



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU Criminal Appeal 92 of 2009

PATRICK WAWERU BUNDI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from Conviction and Sentence of the Senior Resident Magistrate's Court at Kerugoya in Criminal Case No. 1173 of 2007 dated 1st April 2008 by P. T. Nditika – S.R.M.)

J U D G M E N T

Patrick Waweru Bundi hereinafter referred to as “*the Appellant*” was on 30th August 2007 arraigned before the Senior Resident Magistrate’s Court, Kerugoya (P.T. Nditika presiding) on one count of robbery with violence contrary to Section 296(2) of the Penal Code. It was alleged in the particulars that on the 29th August 2007 at Kirima Location in Kirinyaga District within Central Province, with others not before court, he robbed Danson Bundi Ndambiri of Kshs.1,500/= and ½ litre paraffin valued at Kshs.30/= all valued at Kshs.1,530/= and at or immediately after the time of such robbery wounded the said Danson Bundi Ndambiri.

The appellant pleaded not guilty to the charge and he was accordingly tried. The prosecution case was that, Danson Bundi Ndambiri, hereinafter referred to as “*the complainant*” was a bicycle repairer at Kimunye market. On 26th August 2007 he bought paraffin at Kiangwenyi town and proceeded home. On the way home he was suddenly confronted by a group of five people who snatched from him the jerrican containing the paraffin and assaulted him in the process. As there was moonlight, the complainant was able to recognise the appellant among those people. The appellant was a person well known to him since school days. The complainant fought off the attack by biting the appellant. In retaliation the appellant stabbed him on the face. The encounter took about 5 minutes. In the process the complainant lost to the appellant and his accomplices the paraffin worth 30/= and Kshs.1,500/=. When done the appellants and his cohorts disappeared from the scene. The complainant then went back to town screaming and lost consciousness. When he came to he found himself in Kerugoya District Hospital. PW3, Samuel Mutiithi Gachoki, a farmer was on his way home from Kiangwenyi at about 8 o’clock when he found the complainant lying down. He touched him and the complainant told him that he had been stabbed by the appellant who was in a group of other people. He only managed to recognise the appellant among the group. The witness then assisted the complainant to go to the village elder, Jackson Kariuki Muriithi (PW2) to report the incident. Together with PW3, the village elder took the complainant to Kimunye police post. Subsequent thereto they took the complainant to Kerugoya District Hospital. The complainant was unconscious then. The following day, the complainant after coming around told the village elder that he had fought with the appellant. The report of the incident was received by P.C. Mugambi Mwocho (PW4) of Kimunye Police Patrol base. Because of the injuries sustained, the witness referred the complainant to hospital. However before he could leave the station, the appellant suddenly

appeared. The complainant informed the witness that the appellant was among those who had robbed and assaulted him. Indeed he went ahead and pointed to a bite mark that he had inflicted on the appellant during the encounter. The appellant thereafter sought forgiveness from the complainant. The witness then issued P3 form to the complainant. The complainant was subsequently examined by James Muthoka Gathuku (PW5), a Senior Clinical officer at Kerugoya District Hospital. After examination of the complainant, he assessed the degree of injuries sustained as harm. The appellant was thereafter arrested and charged with the instant offence.

Put on his defence, the appellant in his sworn statement of defence stated that on the material day being an employee of KTDA, he worked until 4 o'clock and decided to go home. On the way he decided to indulge in the illicit brew known as "*makabo*" upto about 8 p.m. In the process, police from Kimunye raided the den and he was arrested and taken to the police station. At the police station, those arrested were each asked to part with Kshs.500/= for their freedom. The appellant did not have the money. Instead he called his wife who brought the money the following morning. He was nonetheless charged with the offence.

The learned magistrate having carefully evaluated and re-appraised the evidence tendered by both the prosecution as well as the defence, found favour with the prosecution case, convicted the appellant and sentenced him to death as required by the law.

The appellant was aggrieved by the conviction and sentence. Hence he preferred the instant appeal. He faults the learned magistrate for convicting him on insufficient and contradictory evidence, purported identification and or recognition that was not free from possibility of error and or mistake and finally that his alibi defence was not given due consideration. In support of these grounds of appeal, the appellant with the permission of the court tendered written submissions, which we have carefully read and considered.

The appeal was opposed. Mr. Omwenga, learned senior State Counsel, in opposing the appeal submitted that the appellant was recognised by the moonlight. The complainant had known the appellant from school days. The complainant told PW3 that he had been stabbed by the appellant. The appellant on the same night came to the police station and the complainant identified him. Further the Complainant was able to identify the bite marks he had inflicted on the appellant during the encounter. To the state counsel therefore, the evidence against the appellant was overwhelming and the appeal ought to be dismissed.

In a first appeal, the court is under a duty to consider all the evidence tendered, re-evaluate the same and draw its own conclusion of course without overlooking the findings of the trial court and also bearing in mind that it, unlike the trial court, it did not see or hear the witnesses testify as to be in a position to fully assess their credibility. It is a duty the court must perform and an appellant is entitled to such an analysis and re-evaluation of the evidence. As stated by the court of appeal recently in the case of Jacinta Njoki Ndirangu v/s Republic, Cr. Appeal No. 262 of 2007 (UR) "It will be considered a denial of justice if such a duty is not performed....."

