



REPUBLIC OF KENYA

IN HE HIGH COURT OF KENYA

AT KITALE

[CORAM: KOOME AND AZANGALALA,JJ]

CRIMINAL APPEAL NOS . 35 OF 2010, 37 OF 2010 AND 38 OF 2010

(CONSOLIDATED)

BETWEEN

**NATOME EKAI
SHADRACK EKENO**

JAMES ESEKONAPPELLANTS

AND

REPUBLIC.....RESPONDENT

***[Being an Appeal from the Judgment of the Senior Resident Magistrate
{T. Nzyoki} dated 19/03/2010 – in Lodwor SRMC. CRC. No. 121 of 2009]***

JUDGMENT

Natome Ekai, (1st appellant), Shadrack Ekeno (2nd appellant) and James Esekon (3rd appellant), were jointly charged on two counts of robbery with violence contrary to section 296(2) of the Penal Code (Cap 63 Laws of Kenya). The allegation in the first count was that the three, jointly with others not before the court and while armed with dangerous weapons, namely, an AK 47 rifle, on the 2nd February, 2009, at Kakuma refugee Camp, Darfur Community in Turkana North District within the Rift Valley Province, robbed **Elizabeth Nyanthon Jema** of her Kshs 17,000/=, one hand bag, one nokia phone – 1100 and one suit case containing assorted clothings all valued at Kshs 87,300/=, the property of the said **Elizabeth**

Nyanthon Jema (hereinafter “**the 1st complainant**”) and immediately after the time of such robbery used personal violence to the said complainant.

It was alleged in the 2nd count that the three appellants on the same date and in the same place, jointly, with others not before the court and while similarly armed, robbed **Lith Chau** of her Kshs 9,000/= a nokia phone – 1100 and a suit case containing assorted clothings all valued at Kshs 27,050/= and immediately after the time of such robbery used personal violence to the said **Lith Chau** (hereinafter “**the 2nd complainant**”).

The prosecution called eight (8) witnesses and after hearing their evidence, the learned Senior Resident Magistrate found that the appellants had a case to answer and put them on their defence. The appellants made unsworn statements in their defence and called no witness. Upon analyzing the evidence of the prosecution witnesses and that of the appellants, the court found the appellants guilty as charged. They were each accordingly convicted and sentenced to death on the first count while the sentence on the 2nd count was left in abeyance. Their co-accused, **Napokol Kadeny**, who was charged as accused two, was acquitted on both counts.

The appellants were not satisfied with their convictions and sentences and have each appealed to this court against both conviction and sentence.

During the hearing of the consolidated appeal, the appellants appeared in person and **Ms. Bartoo**, learned State Counsel appeared for the Republic. Having previously filed written submissions, the appellants opted to wholly rely upon the same and **Ms. Bartoo** responded orally. After considering those submissions and the grounds of appeal, we note that they raised the following issues:- Whether the appellants were positively identified; Whether their conviction was founded on adequate evidence and whether their defences were considered by the learned Senior Resident Magistrate.

Ms. Bartoo submitted that the appellants were convicted on sound evidence and were identified by the complainants by recognition. Learned State Counsel acknowledged that the appellants were convicted on the evidence of single identifying witnesses but argued that the learned trial magistrate was alive to the danger inherent in convicting on such evidence but duly warned himself before convicting the appellants. Counsel submitted that the learned trial magistrate was therefore perfectly entitled to so convict on the authority of the case of **Kingori -vrs- Republic [2003] KLR 290.**

As the first appellate court, it is our duty to analyze, re-examine and re-evaluate the evidence upon which the appellants were convicted and reach our own independent conclusion bearing in mind that we neither saw nor heard the witnesses testify and should give allowance for that (See **Okeno –vrs- Republic [1972] EA 32.**)

The prosecution’s case was briefly as follows:- The complainants were asleep outside their houses but within their compound at Kakuma Refugee Camp, on 2nd February, 2009, at about 2.00 a.m. when thugs attacked them. Some of the thugs went to where the 1st complainant (P.W.1) was and others went to where the 2nd complainant (P.W.2) was. The thugs who went to where the 1st complainant was beat her as they demanded her mobile phone. A neighbour, **Abdirazik** also known as **Mohammed Yaya Mohammed** (P.W.5), who was also a security officer in their community, was shot in the abdomen. Other neighbours including **Agerbull** (P.W.3) were scared and hid themselves. The 1st complainant lost a bag containing Kshs 17,000/=, 3 bed sheets, 2 sets of seat covers, a suit, Kitenge material, assorted children’s clothes a nokia mobile phone – 1100 and a hand bag.

The 1st complainant testified that she identified the 3rd and 4th appellants as members of the gang which robbed her. She told the court that she had previously met the 4th appellant at her house on 29th and 30th January 2009 who was in the company of the co-accused who was acquitted.

One of the thugs who went to where the 2nd complainant was removed beads from her neck and demanded money and her mobile phone. He further held her and took her inside her house where he took her Kshs 9,000/=, a mobile phone – nokia 1100, scratch cards and a hand bag after threatening her and hitting her with a sword. The 2nd complainant testified that she identified the thug as the 1st appellant who had previously ferried her at a fee on his bicycle.

