



REPUBLIC OF KENYA
IN HIGH COURT OF KENYA

AT KISUMU

CRIMINAL CASE NO. 74 & 75 OF 2010

JOHN NAKAI NGAVI.....1ST APPELLANT
MOSES ONGALA AKA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case number 1070 of 2009 of the Principal Magistrate's Court at Maseno)

Coram

R. N. Nambuye - J

Ali- Aroni -J

Mr. Kiprop for the state

Court clerks Laban/Ochola

Appellants present in person

J U D G M E N T

The appellants **John Nakai Ngavi** and **Moses Ongala Aka** faced a charge of robbery with violence in the lower court in that **“on the 24th day of July 2009, at Esibuye area in Emuhaya district within Western province jointly with others not before court while armed with dangerous weapons namely pangas and rungus robbed Enock Tallam Cheragon of mobile phone make Nokia 3110C and cash Kshs. 3,400/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Enock Tallam Cheragon”**.

The appellants were tried, found guilty, convicted and sentenced to suffer death in the manner prescribed by law. They were aggrieved and filed appeals numbers 74/2010 and 75/2010 which were consolidated by consent. A perusal of the grounds in both reveals that the grounds of appeal are identical in substance and content these are:-

The learned trial magistrate erred in law and in fact:-

- (1) By convicting them on the evidence of identification notwithstanding that the conditions were not favourable to sustain positive identification.**
- (2) The report to police did not include names and description of the assailants.**

(3) By failing to appreciate the evidence value of the essential witness who did not avail for testimonies i.e. arresting officer.

(4) The verdict was against the weight of the evidence tendered in court.

(5) By convicting basing on circumstantial evidence without any other evidence that would otherwise weaken or destroy the inference of guilt.

(6) The appellants statement of defence was not taken into account yet it was strong enough to secure an acquittal if positively considered.

At the hearing the appellants relied on identical written submissions filed with consent of the state. We have perused the same and in our opinion the following are the salient features of the same in a summary form:-

- **Evidence shows that PW1 did not identify anybody at the time of attack.**
- **PW4 contradicted the evidence of PW1 and PW2 which contradiction was not resolved.**
- **The incident took place at night when it was dark, and there may very well be possibility of mistaken identity as circumstances were not conducive to positive identification.**
- **An essential witness namely the investigating officer was not produced to court to testify.**

The state concedes the appeal on the following grounds:-

- **The defences of the appellants were not considered.**
- **It is doubtful whether the court was convinced of the guilt of the appellants.**
- **There is contradiction on the dates of arrest by both the appellants and the state, a contradiction not reconciled by the learned trial magistrate.**
- **Arresting officer never testified and for this reason it is not clear under what circumstances the appellants were arrested or how they were arrested.**
- **There is contradiction as regards the identification of the appellants as the incident took place at night.**

We have given due consideration to the afore set out concurrent submissions from both the appellants and the state that the conviction should not be allowed to stand and we are alive to the cardinal principles of law applicable which we have judicial notice of that as an appellate court, we have a duty to re-visit the lower court record re-evaluate the evidence that was adduced before the lower court and then determine whether the concurrence of both sides that the conviction should not stand or not is to be upheld or not.

We have re-visited the lower court record and these are our findings on the evidence for purposes of the disposal of this appeal:-

- **The time of the incident was 7.30 p.m.**
- **The attack was sudden.**
- **PW1 concedes that it was dark but says that he saw the attackers well but he does not say how he was able to see the attackers in the dark.**
- **He identified the suspects at the AP camp.**
- **In cross-examination PW1 says there was sufficient light which enabled him identify the assailants, one of whom was taller than the other, but does not state from where the light was coming from.**
- **PW2 says the attack was sudden and sensing danger he ran away.**
- **Told the police he could identify the attackers but PW2 did not say how he could identify them.**
- **He also identified them at the police station.**
- **When cross-examined, he stated that he did not see any distinctive mark on them.**
- **He did not know the attackers before.**
- **PW3 the medical officer who attended to PW1 stated that the victim did not mention the attackers. PW4 who was in the company of PW1 and 2 stated that they passed appellants on a**

footpath. He knew them as neighbours. Appellant greeted them. The two then overtook them and went ahead and when PW4 in the company of PW2 neared them is when they started attacking them. PW1 and 2 ran away and the assailants ran after them. PW4 escaped to a nearby homestead.

- The same night police came to PW4's home with appellants and PW4 pointed them out as the assailants.
- When cross-examined, PW4 stated that Enock did not identify the assailants as he was not coming from their area.
- Maintains she recognized the assailants.
- PW4 was injured but she did not go to hospital. PW5 a police officer who received the report says that PW1 named one of the assailants as Angala.
- PW1 did not give the description of the attackers but said he knew their physical appearance.

In their defence the first appellant John Nakai Ngavi stated that he was arrested on 24-7-2009 on his way home from the shamba and taken to an AP camp and later taken to police station.

- The second appellant says he was arrested on 27-7-2009, also on his way home from work. They were not told their offences.

Against the afore set out background information the learned trial magistrate made the following findings on the same:-

- (i) The complainant and PW2 said that they didn't know the attackers but said that they could identify them from their physical appearances.
- The two witnesses said that they later saw the two arrested and in police custody and they identified them.
 - PW4 knew the attackers as her neighbours and she recognized them during the robbery.
 - PW5 contradicted the evidence of PW1 and 2 when he said that PW1 had identified one of the attackers.
 - That the circumstances of the arrest of the accused person was not clear.
 - That despite the discrepancies in the prosecutions evidence, the learned trial magistrate was satisfied beyond reasonable doubt that the accused persons were identified to have been among the robbers.
 - Agreed with the prosecution witnesses, that it was at 7.30 p.m. and according to the learned magistrate, it was not too dark to render the identification of the attacker impossible.
 - That evidence of PW4 is particularly credible as she knew the accused as her neighbours and had even studied in the same school with the first accused person. Her evidence was not discredited.

We have given due consideration to the said findings of the learned trial magistrate, in light of the evidence on record and proceed to make the following findings on the same:-

- (1) PW1 and 2 said it was dark when the attack took place. None of them said that at the time identification was not impossible. We therefore hold that the learned trial magistrate saying that identification was not impossible, he removed himself from the judgment seat into the witness box, gave evidence on behalf of the victim and then came back to plant himself again in the judgment seat and then gave a ruling in favour of the victim.
- (2) Stated that PW4's evidence was credible but failed to note that PW1 and 2 were in her company all along, did not mention passing appellants seated, appellants passing the party, going ahead of them, and then turning back to attack them. This discrepancy goes to the root of credibility of the evidence of PW4.
- (3) Having found as a fact that the circumstances under which the appellants were arrested were not clear and considering the fact that appellants were identified at a chief's camp the learned trial magistrate should have interrogated the issue of fabrication of charges against the appellants.
- (4) There was discrepancy on the dates of arrest as given in the charge sheet, and appellants

testimony a matter not reconciled by the learned trial magistrate.

(5) The appellants defence which were alibis were not considered.

In view of our findings in number 1-5 above, we are in agreement with the concurrence of both sides that the conviction cannot stand. The appeals are allowed in their entirety, conviction quashed and appellants ordered to be set at liberty in connection with the convictions which led to the appeals subject of this judgment.

Dated, signed and delivered at Kisumu this 5th day of April, 2011.

**ROSELYN N. NAMBUYE
JUDGE**

**ALI - ARONI
JUDGE**

RNN/va