



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MALINDI

Criminal Appeal 37 of 2008

DAVID GICHABA NYAEGA ..... APPELLANT

VERSUS

REPUBLIC ..... ACCUSED

JUDGEMENT

The appellant herein **DAVID GICHABA NYAEGA** has filed this present appeal against the conviction and sentence handed down to him by the learned Ag. Senior Principal Magistrate in **Cr. 90/2005** heard and determined at Malindi Law Courts. In the cited case before the lower court the appellant herein who was the accused person had been charged with the offence of robbery with Violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge read as follows: -  
“**DAVID GICHABA NYAEGA alias KIKO**: On the 25<sup>th</sup> day of December 2004 at Tetu Bar in Majengo Malindi District of the Coast Province, jointly with another not before court being armed with dangerous weapons namely rungu, robbed **KAZUNGU MENZA** of his wallet containing Kshs.5,000/=, one gold chain, one silver bruce, one national identity card S/No. 23169294 to the total value of Kshs.25,000/= and at or immediately before or immediately after the time of such robbery wounded **KAZUNGU MENZA**”.

At the trial below the lower court the accused who was represented by Mr. Gekanana advocate denied the charges. His trial commenced on 30 June 2005. The prosecution led by Chief Inspector Shari called a total of five (5) witnesses in support of their case. Briefly the prosecution case as narrated by the complainant **KAZUNGU MENZA** was that on 25.12.2004 at 6.00 am he was leaving **STARDUST BAR** and was heading towards **TETU BAR**. He met with the accused whom he knew well with another man whom he did not know. The accused was armed with a rungu. The two men grabbed the complainant in a neck-lock and hit him with the rungu as they robbed him of his jewellery, cash 5,000/= and personal documents. The complainant went and reported the matter to the police. He later went to hospital to seek treatment for

his injuries.

That same morning the complainant met his friend who told him that the accused had attempted to sell to him some chains that morning. The two agreed to go to the accused house with the second man posing as a buyer. Accused readily produced the chains to show the man but as soon as the complainant emerged the accused ran into his house and a brawl ensued. Police were called in. They searched the accused room wherein they recovered a wallet containing Kshs.700/= and accused identity card. Later accused was arrested and taken to the police station where he was charged.

At the close of the prosecution case the learned trial magistrate ruled that the accused had a case to answer whereupon he was placed on his defence. He opted to give a sworn defence in which he denied the charges. He also called one witness in support of his defence.

On 26<sup>th</sup> September 2006 the learned trial magistrate delivered his judgment in which he convicted the accused and sentenced him to death in accordance with the law. It is against this conviction and sentence that the appellant now appeals. During the hearing of the appeal on 9<sup>th</sup> November 2009 **Mr. Mauko** Advocate appeared and argued the appeal on behalf of the appellant whilst **Mr. Ogoti** appeared for the Respondent state.

We have perused the grounds of Appeal filed in court and note that it has raised three (3) broad grounds namely

- (i) Insufficient identification by a single witness.
- (ii) Inconsistencies and contradictions in the prosecution case.
- (iii) Failure by the learned trial magistrate to consider the appellant's defence.

At the outset we wish to state that in deciding this appeal we at all times are mindful of the holding of the court of Appeal in the case of **AJODE – VS – REPUBLIC criminal Appeal No. 87 of 2004** that: -

***“In law it is the duty of the first appellant court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that.”***

With respect of the first ground of the appeal which touches on the identification of the appellant, the complainant at page 8 line 25 stated

***“I saw the accused person in the dock now whom I recognized with another whom I did not. Accused is David Gichaba. I knew him very well. ...”***

This therefore amounts to evidence of recognition. The appellant was someone whom the witness knew very well. The incident occurred in the morning hours after day light had broken. Circumstances were indeed ideal for a positive identification.. In view of the fact that the complainant knew the appellant well there was no necessity for police to conduct an identification parade. We are satisfied that there has been a clear and positive identification of the appellant not only by the complainant but by both **PW.2** and **PW.3** both of whom also testified that the appellant was a man whom they knew very well before this incident. As such this ground of the appeal fails and is hereby dismissed.

Mr. Mauko for the appellant addressed us at length on the issue of the inconsistencies and contradictions in the prosecution case. It is alleged that upon searching the appellant's room shortly after the alleged robbery occurred, police

recovered a wallet containing Kshs.700/= and the appellant's identity card No. 23169294. all these items were produced in court as exhibits. Whereas the investigating officer Inspector Juma Mwadima tells the court that the identity card recovered inside the wallet belonged to the complainant, the complainant himself at page 9 line 14 states

***“This (MFI.14) is accused's identity card No. 23169294.”***

The complainant further confirms that the wallet recovered inside the accused room was not his stolen wallet. It seems to us pretty logical that a wallet which belonged to the accused would contain inside it the accused identity card. This is neither unusual nor suspicious. In his evidence the complainant told the court that he was robbed of cash Kshs.5,000/=. Under cross-examination by Mr. Gekanana for the accused states that his money was all in denominations of 1000/=. The money recovered in the appellant's wallet and produced before the court as **P.Exb.2** was Kshs.700/=. There was no recovery of even one 1000/= note. No link is shown to exist between the complainant's stolen cash and the Kshs.700/= found inside the appellant's wallet. Once again we find nothing sinister in the appellant having in his own wallet Kshs.700/=. We cannot rule out the possibility that this was actually his own money.

