REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

Criminal Appeal 104 of 2006

FREDRICK KAKAI MALOBA ==========APPELLANT

V E R S U S

REPUBLIC ==========RESPONDENT

J U D G M E N T

The appellant, *FREDRICK KAKAI MALOBA*, was convicted for the offence of robbery contrary to section 296 (i) of the Penal Code. He was then sentenced to three years imprisonment.

Being dissatisfied with both the conviction and sentence, the appellant lodged an appeal to this court. In his amended grounds of appeal, the appellant raised six substantive issues, as follows;

*" **2… the learned magistrate erred in law and in fact in convicting me on recognition of a single witness (PW1) without the need to consider material discrepancies and contradictions which cast doubt.***

3. ….***the learned magistrate erred in law and in fact in relying on identification evidence of PW1 without observing that the circumstances prevailing at the time of the alleged attack was not favourable for positive identification of the assailants.***

4. … the learned trial magistrate erred in law and in fact in considering the evidence of PW4 without nothing that the arresting officer was not avail (sic!) to clear doubts over the arrest.

5. THAT: The learned magistrate erred in law and in fact in upholding therefore that the prosecution had proved their case beyond reasonable doubts.

6. THAT: The burden of prove (sic!) was shifted on one.

7. THAT: The conviction and sentence passed on me was against the weight of evidence."

When canvassing the appeal, the appellant submitted that it was not possible for somebody who was well known, to attack and rob someone who knows him well because he would fear automatic

Identification. Therefore, the appellant said that his alleged recognition was doubtful.

He also pointed out that his name was not given in the first report.

In any event, had his name been given, the appellant contends that he would have been arrested almost immediately. Therefore, as he was not arrested soon after the incident in issue, the appellant submitted that he could not have been named in the first report.

Another issue raised by the appellant was in relation to the date of the alleged incident. As far as PW4 was concerned, he did receive a report of the incident on 22/5/2005. Yet the complainant (PW1) testified that the incident occurred on 24/5/2005. Accordingly, the appellant asserted that there was no way that the investigating officer, P.C. Tom Juma, could have received a report of the incident some two days before the incident occurred.

As regards identification, the appellant pointed out that the incident occurred at night. Therefore, the circumstances prevailing were said to have been anything but conducive for positive identification.

And even though PW1 said that there was moonlight, the appellant pointed out that the complainant did not indicate whether it was a half moon or full moon; or how long the assailants took when they were with her outside the house.

In any event, as there were said to have been a total of eight armed robbers, the appellant believes that PW1 must have been in shock, especially after she had been threatened with death.

On the next morning after the attack, the complainant's sons said that they tried to follow the footsteps of the robbers, in vain. In the light of that testimony, the appellant submitted that, the victims could not have already recognized the robbers, because if they had done so, they would not have needed to try and retrace the robbers footsteps.

The appellant blamed the bad blood between him and PW1, for the evidence which the complainant gave against him. The bad blood was attributed to the fact that the appellant, who had been a Kenya Police Reservist, had previously been involved in a case between PW1, her husband, and Mildred, who was said to have been the lover to PW1's husband.

It was also submitted by the appellant that his conviction was dangerous as it was founded on the evidence of a single witness, whose testimony was not corroborated.

In this case the prosecution was blamed for failing to call some essential witnesses, such as the police officer who had originally arrested the appellant.

The appellant also drew the court's attention to the fact that although PW1 did testify about having been raped by the appellant and one other assailant, the complainant had not made a report to the police about the alleged rape. Also she had not mentioned the alleged rape in her written statement.

In answer to the appeal, the learned state counsel, Mr. Makura, submitted that the appellant had been convicted on the basis of overwhelming evidence. He also submitted that the evidence tendered by the prosecution was both consistent and corroborative.

Being the first appellant court I am enjoined by law to re-evaluate all the evidence on record and draw therefrom my own conclusions, whilst bearing in mind that I did not have the benefit of hearing or seeing the witnesses when they testified.

PW1, MARY NGUHI WAWERU, was the complainant. She testified that the incident occurred on 24/5/2005, at about 11.00 p.m.

