REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 280 of 2006

NANCY WAKONYO KAMAU……....…..…APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From original conviction and sentence in Nakuru C..M.CR.C.NO.1887/2006

by Hon. M. W. Onditi Senior Resident Magistrate)

Coram:

Hon. M. Koome, Judge

Hon. M. G. Mugo, Judge

Mr. Njogu for State

Court clerk – Kosgei/Ken

Appellant present

Mr. Ogolla for Appellant

JUDGMENT

The appellant, Nancy Wakonyo Kamau, was charged with four counts of Robbery with violence contrary to Section 296(2) of the Penal Code. She was tried before the Senior Resident Magistrate, Nakuru Hon. M. W. Onditi and was convicted on the first count only, for which she was sentenced to suffer death. Being dissatisfied with both the conviction and sentence, she filed this appeal citing the grounds that:

1. The charge in respect of which she was convicted was not proved beyond reasonable doubt as required by law.

2. The appellant was not properly identified, the circumstances surrounding visual identification having been difficult and infavourable for positive identification.

3. The learned trial magistrate erred in law and fact in basing his conviction on dock identification in the absence of prior description of the assailant by the identifying witnesses.

4. The learned trial magistrate erred in ignoring the appellant's defence of alibi.

5. The Learned trial magistrate erred in convicting the appellant on the ground of recognition alone.

The particulars of the charge under count 1 of the charge were that on 3rd July, 2005 at Kiratina Estate in Nakuru District of the Rift Valley Province the appellant jointly with others not before court, while armed with dangerous or offensive weapons, namely, pangas and rungus, robbed Beatrice Waruguru Njoroge of a JVC Television set, a Pomac DVD (recorder) an electric Kettle, gas cooker, a Nokia 3210 mobile phone, a Thermos Flask, two wall clocks and Kshs.2,000/= (cash) all valued at Kshs.50,500/=.

Similarly under count 2 of the charge the appellant is said to have robbed Regina Nduta Mwaura of Kshs.30,000/= in cash on the same date and at the same place still with others not before court and while armed. In count 3 of the charge, the appellant and her compliances are said to have robbed Pauline Muthoni of a radio cassette recorder, a camera, a mattress, Kshs.200/= all valued at Kshs.5,725/= on the same date and at the same place while in count 4 Patricia Wanjiku Mwaura is said to have been robbed of Kshs.28,000/= in cash in similar manner. In all the incidents, which, as stated in the respective counts happened around the same time and at the same place, the appellant and her accomplices (who remain at large) are said to have used actual violence against their victims in the course of robbing them.

At the hearing of the appeal, the appellant was represented by learned counsel Mr. Ogolla while the State was represented by the leaned State Counsel Mr. Njogu. In his submissions Mr. Ogolla cited the following authorities in support of the appellant's grounds of appeal as set out hereinabove.

1. GABRIEL KAMAU NJOROGE VS. REPUBLIC [1982-88] 1KAR 1134

2. JOSEPH MWANGI WAMBUGU VS. REPUBIC (NYERI H.C.) CR.APPEAL NO.11 of 2000

3. RORIA VS. REPUBLIC [1967] E.A. 583.

The authorities have been duly considered.

Mr. Ogolla submitted that the learned trial magistrate erred in basing reliance on the evidence of P.W.3 Beatrice Waruguru Njoroge (the complainant on count 1) and her son P.W.7 whose evidence, according to Mr. Ogolla was contradictory in material respects as follows:

i) P.W.3 stated that when the door to the room where she was robbed was knocked down by the assailants, it fell on her as she was sleeping <u>on the floor</u>, yet P.W.7 said it fell on <u>his mother's bed</u> in the room they both slept.

ii) P.W.7 testified that the lady who assaulted them was of light brown complexion but P.W.3 said the lady was "***not brown"***

iii) P.W.7 stated he did not see the lady's teeth yet P.W.3 testified that the former talked with P.W.7 when he requested to be allowed to go for a short call and that P.W.3 noticed "*the lady's teeth were not white."*

The above, according to counsel, creates a lot of doubt as to the means of identification or recognition of the appellant at the scene of crime. Mr. Ogolla submitted that the issue of whether there was adequate lighting was not clearly explained and that P.W.3, having stated, in her evidence, that one of her attackers covered her head with a sheet, she could not have seen the appellant well enough as to positively identify her as one of her attackers. He further took issue with the witness's claim to have recognized the appellant as a person who worked at a Saloon nearby, when no description of her was made to the police, when the matter was first reported, as was clearly evident in the Occurrence Book (produced in evidence) and supported by the Investigating officer, P.C. James Muguthu (P.W.8) in his testimony where he stated that:

"***In the O.B. extract there is no indication that any of the witnesses identified the lady as one of the assailants."***

