



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 172 OF 2003

*(From Original Conviction and Sentence in Criminal Case No. 1840 of 2002 of the Senior Resident Magistrate's Court at Kwale: **L.N. Mbatia – S.R.M.**)*

CHIMERA NDENGWA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **CHIMERA NDENGWA**, has filed this appeal to challenge his conviction and sentence by the learned Senior Resident Magistrate sitting at Kwale Law Courts. The Appellant was arraigned before the lower court on 2nd September 2002 and charged with the offence of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were as follows

“On the night of 21st August 2002, at Magunduni Village, Mwavumbo Location in Kwale District within the Coast Province, jointly with others not before court being armed with dangerous weapons namely pangas, knives and clubs robbed of (sic) CHIMERA MWACHIDUDU cash Kshs.20,000/-, one radio make national star, one car radio, one bicycle make Avon, one battery, one wall clock, one wrist watch and assorted clothes all to the total value of Kshs.40,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said CHIMERA MWACHIDUDU”

The Appellant entered a plea of **‘not guilty’** to the charge and his trial commenced on 3rd February 2003. The prosecution led by **INSPECTOR MUTANGILI**, called a total of five (5) witnesses in support of their case. The brief facts of the case as narrated by the complainant **CHIMERA MWACHIDUDU**, were that on the night of 21st August 2002, he and his wife were fast asleep in their home in the Kibanda Hasara area of Mariakani. At about mid-night he heard a loud bang. Before he could react a group of ten (10) men armed with pangas and clubs broke into the house. They demanded money and the complainant told them to check his trouser pocket from which they removed Kshs.20,000/-. The men then tied up the complainant and ordered his wife to suckle their crying baby. The robbers then ransacked the house stealing a radio, bicycle, and other goods as listed in the charge sheet. After the men left **PW2 ROSE MWACHIDUDU**, the complainant's wife untied him. He went to the home of the Appellant whom he had recognized as one of the robbers. Finding the Appellant's house locked the complainant went and reported the matter to the police.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed on his defence. He elected to give an unsworn defence in which he denied any involvement in the

robbery. On 6th June 2003, the learned trial magistrate delivered her judgement in which she convicted the Appellant of the offence of Robbery with Violence contrary to S. 296(2) of the Penal Code and thereafter sentenced him to death. It is against this conviction and sentence that the Appellant now appeals.

The Appellant was unrepresented at the hearing of this appeal and chose to rely entirely upon his written submissions which had been duly filed in court. **MR. ONSERIO**, learned State Counsel opposed the appeal and urged the court to uphold both the conviction and sentence of the lower court. Being a court of first appeal we are guided by the decision of the Court of Appeal in the case of **AJODE –VS- REPUBLIC [2004] 2 KLR 81** wherein it was held

“It is the duty of the first appellate 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”

We have carefully perused the written submissions filed by the Appellant. The main ground of appeal is that of identification. The complainant told the court that he was able to see and recognize the Appellant as one of the robbers. The robbery took place at about mid-night. No doubt it was dark. The complainant told the court that during the incident there was a lamp burning inside their room due to the fact that they had a young child. He has not told the court what type of lamp it was – was it a paraffin lamp or a kerosene tin lamp. Neither has the complainant indicated the quality of light available from this lamp. Was it enough to illuminate the whole room or was it just enough to illuminate the area where the baby lay? These are all crucial questions which remain unanswered. The quality of light available was not revealed. Our own view is that since the family were asleep, it is unlikely that they would have wanted bright light in the room, such that even if a lamp were left on it would be giving out only a small amount of light, not sufficient to aid a positive identification.

The complainant did also testify that the ten (10) men who burst into his house that night had torches which in his own words they were **“flashing all over”**. Once again the quality of light being emitted from these torches was not described. Secondly it is debatable whether torch light being **“flashed all over”** would aid a positive and clear identification. In our own view it is more likely that the torches were being directed at the complainant, his wife and at the goods which the robbers intended to seize. It is highly unlikely that the robbers would be shining at torches at each other. It is curious that whereas the complainant claims to have been able to see and recognize the Appellant who was a neighbour, **PW2** his wife who was also with him in the room and who was not tied up at all said she was not able to identify anyone at all yet the same light was equally available to her. The circumstances prevailing at the time, would also to our minds have hindered a clear and positive identification. This was a situation in which ten (10) men had burst into the complainant’s house, rousing both he and his wife from sleep, roughing them up and threatening to stab them – the complainant would have been in a state of anxiety and shock. In such circumstances a mistaken or erroneous identification cannot entirely be ruled out.

The complainant’s evidence was that he was able to identify the Appellant by way of recognition – the Appellant was a neighbour. We have looked at the first report which the complainant made to the police vide OB No. 8 of 21st August 2002 which upon application by the Appellant was accepted as additional evidence in this appeal. This OB report merely indicates

“he [the complainant] can identify some of them [the robbers] in case he came across them”

The report does not indicate that the complainant knew one of the robbers or that he knew where he lived. Why would the complainant passively wait to **‘come across’** a person whom he claims he knew as opposed to simply directing the police to the suspect’s residence? The complainant failed to name the Appellant in his first report to the police raising doubts as to whether he did actually identify the Appellant.

Finally on this issue of identification the Appellant has only been identified by a single witness who is the complainant. In the case of **MAITANYI –VS-REPUBLIC 1986 KLR 198**, the Court of Appeal held

“The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is

being considered and before the decision is made”

With this in mind we have anxiously examined the judgement of the learned trial magistrate. At no point in that judgement did the trial court issue such a warning to itself before proceeding to convict on the basis of the evidence of a single identifying witness. The trial magistrate erred in so failing to warn herself. This is a case where the conviction of the Appellant rests on identification alone. None of the stolen items was recovered in the possession of the Appellant. For the reasons discussed above we are of the view that the identification of the Appellant by the complainant was less than reliable. For that reason we find his conviction to have been unsafe. As such we do quash the Appellant’s conviction for the offence of Robbery with Violence. The subsequent death sentence is also set aside. The Appellant to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this3rd..... day of November 2010.

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J.B. OJWANG
JUDGE

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M. ODERO
JUDGE

Read in open court in the presence of:-

M. ODERO
JUDGE
3/11/2010