At the time PW1 was in her house together with one of her sons (PW2), when she heard someone calling out to her, through the window. The person was asking her to open. She was told that if she did not open, that would be her last day.

PW1 woke up her son (PW2), who then picked up a panga, after PW1 told him that thieves had come.

However, PW1 persuaded the son to open the door.

The assailants entered the house, carrying torches. They ordered PW1 and PW2 to lie down. They then demanded

KShs.100, 000/= from PW1, saying that they had been sent by Mildred, who was said to be a lover to PW1's husband. PW1 said that she did not have money.

The appellant then held PW1's hand and took her outside. PW1 recognized the appellant when they reached outside, as there was moonlight.

Two of the assailants, including the appellant, raped PW1. They then tied her up before leaving. However, as PW1 was embarrassed about her rape ordeal, she did not tell her sons about it.

According to PW1, she did tell the police that the appellant was one of the thieves. Later, after the appellant had been arrested, the police told PW1 about the arrest.

During cross-examination, PW1 confirmed that the appellant had been to her house on several occasions prior to the robbery. On one occasion, the appellant had gone to buy firewood from PW1, whilst on another occasion the appellant went to the house in relation to a case between PW1 and Mildred.

The fact that PW1 knew the appellant well was also conceded by the appellant, during his defence. Therefore it was not an issue.

It was for that reason that the appellant submitted that he could not have gone to rob the complainant whilst he knew that he would have been readily recognized.

To my mind, there is logic in the reasoning advanced by the appellant. However, there are many cases in which the culprits are well known to their victims. Indeed, there are even cases in which closely related persons have been found guilty of committing criminal offences against their own relatives. What drives people to steal or to commit other crimes against people who know them is not understood by me. Nor is it the responsibility of this court to try and engage in an intellectual discourse on what drives people to commit crimes against people who can recognize them. Perhaps that might constitute a good topic for research in due course. Until that issue is delved into by researchers, and an appropriate conclusion is derived from an analysis of the research material, I find myself unable to accept the appellant's invitation, to find that his recognition was doubtful simply because it was unlikely that he could have gone to rob PW1 whilst he was aware that he could be readily recognized by the victim.

The appellant also asserted that PW1 had only implicated him in the robbery because she had a grudge against him. The grudge was said to have been arisen from the fact that at one time, the appellant did try to resolve a dispute between PW1 and the lover to PW1's husband.

I have given careful consideration to that issue. First, the appellant conceded that he had been a Kenya Police Reservist. Secondly, it is common ground that he was a neighbour to the complainant. Therefore, in those circumstances, I find nothing unusual in the fact that the appellant was involved in the attempt to resolve the dispute between PW1 and Mildred.

At no stage in the proceedings was there any suggestion that the appellant had taken sides with Mildred, against PW1, so as to give rise to any grudge between PW1 and the appellant.

As PW1 said, during cross-examination, she had no grudge against the appellant. And, the appellant did not offer any explanation as to why he thought that PW1 had a grudge against him.

If anything, PW1 said to the appellant;

> '***If I had disagreed with Mildred, you had nothing in such a disagreement."***

Furthermore, the appellant did also buy a whole lorry-load of firewood from PW1. That only goes to support PW1's statement, that there was no grudge between her and the appellant. I therefore find that the complainant was not motivated by a grudge or any other ill-motives against the appellant.

PW2, FRANK NIVIRU WAWERU, was the son to PW1. On the material day, he was inside the mother's house, when he heard people talking at the window, saying;

> *" **Mama tumerudi."***

Apparently, the house had been visited severally in the past, by thieves. That fact was stated by the complainant, as well as by PW2 and PW3.

Although PW2 initially refused to open the door, he was later persuaded to do so.

As the assailants were flashing their torches, PW2 recognized the appellant as one of the assailants. PW2 testified that he recognized the appellant in the moonlight.

According to PW2, he had known the appellant before that incident as he (PW2) used to sell milk to him at Matisi.

