



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
(Coram: Ojwang & Dulu, JJ)
CRIMINAL APPEAL NO. 284 OF 2006

BETWEEN

ROBIN MAUTERI ENOCK.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of Principal Magistrate Ms. H. Wasilwa dated 6th June, 2006 in Criminal Case No. 6153 of 2005 at Kibera Law Courts)

JUDGEMENT OF THE COURT

The appellant herein was charged with the offence of robbery with violence contrary to s.296(2) of the Penal Code (Cap. 63, Laws of Kenya). Specifically it was charged that the appellant, on 20th August, 2005 at Kirarapon Trading Centre, Ngong in Kajiado District, in Rift Valley Province, being armed with a dangerous weapon, namely a club, robbed **Lucy Alex Kaurai** of a cellphone, Nokia 3210 by make, a jacket, a head scarf, and cash in the sum of Kshs.2,000/= ? all valued at Kshs.8000/= ? and at, or immediately before, or immediately after the time of such robbery, wounded the said **Lucy Alex Kaurai**.

The complainant (PW1), a farmer at Ngong, had gone to a club in Ngong Town on 20th August, 2005 and was with her friend, **Jane** (PW2), who runs the club. **Jane** closed the club at 11.00pm, and the two set out for their homes, nearby. At this point, quite suddenly, the appellant herein emerged, intruded upon the two ladies, and demanded that they do not move. When PW1 sought to know the identity of this intruder, he fell upon the two ladies, with club blows. He hit PW1 who fell down, whereupon the attacker removed her jacket, and took her shoal and her Nokia 3210 cellphone. The cellphone and cash, Kshs.2,000/=, were in the jacket-pocket. PW1 sustained face battery, and the attacker subjected her to a kick while she was on the ground. PW1's friend screamed for help as the assault took place. The *locus in quo* had electric lighting, and there was moonlight.

It was PW1's testimony that he was able to see the attacker, a man bearing a mark on the face. As soon as the attacker took off, PW1 reported the incident to the Police station. On the following day she led Police officers to the *locus in quo*. The Police officers made a search in a near-by house, and found a man who PW1 identified as the attacker. Her cellphone which had been stolen was found in the said house. She identified this cellphone by its cracked face. Her sim-card had now been removed from the cellphone. The suspect led the Police to a place in the bush, where PW1's jacket and shoal were hidden.

What was not found was PW1's money.

On cross-examination, PW1 said the attacker had been alone at the material time, and she was able to identify him especially by the mark he bore on the face. PW1 said he did not know if the house where the arrest took place belonged to the appellant herein, but she knew that in that house, the stolen cellphone had been recovered, and that it was the appellant who led the Police to the place where her other stolen items were kept.

PW2, **Jane Wambui Mukosio**, is a farmer at Kirarapon, and runs a bar at Ngong town. On the material date PW2 and her friend, the complainant were walking home from PW2's bar, at 11.00pm. She suddenly sensed that somebody was trailing them; and when PW2 stopped, the intruder passed, and then stood between her and the complainant. When PW1 sought to know what the intruder was up to, he hit her with his club, and then held her by the neck. PW2 testified that the attacker was the appellant herein; she had seen him, as there was electric lighting at the *locus in quo*, and there was the full moon. PW2 had seen that this attacker had a healed cut on the head. PW2 saw the attacker fell PW1 to the ground, and kick PW1, after which he removed PW1's jacket and shoal. PW2 identified the jacket and shoal which PW1 had been wearing at the material time. PW2 also identified PW1's cellphone which the attacker had grabbed, at the material time. After the robbery, the attacker went away, leaving PW2 screaming for help. The two ladies reported the matter to the Police. PW2 said she had seen the suspect before, though she did not know him. She suspected that the attacker lived close to the *locus in quo*; and a search of that area on 21st August, 2005 led to the suspect who was inside a certain house. The complainant's stolen cellphone was found in the said house, and the Police officers arrested the appellant herein, On cross-examination, PW2 restated that the *locus in quo* at the material time, was lighted with full-moon- light and electrical lighting.

