



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 293 of 2008

RICHARD MURETHI GATHONGO.....1ST APPELLANT

PETER MUTHUNGU KANGANGI.....2ND APPELLANT

DAVID MWAI MUREITH.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT_

JUDGMENT

The Appellants were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code and were on the evidence found guilty, convicted and sentenced to death as by law provided. They each appealed to this court under separate Petitions of Appeal, and since the appeals raised the same questions of law and fact, they were on the application of Mr. Mugambi learned State Counsel consolidated and heard as one as Appeal Nos. 293 of 2008.

The appeal raises one issue for determination - whether the Appellants were under the circumstances of the commission of the offence, identified by way of recognition by the one identifying witness, PW1, who is also the complainant, and consequently whether the conviction and sentence of the Appellants is safe on the testimony by recognition of that one witness.

The Appellants have argued relying on the tests laid down in the case of TURNBULL vs. R. [1976] 3 ALL ER 549 that-

"recognition may be more reliable than identification of a stranger that even when the witness purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made", and that all these matters go to the quality of identification, if the quality was poor then such evidence must be disregarded ..."

The Appellants raised the technical point that they did not plead to the charges under substituted charge sheet,

and that there was therefore a serious irregularity which rendered the trial a nullity.

The Appellants also argued that they did not understand the substance of the new charges as the provisions of Section 77(2) as to language were not complied with, in violation of their trial rights under the Constitution.

Relying on the English case of WOOLMINGTON vs. D.D.P. [1935] A.C. 462, the Appellants argued that the case of robbery with violence was not proved by the prosecution, contrary to the established English Criminal Law, that it was always the duty of the prosecution to prove that the Appellants were guilty. In Woolmington vs. D.D.P the court held -

"Throughout the web of the English Criminal Law one golden rule threads always to be seen, that, it is the duty of the prosecution to prove the prisoner's guilt. If in the end of the whole case there appears a reasonable doubt created by the evidence brought forward by the prosecution, then the prosecution has not proved their case and the prisoner is entitled to an acquittal."

The Appellants argued in their written submissions that the learned trial magistrate made a crucial error in law and misdirected himself by failing altogether to exclude the existence of a possibility of error or mistake on the part of PW1's identification of his attackers yet the attack was made suddenly and unexpectedly.

On his part Mr. Mugambi learned State Counsel opposed the appeals. Counsel relied on the evidence of PW1 before the trial court. PW1 knew all the Appellants. There was light from a hurricane lamp and from the fire place. The lights remained on throughout the period of the robbery. The complainant recognized the Appellants as his neighbours. As he lay down as if dead, he observed them remove his goods. PW1 gave the names of the 2nd Appellant, and also the 1st Appellant and 3rd Appellant at the first opportunity to both PW2 and PW3. It shows that the complainant was not mistaken. The entire incident took long, 30 minutes, and thereafter the Appellants went underground.

Counsel submitted that under those circumstances there was no mistake in recognition of the Appellants by PW1.

As the first appellate court it is both our statutory duty and command of judicial precedent from the Court of Appeal to examine the evidence before the lower court and arrive at our own findings and conclusions. We have examined all the prosecution evidence adduced before the trial court, and are in agreement with the submissions submitted by Mr. Mugambi learned State Counsel. We do not therefore need to repeat that evidence here.

As a matter of law, the principles of the law of evidence are the same both in civil and criminal trials but in the latter are not applied so rigidly against Accused as against the Defendant in a civil trial - R. vs. CHRISTIE [1914-15] ALL E.R. Rep 63 [1914] A.C. 545. On matters of corroboration, HOLT CJ IN SHUTTER VS. FRIEND (1690), Carth. 142, (*cited in English and Empire Digest - para 5536*) said;

"It is not necessary in any case at common law that a proof of matter of fact should be made by more than one witness, for a single testimony of one credible witness is sufficient to prove any fact."

This statement is codified in Section 143 of the Evidence Act, (Cap 80 Laws of

Kenya), which says:

143. *"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."*

In criminal law and practice, the trial court is required to warn itself of the dangers of relying on the testimony of a single witness without corroboration. There are however exceptions to this. For instance, under Section 124 of the Evidence Act, the evidence of a child of tender years is admissible without corroboration, provided the Court is, for reasons to be recorded in the proceedings, satisfied that the child is telling the truth.