The conviction of the appellant was based on the evidence of a single identifying and or recognition witness, the complainant in difficult circumstances. This being a case of recognition rather than identification and as it has been observed severally by this court and the court of appeal recognition is more satisfactory, more assuring and more reliable than identification of a stranger – see *Anjononi v/s Republic* (9180) KLR 59 and *Kenga Chea Thoya v/s Republic*, Criminal appeal No. 375 of 2006 (UR). Though identification (recognition) of the appellant was by a single witness, the predecessor of the Kenya's court of Appeal in the case of *Abdulla Bin Wendo v/s Republic* (1953) 20 EACA 166, reaffirmed that a fact may be proved by the testimony of a single witness. Again in *Roria v/s Republic* (1967) E.A. 583. The court held that a fact may be proved by the testimony of a single witness. The court stated:-

"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L.C. said recently in the House of Lords in the course of a debate on section 4 of the Criminal Appeal Act

1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

“There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine case of ten – if there are as many as ten – it is in a question of identity.”

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.” In *Abdalla bin Wendo and Another v/s Republic* (supra) the court of appeal reversed the finding of the trial judge on a question of identification and said this:-

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

In the circumstances of this case, the offence was committed at night; 8 o’clock to be precise. The complainant was on his way home when he was unexpectedly confronted by five people who proceeded to unleash terror on him. They beat him senseless. Indeed he even lost consciousness as he staggered back to town. When he came round, he found himself in hospital. It was in these circumstances that the complainant purported to recognise the appellant. This shows that the recognition of the appellant was under extremely difficult circumstances. Because of that, there was need for caution on the part of the learned magistrate before entering a conviction against the appellant as stated in the cases already referred to hereinabove.

We have anxiously considered the issue of recognition of the appellant and it is our view that the trial court below erred in not considering the fact that the brevity of the attack was such that it left no room for the complainant to have observed the appellant sufficiently to be able to recognise him. The complainant does not state how he was able to pick out the appellant among those who attacked him. According to his own testimony “..... while going home, I was held by people. One snatched the paraffin jerrican. The others where (sic) beating me. I identified the accused. There was moonlight. I also bite the accused. I did know him before. I had known him since school days. The others disappeared.....” From the above it is not clear how the complainant would have been able to recognise the appellant. He does not say whether during the attack he ever came face to face with the appellant. The appellant was allegedly among the five people who attacked him. If there was no face to face encounter, how could the complainant have managed to recognise the appellant? It has been stated over and over again that mistakes of close relatives and friends in matters of recognition are sometimes made and even honest witnesses make such mistakes. Perhaps this is one of those cases.

The complainant claimed to have recognised the appellant as there was moonlight. However the intensity of the said moonlight, its position in relation to the appellant and the time taken by the complainant to observe the appellant was not explored by the court as required. In the circumstances of this case, that inquiry was absolutely necessary. Failure to undertake such an inquiry was fatal to the prosecution case. It was so held in the case of *Maitanyi v/s Republic* (1986) KLR 198.

Following the attack, the appellant staggered back to town screaming and fell down. Thereafter he did not know what happened. He only came to the following day. It is clear from this evidence that the complainant lost consciousness before he had talked to any other person regarding the attack. Yet PW2, PW3 and PW4 claimed that he talked to them and mentioned the appellant as having been among those who attacked him. This cannot possibly be correct. If indeed the complainant had talked to these witnesses, nothing stopped him from saying so in his evidence. He was categorical that he lost consciousness after the attack and only came round to find himself in Kerugoya hospital.

The two witnesses, PW2 and PW3 claimed to have taken the complainant to Kimunye police patrol

base where the complainant gave a description of the appellant. However, the complainant has no such recollection. As the complainant was leaving the police post, the appellant suddenly appeared and the complainant pointed him to the police according to PW3, and PW4. However PW3 who was with them offered no such evidence. More surprising is the fact that even after the appellant presented himself to the police, and despite the allegations made against him, the police did not bother to arrest him there and then. More intriguing is even the fact that there is nothing on record to show why the appellant came to the police station in the first place. The appellant must have come to the police station for a purpose. To our mind therefore, PW2, PW3 and PW4 were not truthful witnesses.

There is evidence that the appellant allegedly pleaded for mercy from the complainant. That is according to the evidence of PW2 and PW4. No such evidence was tendered by PW1 and PW3 though. In any event such evidence was inadmissible as it amounted to a confession taken by unqualified persons; a village elder and police constable.

The defence of the appellant, in our view was credible and plausible. The involvement of the village elder deeply in the matter seem to lend credence to the appellant's defence that he was a victim of a police raid in "makabo" brewing den whereat he was arrested. His failure to raise Kshs.500/= as a bribe precipitated the instant charges. Otherwise how could he have presented himself to the police station for no apparent reason and knowing very well that he had on the same night participated in a robbery on the complainant, a person well known to him, and who could easily have recognised him. The evidence tendered herein by the prosecution was simply incredible. We think that there is more than meets the eye in this whole saga.

In the end, we are satisfied that the appeal has merit. Accordingly we allow it, quash the conviction and set aside the sentence of death imposed on the appellant. He should be set free forthwith unless otherwise lawfully held.

Dated and delivered at Embu this 29th day of October 2009

M. S. A. MAKHANDIA

JUDGE

WANJIRU KARANJA

JUDGE