



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 630 of 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 9482 of 2003 of the Chief Magistrate's Court at Thika (Boaz N. Olao – CM)

PAUL MWAURA MURAGURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

PAUL MWAURA MURAGURI was together with another charged with one count of ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code. After the trial the Appellant was found guilty, convicted and sentenced to death as by law prescribed. He was aggrieved by the conviction and sentence and therefore lodged this appeal.

There are nine grounds of appeal cited in the Appellant's supplementary petition of appeal but which rotate along one critical issue which is of identification.

The facts of the prosecution case are that at 7.00 p.m. on 17th October 2003, the Complainant, PW1 one Ann, her husband PW2 one Wachira and a boda boda cyclist PW5 were traveling towards the Complainant's home at Kabati when four or five men pounced on them and robbed them. The Complainant and Wachira claim that they were able to see and identify the Appellant by means of torch light and moonlight, when after Wachira screamed, members of public managed to apprehend him and beat him up before his accomplices went back and rescued him. The Appellant was arrested the following morning by **IP. Kiplagat**, PW4, from his home where he was nursing some wounds.

We have analyzed and evaluated afresh all the evidence adduced before the lower court while bearing in mind that we neither saw nor heard any of the witnesses and giving the due allowance. See **OKENO vs. REPUBLIC 1972 EA 32.**

In this case, the learned trial magistrates found the Appellant guilty of the offence mainly because the Complainants heard the person whom members of public apprehended and beat up was being referred to as 'Paul' and lo and behold the Appellant's name was found to be "Paul" on arrest the next day. The conviction was also based on the finding of circumstantial evidence that the Appellant had injuries on the

date of his arrest which tallied with the Complainants' evidence that the 'Paul' the members of public apprehended briefly was beaten up and injured. The Complainants also said they identified the Appellant at the scene by means of the moonlight and the torches their rescuers had.

In REPUBLIC VS. ERIA SEBWATO [1960] EA 174 LYON J. held: -

“Where the evidence alleged to implicate an accused is entirely of identification that evidence must be absolutely water tight to justify a conviction.”

In yet another case ODHIAMBO vs. REPUBLIC [2002] 1 KLR 241, CHUNGA, CJ, LAKHA and OLE KEIWUA JJA held: -

“1. Courts should receive evidence of identification with the greatest circumspection particularly where circumstances are difficult and do not favour accurate identification.

2. where evidence of identification rests on a single identifying witness and circumstances of identification are known to be difficult, what is needed is other evidence, either direct or circumstantial, pointing to the guilt of the accused person from which, the court may reasonably conclude that identification is accurate and free from the possibility of error.”

In the instant case we had the Complainant and PW2 Wachira both saying they identified the Appellant after robbery upon his brief apprehension by members of public who also referred to him as Paul. The nature of the light which enabled the two to identify the Appellant was described as moonlight and torchlight. The intensity of both these lights was not disclosed nor the distance or angle from which the light flashed on the Appellant. In the circumstances of the identification, the police ought to have mounted identification parades for the two to identify the Appellant upon his arrest for two reasons. The first is that the Appellant was a total stranger to them and the conditions of light under which they claim to have identified him were not conducive for correct identification. Secondly the two did not lead to the Appellant's arrest and therefore the identification parade was important to test their ability to identify the Appellant.

We noted that the learned trial magistrate acquitted the Appellant's co-accused despite the fact that both PW2 who said he identified him at the scene of crime and the accused himself stated that they knew each other very well before the incident having done business together. If any identification was stronger, it was that of PW2, **Wachira**, against the Appellant's co-accused.

We note that the two eye-witnesses claimed that the Appellant was recognized by members of public who went to their rescue at the scene. These members of public are said to have referred to the man they apprehended as 'Paul'. These members of public were not called as witnesses. In BUKENYA vs. REPUBLIC [1972] EA 549 LUTTA Ag. V-P held: -

“(ii) The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.

(iv) where the evidence called is barely adequate, the evidence of uncalled witness would have tended to be adverse to the prosecution.”

In the instant case, the evidence of the members of public who are said to have recognized one of the robbers should have been called to testify in order to establish the truth. Failure to call them was not explained since the evidence called by the prosecution in this case was hardly sufficient to sustain a conviction, we draw an adverse inference that had the members of public referred to by the Complainants herein been called, their evidence would have tended to be unfavourable to the prosecution.

We also wish to deal with the issue whether the fact that the Appellant had injuries on him was circumstantial evidence against him. Whether taken together with the fact that the Appellant's 1st name is "Paul" just as the one identified by persons not called as witnesses or taken on its own that the Appellant

had injuries one day after the alleged robbery, the issue is whether the two incidences are circumstantial evidence against the Appellant which could serve as corroboration as alluded to. In the case of **ODHIAMBO vs. REPUBLIC**, Supra, in **REPUBLIC vs. KIPKENING ARAP KOSKE [1949] 16 EACA 135** at page 136 it was held: -

“The inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypotheses than that of his guilt.”

First of all we find that the fact that the Appellant’s 1st name is Paul is not in itself sufficient to find it was the same Paul called out by the members of public at the scene. That bit of evidence was hearsay evidence if it was intended to be used to implicate the Appellant with this offence. Without the evidence of the one who identified the said ‘Paul’ to confirm it was same ‘Paul’ as the Appellant before court, that piece of evidence was hearsay and the learned trial magistrate erred when he took it into consideration to convict the Appellant.

On the issue of injuries, it cannot be circumstantial evidence sufficient to sustain a conviction. The circumstantial evidence should be “incapable of any other explanation other than of guilt.” In the instant case, PW4 the arresting officer said that when he asked the Appellant concerning the injuries, the Appellant had said he sustained them when he was drunk from a fall. That explanation should have been accepted as sufficient to justify the presence of injuries unless the prosecution adduced evidence to rebut the same. No evidence was adduced to rebut the said explanation. In the circumstances we find that the Appellant’s explanation to PW4 at the time of arrest was good enough to exonerate him from the offence in absence of evidence to rebut the same.

Having considered this appeal we find that the conviction entered against the Appellant was not safe and should not be allowed to stand. We allow the appeal, quash the conviction and set aside the sentence. We order that the Appellant should be set be at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 3rd day of May 2007.

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LESIIT, J.

JUDGE

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DULU

JUDGE

Read, signed and delivered in the presence of;

Appellant present

CC: Tabitha/Eric

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LESIIT, J.

JUDGE

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DULU

JUDGE