Adverting to the matter at hand, the evidence of PW1 is clear and credible. It is set in three scenarios. The first setting is PW1's house. He (PW1) and PW4 (his wife), fixed the time at about 11 p.m. He was seated with his wife, a hurricane lamp alight, and a warm fire place. PW4 wanted to retire to sleep, but being the wet/rainy season, and that is the season also when cattle theft is most common, PW1 testified that he told his wife, (PW4) that he would stay up a little longer to check his cows which were outside. His wife retired to the bedroom. Suddenly he heard a loud bang against the door of his two-roomed and iron sheet house. The door broke and *"I saw two torches they trained the torches in my eyes."* I saw 5 people. One of them warned him, *"Mzee if you scream we will finish you."*

Out of shock, PW1 instinctively moved to take his own panga nearby, but he was hit with a stick and he dropped the panga. PW1, testified that the first person to enter the house wore a black cap on his head, he did not know him, he is the one who hit PW1 with a rungu, pushed him where he stood next to his table. He is the person who went to his bedroom where PW4 was, while the 5 remained with him, warning him that they would kill him if he screamed and with a torch being trained on his eyes he was hit on the head with a panga. He fell down and started bleeding.

The second scenario of PW1's evidence is the recognition of the Appellants. PW1 testified that all the time, the hurricane lamp remained alight, the fire was crackling bright in the fire place. The 5 (thugs) advanced into the house, took 28 cushions, TV (black and white), wall clock, radio, iron box, saw, table clothes and this is the clinker of the evidence of recognition:

"I was seeing them collect these items, I could see their faces. They were not covered. I noticed I could recognize them, I even know their names. They are my neighbours... I saw the man who cut the TV wire and took it outside. He then came back and searched my pockets and took a mobile phone, Motorola. The value of the items stolen was Kshs 20,000/= All this time I was lying on the floor facing up. The incident took over 30 minutes. The robbers were not in a hurry. It is only after their departure that PW4 ventured out, and confirmed to me that they had left.

On being asked by PW4 whether he knew or recognized any of the robbers, PW1 gestured "yes". He had lost his power of speech after the cut on the head and excessive bleeding. PW1 was taken to Hospital with a neighbours help, and was admitted for 4 days, and continued treatment as an outpatient. The matter having been reported to the Police, they came to see him after he had left hospital, and this was his further evidence -

"... I told the Police of the people who had robbed me. This man 2nd accused he is Kingangi's son. They are my neighbours. He is the one who cut the TV wire and took the

phone from my pocket and gave it to his brother, he is not in court, he was not arrested. He has never come back to the village. The 1st accused is called Gathogo. He is the one who was taking the seat cushions. He was getting in and out and tying them at the door. I saw him very well. The 3rd accused person is the brother of the 1st Accused person. He is called Mwai. He is also a neighbor, we live in the same village, he also took cushions and table clothes. They entered after the 2nd Accused cut me ... I saw them they neither put off the lights nor did they put out the fire. Their faces were not covered... The others Elijah and Murego were there. I have never seen them in the village again."

The third line of PW1's evidence concerns the arrest of the Appellants. He did not lead to the arrest of the 2nd Accused, he was arrested at Elburgon, with the help of his son. He saw the 3rd Accused by the road near his shamba, and realized that he had come back to the village, as he had disappeared. He ran to the Police, and informed the Police that the 3rd Accused was back, and he was arrested, with the help of his son. The 1st Accused was also arrested at his home with the help of PW1's neighbour's sons and PW1's son as the Police had no 4 wheel vehicle, and PW1 feared the 1st Accused would escape, if he was not arrested, hence the citizens arrest.

PW1 also identified the log of wood which was used to break his door. He had brought it to his compound to chop it into firewood. In conclusion of his evidence PW1 testified that he knew the Accused persons very well, including their parents, he had never disagreed with any of them, or they with him or his family. They had lived together for 9 years. He regarded them as his sons. He could not therefore tell why they wanted to kill him.

In cross-examination by the 1st Accused, PW1 testified that he could not forget his face - the lights were not put off, and PW1 could not mistake the face of the 1st Accused. Similarly, PW1 confirmed to 2nd accused that he could identify him, knows him by the name Gathogo and knew him very well as he used to collect milk with his son. Similarly with regard to the 3rd accused. PW1 knew him very well, he wore a red jacket on the material night. PW1 used to give him casual jobs, and also used to live at PW1's home. He knew him as Mwai wa Muriithi.

PW4 reiterated PW1's evidence of the antecedents to the attack, and how she was confined to the bedroom with her face covered with a piece of cloth after receiving a cut. PW4 sought help from PW2 who helped to take PW1 to Hospital.

The three accused are the Appellants herein. When put on their defence, they each gave unsworn statements. Although the 2nd Accused said he could call one witness he did not. In the event they all narrated how each of them was arrested, and each denied the charges. The trial court properly dismissed the allegations of grudge against the 2nd Appellant, and alleged rivalry. The trial court also warned itself of the dangers of relying on the testimony of a single witness, and found that the evidence of PW1 was credible and convicted the Appellants. We find that the trial magistrate properly directed herself and we find no reason for interfering either with the judgment, conviction and sentence of the Appellants and we confirm the same.

The Appeal herein has therefore no merit at all, and we dismiss it.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 12th day of March 2010

D. K. MARAGA

JUDGE

M. J. ANYARA EMUKULE

JUDGE