REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 281 of 2005
HENRY KURIA MUCHIRI ……..……...…… APPELLANT
versus
REPUBLIC…… RESPONDENT

(Being appeal against the conviction and sentence by G. K. MWAURA Principal Magistrate, in the Principal Magistrate's Criminal Case No. 1789 of 2004 at Muranga)

JUDGMENT

The appellant HENRY KURIA MUCHIRI was charged with robbery with violence contrary to Section 296(2) of the Penal Code. On being co nvicted the appellant preferred this appeal. This court is duty bound to re-evaluate the evidence of the lower court and in this regard the case of **OKENO vs REPUBLIC 1972 EA 32** is relevant. It was stated in that case as follows:-

"an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya VS R., (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala vs R.(1957) E.A. 570). It is not
the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post (1958) E.A. 424."

PW 1 the Complainant stated that on 27th December 2004 at about 8.30 p.m. while he was walking home from his place of work he was attacked by a group of people. He was hit on the head, strangled and wrestled to the ground. Whilst he was on the ground he was robbed of Kshs. 2200. He recognized the person who was strangling him as the appellant. He was able to note that he was wearing a black jacket. The appellant spoke to the other robbers confirming to them that the complainant had been overpowered. The complainant knew the appellant because they were from the same area and indeed they were neighbours. They had known each other since they were children. The complainant said that at the time of attack there was good moonlight. In his testimony he stated as follows:-

"though it was 8.30 p.m. there was good moonlight. I saw you through moonlight. There was moon that night. ……. there was actual moonlight. You caught me from the side. You choked me from the side not the back or front."

The complainant noted that the appellant was armed with an iron bar whilst his accomplices were armed with pangas. The complainant was injured on his head and his left eg. He was treated for those injuries and issued with a P3 form. PW 3 responded to PW 1 screams. On reaching the scene he found others who

also had similarly responded. He said that PW 1 was his neighbour. He found that he had been attacked and noted that he was injured. PW 1 informed them that the robbers had taken from him Kshs.2000. PW 1 told them also that he had identified the appellant as one of the robbers. PW 3 said that he knew the appellant since they were neighbours. On being cross examined this witness denied that the screams he heard were coming from the appellant's home. He did however acknowledge that the appellant's home was burnt. PW 4 also responded to the complainant's screams. He said that this was about 9 p.m. On reaching the scene he saw three men running away into the
bush. He was unable to identify them since it was dark. He gave PW 1 first aid then escorted him to his house and left his wife nursing him. This witness on being cross examined also denied that the screams he heard were coming from the appellant's home. Rather he said that the screams were coming from the road where PW 1 was attacked. PW 5 was a police officer
who stated that on 18th December 2004 whilst he was at Gatara Police Base the appellant appeared at the police base to report that some 5 people whom he knew had burnt his house. He reported that these people included PW 1. PW 5 booked that report and noted that the appellant had a deep cut on his head. The OCS then advised him to arrest the appellant. The trial court found the appellant to have a case to answer at the conclusion of the prosecution case. In his defence the appellant gave sworn testimony. He said that on 17th December 2004 at 9 p.m. while in his house with his employees three people who were his business partners came and hit the door very hard and entered into the house. They began to attack his workers and doused his house with paraffin and lit a fire. The appellant was cut with a panga by one of those persons. He recognized one of those persons who was attacking them as PW1. The reason for the attack he said was because these people said that he was defrauding his partners. The appellant after submitting in support of this appeal the state counsel responded by saying that there was doubt in respect of the prosecutions evidence. The learned state counsel Miss Ngalyuka submitted that since there was no reconciliation between the evidence of PW 1 and the appellant the doubt that two versions create should be considered in favour of the appellant.

We beg to differ with the submissions made by the learned state counsel. Although the appellant raised as a defence that at the time the robbery was taking place he was in his house which was under attack, he did not cross examine PW 1 in respect of his allegation that PW 1 was amongst the people who attacked him in his house. We however note that he did ask in
cross examination both PW 3 and 4 whether the screams they responded to were from his house. We have considered the evidence of PW 1 and the defence raised by the appellant and we form the view that the evidence of PW 1 is more believable than that of the appellant. PW 1 evidence was clear that he recognized the appellant who he knew since they were children
at the scene of the robbery. He recognized the appellant's voice. He described the jacket that the appellant was wearing and also described the position he was in when he attacked him. We are aware that the appellant bears no responsibility to prove his alibi. However having considered the evidence of PW 1 which was supported by PW 3 and 4 as opposed to the defence offered by the appellant we accept the evidence of PW 1 as being the correct version of the events that occurred between 8.30 and 9p.m. on that material date. In accepting that evidence we are aware that we need to caution ourselves in respect of the identification
evidence since conditions obtaining were unfavourable. That caution is properly captured in the case **JOSEPH LEBOI OLE TOROKE vs REPUBLIC Criminal Appeal No. 204 of 1987** where the court of appeal had the following to say:-

"it is possible for a witness to believe quite genuinely that he had been attacked by someone he knew well and yet still be mistaken. So the possibility of error is still there whether it be a case of recognition or identification."

PW1 stated that there was sufficient moonlight which enabled him to see the appellant who was strangling him as he was put to the ground. He knew the appellant from their childhood and therefore not only recognized him physically but also recognized his voice. In the case of **R. vs TURNBULL (1976)3 ALL.E.R** the court said:-

"recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in

recognition of close relatives and friends are sometimes made."

We have indeed warned ourselves of those dangers that can be made in recognition but we are satisfied that it is safe to rely on the evidence of PW 1. We therefore conclude by saying that the appellant's appeal has no merit and the same is therefore hereby dismissed.

DATED AND DELIVERED THIS 30TH DAY OF APRIL 2008.

MARY KASANGO
JUDGE

M. S. A. MAKHANDIA
JUDGE