



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 145 of 2009

(Arising from Mukurweini S.R.M's Criminal Case No. 851 of 2007)

PETER WAWERU MWANGIAPPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

Peter Waweru Mwangi was tried and convicted for the offence of robbery contrary to section 296(1) of the Penal Code. He was sentenced to three years imprisonment. Being unhappy, he has preferred this appeal to challenge both the order on conviction and sentence.

The appellant put forward the following grounds of appeal in his petition filed by M.K. Kiminda Advocates:

1. *The learned trial magistrate erred in law and fact in convicting the appellant on evidence of identification and or recognition when conditions were not conducive.*
2. *The learned trial magistrate erred in law by relying on evidence of voice recognition.*
3. *The learned trial magistrate erred in law and fact by relying on evidence that was contradicting.*
4. *The learned trial magistrate erred in fact by not appreciating the contradicting report to the police by the complainant.*
5. *The conviction was against the weight of the evidence.*

When the appeal came up for hearing Mr. Kiminda argued the following grounds:

First, that the conditions for the appellant's identification were not conducive for a positive identification free from error. Secondly, that it is the submission of the learned advocate that there was nothing unique in the voice of the appellant that enabled the complainant easily identify

him. Mr. Makura, learned state Counsel was of the view that the appeal has no merit in that the complainant knew the appellant very well hence the identification is that of recognition. It is said the appellant spent about 10 minutes with the complainant's.

I have considered the recorded evidence and the arguments of learned counsels from both sides. The prosecution's case is buttressed by the evidence of six witnesses. It is the evidence of James Kahindo, (P.W.1) AND Mary Kahindo (P.W.2) that they were asleep when robbers gained entry into their house by smashing the door to their house using a big stone on 1st December 2007. According to P.W.1 three people entered his house. P.W.2 was struck on the head by one of them when she raised the alarm. As a result she (P.W.2) sustained head injuries. P.W.1 was attacked with sticks. Both P.W.1 and P.W.2 said the attackers were armed with sticks with torches. P.W.1 said he managed to recognize one of the appellant as one of the attackers being a fellow villager. In the attack, P.W.1 said the attackers fled when he fought back, escaping with two mobiles and Kshs, 2,600/=. P.W.2 said she managed to recognize the appellant by his voice. She said the appellant demanded money from her. P.W.1 and P.W.2 reported the incident to Gakindu police post where they were issued with P3 forms which were filled and produced as exhibits in evidence by Dr. Muraya Mbugua (P.W.4). Both P.W.1 and P.W.2 stated that the incident took between 10 and 15 minutes. P.W.1 gave the appellant's name to the police. Joseph Mwangi (P.W.3) said he was woken up by the screams of P.W.2. He said he met the appellant with two others while he was accompanying his father to the nearby A.P camp. A.P.C. Peter Gichinga (P.W.5) said he visited the home of the appellant whose name had been mentioned by P.W.1 to be his attacker. P.W.5 said the appellant visited the Karindi A.P. post accompanied by his father next morning and claimed he was in Murang'a the previous night having gone to visit his grandmother.

When placed on his defence, the appellant stated that he was in Murang'a during the time of the incident. He thus raised the defence of alibi. He said he spent the night in the house of one Mr. Maigwa until the next morning. James Mwangi (D.W.2) stated that the area assistant chief visited his house the next morning to check the appellant. D.W. 2 said the appellant arrived when he was milking his cows. He interrogated him about the alleged robbery. D.W.2 took D.W.1 to the police where he was arrested and locked u.

On appeal, Mr. Kiminda, learned advocate for the appellant, attacked the evidence of identification. He was of the view that the appellant could be a victim of mistaken identity. I have carefully re-evaluated the evidence. The robbery took place at 2.00 a.m. The complainant (P.W.1) and his wife (P.W.2) were asleep when they were suddenly woken up by the deafening sound of a stone used to smash their door. It was obviously dark. The attacker had torches which they flashed to see their victims. P.W.1 said he identified the appellant with the assistance of bright light emanating from the torches flashed. P.W.1 said he was unable to remember the clothes the appellant wore that night. P.W.2 said she managed to recognize the appellant by his voice. P.W.2 said she was struck by one of the robbers when she raised the alarm. She said the appellant did not hit her because he was busy fighting her husband (P.W.1). P.W.1 was categorical that the robbers flashed bright torches at him and his wife (P.W.2). If indeed, the complainant saw the appellant, then why didn't he manage to notice the kind of clothes he wore that night? P.W.2 said that the appellant had demanded money from her hence she was able to recognize his voice. There was a contradictory to her evidence when she said that the appellant was busy fighting her husband (P.W.1) as she was being assaulted by his accomplices. The question is at what point did the appellant talk to P.W.2. I have entertained some doubts in my mind. That doubt should be give to the benefit of the appellant. I am convinced that it is possible that the identification of the appellant could be that of mistaken identity.

On this account alone, I allow the appeal by quashing the conviction and by setting aside the sentence. The appellant is hereby set free forthwith unless lawfully held.

Dated and delivered this 10th day of March 2010.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Kiminda for the appellant and Mr. Makura for the Respondent.

J.K. SERGON

JUDGE