



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 43 OF 2007

(CONSOLIDATED WITH CRIMINAL APPEAL NO.42 OF 2007)

PERIS WACHERA KIIRU.....1ST APPELLANT

TABITHA WAITHERA KARORI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.1971 of 2004 by Hon G. C. Mutembei, Chief Magistrate, dated 22nd February, 2010)

JUDGMENT

The appellants have brought this appeal challenging the conviction and death sentence imposed by the trial court (G. Mutembei, C.M.) for the offence of **robbery with violence** contrary to **section 296(2)** of the **Penal Code**.

This being their first appeal, the court is enjoined to re-evaluate the evidence presented at the trial in order to come to its own independent conclusion. In doing so, we appreciate that we neither saw nor heard the witnesses.

On 18th August, 2008 at 8p.m., the complainant left Taidy's club for his home driving his car Registration No.KAP 632M. When he got to Shabab Stage, he was stopped by a man who appeared familiar. The man explained that his (the man's) wife was sick and they required assistance to the hospital. The complainant agreed to help the man, "*his wife*" and another lady. The man occupied the passenger seat next to the complainant while the two ladies sat in the rear seat.

As the complainant drove the three toward the hospital, the man suddenly placed what the complainant perceived to be a pistol on his neck and ordered him to drive towards Nakuru-Nairobi Highway. They got to White House near Nakuru High School where they were joined by a second man, who was also armed. The men searched and stole from the complainant a wristwatch, Kshs.8,000/= in cash, wallet, identification card, keys and a mobile phone. At some stage, the two ladies alighted but the men proceeded with the complainant to a spot where they abandoned him after tying his legs and gagging him. Two hours after being abandoned, the complainant managed to free himself, got help to Free Area and reported to the police. He returned to the place he had picked the first man and two ladies near Taidy's Restaurant.

While there, he noticed two ladies who he suspected were the same ones he had picked with a man earlier on. He recalled the dress and headscarf worn by one of the ladies. He also observed that one of the

ladies who he had picked was short while the other was tall.

He watched the ladies go into a lodging, he followed them and called the police. The police arrived and the ladies were found in a lodging room with a man, **P.W.2 Duncan Langat**. When they were searched, Kshs.1,000/=, a diary in which the complainant's car registration number was written, a wallet and a watch were recovered.

The appellants were arrested by P.W.6, P.C. Christine Rono. The appellants in their defence denied involvement in the robbery but confirmed that they were arrested in a lodging room where they had gone to spend the night with P.W.2, Duncan Langat.

The learned trial magistrate considered the evidence presented before him and was satisfied that that evidence proved the charges beyond any reasonable doubt. He proceeded to convict the appellants. Upon conviction, they were sentenced to death. That finding and sentence aggrieved the appellants who brought two separate appeals which were consolidated at the commencement of the hearing. The conviction has been challenged on the following condensed grounds:

- i) that the plea was irregularly taken;
- ii) that **section 77(2)** of the **Constitution** and **Section 191(1)** of the **Criminal Procedure Code** were violated;
- iii) that the evidence of identification was flawed and;
- iv) that the appellants' defence were ignored.

Learned counsel for the respondent did not support the conviction, arguing that there was no evidence of how the complainant was able to identify the appellants as the robbers in the circumstances of the case; that there were contradictions as to what items were recovered from the appellants.

We have considered the appeal, the submissions and the two authorities cited before us - **Kamau V. Republic** (1975) EA 139 and **Roria V. Republic** (1967) EA 583.

Revisiting the facts, it is clear that the complainant came into contact with a man and two ladies at 8p.m. The two ladies sat in the rear part of the vehicle while the complainant drove with the man seated next to him in the front seat. After driving for not a long distance, the two ladies alighted. Being at night and in view of the position of the two ladies in the car *vis 'a vis* the complainant, the whole trial turned on the question of identification – namely whether the complainant was able, in the circumstances of this case, to identify the appellants as the two ladies who were with the two armed men who robbed him.

Abdalla bin Wendo V. Republic (1953) 20 EACA 166 is celebrated for settling the law on identification of a single witness. It held that:

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule 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. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

See also **Kamau V. Republic** (supra)

It was the complainant's evidence that when he was being searched by the robbers, he was able to see the two ladies with the aid of the car roof light. How was he able to do that when the ladies were in the back seat and at the same time two men armed with pistols were searching him for valuables?

Apart from the fact that he did not indicate the intensity of the light, there was also no evidence that when he was rescued he gave the description of the robbers to the people (including the police) who came to his aid.

The complainant further testified that he recognized the appellants from their dress and physique. That one lady wore a dress and headscarf just like one of the appellants; that one was tall and the other short. He did not however specify which of the two appellants wore the dress and a scarf and who between them was short and who was tall.

The prosecution also relied on the evidence of some items recovered from the appellants. While there is no unanimity between the prosecution witnesses as to the specific items, the complainant appeared to suggest, without proof that the Kshs.1,000/= recovered from the appellants was part of his Kshs.8000/= stolen by the robbers. That claim has no basis. There was a diary allegedly recovered from the appellants, which in the first place did not belong to the complainant. On that diary, was written the registration number of the complainant's stolen motor vehicle.

That evidence in our opinion does not amount to evidence of possession of recently stolen goods. There was no evidence of a document examiner to connect the writing to any of the appellants. Even if that was done, the writing of the registration number of a stolen motor vehicle *per se* cannot constitute a criminal act or connect the appellants with the crime.

The learned magistrate failed to evaluate the entire evidence including the defence of the appellants which was corroborated by a prosecution witness (**P.W.2, Duncan Langat**). He first saw the appellants at 7p.m. He booked himself and the appellants in a lodging at about 9p.m. There is evidence by appellants, Duncan Langat, and the lodging receptionist, **P.W.3 Isaiah Baryecho Chebon** that the appellants did not leave their lodging room until the police came. Yet according to the complainant he saw the appellants near the telephone booths upon being released by the robbers. That must have been between 10 and 11p.m. if his evidence that he was car-jacked at 8p.m., driven towards White House and being rescued after 2 hours, is anything to go by.

The learned magistrate erred in shifting the burden to the appellants when he said:

“When put on their defence, save for saying that they were arrested while sleeping in a lodging room, the deceased (sic) person never tendered any defence to the material allegations made against them. These allegations point to the accused persons having committed the offence of robbery against the complainant jointly with others. In absence of evidence by the accused persons to challenge this evidence I have no option but to take the evidence as true.”

With respect, the appellants' *alibi* defence was not displaced by the prosecution evidence. They (the appellants) had no duty to prove their innocence. Having so held, we find no purpose in considering the other grounds of appeal.

For these reasons, the appeal is allowed. The conviction is quashed; sentence set aside and the appellants are acquitted. They will be set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Nakuru this 29th day of November, 2011.

M. J. ANYARA EMUKULE
JUDGE

W. OUKO
JUDGE