REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 188 of 2003

JOHN NGABA KABUU ……APPELLANT

VERSUS

REPUBLIC …….. RESPDONDENT

(From original conviction and sentence in Criminal Case No.2977 of 2002 of the Chief Magistrate's Court at Thika – M. Kiptoo SRM)

JUDGMENT

The Appellant, *JOHN NGABA KABUU* was convicted on one count of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death being the only sentence authorised by law. He now challenges that conviction and sentence in this Appeal.

The Appellant challenges his conviction and sentence in the main on the following grounds: - That the conviction was based on uncorroborated evidence that was full of contradictions, that the burden of proof was erroneously shifted to the Appellant by the trial Magistrate, that the circumstances attending to the alleged commission of the offence were not conducive to proper identification and finally that the Senior Resident Magistrate erred in believing the unbelievable that the Appellant could have kept in his house the keys and part of the jacket which would incriminate him.

The Prosecution case was that on 20th July, 2002 at 7.30 p. m. the Complainant was in a bar at Mutate Trading Centre. After taking three sodas, he left for home at abut 8.45 p. m. On the way he heard footsteps from behind and sensing danger he decided to run back towards the shopping centre as it was nearer than his house. In the process he saw 5 people running towards him. He saw the person who was leading the team. According to the Complainant, that person was the Appellant. He saw him clearly as there was bright moonlight. The Appellant had a cap and had seen him earlier in the same bar at the shopping centre. The group of five pursued the Complainant and got up with him and proceeded to hit him with a blunt object until he fell down. The gangsters then forcefully tore his jacket and took away Kshs.4,500/= and office keys and then left. The Complainant was able to collect himself and proceeded home. At home he informed his wife and children what had transpired. They reported the incident at the nearby Administration Police Post and they were told to go back the following morning. The following morning the AP's visited the scene of crime and recovered a cap. The Complainant was able to identify the cap as belonging to the Appellant. They later proceeded to the house of the Appellant where a piece of the jacket was recovered under the coffee table. The Complainant's office keys were similarly recovered on top of the table. According to the Complainant, the piece of the jacket so recovered was the one torn from his jacket during the

robbery. The Appellant was then arrested and charged accordingly.

Put on his defence, the Appellant, in unsworn statement stated that on the material day, he went to the shopping centre at about 2 p. m. He left the shopping centre at about 7 p. m. and went home. He slept at about 9 p.m. The following day, he was awaken by his wife who told him that there were Police officers who wanted to see him. He went out of the house and found the Police officers who asked him his name. As he returned to the house, one Police officer followed him from behind and handcuffed him and took him to the Police station. On the way, they met the Complainant standing besides the road with his brother near his house. The Complainant informed the Police that he was the one. The Appellant was then taken to the Police station and after 15 minutes, he was transferred to Gatundu Police Station and locked up. On the 5th day he was then charged in Court with the offence. To the Appellant, the Complainant framed him with the case because of the personal grudge he had against him. The Appellant alleged that the Complainant was not happy that the Appellant was having an affair with his daughter.

When the Appeal came up for hearing, the Appellant was represented by Kiania Njau, Learned Counsel whereas the State was represented by Mrs. Kagiri, Learned State Counsel. In urging the Appeal, Mr. Kiania Njau submitted that the evidence of PW1 and PW2 was uncorroborated. The behaviour of the Complainant in running towards the gangsters when he heard the footsteps was strange and abnormal behaviour.

On ground 2, the trial Magistrate, according to Learned Counsel shifted the burden of proof to the Appellant when she drew adverse inference of the Appellant's failure to call witnesses to support his defence. Counsel further pointed out that the identification and or recognition of the Appellant was by a single witness. The evidence of identification was not at all corroborated with any other circumstantial evidence. Accordingly the possibility of mistaken identification and or recognition cannot be ruled out absolutely. Counsel submitted further that the Learned Magistrate did not warn herself of the dangers of convicting the Appellant on the evidence of a single identifying witness. Counsel further pointed out that the Learned Magistrate did not make the necessary inquiries as to the State of light prevailing. To Counsel the circumstances obtaining at the scene of crime were not favourable for a positive identification.

