



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 435 of 2006

CYRUS MAINA NJENGAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 435 of 2006 of the

Chief Magistrate's Court at Thika by L. Gicheha – Senior Resident Magistrate)

JUDGEMENT

The appellant was charged with robbery with violence contrary to section 296(2) of the Penal Code, that on the 15th day of July 2004 at Githurai Kimbo jointly with others not before court robbed Ann Mumbi Matuguta cash 400/=, mobile phone Samsung, siemens C35, a bible and a note book all valued at Kshs.20,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Ann Mumbi Matuguta. After full trial he was convicted and sentenced to death. He is aggrieved by the decision of the trial court and seeks this court to overturn the said decision.

The prosecution called two witnesses to support the charge against the appellant. PW1, the complainant stated that on the material day she was from her work place and heading to PCEA church within Githurai Kimbo area when she was confronted by three young men, one of them who was armed with a knife. One of them removed a knife and threatened to kill if she did not give all that she was carrying. She then gave up her purse and a paper bag containing personal items to the attackers. The attackers immediately ran away from the scene and as they were running away the complainant started screaming and running behind them. She attracted the attention of the members of the public who allegedly arrested the appellant a few metres from the scene of crime. It is also alleged that a paper bag with a bible and note book were found on the appellant after his arrest. According to PW1 she was able to see the appellant as there was electric light from PCEA church which was next to the scene of crime. It is also her evidence that she pointed out the appellant to the members of the public and he was arrested on a straight path and 50 metres from the scene. After his arrest the appellant was attacked by the members of the public but was later rescued by PW2 and other police officers who were patrolling the area.

The evidence of PW2 is that on the material day he was in the company of 4 other police officers patrolling Githurai Kimbo area. At around 7.00 p.m. they were attracted to the screams and started heading to the direction where the screams were coming from. They found the appellant having been arrested and being beaten by the members of the public. The appellant was rescued from the members of the public who were attacking him. He was re-arrested and taken to Githurai Kimbo Police Station where he was later charged with the charge subject of this appeal.

After the close of the prosecution case the appellant gave unsworn testimony and stated that on the material day he had closed his business at about 7.00 p.m. and as he was heading home he was attacked by a group of people who alleged that he had attacked and robbed PW1. In his evidence he also stated that he was not a thief and that he had nothing to do with the charges that were preferred against him.

The trial court after analyzing the evidence of the prosecution and the defence by the appellant summarized the points for determination as;

- (1) Whether a robbery took place.

- (2) Whether the said robbers were armed or were more than one person.
- (3) Whether they threatened to use actual violence to the complainant.
- (4) Whether the appellant was among the robbers who attacked PW1.

As was rightly stated by the trial court there is no dispute that a robbery took place on 15th July 2004 at Githurai Kimbo and that the complainant was robbed of personal items by the said attackers. There is also no dispute that the robbers were armed with a knife and they threatened to use actual violence on the complainant. The question that falls for our determination is whether there is sufficient evidence to connect the appellant to the robbery that took place on 15th July 2004 at Githurai Kimbo area.

The starting point is that the incident happened during the night and that the complainant was not aware that she would be attacked suddenly and within a short span of time. PW1 in her evidence did not state whether the appellant had covered his face or not at the time of the attack. She also did not state the intensity of the light and whether it was possible to identify persons who were encountering her for the first time in distressing circumstances. No doubt the attack was sudden and swift. The appellant denied the offence and implied that he was apprehended by a group of people while innocently walking to his home. In essence it is his defence that he was not among the robbers who attacked PW1. And that he was not positively identified as having been part of the attackers. On the other hand it is the evidence of PW1 that the appellant was part of the gang who attacked her and that he was arrested a few minutes after committing the offence against her. The question is whether identification was favourable, positive and accurate to displace the possibility of mistaken identity that can arise in such circumstances and situations. In our view the evidence regarding identification must be scrutinized carefully and the court must be satisfied that identification is positive and free from any possibility of error. All surrounding circumstances particularly the circumstances, under which the identification was made must be carefully considered. We appreciate that a fact may be proved by the testimony of a single witness and in such circumstances, as the case here there has to be other evidence whether circumstantial or direct pointing to the guilt of the accused person and which can be accepted as free from the possibility of error or mistake.

It is the duty of the prosecution to demonstrate that the appellant was not a man in the wrong place at the wrong time. And by doing so, it is important to show that there is evidence that the complainant identified the appellant at the scene and that she did not lose sight of him till the time he was arrested by the members of the public. Equally it is important for the prosecution to show that the appellant did not escape from the sight and attention of the complainant from the time of the attack to the time of his arrest. In case of **Roria vs R [1967] E.A 583** it was stated as follows:

“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 s. 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 cases out 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. R. (1) this court reversed the finding of the trial judge on a question of identification and said this (20 E.A.C.A at p.168):

“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 favouring a correct identification 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 this case the evidence that led to the conviction of the appellant is that of PW1 who did not state the intensity of the light and the distance between the light from the church and the area where the attack took place against her. She also did not state the time taken by the attackers, during the time of the alleged robbery. PW1 did not state that she had the appellant in sight from the time of the attack to the time of his arrest. There is also no evidence from the persons who arrested the appellant to show that he was arrested running away from the direction where the complainant was attacked.

No doubt the incident happened during the night and the attack was sudden making the possibility of identification not safe from mistake or error. We think that the possibility that the appellant was not one of the robbers who attacked PW1

was not eliminated by the prosecution. There are gaping holes which were not filled by the prosecution making the conviction unsafe to sustain. In our mind the trial court did not evaluate the evidence of the single identifying witness or give adequate consideration to the fact that the persons who arrested the appellant were not called as prosecution witnesses. No explanation was given by the prosecution why any of the members of the public who apprehended the appellant was not called as prosecution witness. Had the trial court performed its cardinal duty of ensuring that all the relevant witnesses and evidence were before court, it could have reached the conclusion that the charge against the appellant was not established beyond any reasonable doubt. We therefore think that the appellant was wrongly or improperly convicted by the trial court on insufficient evidence. The appeal has merits as contended by the appellant.

Order: Appeal allowed, conviction quashed and sentence set aside. We order the immediate release of the appellant unless lawfully held.

Dated, signed and delivered at Nairobi this 27th day of October 2009.

L. NJAGI

M. WARSAME

JUDGE

JUDGE