PW3, Police Force No. 66472 **P.C. Jackson Kirui** who was deployed in general duties at Kirarapon Police Patrol Base, was on duty at 11.45 pm on 20th August, 2005 when the complainant came along to report that she had been attacked on her way home. The complainant was injured on the face and was bleeding. She reported that she had been robbed of Kshs.2000/=, a Nokia cellphone 3210, a black jacket and a white headscarf. PW3 recorded the details of the robbery in the Occurrence Book, and asked PW1 to return in the morning so that a visit could be made to the *locus in quo*.

On 21st August, 2005 the complainant reported to PW3, and a visit was then led the *locus in quo* by PW3 and one **P.C. Joseph Toroitich**. The scene was near residential plots; and the Police officers decided to visit one of the residential units, as they had received a confidential report that crime-suspects had in the past used that accommodation. PW3 and his colleague found two people in the said residential unit, and upon conducting a search, they found a Nokia cellphone hidden inside a mattress. The complainant identified the Nokia cellphone as hers which had been stolen at the material time. The two suspects were arrested and taken to the Police station. The appellant herein led PW3 and his colleague to a place in the bush where the complainant's jacket and shoal had been kept.

PW4, **Dr. Zephania Kamau**, of the Police Surgery in Nairobi, examined the complainant who presented with a history of assault, on 22nd August, 2005. She had a swelling below the right eye, which itself was very red. The complainant was also complaining of pain in her left breast, two days after the alleged assault. PW4 formed the opinion that the injuries to PW1 would have been caused by the thrust of a blunt object. PW4 assessed the degree of injury to PW1 who had already been treated at Ngong Health Centre, as "harm". PW4 made his medical report on a P3 form, which he duly signed.

The appellant elected to give sworn defence, in which he said he had travelled to Kirarapon from Nyabururu, on the material date. He said he left Nyabururu at 9.00 p.m., arriving at his brother's house at Kirarapon at 5.00 a.m. When he arrived at his brother's house, the appellant herein found his brother in bed, and he (appellant) proceeded to make tea; and while he was thus engaged, Police officers came to the house and arrested him. It was the appellant's testimony that the Police officers had asked his brother when his room-mate (who was absent at the time) had returned to the house the previous night, and the brother had said his room-mate had returned to the house at 11.00 pm. The Police officers found a cellphone in the house, and they took possession of it. The Police officers then took the appellant to the

Police station, and his brother also came along. The appellant was then held, charged, and brought to Court the following morning. He said he did not know where the Police officers recovered the complainant's shoal and jacket from.

On cross-examination, the appellant said he had boarded a bus from Kisii on the material date, and came up to Nairobi. He had just arrived at his brother's house, when the Police came and arrested him. His brother had been staying with another person in the same house, but he, the appellant, was the only one who was charged for the offence of the material date.

On the evidence adduced in Court, the learned Principal Magistrate made a finding of guilt, entered a conviction, and made the consequential orders. She came to this result after conducting an analysis as follows:

“I have examined the evidence on record. The evidence of PW1 and PW2 is corroborated as to what happened on the fateful night. The two women say it was bright enough, with electric light and the full moon, and they were able to see the accused well and to identify him as the attacker. The accused was alone. He was arrested the following morning, and the complainant's phone was found in the house where the accused was, and he led the Police to where he had hidden the [shoal] and jacket, and these were recovered...PW3 says [he] arrested the accused and the phone was found, and [the appellant herein] also led them to recover the jacket and [shoal]. The evidence of PW1, PW2 and PW3 is, therefore, [mutually corroborative]. The accused's defence on the other hand is that of alibi...The evidence I am relying on is that of the prosecutor. PW1 and PW2 corroborate [each other], that they saw the accused in ample [lighting]. The items robbed from the complainant were also recovered from the accused. The [prosecution] evidence, weighed against the alibi defence, stands strong. I find [that] the prosecution have established their case against the accused beyond reasonable doubt. I find the accused guilty as charged, and convict him accordingly....”

