



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang & Dulu, JJ.)

CRIMINAL APPEAL NO. 31 OF 2005

BETWEEN

BERNARD WAWERU KAHUNGURA.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of Senior Resident Magistrate Ms. Muchira dated 5th January, 2005 in Criminal Case

No. 788 of 2004 at Kibera Law Courts)

JUDGMENT OF THE COURT

The appellant herein, ***Bernard Waweru Kahungura***, was charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap.63). It was stated in the charge that the appellant, on 25th December, 2003 at Mitumba Slums in Langata, within the Nairobi Area, jointly with others not before the Court, robbed ***Paul Ndirangu Karari*** of cash, in the sum of Kshs.5,000/= and a driving licence, and at, or immediately before, or immediately after the time of such robbery, wounded the said ***Paul Ndirangu Karari***.

PW1, ***Paul Ndirangu***, a charcoal seller at Nairobi South C shopping centre, testified that he was coming from a kiosk close to his vending-point, on 25th December, 2003 at 1.00 a.m. while drunk, and he saw three people in front, standing by the road. One of these people who had a flashing torch, jumped on PW1 and felled him. During this struggle, the torch flashed in such a direction that it fell on the first attacker's face, and PW1 recognized that this was ***Waweru***, the appellant herein. As the two struggled on the ground, the two other attackers pinned PW1 to the ground and removed his pair of trousers. At this point the appellant, who was known to the complainant, cut the complainant on his head and on the left side of his face. The attackers left PW1 bleeding, and he lost consciousness until the following morning. PW1 regained consciousness and found himself in his kiosk. One ***Kariuki*** who found the complainant in his kiosk injured, called the complainant's father, who took him to Kenyatta National Hospital and had the matter reported to Nyayo Police Post. PW1's information on the identity of one of the robbers, led to the arrest of the appellant herein, at Nairobi West where he sells building sand.

PW1 said that at the time of the robbery, in which he lost a driving licence, an identity card and

Kshs.5,000/=, the appellant's torch had illuminated his own face, and at that point PW1 had called out, "**Waweru**, why are you doing this to me?" To this question the appellant had responded by cutting PW1 with a machete. PW1 said the illumination of the appellant's face had taken place for some 10 seconds, and he had known the appellant who was a friend; he "used to greet [the appellant] when [they] met at drinking places, or when he [passed] with his [hand-cart]". On the material night the two had been taking drinks together.

On cross-examination, PW1 confirmed that he had just been with the appellant herein at Kijiji, where they had been drinking together, and the appellant was drunk with alcohol.

PW2, **Joel Kariuki**, a charcoal hawker at Nairobi South C shopping centre testified that on the material date, he and a friend, **Charles Gitau**, went to Mitumba Village to look for PW1, but they did not find him. The two were told that PW1 had not been seen. When they went to PW1's house they found him unconscious, and they secured transport and took him to hospital. PW1's head was covered in blood, and he could talk only faintly. PW2 learned that PW1 had been attacked by robbers in the night.

PW3, Police Force No. 58163 P.C **Clement Muruthi** of Nyayo Police Post testified that he was at his post on 26th December, 2003 at 5.30 a.m. when he received information that PW1 had been attacked and robbed of Kshs.5,000/=, an identity card, and a driving licence. He booked this incident in the Occurrence Book, and gave PW1 a P3 form for medical reporting. Then on 21st January, 2004 at 5.10 p.m., PW3 was on duty when the complainant came to report that he had just seen the appellant herein at Nairobi West; he went with the complainant who showed him the appellant, and an arrest was made. PW3 conducted a search on the appellant, but found nothing; he escorted the appellant to Nyayo Police Post, and later to Langata Police Station.

PW4, **Dr. Z. Kamau** of the Nairobi Area Police Surgery examined PW1 who presented with a history of assault, on 21st January, 2004. PW1 had healed scars on the left and the right side of the head; he had two stitched scars on the left fore-head and on the right eye-brow, one month since the assault had taken place. In PW4's opinion the injuries were caused by a sharp object. He assessed the degree of injury as harm, and filled in a signed the P3 form which he now produced in Court.

PW5, Police Force No. 75624 **P.C. Nyongesa** of Langata Police Station testified that he had been asked by the officer-in-charge of Crimes to investigate the instant matter. PW5 received information that PW1's attackers had been armed with a knife, and that PW1 had recognized the appellant herein as one of them. The appellant was arrested on 26th December, 2003.

Upon the learned Magistrate giving directions to the appellant herein as required by s.211 of the Criminal Procedure Code (Cap.75), he opted to make an unsworn statement. He said he is a driver living at Nairobi West, and on 25th December, 2003 he had gone to the Motorvehicle he plies; but as there were no passengers, he had been allowed by his employer to go up-country. He remained up-country until 28th December, 2003 and upon return he learned that the Police were looking for him, and that PW1 had been attacked by robbers.

The analysis of evidence that led to the finding of the Court is thus recorded:

"PW1 candidly told the Court how robbers, while having lit torches, attacked him. He struggled with the accused, who jumped on him. In the scuffle, the torch turned and lit up the accused's face. Alas! it was Waweru, PW1 exclaimed. PW1 lost consciousness.....I haveno doubts that PW1 knew what he was talking about. When he reported to PW3 the following morning, he told [PW3] a similar story. I believe the torch [lighting] so near [to] [the] accused's face, as far as his hand...[would] be sufficient to enable PW1 to identify his familiar face. PW5, the Police doctor confirmed the injuries described by PW1...In the process, PW1 lost his money.

