



CRIMINAL

- Court to warm itself on visual identification of accused.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 95 OF 2009

CONSOLIDATED WITH

CRIMINAL APPEAL CASE NO.94 OF 2009

DAVID KOOME MUGIRA.....1ST APPELLANT
MARTIN MBAE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the judgment of Hon. S.M. Githinji SPM in Nkubu Criminal Case No. 835 of 2006 delivered on 14th day of May 2009).

JUDGMENT

The appellants David Koome and Martin Mbae were charged before the lower court with two counts of robbery with violence while in addition Martin Mbae with another person was charged with malicious damage to property contrary to section 339 (1) of the Penal Code. After being convicted of one count of robbery with violence by that court, they were sentenced to suffer death. They have now filed this appeal against their conviction and sentence. This is the first appellate court. The principles that should guide this court in considering this appeal were set out in the case **Okeno vs. Republic** [1972] E.A 32 where it was stated as follows:-

“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. R. [1957] E.A 336) and to the appellate court’s own decision on the evidence. The first appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs. R. [1957] E.A 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 conal collusions; 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 court convicted the appellants on count 2 of robbery with violence. They were however acquitted on count 1. On the 9th/10th April 2006, Robert Mutwiri was asleep in his house with his wife. People came to

their house and broke the house windows. They demanded while standing at the window, money and cell phones. They stole from Mutwiri and his wife cell phone and money. On 18th April 2006, Mutwiri learnt that there were people selling a cell phone. With the help of police, they arranged for Fred Kaimenyi to pose as an interested buyer. Kaimenyi is the complainant in count two on which the appellants were convicted. Mutwiri stated in evidence that the cell phone was to be sold at 8pm on that day. He with the police officers followed Kaimenyi was led by 1st and 2nd appellant to buy the cell phone. However, before they reached their destination, Kaimenyi was attacked and robbed. Later the police were led to the house of one of the suspects where the appellants were found in a house in the company of their co-accused. There was a phone recovered in that home but it did not belong to Mutwiri. At the compound of that house, the police recovered Kaimenyi's trouser and belt which had been removed from him when he was robbed. Kaimenyi, PW2 stated that on 18th April 2006 whilst at Nkubu Market he was requested by Mutwiri to assist him recover his stolen phone. Mutwiri requested him to pose as a buyer to those who were selling a cell phone. They involved the police in that operation. The police were in the vicinity when he was introduced to the 1st and 2nd appellant by another person called Mwebia. Mwebia had information that the appellants were selling a cell phone. Kaimenyi agreed to buy the phone but requested to see the phone before discussing the price. The 2nd appellant left their company explaining that he was going to get the key to the premises where they were going. He returned with his co-accused. The 1st appellant in the presence of those other co-accused asked Kaimenyi if he had money. Kaimenyi responded in the affirmative. At that point, the appellant's co-accused left Kaimenyi in the company of both appellants. Kaimenyi and the two appellants began to go to the place where the phone was. However, as they reached a place where there is a children centre called Huruma Centre, Kaimenyi saw some people creeping towards them. The creeping people sprung up on them and Kaimenyi noted that they were armed with blunt objects. Kaimenyi stated that the place was well lit from flood light at Huruma children centre. Kaimenyi began to prepare to defend himself from those creeping people. And then he said:-

“I jumped towards those people ready to face them. Then the 1st accused (1st appellant) hit me on the neck. The 2nd accused (2nd appellant) held me and tried to pull me down.”

He was beaten by those creeping people who stole from him Kshs. 2,500/=. Kaimenyi said that he was saved by a pastor who came from the children's centre. When the pastor appeared, the attackers and the appellants run away. Mwebia later led him and the police to the home of one of the accused persons. In that home, they found both the appellants and their co-accused. Kaimenyi identified before court his trouser and belt which were recovered by the police at the home where the appellants were arrested. He said they were among the clothing he was wearing on the night he was attacked. He said that they were recovered the following day. On cross – examination by the appellant, Kaimenyi said that he did not know the appellants prior to that incident. He however said that he was in their company that night for a long time. On being re – examined he hesitated that he was with both appellants at the Ice Bar. In total, he was with the appellants for one hour. He also repeated that at scene where he was attacked, ‘there were strong security flood lights.’

