REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Criminal Appeal 59 of 2005

JUSTUS AURA ANDANJE……. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

[From original conviction and sentence in Criminal Case number 1361 of 2004 of the Senior Resident Magistrate's Court at Siaya]

CORAM

Mwera, Karanja J. J.

Musau for State

Court Clerk – Raymond/Laban

Appellant in person

JUDGMENT

The appellant Justus Aura Andanje was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code, in that on the 20th May 2004, at Anyiko Sub location within Siaya District of the Nyanza Province, jointly with others not before court while armed with pangas, robbed Francis Okwiri Anyanga of his bicycle make Raley valued at Kshs. 3,000/=, a torch valued at Kshs. 70/=

and cash money Kshs. 70/= totalling to Kshs. 3,140/= and at or immediately before or immediately after the time of such robbery wounded the said Francis Okwiri Anyanga.

After the trial before Ag. Principal Magistrate (F. M. Omenta) at Siaya, the appellant was convicted and sentenced to suffer death. He has appealed against the conviction and sentence on the basis of the following grounds:-

(i) That the trial Magistrate erred when he failed to warn himself when dealing with a case of recognition yet conditions for positive identification were not favourable.

(ii) That the trial magistrate erred by accepting the hearsay evidence adduced by PW2.

(iii) That the trial Magistrate did not warn himself of the danger of convicting on contradictory statements between the complainant and the doctor.

(iv) That the Magistrate failed to note that the prosecution failed to prove the case beyond reasonable doubt i.e. there is no investigating officer yet he is the essential witness in a case of this nature.

(v) That the trial Magistrate failed to consider the appellant's defence which was strong enough to secure an acquittal.

At the hearing, the appellant appeared in person and argued that he was not properly identified by the complainant who failed to state the intensity of the light and how far he (complainant) was from him (appellant). He said that he was arrested on the 14th October 2004, while the offence was committed on 20th May 2004. He said that if he was a known person he ought to have been arrested much earlier. He said that an assistant chief was given his name but was not called to testify and indicate whether or not he received a first report in which his (appellant's) name was mentioned. He said that the complainant is his neighbour but did not give his name to the police. He said that it was not the truth that he asked for forgiveness from the complainant and there was no witness to confirm the fact.

The State was represented by the learned Senior Principal State Counsel, Mr. Musau. He said that even if the evidence of identification was by a single witness in the night the witness was nonetheless clear on the identity of the appellant. He acknowledged that the trial magistrate did not warn himself but this did not occasion a miscarriage of justice. He said that a first appellate court may determine a fresh issues raised and see whether the failure by the trial magistrate to warn himself occasioned miscarriage of justice. He said that the evidence of PW2 was not hearsay as he was called to testify on the fact that he had been informed by PW1 that the appellant was the person who robbed him (PW1). He said that there was no contradiction in the evidence of PW3. He said that PW1 showed that he saw the appellant with the help of a torch light and that he (appellant) was well known to him, a fact not disputed by the appellant.

The learned State Counsel accepted that the trial magistrate failed to consider the defence but this did not lead to a failure of justice. He contends that the appellant was convicted on sound evidence.

At this point our duty is to re-examine and re-evaluate the evidence with a view to arriving at our own findings and conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. The prosecution called a total of four witnesses namely, the complainant, Francis Okwiri Anyanga [PW1], a tinsmith Seth Anyango Ojuang [PW2], a police officer P. C. Leonard Wamalwa (PW3) and a Clinical Officer Charles Mbuya Ekhalia [PW4]. Its case was that on the material date at 8:00 p.m the complainant had closed his kiosk and was heading home riding his bicycle, which had a headlight. He then saw a group of four people running towards him and one had a torch. The group moved off the road as he approached them but on reaching them his bicycle stalled. He alighted to check the problem and was in the process attacked by the four people, injured and robbed of his property including the bicycle, cash Kshs. 70/=, keys and kiosk goods worth Kshs. 22,000/=. The incident was reported at the Yala Police Station. The appellant was later arrested and charged.