"In the defence the accused person steered clear of the area where the offence took place, meaning he did not commit the offence. He offered an alibi. But I find the accused in his

defence and demeanor taking...issues lightly. The accused said he picked up his wife at 11.00 a.m. [on the material day] and they went up-country; how I would have wished he called the wife to corroborate his testimony and dispel Court's opinion about his demeanour. I find the prosecution's case on identity of the accused water-tight. I have no doubts he is the attacker and robber. I find him guilty. I convict him accordingly".

In his appeal the appellant stated his grounds, in summary, as follows:

- i. that it was erroneous for conviction to be entered on the basis of identification by a single eye-witness in difficult circumstances;
- ii. that there had been no first report confirming the identification by the complainant;
- iii. that the charge sheet was defective;
- iv. that some of the prosecution evidence was contradictory;
- v. that the trial Court erred in rejecting the defence statement.

The appellant developed the foregoing points in both written and oral submissions. He urged that the prosecution testimony was contradictory, on the question whether PW1 had reported the robbery incident on 26th December, 2003 and on that same day he, the appellant, had been arrested; he returned to Nairobi from up-country on 28th December, 2003. From PW1's testimony that he had been drunk when attacked by robbers, the appellant wondered how PW1 could have identified him, in his admitted state of drunkenness, and in the limited light cast from a torch.

Learned State Counsel **Ms. Gateru** contested the appeal, and urged this Court to uphold conviction and affirm sentence as imposed by the trial Court. She urged that the appellant had been positively identified as one of those who attacked the complainant on the material night. On the circumstances in which identification of the appellant at the scene of crime is said to have taken place, counsel urged:

“Even if PW1 says he was drunk, he said he recognized the appellant. He knew the appellant as **Waweru**, before the incident. **Waweru** had a torch, and jumped on him. The torch hit the appellant's face. The complainant then called **Waweru** by name....The appellant then cut PW1 with a *panga*. PW1 sustained injuries, confirmed by PW4, the doctor. I submit that the appellant was positively identified as one of the attackers.”

Of the contradictions in the prosecution evidence, **Ms. Gateru** urged that these were minor and did not demolish the prosecution case.

This is a case, in our opinion, which turned squarely on *identification* of the suspects, and only one person, namely the complainant, was in a position to carry out the identification. The outcome of this appeal, therefore, must depend on the Court's conviction as to how well the complainant did identify the appellant as one of the robbers.

It is established as a fact that the robbery took place at about 1.00 a.m. in the night. There is no evidence that there was any fixed light-source illuminating the *locus in quo*, so we take the position that darkness had enveloped the place. It is the complainant's evidence that he was drunk, at the time of the attack; and it is his evidence that in those conditions he saw three people, and then one of them who had a torch engaged him in a scuffle, during which the torch-light beamed onto this attacker's face, and he perceived him to be the appellant herein.

It is well known that the identification of a suspect in difficult conditions of visibility, is a matter of *legal import*; and in such conditions, there is to be no conviction unless it is clear that the subject was identified with certainty. Writing on this question in his work, *Procedures in Criminal Law in Kenya* (Nairobi: EAPH, 1994) (pp.246 – 247), **Momanyi Bwonuon'g'a** states:

“In cases where the offence is committed in circumstances that do not favour identification of the offenders, say, during a dark night, the trial Court has to direct its mind on the issue of identification under those circumstances. In *Roria v. Rep.* [1967] E.A. 583 (C.A.), it was held that a Court can convict on the uncorroborated evidence of a single witness identifying an accused and connecting him with the offence. In this case, the Court quoted with approval the well known case of *Abdalla bin Wendo & Another v. R* (1953), 20 EACA 166 (CA), in which it was stressed that the evidence of identification of a single witness is acceptable if it is free from the possibility of error. As a matter of judicial practice, the Court will look for corroborating evidence which may be direct or circumstantial.”

From the circumstances in which the robbery in question herein took place, was PW1’s testimony by itself, definite and clear-minded enough to justify, without corroboration, the conviction of the appellant? We think this is a case in which corroboration, whether from direct or circumstantial evidence, was required, to ensure a safe conviction. There was no corroborative, direct evidence; and neither was there any corroborative circumstantial evidence.

The appellant had an alibi which, though its integrity could not be ascertained, was not displaced by firm evidence of identification.

We also found certain contradictions in the prosecution testimony which learned State Counsel did not advert to. PW5 speaks of the torch at the *locus in quo* having been robbed from the complainant, but the complainant says it was the appellant who had the torch. PW5 said the appellant had been arrested on 26th December, 2003, but PW3 said the arrest had taken place on 21st January, 2004.

Such contradictions bring *uncertainty* to the account of the chain of events leading to the instituting of the prosecution case. Though such contradictions by themselves need not have been fatal to the prosecution case, we would take them cumulatively with the crucial shortfall in the case, unsafe identification of the appellant as suspect, to hold that conviction was not, as a matter of law, rightly arrived at.

We hereby allow the appeal, set aside the conviction and sentence recorded by the trial Court, and direct that the appellant shall be forthwith be released from custody unless otherwise lawfully held.

Orders accordingly.

DATED and DELIVERED at Nairobi this 28th day of February, 2008.

J.B. OJWANG G. A. DULU

JUDGE JUDGE

Coram: Ojwang, J.

Court Clerks: Tabitha Wanjiku & Erick

For the Respondent: Ms. Gateru

Appellant in person