The appellant challenged the trial Court's findings on the following grounds:

- (i) that the lighting conditions prevailing at the material time were not conducive to proper identification;
- (ii) that the exhibits recovered by the Police officers had not been found in the appellant's possession;
- (iii) that the trial Court had given no reasons for rejecting the defence evidence;
- (iv) that it was erroneous for the trial Court to hold that proof beyond reasonable doubt had been achieved.

The appellant elaborated these several points in written submissions which he brought with him into the Court.

Learned State Counsel, **Ms. Gateru**, contested the appeal, and urged that conviction be upheld, and sentence affirmed. She urged that there was evidence that the appellant, on the material night, had battered the complainant with a club, had stolen her property; and, of the personal injury sustained, there was evidence. She urged that both PW1 and PW2 had clearly seen the armed attacker at the material time, as there was sufficient lighting. **Ms. Gateru** submitted that PW1 and PW2 had borne no grudge towards the appellant, and the charge of robbery had been brought in good faith.

The direct evidence of perception, learned counsel urged, was further corroborated by the indirect evidence of recovery of stolen items, from the abode where the appellant stayed, and, in respect of some of these, from places to which the Police officers were led by the appellant himself.

Ms. Gateru questioned the veracity of the appellant's alibi defence, and urged that the same had rightly

been rejected by the Court.

The ultimate question before us is whether the appellant was inside a moving bus, on the Kisii-Nairobi road throughout the material night, or whether sometime, just before midnight, he was armed with a club, battering the complainant and robbing her of her personal effects, at Ngong, only a short distance from Nairobi.

The prosecution evidence is that there was abundant lighting at the material time, illuminating the appellant as he executed the robbery, and that both the complainant and her companion did clearly see this stranger bearing a cut-scar on the face. It is obvious that the evidence given by PW1 and PW2 is mutually corroborative, and bears no inconsistency. Moreover, the learned trial Magistrate, as the record shows, encountered no difficulty with demeanour on the part of PW1 and PW2, and she readily believed them. The Court did not, however, find the appellant's alibi evidence believable.

Besides, and for good measure, there is something else, in the shape of circumstantial evidence, to further corroborate the direct evidence of PW1 and PW2. It is not disputed that the Nokia 3210 cellphone which PW3 found at the abode where the appellant was arrested, was the property of the complainant which had been robbed from her the previous night. How did this cellphone come to be in that house? It would, certainly, have been brought by somebody staying in that house – either the appellant, or his brother, or some other person who was said to have been staying in that house. Whatever the case, however, that cellphone could not have been in the single-roomed house without this fact being known to at least **one** of the occupants of that room. Somebody had, besides, taken the deliberate step of extracting the original sim-card from the said cellphone. The act of bringing the cellphone into the room, and then fiddling with its accessories may, we think, be regarded as acts sufficiently-engaging to attract the attention of at least some of the occupants of the house. If this scenario is taken together with the fact that both PW1 and PW2 had earlier *seen* the appellant steal the said cellphone, then that direct evidence proves the hypothesis that the thief was the appellant herein; he is the one who brought the cellphone into the house where he was arrested; and the recovery of this cellphone links only *him*, to the robbery of the previous night.

There is, indeed, further indirect evidence to support the conclusion that the appellant herein was the robber. PW1, PW2 and PW3 gave evidence that the appellant herein is the one who *led to the recovery*, from the bush, of the complainant's jacket and shoal. How did he know that those items were in the bush? And how did he know which bush they were in? The fact that these personal items would be stored in the bush would suggest, we think, that there had been no opportunity to dispose of them, and that they had been out there for only a comparably short time. According to the complainant and PW2, the thief who had stolen those items was the appellant herein, and he had done so only *a few hours* earlier. That he should be the one leading to the place where those items were hidden, would confirm that he was the lone thief who had robbed them from the true owner. There was no cross-examination to shake the standing of the testimonies concerning the recovery of the complainant's stolen items.

We must conclude that the robber was none other than the appellant herein. We dismiss his appeal; uphold his conviction; reaffirm sentence as imposed by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 11th day of March, 2008.

J.B. OJWANG

G.A. DULU

JUDGE

JUDGE

Coram: Ojwang & Dulu, JJ.

Court Clerks: Huka & Erick

For the Respondent: Ms. Gateru

Appellant in Person