshs.38,000/= and that immediately before or immediately after the time of such robbery used personal violence on the said ANAB OSMAN ISSACK.

The two appellants were found guilty of the charge and were each sentenced to death. They were aggrieved by the conviction and sentence and therefore filed these appeals. We have consolidated the appeals since they arise out of the same proceedings.

The prosecution called seven witnesses. The facts of the prosecution case are that the complainant, PW1, was going to the market at 6.20 a.m. on the material day when she was attacked from behind by two men. One of them was brandishing a panga while the other was masked. The two robbed the complainant of her handbag in which was cash Kshs.24,000/= and two mobile phones .

At 8 a.m. same morning both appellants sold a mobile phone to PW2. Soon thereafter PW3 and two others apprehended the 1st appellant. When PW2 saw that, she went to where the 1st appellant and PW3 were and returned the mobile phone the 1st appellant had just sold to her. The phone was identified by the complainant as one of those stolen from her that same morning. The complainant was able to switch on the phone and when it came on, her name appeared on the screen.

The 2nd appellant was arrested at 10.30 a.m by PW6 and others. At 11 a.m. same day, PW4 recovered the second mobile phone stolen from the complainant near the market. The complainant identified it as her phone also stolen during the incident.

Both appellants denied the offences in their defence. The 1st appellant dwelt on the events leading to his arrest. The 2nd appellant on his part put forward an alibi as his defence. He also alleged that the case was a fabrication because the son of the complainant had a grudge against him due to an earlier case of grievous harm in which he, the 2nd appellant was acquitted.

We subjected the evidence adduced before the lower court to a fresh analysis and evaluation we are guided by

OKENO V. REPUBLIC [1972] EA 32, where the role of a first appellate Court is given as follows:

“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 appellants raised six grounds of appeal and we shall deal with each of them. The appeal was opposed by Mr. Musau for the state.

The first ground raised was that the appellants’ rights were breached at the time of plea in that the appellants were not cautioned of the seriousness of the charges before their pleas were taken. That ground has no merit since the appellants pleaded not guilty to the charge. They did not suffer any prejudice in the circumstances.

The second, third and fourth issues raised are those of identification. The appellants urged that the evidence of identification was not strong; that the complainant did not indicate the length of time under which she saw the attackers, and that in the circumstances her evidence of identification was insufficient.

Mr. Musau for the state submitted that the evidence of the complainant was reliable because the incident took place in broad day light, that the appellants were arrested the same day of the incident and one of the stolen items recovered.

The learned trial magistrate, in his judgment has this to say of the complainant’s evidence:

“On the recorded evidence it is clear PW1 was attacked as she travelled from her house heading to her business place, on 25.6.05 at about 6.20 a.m. The scene was on a road which was clear and as it was early morning there was sufficient light that enabled PW1 to see the people who attacked and robbed her. She noted one was tall and the other short and gave a description of their clothing’s to the police and her friends including PW3 who assisted in looking for the robbers. She says the two robbers are accused in the dock and even though the accused deny this in their defence I find the evidence adduced by PW1 on the identification of the two accused cannot be faulted.”

The evidence of identification was by a single identifying witness. The evidence of a single identifying evidence can be a basis of conviction only if the court is satisfied that the conditions of identification were free from any possibility of mistake or error. Further on condition the court cautions itself of the danger of relying on the evidence of a single witness, it may convict on such evidence. These were observations made in following the two cases

In the case **R vs Turnbull and others [1976] 3ALLER549** it was 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.

In the case of **Maitanyi vs Republic [1985]2KAR 75** it was held:-

- 1. Although it is trite law that a fact may be proved by the testimony of a single witness, this 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.**
- 2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.**
- 3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.**

Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.”

The complainant’s evidence was that she was attacked from behind. She however turned and was able to see her attackers. The one armed with a panga was identified in court as the 1st appellant. The masked attacker was identified as the 2nd appellant. The complainant was promptly robbed and the two robbers fled.

We are of the view that the evidence of the complainant could not, standing on its own, be a basis for conviction. There are several reasons for saying so. Firstly the complainant was attacked from behind and when she turned she did not say for how long she had her attackers under observation. These were total strangers. One of them was even wearing a mask. Finally no identification parade was conducted to test the complainant’s ability to identify her attackers. Her evidence of identification was at best dock identification which is of little evidential weight. There was therefore need for corroboration of PW1 evidence on material particulars implicating the appellants.

There was other evidence against the appellants. PW2’s evidence shows clearly that both appellants approached her and requested her to purchase a mobile phone.

The mobile phone was in the possession of the 1st appellant. She bought it but within a short time,

returned it to the 1st appellant when she saw PW3 and others apprehend him for the offence.

We are satisfied that the phone recovered from PW2 was properly identified by the complainant as the one stolen from her during the incident. The phone was found to have her two names when it was switched on. We are satisfied that the names inscribed on the screen of the mobile phone when the phone was switched on was cogent proof of the complainant's ownership beyond any reasonable doubt.

The prosecution, through the evidence of PW2 established beyond a doubt that it was the 1st appellant who had the phone 1 ½ hours after it was stolen from the complainant. That was recent possession of the stolen phone and we are satisfied that the doctrine of recent possession applies to this case. We also find that the evidence of recent possession of the phone against the 1st appellant provided material corroboration to the evidence of identification by the complainant, that the 1st appellant was one of those who robbed her. We are satisfied that, considering the totality of the prosecution case, the evidence against the 1st appellant was overwhelming.

The position of the 2nd appellant was however different. Since the complainant identified the 1st appellant as the unmasked robber, it means the co-robber was the masked one. That means the complainant did not see the face of the second man in the 1st appellant's company during the attack.

The evidence against 2nd appellant is circumstantial. PW2's evidence show that while the 1st appellant, offered her the phone to buy, the 2nd appellant stood by taking a passive role. The 2nd appellant's presence at PW2's shop was capable of an innocent explanation. We rely on the case of **SAWE -V- REP [2003] KLR 354** for the proposition that the circumstantial evidence against the 2nd appellant in this case did not meet the requirements for such evidence. The Court of Appeal held as follows:

“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

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7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

The facts relied upon by the prosecution should be incapable of any other explanation except that of guilt since an innocent explanation can be given of the circumstantial facts against the 2nd appellant, the 2nd appellant ought to be given the benefit of doubt.

The only other ground raised in their appeal, apart from the illegality of the sentence of death, which we find a non-issue, is that of appellant's defences.

The 2nd appellant's defence was good but we need not go over it as we have already formed an opinion that the conviction entered against him was unsafe.

The learned trial magistrate considered the appellant's defences at length before rejecting them.

We have considered the 1st appellant's defence afresh. We find that it cannot withstand the overwhelming evidence adduced by the prosecution against him. We find no merit in that defence and we do agree with the learned trial magistrate's finding concerning it.

Having come to the conclusion we have of this appeals, we allow the 2nd appellant's appeal, quash the conviction and set aside the sentence imposed against him. The 1st appellant's appeal has no merit and we consequently uphold the conviction and confirm the sentence passed against him.

In the result the 1st appellant's appeal is dismissed. The 2nd appellant's appeal against conviction and sentence is allowed. The 2nd appellant should be set at liberty unless he is otherwise lawfully held.

Dated, Signed and Delivered at Meru this 31st Day of March 2011

LESIIT, J

JUDGE

KASANGO, J

JUDGE