Moses Kirimi PW3 on 18th April 2006 was in the company of Mutwiri. That was around 7pm. He said that Mutwiri is his colleague at the place of work. Mutwiri told him that his phone had been stolen and were people selling a phone. They reported the matter to the police. They were given three police officers to assist them trace the phone. Kirimi provided the car which they used with the police to keep watch over Kaimenyi who posed as a buyer. Then Kaimenyi was led to where the phone was being sold. They did not go through the route they were expected to take. As a result, Kirimi was unable to follow them with the car. They however heard screams coming from Huruma Centre side. When they went they found Kaimenyi and PW4 without shoes, trousers and coat. Kaimenyi told them that some young men joined the two appellants and they together attacked and robbed him. Kirimi said that Mwebia led them to the 2nd appellants house. Kirimi remained in the car and later saw the police having arrested the appellants and their co-accused. Kirimi confirmed that earlier in the day he had been in the company of Kaimenyi. He identified the trousers and belt before court as the ones that Kaimenyi was wearing earlier in the day. On being cross examined, Kirimi said that he had seen the 2nd appellant as one of the people in the company

of Kaimenyi. The 2nd appellant according to Krimi was the one who was going to take Kaimenyi and PW4 to the place where the phone was being sold.

The original hand written proceedings of the lower court has a page missing that is page 35. As a result, the evidence of PW4 who gave the evidence on the subsequent page 36 is not part of the proceedings. PW4 is however seen to be the one who introduced Kaimenyi to the appellants. Apart of hi evidence is on typed copy, pages 34 to 36. The learned trial magistrate summarized the evidence of PW4 in his judgment. That means that the page went missing at the time the proceedings were being typed. We will get back to this later. PC James Amolo was instructed by his superior to accompany Mutwiri to follow a person who was posing as a buyer of a phone which was suspected to have been the one stolen from Mutwiri. They went together but on arrival, they found Kaimenyi and PW4 had been attacked and robbed and both left half naked. PC Amolo also said that Mwebia was attacked but that his clothes were not taken away from him. He said that it was Mwebia who led the police to where the appellants and their co-accused were arrested. At that place, they recovered a phone and clothes of Kaimenyi. PC Amolo stated that he arrested the 1st appellant with his co-accused in one house and arrested the 2nd appellant who was in another house in that neighbourhood. The 2nd appellant was in that house with his wife. 1st appellant stated in his defence in unsworn statement that he was arrested at a stage on 18th April 2006. He said that the police found him there and asked him for his identity card. He did not have it and he was arrested according to him for failing to carry that card. He said that his business was selling eggs and that he was frequently disturbed by the police who wanted him to bribe them because he did not have a medical certificate. He alleged that his arrest was with a view to 'fix' him. He was later charged with the offence he faced at the lower court. The 2nd appellant gave his sworn evidence in his defence. He said that he was carrying on business of shoe repair in Meru Town. On 18th April 2006 from 5pm, he was in his house with his wife. He ate dinner that was prepared by his wife. Later they slept and at 10pm their door was knocked. On opening, he saw PC Amolo PW6 in the company of another police officer PC Kubai. PC Kubai, according to this appellant, was co-habiting with this appellant's wife before this appellant married her. PC Kubai had sometimes before then, asked this appellant of Kshs. 500/= because PC Kubai alleged that he was brewing alcohol. This appellant stated that PC Kubai had threatened to 'fix' him. He said that when the two police officers entered his house that night, they carried out a search. They did not recover anything. He was arrested and taken to NKubu Police Station. He said that it was noteworthy that PC Kubai did not testify in his trial. He said since his arrest PC Kubai moved away from the area with his wife. This appellant denied that he knew Kaimenyi or that he bargained over the telephone with Kaimenyi. The attack on Kaimenyi occurred at night. It is therefore necessary for us to war ourselves of the evidence of identification by Kaimenyi. This would be in line with the holding of the case *Karanja & another vs. republic* [2004] 2 KLR.