The 2nd complainant was also confronted with a gun wielding thug who demanded to have sex with her but she told him she had AIDS. The thugs then left.

P.W.5 was taken to Kakuma Hospital where he was admitted, treated and later examined by **Edina Moturi** (P.W.4). It was P.W.4's testimony that P.W.5 sustained penetrating abdominal injuries which necessitated two abdominal Surgeries. He opined that the probable weapon used was a gunshot and assessed the injury as grievous harm.

P.C. **Isaac Wanjora** (P.W.6), then at Kakuma Police Patrol Base, testified that on 2nd February, 2009, at about 10.40 a.m., he re-arrested the 1st appellant and the co-accused, who was acquitted, from the complainants and the members of the public. The two were later collected by Kakuma Police Station Officers. On 8th February, 2009, P.W.6, while in the company of his colleague, P.C. **Masai**, re-arrested the 3rd and 4th appellants from L.W.F Security personnel at Kakuma II Phase I and escorted them to Kakuma Police Station.

The defence evidence was unworn. The 1st appellant denied the offence and testified that he was arrested after an attack was staged by Turkana men upon a Somali over the sale of his (appellant's) Camel as the former were bitter at a higher price offered by the Somali man. The 2nd appellant also denied committing the offence and stated that he was arrested as he sought food at Kakuma. The 3rd appellant similarly denied committing the offence and testified that he was arrested as he also sought food at a shop at Kakuma.

On the above facts, the learned Senior Resident Magistrate found that the offence of robbery with violence had been proved against the appellants as required in law and convinced them as already stated. In so convicting, the learned Senior Resident Magistrate found that the 1st complainant had had a good opportunity to see and recognize the 3rd and 4th appellants during the robbery. In the learned Senior Resident Magistrate's view, the 1st complainant recognized the two appellants with the aid of torch light from the torches carried by the thugs. He also found that the 2nd complainant was able to recognize the 1st appellant who was a boda boda operator and had in fact previously ferried her on his bicycle. She had recognized the 1st appellant using torch light the appellant had.

We have re-evaluated and re-examined the same evidence and note that the robbery was indeed staged at about 2.00 a.m. Light from the torches which the thugs had was the only source of light. We also note that identification of the appellants was by single witnesses. The 1st appellant was allegedly identified by the 2nd complainant – **Lith Chau** (P.W.2). In her own words:-

“The first accused person removed the beads on my neck and he demanded for my mobile phone. He also asked for money. The 1st accused held me by the hand and took me inside my house. The mobile phone is nokia 1100. The first accused person then told me to sit down ...

The first accused person used a sword to beat me while asking for money. The first accused person is the person I am talking about ...

I saw the first accused person with the light coming from the torch lights. I was able to identify the first accused who was a boda boda operator. The first accused person has previously, ferried me using the boda boda”.

On cross-examination, the 2nd complainant (P.w.2) testified in part as follows:-

“I have known the accused person since 1999. The first accused person even used to carry me on his boda boda bicycle. I was also present when the accused person was arrested”

The 2nd complainant was the only witness who identified the 1st appellant. The identification of the 1st appellant was therefore by a single witness. There was therefore need to exercise caution before conviction was entered. The record does not indicate that the learned Senior Resident Magistrate expressly warned himself of the inherent danger of relying on the identification of a single witness. We have no doubt however that had he done so, he would still have come to the conclusion that the 2nd complainant (P.W.2) did infact see the 1st appellant during the robbery and recognized him as a person previously known to him. This is what the learned Senior Resident Magistrate stated with respect to the identification of the 1st appellant by the 2nd complainant:-

“Lith Chau (P.W.2) led evidenced that during the robbery, the first accused person removed beads from her neck. She gave to the first accused person Kshs 9,000/=, a mobile phone and scratch cards. The first accused person used a sword to beat P.W.2. The first accused person also took bags of P.W.2. P.W.2 was able to see and recognize the first accused who was a boda boda operator and had previously ferried her using his boda boda. She was able to see the first accused with the help of the torch light the first accused and the man with the gun were carrying. Although she is the only prosecution witness who saw the first accused during the robbery and she did not know the names of the accused person, her evidence was consistent. I find P.W.2 was an honest witness who was sure and accurate in identifying the first accused person, a man who she used to ride on his boda boda. There was ample opportunity and good light from the torches to enable P.W.2 see the first accused person who was close to her while holding her hand”.

The above shows that the learned Senior Resident Magistrate was alive to the danger of convicting on the evidence of a single identifying witness and still found that he could convict the 1st appellant on the same. Like the learned Senior Resident Magistrate, we appreciate that the conditions were not favourable for a positive identification but have come to the conclusion that the identification of the 1st appellant by the 2nd complainant was free from error and could be safely relied upon. The 1st appellant removed beads from the neck of the 2nd complainant. He was therefore in close proximity with her. He further held her by the hand and led her to her house where he ordered her to sit down- after she had given him Kshs 9000/=, a nokia mobile phone and scratch cards. He also took her bags containing assorted clothes. These events took some time and the 1st appellant and the 2nd complainant were in close proximity with one another. The 2nd complainant stated that she recognized the 1st appellant with the aid of light from the torches carried by the 1st appellant and his colleague who was armed with a gun. It is significant that she did not allege that the torches were shown to her face. The 1st complainant therefore had sufficient opportunity to identify the 1st complainant by recognition.

