REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 127 of 2005

PETER MATHIA KAMAU……..…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Being an appeal from the judgment of T.W. MURIGI,

Senior Resident Magistrate in Principal Magistrate's Court Criminal Case No. 1056 of 2004 at Murang'a)

JUDGMENT

The appellant was charged with robbery with violence contrary to ***Section 296(2)*** of the penal code. The particulars of charge were that on 25th October 2001 jointly with others who were not before court while armed with offensive weapon namely timber robbed the complainant of various items all totaling to the value of Kshs.690/- and at immediately or after such robber wounded the complainant. The accused person after trial before the lower court was convicted as charged and sentenced to death. He has now preferred this appeal against both conviction and sentence. As the first Appellate court, we are expected to submit the whole evidence of the Lower Court to a fresh and exhaustive examination. In so doing we must weigh the conflicting evidence and draw our own conclusion. Further in so doing we should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. See the case of ***OKENO vs R [1972] EA 32.*** The complainant PW 1 began in giving his evidence by stating that he knew the appellant since they had lived together at Maragi. The appellant was his friend and used to visit him. He said that on the 25th October 2001 he had finished burning charcoal with two other persons not in court. They had taken charcoal to Makuyu. After selling the charcoal he divided the proceeds of that sale Kshs.1030/-. He said that he had given those two other persons their due of the money since the charcoal burning business was his. After giving them their amount they all left Makuyu now also in the company of the appellant. With the balance of money that he had with him he purchased paraffin, half a kilo meat, sugar and tea leaves. He began to head home with those items. As he walked home the other persons passed him on a footpath commenting that he was walking very slowly. The complainant said that he continued walking at his own slow pace. After a while he did not see them any more. When he reached at the corner of the road he was hit on his neck and he fell down. He did not see who hit him but after falling he saw the appellant together with the other two persons. He described the evening as having moonlight. It was then about 9 p.m. At this point it is important to reproduce his words for better understanding of how the complainant identified those persons.

"***There was moonlight and I could see properly. After all I was with them and I could identify them. They were in the clothes they had with (sic). I cannot remember the clothes they were wearing but they had not changed……. They dragged me inside in dense place (sic) and took all the items I was addressing them by their names. They then decided that I should be killed since I identified all of***

them."

The complainant then stated that the robbers poured on his head paraffin oil and then set him ablaze. He was able to identify one of the persons not the subject of this appeal as the person who poured oil. He however was unable to identify the person who lit the match stick. He was unable to scream because he was aflame. He rolled himself on the ground until the fire went out. He was unable to walk and waited at that place until 6 a.m. when he called a person who was passing by. By then he said that he was naked. The person he called was PW 2. PW 2 with the help of a neighbour took him to the hospital where he was admitted for one year seven months. He said that the appellant and his companions ran away from the area after that incident. He again as he concluded his evidence stated that the appellant was a very good friend of his and was unable to believe that he could do such a thing to him. He said that he was issued with a PW 3 from the hospital. On being cross examined by the appellant he said that he did not tell PW 2 who had burnt him because by then he was in a lot of pain. He however said that he did tell the police the persons who had attacked him. He confirmed that he had no grudge against the appellant either before or after the incident. He stated as follows in respect of his identification of the appellant;

"***in fact you held me by shoulder and the rest on my legs and carried me to a thicket where you took my money."***

PW 2 stated that on 26th October 2001 at about 6a.m. he was leaving his home. He saw a man calling him using his hands. As he approached he noted that it was the complainant. He noticed that the complainant had been burnt. He also noted that he was naked. He rushed to their neighbour with whom they were able to take the complainant first to the Murang'a police station then to the District Hospital. He said that on that day he did not get to know who had attacked the complainant. It was two months later while the complainant was still in hospital that he came to know the identity of those that had attacked him. He confirmed that those robbers lived in the same area as he did and he would see them every day. After the incident of the complainant's attack he did not see the robbers in that area. He too confirmed that he had no grudge against the appellant. PW 3 a police man was on patrol on 30th June 2004. He was requested by the complainant whom he described as an old man to arrest the appellant who the complainant said had attacked him two or three years before. He said that the complainant was fearful of being recognized and therefore gave the description of how the appellant looked like and the clothes he was wearing. PW 3 with that information was able to arrest the appellant. PW 4 was the Clinical Officer who filled the complainant's P3 Form. He said that when the complainant was admitted at the hospital he was subconscious and unstable. He had sustained deep burns on the neck downwards to his chest and also to his left armpit up to the upper arm. He was admitted in hospital in surgical ward for ten months as he received treatment. He assessed the injury to be grievous harm. PW 5 confirmed that the appellant had ran away from the area he resided after the incident. At the close of the prosecution's case the appellant was found to have a case to answer. In his unsworn statement the appellant did not give evidence in regard to the night that the complainant was attacked. He stated that on 26th June 2004 he was at his work place where he worked as a carpenter. At about mid day he went to a customer's home to carry out some repairs. As he was at that customers place he saw policemen arresting drunkards and brewers in the area. He was arrested alongside those people and on being taken to the police station he had one of the officers telling the OCS that he had been arrested for obtaining money fraudulently by pretending that he could train young men in carpentry. He denied any involvement in the charge before him. The learned magistrate as stated before convicted the appellant. In his considered judgment the learned magistrate had the following to say;-

"***the complainant positively identified his assailants. In fact its on record that the accused was a good friend of him (sic) and he did not have a grudge against him and didn't understand why he did that to him. It is in the strength of the foregoing that I find the accused person guilty of the offence of robbery with violence contrary to section 296(2) of the penal code and convict him as prescribed by the law."***

As we consider our judgement we are aware that the complainant was a single identifying witness in unfavourable circumstances. The incident against the complainant occurred at 9p.m. For us to be able to rely on his evidence of identification of the appellant for the purpose of finding the appellant guilty it is

important for that evidence to be tested with the greatest care and must be absolutely water tight. **See the cases of *KAMAU Vs REPUBLIC (1975) E.A. 139, R Vs ERIA SEBWATO (1960) E.A. 174.***

"***It is also the law that whether or not a conviction on identification of a single witness can be maintained is a question of both law and fact. See Kamau Vs Republic (Supra).***"

The complainant described having very close contact with the appellant and his companion. They had been together during the day and had only parted company a short while before. He said that there was sufficient moonlight for him to identify them. Indeed it does seem that it is because he identified them and called them by name that they decided to set him on fire. He was able to notice that the appellant carried him by the shoulder as they took him to the thicket where they set him on fire. Having reproduced his evidence on identification earlier on in this judgment it does clearly show that the appellant was able to identify the robbers. The appellant in his cross examination did not question the complainant in respect of that identification. We find that the identification was sufficient to be relied upon in the conviction of the appellant and we do concur with the learned trial magistrate. We have considered the appellant's defence. As stated before the appellant did not state where he was on the day of the attack. The complainant said that he was on good terms with the appellant and that he did not hold a grudge against him either before or after the incident. That defence looked upon as opposed to the prosecution's evidence we find that it cannot sustain a defence to the charge. The complainant not only was he clear in his identification of the appellant but he was able two to three years later to identify the appellant which led to his arrest. Having re-examined the lower court's evidence we can find no reason to interfere with the finding of guilty of the appellant. Accordingly his appeal is dismissed.

Dated and delivered at Nyeri this 22nd May 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE