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

Criminal Appeal 593 of 2006 & 85 of 2007

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

Criminal Appeal 593 of 2006 & 85 of 2007

ABUBAKAR MOHAMMED……..……1ST APPELLANT

ALI JAMAR SHEIKH ……..……..…….2ND RESPONDENT

VERSUS

REPUBLIC ……..….RESPONDENT

(From the originating conviction and sentence in Criminal Case No. 13 of 2005 of the Senior Resident Magistrate's Court Moyale)

JUDGMENT

ABUBBAKAR MOHAMMED (the 1st APPELLANT) and ALI JAMAR SHEIKH (the 2nd appellant) were initially charged jointly before the subordinate court with the offence of robbery contrary to section 296(1) of the Penal Code. In the course of the trial, the charge was substituted with a charge of burglary and stealing contrary to section 304(2) and section 279(b) of the Penal Code. The particulars of the charge were that –

"On 11th January 2005 at Moyale township in Moyale District of the Eastern Province, with intent to steal, jointly broke and entered the dwelling house of RUKIA MOHAMED and did steal from therein cash Kshs.50,000/= the property of the said RUKIA MOHAMED"

After a full trial, they were convicted and sentenced to serve nine (9) years imprisonment on the first limb of the charge, and nine (9) years imprisonment on the second limb of the charge. The sentences were to run concurrently. Being dissatisfied with the decision of the magistrate, they filed their appeals to this court against both the conviction and sentence. At the hearing, the appeals were consolidated and heard together. Both appellants filed written submissions in support of their appeals.

Learned State Counsel, Mrs. Kagiri, opposed the appeals. It was counsel's contention that there was sufficient evidence adduced in proof of the charges against the appellants. Counsel contended that the evidence of PW1 was clear when she stated that she clearly saw her attackers as it had not become dark.

PW1 was a truthful witness. Counsel contended that the evidence of PW1 was strengthened by the evidence of PW2. Both PW1 and PW2 knew the appellants by appearance before the incident. Therefore their evidence was evidence of recognition. The evidence of PW3 on the other hand was corroborative evidence. In counsel's view the evidence on record established that the appellants broke and entered the house of PW1 and stole Kshs.50,000/=. The defence of the appellants was not believable.

On sentence, counsel submitted that the sentence meted was legal and not excessive.

In response the 1st appellant stated that his warrant stated that he was imprisoned for 18 years, while the court sentenced him to serve 9 years imprisonment. He denied committing the offence.

The 2nd appellant, on the other hand, submitted that he was arrested on duty as a shoe shiner.

This being a first appeal, I am duty bound to evaluate the evidence on record and come to my own conclusions and inferences – see OKENO –vs- REPUBLIC [1972] EA 32.

The facts are briefly as follows. On 11/1/2005 at about 6.30 p.m. PW1 RUKIA MOHAMMED was at home at Moyale Township with her brother aged 3 years. Her father PW1 MOHAMED ALI MOHAMED had gone out to see a friend in the township. PW1 heard his younger brother say that a madman was coming into the house. PW1 moved from the bedroom to the sitting room and there she met two young men. Each of the two young men was wearing a green cap. She had seen those people in town before that day. One of the young men grabbed her and blind folded her with a blue piece of cloth and threw her on the bed. The intruders then asked her to give them the keys to the drawers, but she told them that she did not have the keys. The intruders then banged the drawers. They then left. Thereafter PW1's sister HALIMA MOHAMED arrived. PW1 knew that there was a bag in the house with Kshs.25,000/= The drawer also had Kshs.25,000/= The money was for school fees for some children. That money went missing. It was her contention that the appellants took the money, and also broke the drawer.

PW2 HALIMA MOHAMED was a standard 7 pupil. It was her evidence that when she was coming back from the shop at 6.30 pm she met both appellants coming from their house running. She called PW1, but she did not answer. She later discovered that the drawers in the house were broken into and that they had lost Kshs.50,000/=. It was her evidence that she saw the 1st appellant wearing a cap which was produced in court. PW3 MUSTAFA MOHAMED ABDI testified that, as he was going to the mosque, he met the appellants coming from the house of PW4. Both were wearing caps. The appellant were running and looking back at him. PW4 MOHAMED ALI MOHAMED was the father of PW1. At 6.45 pm, while at the home of another old man at Moyale town, he was informed that thieves had tied his daughter and stolen his property. He later found out that all the money he had been given by PW1 for school fees had been stolen. He reported the incident to the police. PW5 APC ANDREW KUSIMBA rearrested the 1st appellant at about 7 p.m.. The 1st appellant had already been arrested by members of the public. The 2nd appellant was also arrested by members of the public and taken to the police at 8 p.m.