In his evidence in chief the complainant said that he had been robbed of a gold chain and a silver chain. **PW.2 KENNEDY NYIRO** however tells the court that he met the accused selling silver chains. He did not mention a gold chain at all. Lastly **PW.5** the investigating officer states at page 19 line 27 of the record

***“There was a gold and brass chain. I think brass and silver are the same I cannot say anything if you say complainant says his chain was silver.”***

If the complainant lost a gold and silver chain then in order to link him to the robbery a gold and silver chain should have been recovered on the accused. As it is **PW.2** makes no mention of a gold chain and **PW.5** introduces a brass chain insisting that brass and silver are the same. This is entirely untrue as brass and silver are totally different. There seems to be confusion amongst the prosecution witnesses with respect to what type of chains were recovered.

At page J5 of his judgment the learned trial magistrate made the finding that

***“PW.5 searched and recovered Kshs.700/= from the wallet of the accused. From it he also recovered [the] wallet of the complainant.”***

This finding is factually incorrect and is not supported at all by the evidence on record. **PW.5** at page 8 line 20 stated

***During my search I recovered Kshs.700/= from the wallet of the accused person”.***

The witness made no mention of having recovered the complainant's wallet at the scene.

In the absence of any other eyewitness it would only be the recovery of the exhibits which would serve to link the appellant to the robbery. The evidence as to such recovery is so riddled with inconsistencies and contradictions as to render it totally unreliable. In the case **AUGUSTINE NJOROGE RITHO alias CHABAH and ANOTHER – VS – REPUBLIC Criminal Appeal No. 99 of 1986** the Court of Appeal held that

***“It is trite law that where evidence is inconsistent or where it is contradicted it cannot be relied upon”.***

This is exactly the position here. The trial magistrate erred in relying on such evidence as a basis for a conviction. These inconsistencies cannot be overlooked and serve to seriously weaken the prosecution case.

The complainant in his evidence alleged that the robbery occurred as he was leaving stardust bar at 6.00 am on his way to Tetu Bar. Surprisingly after admitting that he was leaving a bar at dawn headed to another bar the complainant insists under cross-examination by defence counsel that he does not drink beer at all. Why would a man spend the whole night bar-hopping if

he does not drink beer at all. This evidence is materially contradicted by **PW.3** Kennedy Nyiro who tells the court that when he met the complainant at 8.30 am the same morning **“the complainant looked like he was drunk”**. It is stretching the truth for the complainant to insist that despite leaving a bar at 6.00 am he had only been taking soda the whole night. In our view this inconsistency places serious doubt on the veracity of the complainant as a witness.

From the evidence adduced before the lower court it would appear that the robbery occurred at about 6.30 am. Thereafter the complainant and the appellant were involved in a brawl the same morning at about 8.30 am. In his submissions Mr. Mauko for the appellant states that there is a doubt as to whether the robbery actually occurred as alleged by the complainant. In his defence the appellant stated that the complainant had a grudge against him on account of his disapproval of the appellant's dating a certain lady called **ARUSI**. Contrary to the appellant's submissions that the learned trial magistrate failed to give due consideration to his defence, we find that in fact the learned trial magistrate did actually give consideration to the appellant's defence as is evidenced at pages J6 and J7 of his judgement.

However the trial magistrate did observe at page J6 line 16 of his judgment that

*“From all these facts come out that there was an encounter between the accused and the complainant at accused's home”.*

Further on at page 7 line 14 the trial magistrate goes on to find that

*“..complainant went to police and reported and when police did not seem to act fast, he and his friends tied to recover the robbed items and a brawl occurred ...”*

In view of these findings we are surprised that the learned trial magistrate proceeded to dismiss the appellant's defence as he did. It is clear from the evidence that the parties knew each other well. It is also clear that the complainant and others did involve themselves in a brawl at the appellant's house. If the appellant had reported a robbery incident to the police, why did he not wait for the police to act upon his report. Why would he go to the

appellant's house after having been robbed by the appellant in an attempt to recover the stolen items. This is behaviour which is more consistent of a person who had a bone to pick with the appellant. In view of the inconsistencies we had noted earlier, with respect to the recovery of allegedly stolen items, it would not be far-fetched or extreme to suggest that in actual fact the cause of the complainant's injuries was actually the brawl and not the alleged robbery. The complainant as we have found was not an entirely honest witness and if he had a pre-existing grudge against the appellant, he could very well have fabricated the tale about the robbery. **PW.5** the investigating officer told the court that the brawl was also reported to police at 8.00 am. **PW.4 Dr. Samuel Ibrahim** who filled out the complainant's P3 form told the court that although he saw injuries on the complainant, it was not possible to tell which injuries were inflicted at the time of the alleged robbery and which were inflicted during the brawl at the accused's home. The complainant was the only eye-witness to this alleged robbery. His evidence on this remains uncorroborated. It is curious that having reported a robbery to police the complainant would proceed to the suspect's home in the absence of police and involve himself in a brawl there. Clearly there is more here than meets the eye here. The complainant's behaviour is more consistent with that of a person who had a bone to pick with the appellant on some other issue.

In view of the inconsistencies we have noted earlier relating to the recovery of the exhibits allegedly stolen from the complainant, in view of the question mark on the veracity of the complainant as a witness, and lastly in view of the defence given by the appellant, we find that sufficient doubt has been raised as to whether the appellant did actually rob the complainant as alleged. In our view there is sufficient doubt, which doubt ought to have been determined to the benefit of the appellant. We find that the evidence adduced was so riddled with inconsistencies and contradictions as to make any conviction thereon unsafe. We find further that the learned trial magistrate did err in rendering a conviction on the basis of such unreliable evidence. Finally we do find the present appeal to be meritorious, the same is hereby allowed. The conviction of the appellant by the lower court is hereby quashed and the consequent death sentence is set aside. The appellant to be released forthwith unless he is otherwise lawfully held.

**Dated and delivered in Malindi this 15th day of March 2010.**

**H. A. OMONDI**

**JUDGE**

**M. ODERO**

**JUDGE**