



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 13 OF 2010.

MATHEW MBAM MAJOR.....APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(From the original conviction and sentence in Criminal Case No. 505 of 2008 in the Kapenguria Law Courts

before G.M.A. Ong'ondo – P.M. delivered on 16th day of February, 2010.)

J U D G M E N T.

1. The appellant **Mathew Mbam Major** was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the charge stated that on the 8th day of July, 2008 at Keringet Trading Centre in West Pokot District within Rift Valley Province jointly with others not before court they robbed **MATHEW ATUDO** of cash Ksh. 4,555/=, five (5) mobile phones, two radios, one speaker and an investor all valued at Ksh. 30,000/= and at or immediately before or immediately after the time of such robbery beat the said **MATHEW ATUDO**. The appellant also faced 2 other counts of robbery with violence.

2. In count 2, it is stated that on the 8th day of July, 2008 at Keringet trading centre in West Pokot District within Rift Valley Province jointly with others not before court they robbed **RAMSI MOHAMMED** of cash Ksh. 720/= while armed with dangerous weapon namely a gun and at or immediately before or immediately after the time of such robbery beat the said **RAMSI MOHAMMED**.

In count 3, it is stated that on the 8th day of July, 2008 at Keringet trading centre in West Pokot District within Rift Valley Province jointly with others not before court they robbed **EDWIN KIPKOECH** of cash Ksh. 3,200/= while armed with dangerous weapon namely a gun and at or immediately before or immediately after the time of such robbery beat the said **EDWIN KIPKOECH**.

The appellant was tried convicted and sentenced to suffer death as prescribed by law.

3. Being aggrieved by the conviction and sentence, the appellant has appealed on the grounds inter alia that the evidence before the trial court was not sufficient to support a conviction. The complainants were attacked at night. There was insufficient light to enable them identify their assailants. The learned trial magistrate is also faulted for failing to evaluate the

defence evidence which in the opinion of the appellant was credible. Further the judgment is challenged for failure to note the contradictions born out of the evidence by the complainants and the investigating officer who confirmed that the complainants did not name their attacker when they recorded the first report. The appellant also filed lengthy submissions in support of the grounds of appeal which we have taken into consideration.

4. This appeal was opposed; M/s. **Bartoo** the learned state counsel supported the conviction and sentence. She submitted that the evidence by PW1, PW2 and PW3 who were victims of the robbery was consistent. They all identified the appellant by recognition. The appellant was well known to the complainants and moreover they said they identified him by the light that emitted from the torch the appellant held during the attack. The strong lighting from the torch illuminated the one room where the complainants were attacked and they all identified the appellant. Counsel urged the court to find no merit in the appeal.

5. This being a first appeal, this court is mandated to re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to allow the appeal. In so doing the court must always caution itself that it never saw or heard the witnesses and give due allowance for that. The appellant was convicted based on the evidence by 5 prosecution witnesses. The appellant gave unsworn statement of defence and did not call any witness. Briefly stated the prosecution's case before the trial court was supported by 5 prosecution witnesses.

6. Mathew Atundo, PW1, Edwin Kipkoech, PW2 and Ramsi Mohammed PW3, testified that on 8th July, 2008 at about 11 p.m. they closed their business and retired to sleep at PW1's house within Keringet Trading Centre. While the three were sleeping, they were woken by a big bang on the door, 3 assailants forced their way into the room. One of the assailants, who the three complainants said they recognized as the appellant, was armed with a rifle and a torch. The assailant demanded to be given money. The complainants were robbed of their money, their mobile phones and other items that are indicated in the charge sheet. The attackers also assaulted the complainants. They were whipped and sustained injuries.

7. They were issued with a P3 form which were completed and produced in evidence by **Loriono Limangole**, (PW4) a District Eye Specialist based at Kapenguria District Hospital. PW4 examined the 3 complainants on the 16th July, 2008. He found that they had injuries which were classified as harm. The complainants also reported the matter at Kapenguria Police Station and **PC James Kimwetich**, PW5, testified that on 14th July, 2008 he was at the police station when the appellant was brought to the station on allegations that he had committed robbery with violence by use of an AK 47 rifle. PW5 investigated the matter by visiting the scene of the crime. However, no recoveries were made. During cross examination, he confirmed that no names of the suspect(s) were given to him or recorded in the first report in the OB. He based the charge on the statements taken from the complainants who said they had identified the appellant as the one who was armed with rifle during the attack.