The defence case was that the appellant is a mason –cum- farmer and was arrested on the 14th October

2004, while at home with his parents. He was then charged with the present offence after being incriminated by the complainant out of malice and due to a shamba dispute and grudges between him and the complainant's family. He was one of those who assisted to take the complainant to the Yala District Hospital and while there police officers arrived and as an afterthought an allegation was made that he had attacked the complainant. He was surprised, as he had lived peacefully without being involved in any crime. He was arrested five months after the commission of the offence and had never gone into hiding.

After the presentation of both the prosecution and defence cases it emerges that the basic issue arising for determination is the identification of the appellant as having been one of the four people who attacked and robbed the complainant. The offence was not disputed and was in any event, established by the evidence of the complainant (PW1) when he stated that he was attacked by a group of four people armed with a panga who injured and robbed him off his property. The necessary ingredients of Section 296(2) of the Penal Code were clearly established.

As regards the evidence of identification, the complainant said that the offence occurred at 8:00 p.m. This was during the night. The complainant said that he saw four people running towards him and one had a torch. They moved off the road as he approached. He reached where they were and his bicycle could not move on. He alighted to check what was holding the bicycle and was in the process kicked. He fell down and so did his torch and bicycle. The bicycle fell down on him and was lifted up by one of the attackers. Another attacker aimed a panga at his head. He raised his left hand to block the panga and was cut on the left thumb. He raised alarm and was further cut on the left side of the forehead and the head to silence him. He kept quiet but prior to the attack had already identified the appellant whom he had seen during the day with a bandage on the left hand and a thread cap. He did not identify his accomplices. He had lost consciousness and regained it while at the Yala Sub –district hospital where the appellant pleaded for forgiveness from himself (complainant). In cross-examination, the complainant stated that he managed to identify the appellant with the help of the bicycle's torch light. He said that he gave the appellant's name to the police. He said the appellant was his neighbour.

The tinsmith Seth (PW2) said that on the 20th May 2004 at around 8:00 a.m. he was at home. He then went to his place of work at a place called Jua Kali and as he was sweeping picked some receipts bearing the complainant's names and a purse containing his identity card. He became suspicious and proceeded to the complainant's house. The complainant's wife told him that the complainant did not arrive home. He went to the complainant's kiosk and found it closed. He went back where he had collected papers and looked around. He saw a vest hanging on the window of a nearby church. He went to the church and saw bloodstains. He found the complainant inside the church with bloodstains all over the body but alive. He reported to the police and later rushed the unconscious complainant to the hospital. He was later told by the complainant that one of the attackers was the appellant.

In cross-examination, Seth [PW2] confirmed that he was not at the scene of the offence. He talked of the 20th May 2004 at around 8:00 a.m but we think that there was an error in the recording of the date. His evidence suggests that what he witnessed occurred on the following day after the attack on the complainant. The correct date should be 21st May 2004, and not 20th May 2004, when the offence occurred.

P. C. Leonard Wende Wamalwa [PW3] stated that he was on duty on 14th October 2004, when the complainant came to Anyiko Police Post saying that he wanted a suspect called Aura arrested. He stated that the complainant alleged that he had met a group of people and when he (complainant) flashed his torch was able to identify the appellant. P. C. Wamalwa and his colleagues proceeded to the home of the appellant and arrested him. The clinical officer's [PW4] evidence was merely to show that he examined the complainant and confirmed that he had suffered bodily injury after being assaulted on the material date of the robbery.

The appellant's defence was all along a denial and a contention that he was maliciously implicated due to standing grudges and land dispute involving his family and that of the complainant. He said that the complainant is very well known to him and that they come from the same village. He said that he was among those who assisted to take the complainant to the hospital. He said police officers came to the

hospital and asked the complainant whether he knew the assailants. It was then that it was alleged that he had attacked the complainant.

