



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Criminal Appeal 74 of 2005

JEREMIAH GATWIKU KARIUNGIAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original Conviction and Sentence of the Senior Resident Magistrate's Court at Kerugoya in Criminal Case No.606 of 2004 by J.N. ONYIEGO – SRM)

J U D G M E N T

The appellant, **Jeremiah Gatwiku Kariungi** was convicted by the senior resident Magistrate at Kerugoya on one count of robbery with violence contrary to *section 296(2)* of the Penal Code and was sentenced to the mandatory death sentence. He was aggrieved by the conviction and sentence. Hence he preferred the instant appeal.

In a self-drawn petition of appeal the appellant faults the learned Magistrate for convicting him on the following grounds:-

- “1. That the trial court erred in law and facts in replying (sic) on the identification/recognition of a single witness whereas the circumstances surrounding the scene were not favourable for a positive identification.**
- 2. That the trial court erred in both law and fact in relying on the evidence of PW2 and 3 which was hearsay and no police officer appeared in court to give first report nor arrest.**
- 3. That the trial court erred in both law and fact in convicting me on insufficient evidence on prosecution side.**
- 4. That the trial court erred in both law and fact in rejecting my defence and no reasons were given as to why.”**

The complainant, **Elijah Mwaniki Ngarari** (PW1) was on 14th April, 2004 sent by his neighbour, **Amos Njogu Nyamu** (PW2) to Kutus to buy sugar for him. PW2 apparently operates a shop. He gave PW1 ksh.3,000/= for that purpose. He also gave him his bicycle make Avon to ferry the sugar. PW1 proceeded to Kutus but found that the sugar cost more than the Ksh.3,000/= he had been given. He decided to come back. On his way and on reaching Kimoni bridge he came across 4 people, among them was the appellant whom he knew very well as they came from the house, presumably, same village. Time was approaching 7pm. He was stopped by the four people who ordered him to remove his shoes and shirt. He complied. He was then ordered to surrender the cash on him. By then they had already taken

possession of the bicycle. When PW1 called out the name of the appellant, Jeremiah, he was thrown into the river. While making the demands apparently, the appellant had placed a knife on the throat of PW1. PW1 managed to get out of the river and proceeded and reported the incident to PW2 and PW3. He was half naked and was crying. He gave the name of the appellant as being among those who robbed him. PW2 knew the appellant before as he had married from his village. PW2 then contacted the Assistant Chief and agreed to meet at Rukenya area. In the meantime PW1, PW2 and PW3 proceeded to the scene where PW1 alleged that the robbery took place. PW3 a neighbour of sorts had been requested by PW1 and PW2 to assist them in pursuing the robbers. They proceeded to the bridge where they encountered a group of people and when they flashed their torches at them, they fled. However PW3 managed to identify the appellant among those who fled. He was a person he knew very well. The trio then proceeded and met the Assistant chief, **Joseph Gitari Kaburu (PW4)** at Rukenya. They jointly went looking for the appellant at his home. They did not find him. That was about midnight. They then proceeded to report the incident at Kutus police station. The following day they arrested the appellant and took him to Kutus police station. It was then that he was charged with the instant offence.

Put on his defence, the appellant in an unsworn statement of defence stated that on the material day he woke up and went about his daily chores as a mechanic and in the evening went to sleep. The following day, he proceeded to Kutus to visit a colleague whom he found planting maize. It was then that he was arrested. He denied having robbed PW1. He called in aid his brother who testified that sometimes in June, 2004 he left his home to visit his parents. On reaching there, he was informed that the appellant was at Kutus and decided to go and see him. When he reached Kutus, he was informed that his brother had been arrested on account of stealing a bicycle.

At the hearing of the appeal, the appellant was represented by **Mrs Rika**, learned counsel. Counsel elected to pursue only one ground of appeal i.e. ground one in the petition of appeal. Counsel submitted that the trial court erred in convicting the appellant on the evidence of a single witness who purported to recognize and identify the appellant. That at the time when the purported robbery occurred it was between 7 and 7.30 pm and yet PW1 did not say how he recognized the appellant. PW1 also claimed that he recognized the voice of the appellant but does not say the words that the appellant uttered that enabled him to recognize him. Finally counsel contended that the circumstances of the robbery were such that PW1 must have been so terrified as to be incapable of identifying anyone. He could have been genuinely mistaken in his identification of the appellant.

Mr. Orinda, principal state counsel opposed the appeal. He submitted that there is no law stopping court from relying on the evidence of a single identifying witness. All the court needs to do is to warn itself. The robbery was committed at about 7pm. It was still reasonably bright for one to see and recognize someone he knows. Counsel further submitted that PW1 consistently told PW2, 3 and 4 the name of the appellant as having been a member of the gang of robbers which name surprisingly coincides with the appellant's name. There was therefore no possibility of mistaken identity.

This being a first appeal, it is the duty of this court to reconsider the evidence, evaluate itself and draw its own conclusions but making allowances for the fact that the trial court had the advantage of hearing and seeing the witnesses. (**Okeno VR (1972) E.A.32**).

The entire evidence that was before the trial court clearly shows that the appellant was convicted on the evidence of a single witness on identification and or recognition. It is trite law that when the evidence before a court of law is mainly that of a single witness on identification, the court has to be extra careful before entering a conviction. That need for extra care is not reduced even when the evidence is that of recognition for there are cases where even people who know each other may still make mistakes. In such circumstances, the court needs to see if there is other evidence to lend credence as to guilt, before it can enter a conviction. See generally **Abdalla Bin Wendo and another VR (1953) 20 EACA 166, R V Turnbull 3 ALL E.R. 519 and Kiarie V Republic (1984) KLR 739**. In this latter case the court of appeal was emphatic that where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction. In the same case the court again stated that it is possible for a witness to be honest but mistaken and a number of witnesses to be all mistaken. We may also add and it has been held severally that although recognition is more reliable than

identification of a stranger, such evidence of recognition should be tested carefully seeing that mistaken recognition of close relatives and friends are sometimes made (Anjononi and others V the Republic (1980) KLR 59 and Wamungi V Republic (1989) KLR 424).

