



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS

CRIMINAL APPEAL 169 OF 2004

(From original conviction and sentence of the Senior Resident magistrate's court at Narok in Criminal Case No. 597 of 2003 - [S. M. Githinji (S.R.M.)

DANIEL KARUBE SAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant, Daniel Karube Sambo was charged with robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the 24th May 2002 at Ilkiragarie village Narok District, the appellant jointly with another robbed Annah Wanjiru Maina of one Phillips Television Set and one Solar Panel all valued at Kshs 14,500/= and at or immediately after the time of such robbery wounded the said Annah Wanjiru Maina. The appellant pleaded not guilty to the charge. After a full trial, he was convicted as charged and sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant has raised several grounds challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted based on the evidence of identification that was made in circumstances that were not conducive for positive identification. He was further aggrieved that the trial magistrate had failed to consider the fact that the complainant in the robbery case was the wife to a complainant in *Narok SRMCC Criminal Case No. 523 of 2003* whereby the appellant had been charged and found guilty for assaulting the complainant in the said case. He was aggrieved that the trial magistrate failed to consider the fact that the complaint could have been motivated by an already existing grudge. He faulted the trial magistrate for relying on the evidence of the injuries sustained by the complainant yet the P3 form confirmed that the complainant had been injured by a blunt object and not a sharp object. He faulted the trial magistrate for convicting him yet the exhibit recovered did not connect him to the crime. He was aggrieved that the trial magistrate had not considered the fact that the investigating officer in this case was the same investigating officer in the assault case and therefore a likelihood of bias could not be ruled out. He urged this court to allow the appeal.

At the hearing of the appeal, the appellant, with the leave of the court, presented written submissions in support of his appeal. He further made oral submissions urging this court to consider the fact that there existed a grudge between him and the husband of the complainant that motivated her to make the false allegation that she had identified the appellant during the robbery. Mr. Njogu for the State supported the conviction of the appellant by the trial magistrate. He submitted that the complainant and her son had positively identified the appellant during the robbery by his voice. He submitted that the complainant and

her son were known to the appellant prior to the robbery incident and were therefore familiar with the voice of the appellant. He submitted that there was no mistake in the identification of the appellant by the complainant and her son. Mr. Njogu argued that the prosecution had proved the charge of robbery with violence to the required standard of proof. He urged this court to disallow the appeal and confirm the conviction of the appellant.

Before we give reasons for our judgment, it is imperative that we set out the facts of this case, albeit briefly. On the 24th May 2002, while PW1 Annah Wanjiru Maina (*hereinafter referred to as the complainant*) was asleep in her house at Ilkiragarie, robbers broke into her house and robbed her of her Phillips Television set and a solar panel. The complainant testified that the robbery took place at about 5.00 a.m. at dawn. She testified that in the course of the robbery, one robber, whom she identified as the appellant, hit her on the head with an axe thereby causing her to lose consciousness. The complainant testified that she was able to identify the appellant by his voice. She testified that the appellant worked for her as a casual labourer for about five months and therefore she was familiar with his voice. She recalled that before the robbers broke into her house, one of the robbers whose voice she recognised as that of the appellant ordered her to open the door to her house or else the robbers would break into the house. She did not comply with the order and therefore the robbers broke into the house. The complainant's evidence of voice identification was corroborated by the testimony of PW3 Jeremiah Mburu, the 16 year old son to the complainant who was sleeping in the same house but in a different room. The complainant and PW3 further testified that they saw the appellant among the gang of robbers during the course of the robbery. They testified that they were able to identify the appellant by the light which was being emitted by a lamp.

After the robbery, the complainant testified that she regained her consciousness when she was already admitted at Nairagie Enkare hospital. She recalled that the axe which the appellant used to attack her caused an injury to her fore head. The complainant was examined by PW2 Harriet Kamere, a clinical officer based at Nairagie Enkare Health Centre on the 18th August 2003 and who formed the opinion that the degree of injury which the complainant had sustained was harm. She could not however tell who had treated the complainant after the said injury was inflicted on her because she only examined the complainant after she was referred to her by the police one year and three months after the robbery incident. She further testified that the injury to the complainant's head was caused by a blunt object and not a sharp object.

PW4 PC Patrick Nderitu investigated the case. He testified that on the 24th May 2002, the complainant made a report of a robbery to Nairagie Enkare police station. She reported that she had been robbed by the appellant. PW4 testified that, although he did not visit the scene of the robbery, he took the statements of the witnesses and later made a decision to charge the appellant. He produced the Television Set which was recovered by the members of the public when it was abandoned by the robbers near Nairagie Enkare. He denied that he had a grudge against the appellant. He testified that on the 4th August 2003, the complainant went back to the police station accompanied by the appellant. He arrested the appellant and charged him with the offence for which he was convicted.