The appellants were initially charged with an offence of robbery. After four witnesses had testified, the prosecution amended the charges to those house breaking and theft. The trial started afresh after substitution of the charge.

Both appellants gave sworn testimony. The 1st appellant stated on oath that he was a shoe repairer. He denied that he stole and stated that the charge was a frame up. He also stated that it was not true that he was arrested while running away. He denied tying up PW1.

The 2nd appellant (who was 1st accused in the subordinate court) stated that he was arrested by members of the public at 7.30 pm. He was a vehicle repairer and did not know why he wars arrested. He denied having gone to the house of the complainant. He denied having participated in the alleged theft. He denied being arrested while running away.

Faced with this evidence, the learned magistrate found that the prosecution had proved its case beyond any reasonable doubt. The learned magistrate found that the defences of the appellants were mere denials and disbelieved them. The magistrate found both appellants guilty and convicted them.

The conviction of the appellant is predicated on visual identification and their mode of arrest.

In **PAUL ETOLE & ANOTHER –vs- REPUBLIC CA NO. 24 of 2000** (unreported) the Court of Appeal stated –

"The appeal of second appellant raises problems relating to evidence of visual identification. Such evidence can bring about miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made ---------- It is true that recognition may be more reliable that identification of a stranger; but even where a witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made".

PW1 is the only witness who testified that she recognized both appellants in the house. The time was said to have been at 6 pm, or 6.30 pm according to the earlier testimony of the same witness when the appellants were charged with robbery. In the earlier testimony PW1 even talked of a lamp being in the house. In both cases there was no attempt to give evidence on the intensity of the light from whichever source. There was no attempt to give evidence on how and for what period PW1 observed the appellants in the house. She clearly stated that she was scared. PW2 stated that she saw both the appellants running away from their house when she was coming back from the shop. Again, no attempt was made by the prosecution to describe the source of light, its intensity, and how close the witness reached the appellants and how she actually observed and recognized them. PW3 also testified that he saw the appellants leaving the house of PW4, as he was going to the mosque about 6.30 pm. The prosecution also did not make an attempt to describe the source of light, how intense it was and how close this witness got to the two appellants in order to identify them.

The appellants were arrested by members of the public not by or in the presence of the three witnesses. In my view, the circumstances of this case would require that there be additional evidence to support identification. It was imperative to hold an identification parade to determine whether all the three witnesses were talking about the same people.

The failure to hold an identification parade seriously eroded the value to be placed on the identification of the appellants by the three witnesses In addition, the descriptions given in evidence on the circumstances of the identification or recognition leaves me in doubt as to the accuracy of the identification or recognition. It could really be a case of mistaken recognition, as the evidence does not show the factors that would lead to the conclusion that the circumstances for the recognition or identification were positive. In my view, it is unsafe to sustain a conviction on the evidence of identification and recognition on record.

The second factor on which the conviction is predicated is the mode of arrest. The appellants appear to have been arrested shortly after the incident, within a period of two hours and in the same town, Moyale.

The arrest was made by members of the public. None of the people who arrested the appellants was called to testify arrested. Therefore this court does not know why and in what circumstances the appellants were in court. The people who arrested the appellants were crucial witnesses who could shed light on the reasons and circumstances of the arrest. None of them was called to testify, nor did the prosecution give any reason for not calling those witnesses.

In **BUKENYA –vs- UNGANDA [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.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

I have already pointed out the inadequacy of the evidence of recognition and identification of the appellants. In my view, the failure to call any of the witness who participated in the arrest to clarify the circumstances and reasons for the arrest of each of appellants, justifies me to make an adverse inference that such evidence would have tended to be adverse to the prosecution case, there being doubtful evidence on whether the appellants were positively identified or recognized. I give the benefit of the adverse inference to the appellants.

For the above reasons, I find merits in the appeals and allow them. I quash the conviction and set aside he sentence imposed on each of the appellants. I order that each of the appellants be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 29th June 2007.

George Dulu

Judge

In the presence of –

1st appellant

2nd appellant

Mrs. Kagiri for state

Eric – court clerk