In this case, the appellant was recognized by PW1 as one of the assailants. He disputed the same evidence and stated in his defence that he was nowhere near the scene. In effect he raised the defence of alibi. He called up his brother as a witness to back him up. However the testimony of his brother did not at all advance the appellant's defence even for an aota. He came to see the appellant at Kutus only to find that he had already been arrested.

The offence took place as it was approaching 7.P.M. According to PW1 it was not yet dark. He was able to see and positively recognize the appellant among the assailants. He was a person well known to him as they come from the same village. Indeed it was him who demanded the money from him. Having recognized the appellant, he called out his name. Apparently and fearing that one of them had been recognized, the assailants then threw PW1 into the river, whether it was to drown him so that he could never live to tell, what transpired we shall never be able to know. When the appellant managed to escape, he was able to tell whoever cared to listen that he had been robbed by a group of people at the bridge who included the appellant. He told PW2, PW3 and PW4. This was soon after the incident. Much as the appellant claims that the circumstances obtaining during the attack on PW1 were such that he could ill afford to observe and identify any of the assailants, we are however on the recorded evidence unable to agree with that proposition. The attack on PW1 was not sudden. PW1 was pushing his bicycle when he met the gang at the bridge. The gang then ordered him to stop. Thereafter he was ordered to remove his shoes and shirt. The gang then took possession of his bicycle. The gang thereafter demanded money from him. It should be noted that as all these was going on no violence was being visited upon PW1. PW1 had even opportunity to call out the Christian name of the appellant. Incidentally that name coincides with the appellant's Christian name herein. It was then that he was pushed in the river. The totality of the foregoing is that PW1 had ample opportunity to observe the assailants and was able to identify the appellant whom he knew very well. There is nothing on record to suggest that at 7 p.m it was so dark that PW1 could not have seen and or recognized the appellant a person well known to him. Indeed PW1 was emphatic under cross-examination by the appellant that it was not dark. On our own we are satisfied that the time of the alleged robbery being 7 p.m, it was not so dark as not to disable PW1 from recognizing the appellant, a person whom in any event knew very well. This finding is buttressed by the conduct of the gang after they realized that one of them had actually been recognized by PW1. They threw PW1 into the river. PW3 confirmed that when he saw PW1 he was half naked and wet, thereby confirming PW1's story that he had been threw into the river. Was the intention of throwing PW1 into the river after he had recognized the appellant was with a view that harm may come his way and not to live to tell what transpired? Perhaps!

The appellant also faults the evidence of alleged voice identification. That the words uttered by the appellant that assisted PW1 to recognize the appellant's voice were not disclosed at the trial. The complaint is valid. However there is no doubt that there was an exchange of sorts between the appellant's gang and PW1 when they were ordering him to remove shoes, shirt and money. However as we have already indicated elsewhere in this judgment, PW1 visually identified the appellant in the gang as it was not dark. Evidence of voice identification was mere secondary.

The learned Magistrate was acutely aware of the dangers of acting on the evidence of a single identifying witness in difficult circumstances. Listen to what he said,

“.....I have warned myself of the dangers of convicting on the evidence of a single witness and in this case I am satisfied that there will be no miscarriage of justice. Superior courts have severally upheld the evidence of a single witness to convict (sic)....”

Still on the same issue the learned Magistrate went on to cite relevant court of appeal authorities to wit Lawrence Gather Chege & Anor V Republic, CR.APP.NO.75 OF 1985 and Gerald Ndeirtu Ngare V Republic, CR.APP.NO.32 OF 1985. The totality of the foregoing is that the learned magistrate had the correct legal principles in mind when he was considering the evidence of identification of the single

witness (PW1) and we cannot fault him. In any case if there is any other evidence linking the appellant to the crime, it is found in the testimony of PW3. He testified that when he in the company of PW1 and PW2 went back to the bridge, they found a group of people and when they flashed their torches at them, the group, which included the appellant fled. However PW3 managed to recognize the appellant whom he knew very well. That evidence was not challenged or contested. Was it coincidental that the appellant was found at the same scene which a while ago he had been accused of robbing PW1 and on being flashed with a torch he ran away with the group of people? We do not think so.

The learned Magistrate observed the demeanour of the witnesses who testified and in particular PW1. He observed that the evidence of PW1 was consistent and from his demeanour appeared to be truthful, honest and reliable. This is a finding on the credibility of a witness. An appellate court can only disturb that finding if it is satisfied that no reasonable tribunal would make such a finding or it is shown that there existed errors of law. See

Republic V Oyier (1985) KLR 353 and Ogol V Muriithi (1985) KLR 359. Nothing has been brought to our attention that would remotely suggest that the learned Magistrate went on a different tangent in determining the credibility of PW1.

Finally and as correctly pointed out by the learned Magistrate, there is nothing to suggest that both PW1 and PW2 would have framed the appellant with the case. There was no grudge that was alleged and or proved between PW1 and the appellant much as they come from the same village.

On our part, we are satisfied that the evidence of the recognition of the appellant by PW1 was free from any possibility of error and the appellant was therefore properly convicted. In the result we dismiss the appeal.

Dated and delivered at Nyeri this 15th May, 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE