REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 226 of 2004

(From Original Conviction and Sentence in Criminal Case Number 44 of 2004 of the

Senior Resident Magistrate's Court at Limuru by Ezra O. Awino – S.R.M. dated 28th April 2004)

MARTIN SHIKUKU MAKOKHA……..……..……..APPELLANT

VERSUS

REPUBLIC……..……...……..RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 140 OF 2005

From Original Conviction and Sentence in Criminal Case Number 44 of 2004 of the Senior

Resident Magistrate's Court at Limuru by Ezra O. Awino – S.R.M. dated 28th April 2004)

JOB NDIKA ABEBE……..APPELLANT

VERSUS

REPUBLIC……..……..……..…….RESPONDENT

J U D G M E N T

MARTIN SHIKUKU MAKOKHA, the 1st Appellant and **JOB NDIKA ABEBE**, the 2nd Appellant were the 2nd and 1st accused persons respectively during the trial in the subordinate court. They were charged with one count of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code. Following a full trial the learned magistrate deemed it fit and without assigning any reasons, reduced the charge to one of simple robbery contrary to ***Section 296 (1)*** of the Penal Code. This was wrong on the part of the learned magistrate. In our view the learned magistrate should have come out quite clearly as to why he thought that the offence proved was not robbery with violence contrary to ***Section 296 (2)*** of the Penal Code but rather simple robbery. In reducing the charge the learned magistrate merely stated: -

*"…….**This identification is without mistake, this was recognition of people known to the two witnesses. I would nevertheless reduce this offence to that of robbery under Section 296 (1) of the Penal code and enter a conviction against 1st and 2nd Accused."***

Now did the learned magistrate reduce the charge because the ingredients of robbery with violence were not met? It is impossible to tell. We wish to remind the learned magistrates that whenever an occasion arises when a charge is reduced, reasons for the reduction must be stated so that if the issue is raised on appeal, the appellate court should be able to give it appropriate consideration rather than being left to it to speculate!

Small wonder then that when the appeal came up for hearing, the state rightly, put the Appellants on notice that it will be seeking the enhancement of the sentence to that of capital robbery in line with ***Section 296 (2)*** of the Penal Code under which the Appellants were initially charged. The conviction for a lesser offence according to Miss Wafula, learned State Counsel, was illegal as the Appellants committed the robbery while armed with pangas; offensive weapons which they used to visit violence on the Complainant. Further, learned State Counsel submitted that they committed offence being more than one. All these fitted as ingredients for the offence of robbery with violence. We would add that if this be the case then obviously the learned magistrate grossly misdirected himself in reducing the charge.

Despite the Notice and warning by this court, the Appellants nonetheless elected to prosecute their appeals. For ease of hearing and as the two appeals emanated from the same trial, we ordered for the consolidation of the two appeals.

The learned magistrate having erroneously reduced the charge facing the Appellants proceeded to sentence each one of them to an imprisonment term of 8 years. The Appellants were aggrieved by the conviction and sentence. It is against the said conviction and sentence that they have now appealed to this court.

In their separate Amended Memorandum grounds of appeal ***the*** Appellants have raised the same grounds to wit***: -***

(I) THAT the learned magistrate erred both in law and fact in convicting the Appellants on the basis that they were positively identified by P.W.1 and P.W.2 at the locus in quo.

(II) ***THAT they were convicted on a charge that was not proved.***

(III) ***THAT the learned magistrate erred in both law and fact in rejecting their defences.***

The brief facts of the prosecution case were that on 1st January, 2004 at about 8.30 p.m. the Complainant P.W.1 was in the company of P.W.2 going home from Ngecha Trading Centre. While on the way, they were suddenly ordered to sit down by some intruders. P.W.1 was then cut on the face and shoulder with a sword. With the assistance of the moonlight both witnesses were able to recognise their assailants who are the Appellants herein. They recognised the Appellants as they knew them before as they used to work on a neighbour's farm. After the attack, the Appellants allegedly took Kshs.3,800/= and left. Subsequent thereto, the Complainant woke up and went to one Mzee Mbugua who assisted him home. By this time, P.W.2 had managed to escape from the attackers and had run away. The Appellants were subsequently arrested and charged while P.W.1 was still in hospital.

Put on their defence, both Appellants elected to give unsworn statements of defence in which they categorically denied being involved in the crime. They said that they were arrested by police officers from their place of work in Ngecha for no apparent reason.

In support of their appeals, the Appellants tendered written submissions which we have carefully read and considered. In opposing the appeal, Miss Wafula, submitted that the conviction of the Appellants was based on the evidence of recognition by P.W.1 and P.W.2 as well as voice recognition. P.W.1 had known the Appellants for well over 5 months as their place of work was near his home. Counsel submitted that the evidence of recognition by P.W.1 was corroborated by the evidence of P.W.2 in material particulars. Counsel further submitted that there was moonlight which assisted these witnesses to positively identify the Appellants. To counsel, the identification of the Appellants by recognition cannot therefore be faulted.

Regarding the reduction of the charge by the learned magistrate, counsel submitted that the learned magistrate grossly misdirected himself in doing so as the ingredients of capital robbery were proved. For these reasons counsel urged us to dismiss the appeal and enhance the sentence to one of death as envisaged by ***Section 296 (2)*** of the Penal Code.

In compliance with the celebrated case of **OKENO V REPUBLIC [1972] E.A. 32,** we have analysed and evaluated afresh the evidence tendered before the trial court so as to reach our own conclusion as to the guilt or otherwise of the Appellants. In doing so, we have given allowance to the fact that we neither saw nor heard the witnesses as they testified and therefore cannot comment on their demeanour.

No doubt the conviction of the Appellants rested squarely on the evidence of visual identification as well as voice recognition of the Appellants by P.W.1 and P.W.2. In convicting the Appellants, the learned magistrate delivered himself thus: -

*"……**The two witnesses, that is P.W.1 and P.W.2 testified that they recognised the two accused persons and that they were helped by moonlight. It is their evidence that the two accused persons are neighbours being employed in the neighbourhood, the Complainant further stated that the 2nd accused told the 1st accused not to cut him again. This identification is without mistake, this was recognition of people known to the witnesses……"***

Two issues arise in this case. One, whether the conditions under which the Appellants were recognised visually were conducive for a positive identification and two, whether the words allegedly uttered by the 1st Appellant to the 2nd Appellant if at all were sufficient to aid in recognition of the 1st Appellant's voice. The test applicable to each case is quite different. In the case of **KAVETA AND OTHERS V REPUBLIC C.A. NUMBER 65 OF 1986 (UNREPORTED),** the court of appeal held:

*"……. **Where evidence is based on identification the court should closely examine the circumstances in which the identification by each witness came to be made……"*** Further in the case of Boniface **OKEYO VS REPUBLIC C.A. 52 OF 2000 C.A. [unreported], Chunga C.J, Tunoi and Shah JJA** observed:-

*"……**If circumstances of identification are poor and unfavourable and witnesses cannot accurately and positively identify a suspect a conviction cannot arise from such identification. There should be no possibility of error……..."***

Finally in the case of **MAITANYI V REPUBLIC [1986] KLR** ***198*** we are cautioned in the following terms: -

*"…**Of course, if there was no light at all, identification would have been impossible. As the strength of the light improve 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 careful test if any of these matters are unknown because they were not inquired into…."***

The record shows that the learned magistrate never undertook the said inquiries. The prosecution too never led any evidence to ascertain the nature of the light available, its intensity, its size and its position relative to the suspects. The offence was committed at 8.30 p.m. It must have been dark. The witnesses claimed that they were assisted in recognising the Appellants by the moonlight. The witnesses however never said that the moonlight was bright. P.W.1 merely said "……***There was moonlight….."*** Similarly P.W.2 also stated in evidence in chief that "***there was moonlight."*** With this kind of evidence it is difficult to tell whether the moonlight was bright, or was covered by clouds, and or whether it was half or full moon. In the premises the intensity of the light is unknown. We also note that those who attacked the Complainant came from the opposite direction. It was therefore important to know the position of the moon in relation to the attackers.