From all the foregoing, it is apparent that it is only the complainant [PW1] who alleged that he was able to identify the appellant as one of the attackers. The offence occurred in the night thereby creating uncertainty as to whether there existed favourable conditions for the identification and/or recognition. However, the complainant indicated that there was some light at the scene either coming from the headlamp of the bicycle or from a torch in his possession. He was not clear as to the source of the light. He said that he had identified the appellant prior to the attack but did not say how. He did not say that he identified the appellant as he approached the four people who by this time were off the road. He did not say that he identified the appellant when he arrived where the four people were. He said that his torch and bicycle fell down after being kicked and before he was rendered unconscious by the vicious attack on him. He did not say that when his torch fell down its flash was directed at the appellant or that the light from the bicycle headlamp was directed at the appellant to enable positive identification. He said that he managed to identify the appellant with the help of the bicycle's torchlight. He also said that he flashed his torch and saw the appellant. He did not say at what point his torch was flashed to enable him see and identify the appellant. He talked of a bicycle torchlight, which is something we do not understand.

In our view, the complainant's evidence of identification was rather shaky and full of uncertainties such that it ought not have been relied upon without other support evidence whether direct or indirect. If it had to be relied upon in the absence of support then the trial magistrate ought to have warned himself of the danger of a possible wrongful or mistaken identification particularly considering that the evidence was that of a single witness in circumstances which may not be described as favourable. Perhaps, if the trial magistrate had taken consideration of the defence raised by the appellant he may have found a real need to warn himself before acting on the complainant's sole evidence of identification.

The appellant talked of malice and existing grudges between his family and that of the complainant. He was not required to prove his innocence. He was merely creating doubt as to the quality and credibility of the evidence adduced against him. It was unfortunate that the trial magistrate made the following remarks

"The accused has denied committing the offence for the sake of it. His defence is a mere fabrication and I shall dismiss it as such".

The failure by the trial magistrate to warn himself and his failure to give due consideration to the defence raised did in our view occasion a miscarriage of justice.

We deem it appropriate herein to restate that in cases where the evidence alleged to implicate an accused is entirely of identification by a single witness that evidence must be absolutely watertight to justify a conviction (see Republic =vs= Eria Sebwato [1960] EA 174). Evidence of a single witness respecting identification in difficult circumstances must always be tested with the greatest care.

In Abdala bin Wendo & Another =vs= R (1953) 20 EACA 166 the court said:-

"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error".

In Roria =vs= R (1967) E. A. 583 the court said:-

" That danger (i.e. of possible wrong identification) is of course greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all

circumstances it is safe to act on such identification".

All the aforementioned cases emphasise the need of a trial court to exercise great care and caution before convicting on the basis of the evidence of identification of a single witness in difficult circumstances. The Roria case in particular emphasises the danger of possible wrong identification. Under the circumstances, the court should undoubtedly warn itself of these dangers in appropriate cases in order that the record reflects awareness thereof.

Regarding an accused's defence statement whether or not made on oath, attention must be drawn to what was stated by the Court of Appeal in the case of HENRY KIMATHI =vs= REPUBLIC C/APP 24/02 AT NYERI. The court held:-

"In a criminal trial, the evidence tendered by the accused should be considered by the court before determining the guilt or innocence of a person. That is to say the evidence is of vital importance and should be considered by a court carefully, failure of which it is fatal to convict after disregarding his defence. The consequence of this is that the accused person should be set free".

We have examined the facts and law applicable in this case and in finality, have to state that the appellant's conviction cannot stand. Consequently, the conviction is quashed and the sentence set aside. The appellant shall be released forthwith unless otherwise lawfully held.

Dated, signed, and delivered at Kisumu this 29th day of July 2008

J. W. MWERA **J. R. KARANJA**

JUDGE **JUDGE**

JRK/aao