We are fortified in this view by the fact that the 2nd complainant was present when the 1st appellant was arrested and with members of the public escorted him to Kakuma III Police Patrol Base where he was re-arrested by P.C. **Isaac Wanora** (P.W.6). We also note that although the 1st complainant did not identify him during the robbery, she knew him as a boda boda operator at Kakuma which knowledge confirmed the 1st complainant's statement that she had previously been ferried by him on his bicycle.

Given the above findings, we think the defence proffered by the 1st appellant was not plausible and was rightly rejected by the learned Senior Resident Magistrate.

In the end we have come to the conclusion that the 1st appellant was convicted on sound evidence and his appeal lacks merit.

We now turn to the 2nd and 3rd appellants' appeals. The two were allegedly recognized by the 1st complainant, **Elizabeth Nyanthon Jema** (P.W.1). Their conviction was therefore founded on the

testimony of a single identifying witness. The 1st complainant said as follows on the identification of the 2nd and 3rd appellants:-

“I was able to identify 2 of the 3 men who entered my house on the material day and began to beat me. The fourth accused person is one of the men who attacked me. He slapped me and removed the mosquito net I was covering myself with. He was the one telling me ‘Woman, be fast, give out the mobile phone’. I do not know the fourth accused person by name. I recall that on 29th January and on the 30th January, 2009, the fourth accused person visited my house together with Napokol, the second accused ...

The third accused person is the man who kicked the door and entered into my house. The third accused person is the one who was removing all the goods inside my house. The three men who entered my house were having torches which they were pointing at me and the same light from torches enabled me to see and identify the fourth and third accused persons. The torch lights were bright and at times would point to the accused person 3 and accused 4 thus enabling me to identify them. ...”

We have anxiously considered the testimony of the 1st complainant regarding the identification of the 2nd and 3rd appellants and note the following: In her testimony in chief, the 1st complainant testified that on the material night only three men entered her compound. One of those three, kicked the door of her house and entered inside. Two went to where she was and beat her. She further stated that she identified the 2nd and 3rd appellants using light from their own torches. It is significant that the 1st complainant did not go into the house with the thug who kicked the door of her house and removed her property from therein. She was at that time being assaulted by two thugs. We find it rather puzzling that given those circumstances, she could be able to identify the thug who kicked the door, entered her house and removed her property from therein. How could she see the thug remove her property from her house as she was being confronted by two others? We have our doubts that her identification would be free from the possibility of error.

She also testified that the light from the torch carried by the 2nd appellant enabled her identify the 3rd appellant. She did not state that the thug who kicked her door and entered her house, went to where she was later and joined the thugs who were attacking her. The 1st complainant’s sequence of events is confused. We do not find her evidence on identification as consistent as was found by the learned Senior Resident Magistrate.

We also find that unlike the 2nd complainant, the 1st complainant was not in close proximity with her attackers to facilitate a positive identification. Her evidence on the identification of the 2nd and 3rd appellants would have been more plausible if indeed she furnished their description to those who arrested them. The testimony of **Nasir Jimani**, (P.W.8), was categorical that he arrested the 2nd and 3rd appellants with others on information received from an informer. He did not do so on the description given by the 1st complainant.

The learned State Counsel placed reliance upon the case of **Kingori –vrs- Republic [2003] UR 289**. There, the Court of Appeal upheld the conviction of the appellant who was identified by a single identifying witness. That case is however clearly distinguishable from this case. The complainant in that case was the one who flashed his torch and recognized the appellant who he had known since his youth and was infact related to him. Here, the source of light was torch light flashed by the thugs and the alleged previous knowledge was limited to a short time.

In those premises, we think that the identification of the 3rd appellant by the 1st complainant was not free from the possibility of error. We have come to the conclusion, notwithstanding the 1st complainant’s testimony that she had previously known the two appellants and therefore that she had identified the two by recognition. In our view, she could still have been mistaken. In **Republic –vrs- Turbull [1976] 3 All**

ER 549, it was stated as follows:-

“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

In the end, we find that the 1st complaint’s evidence on the identification of the 2nd and 3rd appellants was of poor quality. Having so found, we do not think it is necessary to consider the other complaints made by the 2nd and 3rd appellants.

The result is that the 1st appellant’s appeal is dismissed. The 2nd and 3rd appellants’ appeals are allowed. The conviction in respect of each of them is quashed and their respective sentences set aside. Each of them (the 2nd and 3rd appellants) shall be set at liberty unless otherwise lawfully held.

Orders accordingly.

DATED AND DELIVERED AT KITALE THIS 13TH DAY OF MAY 2011.

M. KOOME

JUDGE.

F. AZANGALALA

JUDGE.

Read in the presence of:-

M. KOOME

JUDGE.