8. The learned trial magistrate evaluated in evidence and was satisfied that the testimonies of PW1 to PW5 were clear and consistent. PW1, 2 and 3 who were the victims of the robbery which took about 20 minutes were able to identify the appellant through the intense lights that illuminated from a torch. The learned trial magistrate also evaluated the defence of alibi by the appellant which in his opinion lacked credibility. The appellant was convicted based on that evidence.

9. We have subjected the above evidence as well as the judgment by the learned trial magistrate to fresh analysis. The conviction of the appellant was based on evidence of identification by the 3 complainants who were victims of the robbery. The robbery took place at 11.30 p.m. and the all the complainants confirmed that they recognized the appellant who was known to them as a neighbor, a church mate and a classmate respectively. They also said that they were able to identify the appellant through the lights that illuminated from the torch that the appellant shone at them during the robbery.

10. It is trite that identification by recognition is more reliable because it is based on familiarity between the complainant and the assailant. There is a long line of authorities by the Court of Appeal of the principles to guide the court when considering the evidence of identification especially at night when the circumstances of identification can be said is difficult. The complainants were woken from sleep when they saw the assailant armed with a gun and the issue for determination is whether the identification of the appellant was positive and free from possible mistakes. In the case of **WILSON KAMURI NDIRANGU VS. REPUBLIC CA CRIMINAL APPEAL NO. 88 OF 1999 (NAKURU)** the Court of Appeal while dealing with evidence of identification at page 7 of the judgment held as follows:-

“Furthermore, as argued before us by Mr. Karanja, the moments must have been stressful for the witness, who was faced with a gang armed with a pistol and being threatened with death. We agree with Mr. Karanja and as was held by this court in Patrick Nasibwa vs. Republic, Criminal Appeal No. 80 of 1997 (unreported)

“This case reveals the problem caused by visual identification of suspects. This mode of identification is unreliable for the following reasons which are discussed in the BLACKSTONE’S CRIMINAL PRACTICE 1997, Section F18.

(a) Some people may have difficulty in distinguishing between different persons of only moderately similar appearance, and many witnesses to crimes are able to see the perpetrators only fleetingly, often in very stressful circumstances;

(b) Visual memory may fail with the passage of time; and

(c) As in the process of unconscious transference as witness may confuse a face he recognized from the scene of he crime (it may be of an innocent person) with that o the offender.”

11. Bearing the above principles in mind, it is obvious from the evidence especially by the evidence by PW5, the investigating officer that the name of the appellant was not given to the police when the complainant made the 1st report. During cross examination, PW5 stated the following in his evidence;-

“I am the investigating officer herein. I visited scene of the alleged crime. I was not at the scene on the material time and day. I recorded statements of PW1, PW2 and PW3. No names of suspects given to me. I charged you hereof. PW1 identified his attackers by use of your torch, PW1 stated so even in his statement, so did PW2 . Statement of PW1 taken while you were in police custody. I rearrested you but you had nothing. I went to the scene on 18/7/2008. I relied on statements of witnesses and my visit to the scene. Report made to Keringet police post immediately after the attack. No photos of the scene taken or at all. No stolen item recovered from you. This case is not a frame up. PW3 identified you as Mathew Mbam Major. PW1 and PW3 didn’t identify you by names. Initial report to police, PW1 to PW3 didn’t mention names. O.B is not a statement. They stated that they had seen a rifle with you. I am telling court the truth. The rifle not recovered. You didn’t lead me to any person or recovery of items. CPL Bungei visited the scene. I revisited the scene of crime. House door pushed open by you and others at the material time.”

12. In this appeal, we entertain doubts in our minds as to whether there was correct identification of the appellant by the complainants. This is compounded by the fact that no description or name of the appellant as the suspected attacker was given to the police by the complainants when they first reported the robbery. There is a further gap in evidence regarding the arrest of the appellant. It is evident that the appellant was not arrested in possession of any of the items that were robbed from the complainants. PW5 who is the investigating officer merely stated that the appellant was brought to Kapenguria Police Station from Keringet. It is not clear from evidence how the appellant was arrested.

13. For those reasons we find it impossible to sustain this conviction. The conviction of the appellant on all the counts of Robbery with Violence contrary to section 296 (2) of the Penal Code are hereby quashed. The death sentence imposed is hereby set aside. The appellant is ordered set at liberty and released from prison unless otherwise lawfully held.

Judgment read and signed this 13th day of May 2011.

M. KOOME.

JUDGE.

F. AZANGALALA.

JUDGE.