



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 77 of 2005

JOHN GAITHO WATENGA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 1861 of 2004 of the

Chief Magistrate's Court at Kibera – Ms. Mwai (SRM))

JUDGMENT

JOHN GAITHO WATENGA the appellant was charged before the subordinate court with two counts of robbery with violence contrary to Section 296(2) of the Penal Code. After a full trial, he was convicted of both counts and sentenced to suffer death as provided for by law. Being dissatisfied with the decision of the learned trial magistrate, he has appealed to this court. His amended grounds of appeal are that –

- 1. The learned trial magistrate erred in convicting him on visual identification by PW1 and PW2 which left a lot to be desired.**
- 2. The learned trial magistrate erred in convicting him on charges which had not been proved.**
- 3. The learned trial magistrate erred in rejecting his defence.**

The appellant also filed written submissions.

Learned State Counsel, Mr. Makura, opposed the appeal and supported both conviction and sentence. He submitted that the prosecution adduced sufficient evidence to prove both charges. Counsel contended that the complainant in the 1st count, PW1, testified that there was electricity light at the scene and the motor vehicle headlights were also on. PW1 also testified that the robbery incident took a duration of about one (1) hour.

Counsel submitted further that PW2, the complainant in the 2nd count, knew the appellant before the incident. She used to give the appellant some goods to carry for her at Kawangware market. The witness also testified that there was electricity light. It was counsel's contention that the identification of the appellant was positive, and that the charges were proved beyond reasonable doubt.

Counsel further contended that the learned trial magistrate gave due consideration to the appellant's

defence. Counsel urged us to dismiss the appeal.

This being a first appeal, we are duty bound to evaluate the entire evidence on record and come to our own conclusions and inferences – see **OKENO – vs – REPUBLIC [1972] EA 32**.

The facts of the case are these. On the 25.2.2004 at 11.00 p.m. the two complainants (PW1 and PW2) alighted from a lorry at Kawangware, having brought some maize from Molo. Before they could have the maize off loaded from the lorry, some six young men approached them. One of those young men went up the lorry and made a hand signal, whereupon a big group of young men approached. The young men had knives. They got hold of the hands of PW1 **SIMON NJOROGI MURAGURI**. They threatened him by pointing knives at his stomach. They demanded that he gives them some money. When he told them that he did not have money, they went for the lorry driver, who escaped by driving away the lorry. They then took from PW1 Kshs.841/=, his pair of shoes and wrist watch. PW1 identified one of the young men who had a mark below his lower lip. It was his evidence that there was electricity light at the scene, and the lorry's lights were still on.

The young men also held PW2 **ELIZABETH NYAMBURA**. They took away her bag which had a dress inside, her wrist watch and Kshs.3,000/=. They also hit her on the face and legs and she felt pain, though they did not inflict any visible injury on her. It was PW1's evidence that she was able to identify one of the young men through the electricity light at the scene. She knew him before and his name was **RWARU**. He had a fresh injury at the lower lip.

The lorry driver, in the meantime, drove the lorry to the market and got the maize off loaded. The appellant was arrested the next day. He was later charged with the offence.

In his defence, the appellant gave unsworn testimony. He stated that he was a loader at Kawangware. On the day he was arrested, he went for work as usual. He saw the complainant with informers, who claimed that he was involved in an offence which he knew nothing about. He was then taken to the chief. It was his contention that he had done some work for PW2, who had not yet paid him.

The first complaint of the appellant is that he was not positively identified. We observe that the conviction of the appellant hinges on evidence of identification or recognition. 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 and 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 needs 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 than identification of a stranger; but even when a witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made”.

In our present case, the robbery occurred at night around 11.00 p.m. The evidence is that there was electricity light, as well as the lights from the lorry. There is however, no evidence as to how far the source of electricity light was from the scene. There is no evidence regarding the intensity of that light it was. On the light from the lorry, there is no description of how bright. There is also no evidence as to whether the light referred to was from the front or rear lights of the lorry. In our view, the circumstances for identification were not favourable for positive identification. There could be a high possibility of mistaken identify, especially taking into account that the robbers (young men) were said to be many. On the recognition, PW2 **ELIZABETH NYAMBURA** gave evidence that she recognized the appellant as a person that she knew before. It was her evidence that his name was **RWARU** who used to carry loads for her. The appellant on the other is called **JOHN GAITHO WATENGA**. Those are two different names. The prosecution did not give any evidence to show the connection between the two different names. In our view, the two names refer to two different people. Though the appellant admitted to

having done some work for PW2, it is quite possible that PW2 mistook the appellant for another person called RWARU .

The learned trial magistrate should have warned herself of the need for caution before convicting the appellant on the evidence of identification or recognition. She did not do so. In our humble view, if the learned trial magistrate had warned herself of the need for caution and evaluated the evidence with that warning in mind, she would not have convicted the appellant on the evidence of identification or recognition that was before her. The fact that that appellant was said to have had an injury on the lower lip was not sufficient identification.

Having evaluated the evidence on record, we come to the conclusion that the evidence of identification and recognition is not free from possibility of error. It would therefore not be safe to sustain a conviction on the same. Our findings herein dispose of both 1st and the 2nd ground of appeal.

The other complaint of the appellant is that the learned trial magistrate erred in rejecting his defence. On the defence of the appellant, the learned trial magistrate had this to say on page J2 of the judgment –

“It is also in evidence that more than one robber was involved and hence the ingredients of the offence were clearly established. The accused defence on the other hand was a mere denial. He claimed that the complainant (No.2) had not paid him for some work done. This was denied by the complainant in cross-examination. I do not find it to be the truth that PW2 implicated the accused person”.

In our view, the learned trial magistrate properly considered the defence of the appellant. She did not believe the same. We find no error or misdirection that was committed by the learned trial magistrate in considering the defence of the appellant. That ground of appeal therefore fails. However, as we have already found that it is not safe to sustain a conviction on the evidence on record, we will allow the appeal.

Consequently, we allow the appeal, quash the convictions on both counts and set aside the sentence imposed by the learned trial magistrate. We order that the appellant be set at liberty unless otherwise lawfully held.

Dated at Nairobi this 7th day of June 2007.

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LESIIT

JUDGE

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DULU

JUDGE

Read, delivered and signed in the presence of –

Appellant

Mr. Makura for State

Tabitha/Eric – Court Clerks

LESIIT

JUDGE

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DULU

JUDGE