In support of these submissions, Counsel drew the attention of this Court to the cases of *REGINA VS TURNBULL (1976) 3 ALL ER 549* and *WAMUNGA VS REPUBLIC (1989) KLR 42*. Finally Counsel took issue with the inability by the Police at Nembu and Gatundu Police Stations to produce the OB for 21st July, 2003. The OB would have shown that the keys and a piece of the jacket were not recovered from the Appellant's house. As the reasons advanced by the Police for their inability to avail the OB's were not convincing, Counsel invited us to draw the necessary but adverse inference that the evidence in the OB would have exonerated the Appellant.

Mrs. Kagiri, Learned State Counsel opposed the Appeal. Counsel submitted that the Appellant was positively identified at the scene of crime by the Complainant with assistance of moonlight. That the Appellant was well known to the Complainant. Counsel pointed out that the Appellant had a cap which was later recovered at the scene of crime. The said cap was positively identified as belonging to the Appellant. Counsel further submitted that the other evidence connecting the Appellant with crime was the recovery of a piece of PW1's jacket that had been ripped off during the robbery, in the Appellant's house. Similarly the Complainant's office keys were recovered in the Appellant's house by PW5. No explanation was forthcoming from the Appellant as to how he came by those items.

Counsel maintained that the evidence of identification coupled with the description of what the Appellant was wearing was corroborated by the evidence of the bar owner. Further the recovery of the items belonging to the Complainant in the Appellant's house and lack of explanation as to how the items found themselves in the house irresistably pointed to the

Appellant as the person who committed the offence. On the failure by Police to produce the OB's Counsel submitted that the OB would ordinarily reflect the charges that are likely to be preferred against the suspect and not the details of the evidence.

It was held in the Court of Appeal case of *DANIEL MUHIA GICHERU VS REPUBLIC, CA NO. 74 OF 1991 (unreported)*

It has been said down the years that:-

"……*It was the duty of a first Appellate Court to reconsider the evidence, evaluate it itself and draw its own conclusion on it in deciding whether the Judgment of the trial Court should be upheld or overturned – see OKENO VS REPUBLIC (1972) EA 32. In doing so, the Court must bear in mind that it did not see witness testify as to be able to comment on demeanor of the various witnesses at the trial….."*

It would appear that the Appellant's conviction was predicated upon the evidence of identification as well as the finding in his house a piece of the Complainant's jacket and office keys soon after the robbery. Commenting on these two pieces of evidence the Learned Magistrate stated:-

"….*These are two pieces of evidence already links the accused to the said offence. If accused was not involved as he would want to convince the Court, where could these 2 pieces of evidence have found their way into his house. Infact the Complainant's jacket was produced as exhibit too and it shows where the piece had been torn off…."*

Dealing first with the question of identification, we note that the offence was committed at night and that only PW1 was a witness to the crime. Although PW3 testified as to seeing the Appellant in his bar, he was not at the scene of crime. Thus PW1 was a single identifying witness. As it was at night, the question that arises is how PW1 was able to recognise and or identify the Appellant. He testified that he was able to do so by the moonlight which, according to him was bright. However and as correctly pointed out by the Counsel for the Appellant, the trial Court did not make the necessary inquiries regarding the state of light. Apart from the bold statement of PW1 that the moon was bright, there was no other evidence to back up that statement. Indeed PW3 who had been with PW1 shortly before he was attacked never mentioned anything about the moon in his testimony. Further even if there was moonlight, the Court ought to have made its own inquiries as regards as to whether it was full moon, half moon, whether there were clouds, the position of the moon in relation to the Appellant and period under which the Appellant was under observation by PW1. It does appear to us that the issue of the moonlight is far fetched. Indeed under cross-examination by the Appellant, PW1 did state:-

"…….*We went back to the scene to look for my money and the office keys. We had a lantern and a torch. The lantern and the torch was not enough light (sic) as usual….."*

Surely if the moonlight was that bright would it have been necessary to use the lantern and the torches to look for the Complainant's lost items at the scene of crime. Further PW1 states that even the light from the lantern and the torch was not sufficient to enable them see the items. This would seem to suggest that it was very dark on that night contrary to the evidence of PW1.

It is also apparent, that the offence was committed very fast and brutally. PW1 testified thus:-

"….*The incident took about 2 minutes. I was not expecting to encounter such an incident……I was in great shock. I can't tell how long I was in shock. Since i was also in great pain I was not able to identify the others but I was able to identify you….."*

As to the manner of attack, PW1 stated:-

"…..A few metres from the trading centre I heard footsteps behind me. I sensed danger and decided to run for my life. My home was about 300 metres away. I decided to go back to the trading Centre which was nearer. I saw 5 people running towards me. I saw them clearly. The man who was leading the team was accused herein. He had a cap and I had seen him earlier in the bar before I left. I ran back to the trading centre but the men ran after me. The accused hit me with a blunt object and I fell down…"

From the foregoing it is clear that the Complainant could not have had opportunity to sufficiently observe the assaillants as to be able to recognize them. First he heard footsteps from behind and without checking he ran onwards his house. Subsequently he changed his mind and decided to run towards where the footsteps had come from. It is then that he saw a group of 5 people. These people were running towards him. At no time did he, PW1 or the robbers stop so as perhaps to enable PW1 observe any one of them. As soon as he saw this group of 5 people he continued running. The 5 pursued him, got up with him and unleashed violence on him. To our mind PW1 had absolutely no opportunity to sufficiently observe any of the attackers to be able to identify them. Indeed PW1 does admit that because of the shock and pain he was able only to identify the Appellant out of the 5 people. How he was able to do that does not come out clearly in the evidence. It is important to note that at all material times, PW1 was being pursued by five people. The five were also involved in assaulting him. In our view the circumstances obtaining at the scene of crime was not conducive for positive identification. In the case of *WAMUNGA VS REPUBLIC (1989) KLR 424,* the Court of Appeal observed:-

"…..Where the only evidence against a Defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility error before it can safely make it the basis of a conviction…… recognition may be more reliable than identification of a stranger but mistakes of recognition of close relatives and friends are sometimes made…"

In our view the trial Court did not discharge the task of examining the evidence of identification. Had the Learned Magistrate carefully done so she would have come to the inevitable conclusion that such evidence was unreliable as the condition obtaining at the scene of crime could not have permitted positive identification of the Appellant.

PW1 also claimed to have recognised the Appellant as they have been neighbours at home for 18 years. Yet he never gave the name of the Appellant to his own family, the Police or even PW3. This is indeed strange. In the case of *LESERAU VS REPUBLIC (1988) KLR 783,* the Court of Appeal observed:-

"…..Where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name. The identification evidence in this case was of very poor quality thus making the danger of mistaken identify even greater. That evidence could not be accepted as true and free from possibility of error……"

We think that this observation applies with equal force to the circumstances obtaining in this case.

The behaviour of PW1 just before the attack makes an interesting reading. During cross examinations by the Appellant he stated:-

"……I sensed danger when you came to me running. They were behind me. I decided to run towards my house. After running for about 50 yards. I decided to run back to the shopping centre since it was nearer than my house. I came to learn later that it was risky. If a leopard enters the court I will run, use a different exit unless there is no alternative. I decided to go back and meet you since my house was far……"

That PW1 would dare confront five people whom earlier he feared that they were upto no good is inexplicable to us. This behaviour juxtaposed with the Appellant's defence creates doubt as to whether really the Appellant committed the offence.

It is trite law that facts proved by a single witness can form the basis for a conviction. But this rule does not lessen the need to test with great care the evidence especially when it is identification made under unfavourable conditions. In such a case there must be other evidence circumstantial or direct pointing to the guilt of the accused. See *ANDITI V. REPUBLIC [1981] KLR 519.*

The trial Court took the view that apart from the identification of the Appellant at the scene, there was other direct evidence linking the Appellant with the crime. That evidence was the finding of the Appellant's keys and a piece of his torn jacket in the house of the Appellant. There was also the evidence of the Appellant's cap being found at the scene of crime the following day. The Appellant maintained throughout the trial that neither the key nor a piece of the PW1's torn jacket was found in his house. To buttress this argument, the Appellant applied and we granted the application to have the OB for 21st July 2003 for both Gatundu and Nembu Police Stations produced. After several adjournments at the request of the OCS Gatundu Police, to enable him to trace the OBs, he eventually owned up on 23rd January, 2007 and stated that he had not been able to trace any of the OBs' and that there was no record to show where the OBs disappeared.