Mr. Ogolla submitted further that the two witnesses testified that the attack was sudden and happened at 2.00a.m. while P.W.3 and P.W.7 were sleeping. They both testified that they were shocked. Counsel asked us to find that the testimonies of both P.W.3 and 7 as to the description of the assailant, as a lady who worked at a salon in their neighbourhood, was an afterthought since none of them reported that to the police until they saw the appellant at that salon on the Monday following the attach which had occurred on a Saturday. He further submitted that failure by the learned trial magistrate to find that the circumstances surrounding the attack in count 1 were not favourable for positive identification was erroneous, more so because the learned trial magistrate herself agrees in her judgment that there was a "***slight doubt"*** as to whether P.W.3 and P.W.7 "***did positively identify and/or recognize this accused (appellant) during the robbery incident"*** Mr. Ogolla submitted and correctly so in our view, that the law requires that a person accused of a crime be acquitted even where there is an "***iota of doubt".***

In his final submission counsel stated that the appellant's defence of alibi, which was that she had never left her home on the night of the robbery, and which evidence as corroborated by her witnesses D.W.2, 4, 5 and 6 was not properly considered but was dismissed without any reasons being given for disbelieving the same.

Mr. Njogu, for the State has conceded the appeal, mainly, on the ground that the complainant in the count 1 never told the police at the first instance who her attackers were. He submitted therefore that the learned trial magistrate was wrong, in those circumstances, in believing that the complainant recognized the appellant and in proceeding to convict her on the basis of that evidence.

We have, as is required of us, being the first appellant court, analyzed and evaluated the evidence adduced at the trial, considered the submissions made before us and have arrived at our own independent conclusion.

It is evidently clear, that the appellant was convicted, primarily, on the evidence of P.W.3 and P.W.7. The two witnesses testified that their attackers were 4 men and 1 lady. They claimed to have recognized the appellant, at the scene of robbery, as someone they had known for about 3 weeks and with whom they had interacted prior to the robbery incident.

PW.3, the complainant, admitted under cross-examination that she did not record in her statement how the attacker was dressed nor did she give any other description of the attacker to the police when she first reported the robbery. She testified further (still under the cross-examination) that it was not until Monday (after the Saturday attack) that she told the police who her attacker was, saying it was the appellant. She described the attacker's complexion as "*not brown,"* clearly contradicting P.W.7's description of the attacker.

P.W.7, the complainant's 7 year old son, testified as follows:

"***I can see the lady I know as*** *"Wakonyo"* ***before court. She was among the robbers…….Accused used to work in Bravo Salon just near the estate where we lived. She was among the robbers."***

and

"***I requested to go for a short call and that is when I saw the accused….."***

In the same breath P.W.7 testified that

"***I had not covered myself fully so I saw the accused's face very well. I did not see the accused's teeth. I did not see the accused's eyes but I saw her face and it was light brown."***

It is quiet clear from the above that P.W.7's testimony as to when exactly he recognized the appellant (as

the lady he knew) is contradictory in itself. Although he testified that he had known the appellant quite well, his testimony under cross-examination was that he came to know her name when he and his mother went` to Central Police Station and also that he told the police about the appellant a week after the robbery (on 9th July, 2007).

As rightly submitted by Mr. Ogolla, the investigating officer who also doubled as the arresting officer, testified that no record was made in the Occurrence Book that the appellant had been seen at the scene of robbery. He stated that he had been told (without stating by whom) that the suspect was wearing a black trouser and black shoes, yet P.W.3 clearly testified (under cross-examination) that she

"***did not record in her statement that this lady was in a trouser and was wearing a maroon cap which covered the head…"***

P.W.8 testified further that he arrested the appellant at her place of work (a salon) "***after the complainant identified her"*** and that "***she (the appellant) led (him) to her house."***

Curiously however, another victim of the robbery, Patricia Wanjiku (P.W.5 and complainant in count 4) testified that she was

"***one of the people who identified (the appellant) to the police officer who arrested (the appellant)."***

She testified further that she had seen the appellant "*very well"* during the robbery and stated that:

"***I told the police I saw a lady I knew during the robbery and I took the police upto the accused's home."***

Although P.W.5 testified that she was attached while in the company of her sister, Regina Nduta Mwaura, the complainant in count 2 (P.W.4), the latter testified that although she knew the appellant herein as a person who worked at a salon nearby, she did not see her among the persons who attacked and robbed them.

In our view, the glaring contradictions in the prosecution witnesses' testimonies create a lot of doubt in the mind of the court as to whether the appellant herein was at the scene of the robbery at all. Such doubt leads us to conclude that she was not positively identified as one of the persons who committed the robbery for which she was convicted and sentenced to suffer death.

We accept Mr. Ogolla's submission that her defence alibi which was not dislodged by the prosecution was credible and which, weighed against the contradictory and inadequate evidence adduced by the prosecution, was strong enough to earn her an acquittal. It was wrong, in our view for the learned trial magistrate to dismiss the defence as a "*mere denial"* when the same was corroborated and/or supported by four credible witnesses. We find that the conviction herein was not properly arrived at, particularly since the learned trial magistrate did make, as a finding, that there was some doubt in the prosecution's evidence. The State is in order, therefore, to concede the appeal.

In the premises, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set free and released from jail forthwith unless she be otherwise legally held.

DATED, SIGNED and DELIVERED at NAKURU this 21st day of May,2009.

M. KOOME **M. G. MUGO**

JUDGE **JUDGE**