The attack on P.W.1 was sudden, fast and furious. Immediately P.W.1 was accosted by the assailants from undisclosed point and ordered to sit down, he was ruthlessly set upon by the assailants. In the process however P.W.2 managed to escape and run away. Under those circumstances we doubt whether any of the two witnesses could have been in a position of either identifying or recognising any of the assailants. Nowhere in the record has P.W.2 revealed that prior to his vanishing from the scene of the alleged crime he had taken time to observe the Appellants in order to be able to identify them subsequently. It would appear that his act of running away from the scene was spontaneous in that the moment he saw the attackers armed and issuing orders, he took off.

We also note that much as the two witnesses claimed to have recognised the Appellants during the incident, and claimed to know their names, they never gave those names to the police in their first reports. None of them and more particularly P.W.2 led to the arrest of the Appellants. It is understandable that P.W.1 could not have done so as he was at the material time hospitalised. However P.W.1 claimed that after the attack he was assisted home by one Mr. Mbugua. He never told this Mbugua that he had been attacked by people he knew i.e. the Appellants. Neither was this Mr. Mbugua called as a witness. P.W.2 knew where the Appellants resided and worked. It was never suggested in evidence that soon after the commission of the offence, the Appellants went underground. In fact the evidence on record is that the Appellants went about their business as usual. They were arrested from their places of work on the strength of a letter from Tigoni Police Station. That letter was however not introduced in evidence, so that the trial court did not know the basis for the arrest of the Appellants and who the Complainant was. It may very well be possible that the Appellants were arrested for a totally different offence.

According to the evidence of P.W.4, he received "***a letter from Tigoni to arrest the two accused persons. We went to where the two accused were employed and found the panga they used to attack the Complainant. The panga was with 1st accused and I produce the panga as exhibit number 2……."*** It is important to note that this panga had no blood stains. It is therefore impossible to link the same to the crime. If it had blood stains and the same were forwarded to government analyst for analysis and report thereof indicated that the blood thereon was the Complainant's then this would have formed strong circumstantial evidence linking the 2nd Appellant to the crime. It would have buttressed the evidence of identification and or recognition. Further we note that according to evidence of P.W.1 the assailants had a sword and not a panga. P.W.2 said nothing regarding the weapons used in the attack.

Taking all the foregoing into account we are persuaded that the conditions prevailing at the scene of crime could not have afforded P.W.1 and P.W.2 an opportunity to positively identify their attackers. Failure by the learned magistrate to conduct the inquiries alluded to above lends credence to the fact the purported identification by recognition was far from being satisfactory nor watertight. Indeed as stated in the case of **MAITANYI V REPUBLICE** ***(Supra): -***

"…….***Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot be acted upon."***

As for voice recognition, in the case of **CHOGE V REPUBLIC [1985]** ***KLR 1 Hancox, Nyarangi JJA and Platt Ag. J.*** had this to say with regard voice recognition:-

"…….***In relation to the identification by voice, care would obviously be necessary to ensure***

(a) that it was the accused person's voice

(b) that the witness was familiar with it and recognised it and

(c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who said it6…"

Both witnesses claimed to have known the Appellants for a while. However they never claimed that they used to talk to them frequently as to be able to recognise or master their voices. They never testified

that they were familiar with their voices. Further the exact words used by the Appellants were never disclosed during the trial.

We therefore find that the evidence of voice recognition was not taken with circumspection and caution. As a result certain issues were left unanswered. For instance, it is unknown from the evidence how far P.W.2 was from assailants when the words, if any, were uttered. It is also unknown whether the words were spoken loudly, softly or just how. We are not satisfied with the evidence of voice identification. Anyhow and as we have already stated, the conditions prevailing at the scene of crime, made it impossible for any of the witnesses to recognise the Appellants.

On the overall then we find that the evidence of visual and voice recognition given by the two witnesses in this case was not watertight or free from error and mistake. There was need for other evidence, whether direct or circumstantial to implicate the Appellants with the offence and such evidence was not available in this case.

Consequently, we allow the appeals, quash the convictions and set aside the sentences. We order that the Appellants and each one of them should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 8th day of March 2007.

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J. W. LESIIT

JUDGE

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M. S. A. MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellants – in person present

Miss Wafula for the Respondent

CC: Tabitha/Erick

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J. W. LESIIT

JUDGE

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M. S. A. MAKHANDIA

JUDGE