



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

Criminal Appeal 288 of 2005

JOSEPH KANJA WANJIKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No.195 of 2004 in the Senior Principal Magistrate's Court at Kiambu – L. Muhiu SRM)

JUDGMENT

JOSEPH KANJA WANJIKU was charged before the subordinate court with one count of robbery with violence contrary to section 296(2) of the Penal Code. He was also charged with a second count of being in possession of Government Stores contrary to section 324(2) of the Penal Code. He was also charged a third count of personating a Public officer contrary to section 105(a) of the Penal Code. After a full trial, the learned trial magistrate found him not guilty of the offence of possession of Government stores and the and the offence of impersonating a public officer. He acquitted him of the two counts. He also found no sufficient evidence for the offence of the robbery with violence. He found that the prosecution had adduced sufficient evidence to prove the offence of simple robbery contrary to section 296(1) of the Penal Code. He convicted him of the offence of simple robbery and sentenced the appellant to serve five(5) years imprisonment.

Being aggrieved by the conviction and sentence, the appellant lodged this appeal against both conviction and sentence.

At the hearing of the appeal, learned State Counsel Mrs. Kagiri conceded to the appeal. She submitted that the evidence on record to connect the appellant with the offence was evidence of voice identification by PW1. The said PW1 testified that the incident occurred in darkness and he had come from drinking in a bar. There was no other independent evidence to corroborate the allegation of PW1. She submitted that the learned trial magistrate failed to warn himself on the dangers of relying on the evidence of a single identifying witness. She contended that the conviction was not safe and should therefore be quashed.

I have myself perused the record. The evidence of the prosecution which connects the appellant to the alleged offence is that of the complainant GEORGE WAINAINA WATHIMU (PW1). It was clearly evidence of a single voice identifying witness at night. He was drinking in a bar and came out at 10.00

p.m. Therefore, he was attacked by three people. His testimony on the identification of the appellant goes thus –

“My attackers were threeThe accused is the one who talked saying that I had instigated for them not to be served and when he talked I recognised him. He was known to me for about one year because he has leased a house at my neighbour’s place. I recognised his voice”.

Evidence of identification by voice can be positive identification. However, there is need to test the same to ensure that there is no possibility of mistaken identity. In the case of KARANI –vs- REPUBLIC [1975] KLR 191 – Nyarangi, JA and Platt and Gachuhi Ag JJA stated at page 191 –

“Identification by voice nearly always amounts to identification by recognition. Yet here as in any other case care to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognised it and that there were conditions in existence favouring safe identification”.

The learned trial magistrate found that the appellant was positively identified by the complainant (PW1), because PW1 heard the appellant say that he had caused them not to be served in the bar, and that the appellant was known to PW1 for about one year and lived at the premises of PW1’s neighbour.

In my view, the learned trial magistrate did not evaluate the conditions of identification before he came to his conclusion. The complainant was robbed at night. It was in darkness. He stated that he was robbed by three people. Prior to that he had the complainant had seen the appellant in the bar. He stated in his examination in chief –

“I had seen him when people were being sent out to the bar”

Clearly, there was a possibility that the complainant mentioned the appellant because he had seen him in the bar as one of the people who was chased out of the bar. Secondly, the robbers were said to be three people. The complainant did not describe the parts played by each of the three robbers. His evidence was general that – he was told to sit down and that money was pulled out of his pocket. In my view, the conditions for positive identification were unfavourable. The evidence of the single identifying witness, therefore, needed to be tested and there was need for other supporting evidence.

Nor is that all. The evidence of the single identifying witness needed to be corroborated.

In the case of RORIA –vs- REPUBLIC [1967] EA 853 the court of Appeal for East Africa had this to say at page 584 –

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of the 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 error”.

From the evidence on record, there is no other evidence that could possibly connect the appellant with the offence. Though the complainant stated that he knew the appellant’s voice for about a year because the appellant had rented a neighbour’s house, that neighbour was not called to testify. In addition there is no evidence that the complainant went and complained to the neighbour or looked for the appellant that night from the neighbour’s house. In my view, the evidence on record does not establish that the appellant was positively identified. In my view, had the learned magistrate tested the evidence of identification and warned himself of the dangers of convicting on the evidence of a single witness, he would possibly have arrived at a different conclusion. Learned State Counsel rightly conceded to the appeal. I agree with her.

Consequently, I allow the appeal, quash the conviction and set aside the sentence.

I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

DATED and delivered at Nairobi this 28th say of March 2007.

George Dulu

Judge

Delivered and signed in the presence of –

Appellant

Mrs. Kagiri for State

Eric – Court clerk

George Dulu

Judge