It is instructive however that one, William Kabuu Ngaba, the father of the Appellant had on the instructions of the Appellant been to Gatundu Police Station sometimes in 2002 and had been given the said OB which he read. It is thus strange, that when the said OB is requested by Court, it disappears into thin air. Could it be that the police are hiding something. It is common knowledge that OB's are normally destroyed after 10 years. In the circumstances of this case, the 10 year period has not elapsed. As correctly argued by the Learned Counsel for the Appellant, an OB entry would ordinarily have details of the suspect and if arrested with any item(s) it will be reflected in the OB. It is not correct as submitted by the Learned State Counsel that the OB only reflects the charges that are likely to be preferred and not the details of the evidence. We were invited by Counsel for the Appellant to draw an adverse inference from the failure by the police to avail the OBs'. The Appellant denied that anything was recovered from his house. He also said he was not taken with anything to Gatundu Police Station. The OB would surely have reflected the details of what was recovered from the Appellant if at all. Given that we are not at all persuaded at all that an OB would simply put disappear without trace from the Police Station, we are inclined to read mischief in the whole saga. Accordingly we would draw an adverse inference against the police for further failure to produce the OB. It may well be possible that whatever had been recorded therein could have exonerated the appellant.

The Appellant all along claimed that PW1 set him up in the case as he did not approve of his relationship with his daughter. This evidence was not at all challenged and or controverted. Taken together with the alleged and sudden disappearance of the OB from the police station, the defence would appear to be plausible. It may well be possible that neither the key nor a piece of PW1's jacket were ever recovered in the Appellant's house.

How about the cap recovered at the scene of crime. PW1 and PW3 claimed that they had earlier seen the Appellant wearing the same. PW1 admitted that the Appellant was not the only one with such cap in the neighbourhood. We also note further that there was nothing special about the cap that irresistibly pointed to the Appellant as the owner of the same. The totality of the foregoing is that the evidence regarding the cap was of very little value to the Prosecution. Infact it was worthless.

Finally there is the issue as to whether the Learned Magistrate shifted the burden of proof to the appellant in her judgment. At page J3 of the judgment the Learned Magistrate stated:-

"…… I do not believe the evidence tendered by accused herein. He gave unsworn evidence which was not corroborated".

This observation was unfortunate. It clearly shows that the Learned Magistrate shifted the burden of proof and disregarded the fact that the Appellant gave unsworn statement. The burden of proof never shifts to the accused.

That was made very clear in *SEKITOLEKO VS. UGANDA [1967] EA 531* which case has been applied before by this court. The Chief Justice Sir Udo Odoma in that case held:-

"*……...as a general rule of law the burden is on the Prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else (REPUBLIC VS. JOHNSON [1961] 3 ALL ER 969 applied; LEONARD ANISETH V. REPUBLIC [1963] EA 206 applied."*

Further if an accused person elects to give unsworn statement, it is not something that should be frowned upon or invite unsavory comments from the trial Magistrate. It is one of the three recognised and lawful ways in which an accused person can defend himself.

The conclusion we have come to is that there is no evidence upon which the conviction of the Appellant can be sustained. For these reasons, we allow the Appellant's Appeal quash his conviction and set aside the sentence. We direct his immediate release unless he is otherwise lawfully held.

Dated at Nairobi this 15th day of February, 2007.

LESIIT

JUDGE

MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:

Appellant – present

Mrs. Kagiri for State

Kiania Njau for Appellant

Tabitha / Erick Court Clerks

LESIIT

JUDGE

MAKHANDIA

JUDGE