When the appellant was put on his defence, he testified that he fought with the husband of the complainant on the 17th May 2003. The husband of the complainant made a report to the police after which he was arrested, charged and convicted for the offence of assault. He was sentenced to serve a term of one year imprisonment in *Narok SRMCC Criminal Case No. 532 of 2003*. On 3rd August 2003, while he was at Nairagie Enkare Trading Centre, he was arrested by the police and charged for the offence of robbery which he was not aware of. He readily admitted that he had assaulted the husband of the complainant in an unrelated incident but denies that he was involved in the robbery of the complainant. He testified that the complaint against him was motivated by the husband of the complainant, one James Maina, who had brought the robbery charge to fix him.

This being a first appeal this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination this court is required to put in mind the fact

that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any decision as to the demeanour of the witnesses (*See Njoroge -vs- Republic [1987] KLR 19*). The issue for determination by this court is whether the prosecution proved the charge of robbery with violence against the appellant to the required standard of proof beyond reasonable doubt. We have re-evaluated the evidence adduced before the trial magistrate's court and also considered the submissions made before us by the appellant and by Mr. Njogu on behalf of the State.

It is clear that the prosecution relied on the sole evidence of identification to secure the conviction of the appellant before the trial magistrate's court. The complainant testified that, although it was at night, she was able to identify the appellant by his voice. She testified that before the robbers broke into her house, they had ordered her to open the door of her house or else they would break into the said house. The complainant testified that she was able to identify the voice of the appellant as the person who issued the order for her to open the door to her house. The complainant's testimony on voice identification was corroborated by PW3, the complainant's 16 year old son. The two testified that they were able to identify the appellant by his voice because the appellant had previously worked for them for a period of about five months as a casual labourer. They further testified that they saw the appellant by the light of a lamp which had been put on. The complainant recalled that she identified the appellant before she was hit on the head by the appellant using an axe. Similarly PW3 testified that he identified the appellant when he peeped through a gap in the timber wall into the room where the complainant was being assaulted during the course of the robbery.

We have re-evaluated this evidence of identification. The said identification was made in difficult circumstances. As was held by the Court of Appeal in the case of *Maitanyi -vs- Republic [1986] KLR 198* at page 200 by the Court of Appeal;

"Although the lower courts did not refer to the well known authorities Abdulla bin Wendo and another - vs- Reg (1953) 20 EACA 166 followed in Roria -vs- Rep. [1967]E.A. 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated yet bear repetition:-

"subject to the well known exceptions it is trite law that a fact may be proved by a 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 be it 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 the present appeal, the complainant and her son further testified that they were able to identify the appellant by his voice during the course of the robbery. As was held by the Court of Appeal in the case of *Libambula -vs- Republic [2003] KLR 683* at page 686:

"Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it See Choge v Republic [1985]KLR 1."

In the present appeal, we are not satisfied that the complainant and her son positively identified the appellant as one of the robbers, who robbed them during the material night. This is because of contradictions inherent in the testimonies of the said prosecution witnesses. Firstly, it is not clear when the report of the robbery was made to the police. Although PW4, the investigating officer testified that a report was made to the police by the complainant on the 24th May 2002, there is no evidence that the police took action after the said report was made until the 4th August 2003 when the appellant was arrested. It is also clear from the record of the trial court, that the investigating officer was still recording

statements of witnesses as late as the 10th November 2003 when the complainant testified before court. The clinical officer who saw the complainant and prepared the P3 form, testified that the complainant saw her on the 18th August 2003 at Nairagie Enkare Health Centre for the purposes of the said report being prepared. She admitted she prepared the said P3 form from the medical notes which had been prepared by someone she did not know one year and three months before. She further confirmed that from her examination of the complainant, she was of the opinion that the complainant had been injured by a blunt object and not a sharp object. This contradicted the testimony of the complainant that she had been hit on the head by an axe.

Further it is clear that there existed a grudge between the appellant and the husband of the complainant. The appellant and the husband of the complainant had fought on the 17th July 2003 upon which the husband of the complainant made a report to the police. The complainant was subsequently charged with assault causing actual bodily harm in *Narok SRMCC Criminal Case No. 532 of 2003*. The police officer who investigated the robbery case is the same police officer who investigated the assault case. It cannot be ruled out that the said police officer was biased in favour of the complainant and her husband and as against the appellant. The period between which the robbery is said to have taken place and the time which the police took action (*i.e. a period of one year and six months*) raises doubt in our minds that the complainant and her son actually identified the appellant during the robbery. The robbery complaint and the assault complaint involving the same members of the family cannot be separated. It is clear that the investigating officer failed to disclose to the court the existence of the assault case involving the appellant and the complainant's husband. There was no evidence to suggest that the appellant disappeared from the area after the said robbery that the police could not have arrested him immediately upon the report being made to the police.

The upshot of the above reasons is that we find that the circumstances of this case raise reasonable doubt as to whether the complainant and her son actually identified the appellant during the course of the robbery. The fact that there was bad blood between the appellant and the family of the complainant is further reason why this court cannot in good conscious uphold the conviction of the appellant based on the sole evidence of identification in the absence of any other supporting evidence. The appeal is allowed. The appellant's conviction is quashed. He is set at liberty and ordered released from prison unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 30th day of March 2007.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE