REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 72 of 2008

FORMERLY MOMBASA CRA NO. 97 OF 2005

(From original sentence and conviction in Criminal Case No. 39 of 2005 of the Senior Resident Magistrate's Court at Kilifi before C. O. Obulutsa –SRM)

MOHAMED HASSAN ABDUL……….…..………..…………APPELLANT

VERSUS

REPUBLIC …………………………………...……..………PROSECUTOR

JUDGMENT

The appellant, Mohammed Hassan Abdul alias Niko, was charged with robbery with violence contrary to section 296(2) of the Penal Code before the Senior Resident Magistrate, Kilifi. He was found guilty as charged and sentenced to death as by law provided. He appealed to this court against both conviction and sentence.

The particulars of the charge against the appellant were that on the 10th day of December 2004, at about 10.20pm at Mtwapa Township in Mtwapa Location within Kilifi District of the Coast Province, jointly with another before the court, while armed with a panga and a knife, he robbed MKD of a handbag containing one mobile phone make Siemens A35, 2 silver rings, two wallets, national identity card, a bunch of keys and cash Kshs. 5,030/= all valued at Kshs. 12,300/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said MKD. As the first appellate court, we are aware that it is our duty to re-evaluate the evidence and make our own assessment while bearing in mind that we do not have the advantage of seeing the witnesses adduce their testimony as did the trial court.

The key prosecution witness was the complainant herself, M KD (PW1), who told the court that on 10th December, 2004, she was heading home from work. Near "the house" she did not say which house) she met the appellant, who she knew as Nicholas, in the company of two others. He said the complainant should give all she had, and threatened her with a panga which he had. The complainant started running away, hit herself against a wall and fell down. The attackers then took her handbag and paper bag which contained her clothes. She could see him clearly as there were security lights nearby.

The witness further told the court that she had known the appellant since childhood. She reported the matter to the police and mentioned him by name. She next saw him at the police station after his arrest. Nothing was recovered. In cross-examination, she said that according ot the investigation charge, her report to the police indicated that she mentioned the appellant by name. Whereas she was alone on her way home, the appellant was with a fellow man. She denied the appellant's suggestion that he was in Nairobi at the material time, and further stated that the appellant did not attempted to rape her. She also asserted that she knew the appellant but not his parents, and that she had grown up with him as a sister in the neighbourhood since she knew him.

The second prosecution witness was one Mutunga, a police officer at Mtwapa Police Station. He was one of the three

officers who arrested the appellant. In cross-examination, he said that they did not get the appellant with any weapon. Even after escorting the appellant to his family, they returned without any recovery.

Police constable Okello (PW3) testified that he was at Mtwapa Police Station when the complainant reported being attacked by two people armed with pangas and knives. She said that she knew one of them as Nico. Subsequently the appellant was arrested over a different issue and pointed out by the complainant as the suspect. However, nothing was recovered.

In a sworn statement in his defence, the appellant said that he knew the complainant and they had grown up in the same area. In December 2004, he was in Nairobi from the 5th, and came back on 10th January 2005. He did not know what happened to her on 10th December, 2004. He was not cross-examined on that statement.

Mr. Ogoti supported the conviction and death sentence. From the above account of events, we note that the time of the alleged attack was 10.30pm. This was at night, and therefore the identification of the appellant takes the centre stage. The complainant said that she could see the appellant clearly as there was security light near there. This evidence does not disclose the nature of that light, how bright it was, its distance from the appellant, and its close proximity to the appellant. In the case of MAITANYI V REPUBLIC [1986] KLR 198, the Court of appeal had this to say on identification –

"*It must be emphasized that what is being tested is primarily the impression received by the single witness. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve that may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into…"*

In the instant matter, none of these matters were inquired into. We cannot be certain, therefore, that the quality of the security light to which the complainant testified was such as would facilitate the positive identification of the appellant.

Apart from identification, the complainant also said that she grew up together with the appellant as a sister in the neighbourhood since she knew him. This suggests that the complainant did not merely identify the appellant, but actually recognized him. However, she could have been mistaken, as sometimes people have been known to mistake the identity of their own relatives. In R V turnbull [1976]3 ALL er 547, referring to that aspect of identification and recognition, Lord Widgery CJ, said at page 552-

"…*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"*

If mistakes in recognition of close relatives and friends are sometimes made, then many more such mistakes are certain to be in recognition of those that we may think we know fairly well because, for instance, we have lived long with them in the same neighbourhood. We therefore take the view that the complainant could have been mistaken about the identity of the appellant.

In his defence, the appellant raised an *alibi* which was not challenged by the prosecution by cross examination or otherwise. This introduces into the mind of the court a doubt that the *alibi* may not be unreasonable, and if it is true, then the complainant would have been clearly mistaken as to her apparent recognition of the appellant.

In his judgment, the learned trial magistrate observed that the appellant, who had a copy of the complainant's statement from which he cross examined her, did not challenge the fact of his name being mentioned in the statement. In a criminal trial, care should be taken to ensure that an accused person is not called upon to prove his innocence. The law presumes him to be innocent until proved guilty, and the burden of proving that guilt beyond reasonable doubt rests exclusively on the prosecution throughout the trial.

On account of the foregoing, and upon our re-evaluation of the entire evidence, we differ with the learned trial magistrate especially on the issue of the identification or recognition of the appellant. We have no doubt that the complainant honestly thought that her attacker was the appellant. However, in the circumstances we have set out on identification and recognition, she could have made an honest mistake.

We therefore allow the appeal, quash the conviction and set aside the death sentence. We also order that the appellant be set free forthwith unless she is otherwise lawfully held.

Dated and delivered at Malindi this 24th day of September 2008.

L. N. Njagi H. A. Omondi

JUDGE JUDGE