“Evidence of visual identification in criminal cases can about miscarriage of justice and it is of vital importance that such evidence be examined carefully to minimize this danger.”

The evidence of Kaimenyi was that at the place where the attack took place there were flood lights. The lights were such that they enabled him to see people creeping towards them. He was also able to see that these people were armed with blunt weapons. We are of that there is no possibility of error in the identification of both appellants. This is because Kaimenyi spent a considerable time with both the appellants at the ice Bar. On being cross examined by the 1st appellant, Kaimenyi responded:-

“ I know you facially.....You had agreed to sell me the phone. I saw you.

I was with you a long time. I talked with you.”

On being cross examined by the 2nd appellant Kaimenyi stated:-

“ I know you faciallyyes I was with you at the Ice Bar and you called the 1st accused (1st appellant).....You attacked us at Huruma Centre.”

On being re-examined, Kaimenyi said that he spent one hour with both appellants. From his testimony, it

is clear he knew the appellants physically. He spent at least one hour with them in the bar. We are therefore satisfied that there is no error in the identification of the appellants by Kaimenyi. In the light of that evidence, we are in agreement with the trial magistrate that the defences offered by the appellants did not weaken the prosecution's case and were rightly rejected. It is pertinent to note that none of the appellants cross examined PC Amolo to put it to him that their arrest was as a result of a grudge. More importantly, the 2nd appellant who alleged that PC Kubai had threatened to 'fix' him did not question PC Amolo on that issue nor did he question him on whether PC Amolo was accompanied by PC Kubai when they were arrested. He also did not question PC Amolo whether PC Kubai had been transferred out of that area as stated in his defence. The fact that the investigating officer of the case was not called to give evidence was relevant if he could have given evidence adverse to the prosecution. In the case *Reuben Gitonga Nderitu vs. Republic Criminal Appeal No.349 of 2007* the Court of Appeal had this to say about the investigating officer not being called.

***“Secondly, with regard to the complaint that the investigating officer was not called to testify is also neither here nor there. It is not mandatory that he be called, unless there is an allegation that he would have said something adverse to the prosecution case. There is no such argument here, nor do we believe his evidence would have added value to the overwhelming evidence before the court.*”**

Similarly the question whether the prosecution is bound to call any number of witnesses was discussed in the case *Bukenya & Others v. Uganda [1972] E.A* where it was held as follows:-

“ ii) the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent;

ii) the court has the right, and the duty, to call witnesses whose evidence appears essential to the just decision of the case;”

We echo those sentiments in this case. The fact that the investigation officer did not testify was irrelevant and immaterial in light of the evidence adduced by other prosecution's witnesses. Similarly, the fact that part of the evidence of PW4 was missing as stated before in this judgment does not affect the prosecution's case. The evidence particularly of Kaimenyi was overwhelming against both appellants. His trousers and belt were found outside the houses from which the appellants were arrested. The recovery of the exhibits outside the appellants' homes corroborated Kaimenyi's evidence of the robbery. We find just like the trial court, that the prosecution proved its case in count two beyond reasonable doubt. We find that there is no merit in the appellant's appeal and the appeals are therefore hereby dismissed. We uphold the conviction and sentence.

Dated, signed and delivered at Meru this 13th day of April 2011.

LESIT, J.
JUDGE

KASANGO, M.
JUDGE

Read, signed and delivered at Meru this 13th day of April 2011.

In The Presence Of:

Kirimi /Mwonjaru.....Court Clerks
Appellant.....Present

Mr. Kimathi.....For the State

LESIT J.
JUDGE

KASANGO, M.
JUDGE