PW2 also corroborated the testimony of PW1, to the effect that she was taken outside the house for a while. He also confirmed that on the morning after the incident, they followed, but did not find the suspects.

When PW2 reported to the police, he did not give them the appellant's name, because the police did not ask him.

PW3, ANTONY NJUGUNA WAWERU, was another son of PW1. He told the court that PW2 had called him at about midnight, to tell him that thieves had attacked again. PW3 said that although they tried to take the route which the thugs had taken, they did not find the thugs.

According to PW3, his mother told him that she had recognized the appellant. As PW3 had known the appellant previously, he reported to the chief. Later, PW3 led the Chief's Vigilante to show him the home of the appellant.

PW3 testified that they did see the appellant although it was not at his home.

PW4, P.C. TOM JUMA was a police officer attached to the Moi's Bridge Police Station. He said that the complainant reported the robbery to the police, on 22/5/2005. During the said report, PW1 is said to have told the police that she had recognized one suspect who was a former Kenya Police Reservist.

On 5/6/2006 PW1 told the police that the suspect she had identified was in custody at Kitale Police Station, on different charges. PW4 then went to the Kitale Police Station and traced the appellant from the cells.

When PW4 removed the appellant from the cells, PW1 confirmed that he was the suspect. It was then that PW4 arrested the appellant in relation to the offence in issue in this case.

In the light of the foregoing, I find no merit in the appellant's contention that he was not named in the first report. I say so because PW1 expressly stated that she had recognized Kakai (the appellant) as one of the thieves.

The appellant submitted that having been a police reservist he ought to have been arrested immediately, if PW1 had named him. In his view;

> *"**It must be noted that a Kenya Police Reservist is well known personnel in the police station and***

at the local authorities like the Chief and the Village Elders amongst the locals."

If that be the case, I fail to understand why in the appellant's defence, he said that the Assistant Chief of Bondeni asked him if the was Kakai. In other words, from the action of that Assistant Chief, the appellant should have learnt that perhaps he was not as widely well known as he presumed himself to be.

In any event, when the Assistant Chief told the appellant that he had summoned him thrice to his office, that implies that the appellant was already being sought by the local administration. And when they got to the police station, the appellant learnt that it was the police who had been looking for him.

The fact that both the police and the Assistant Chief had been looking for the appellant can only confirm that they had received information that the appellant had been recognized as one of the robbers.

As regards the circumstances under which the appellant was recognized, there is no doubt that the same were not conduicive for easy recognition. Indeed, PW1 said that she did not identify the appellant inside the house. She only identified him outside, in the moonlight.

She explained that the appellant was holding her and that he even raped her. She also said that the appellant told her not to look at him.

In the circumstances, the proximity of the two persons was very close. Not only did the appellant hold the complainant's hand and take her outside the house; he also raped her.

As the appellant concedes that the complainant knew him well, I find and hold that there cannot have been any room for error in the complainant's recognition of the appellant, from such a close range.

The learned trial magistrate, who had the benefit of seeing and hearing PW1 testifying, found her to be a credible witness. I find no reason to fault that assessment of the complainant.

Whilst it is true that it was only PW1 who told the police and her sons that she had recognized the appellant, it is clear that the learned trial magistrate warned herself about the importance of treating with caution the evidence of a single identifying witness especially when the conviction is founded largely on that identification. By so doing, the trial court complied with procedure, and cannot be faulted.

In the result, having re-evaluated the evidence on record, I hold and do find that the evidence adduced against the appellant was not only consistent but also corroborative. That being the position, the prosecution is deemed to have proved the charge against the appellant beyond any reasonable doubt.

As the evidence was overwhelming, I find that the trial court was right to have rejected the appellant's defence as the same did not cast any doubt on the prosecution case.

Accordingly, I uphold the appellant's conviction.

And, as regards sentence, I do find that three years imprisonment was neither harsh nor excessive, when it is borne in mind that the maximum penalty under Section 296 (1) of the Penal Code is fourteen years imprisonment. Accordingly, I also uphold the sentence.

In the result, the appeal is dismissed.

Dated and Delivered at Kitale, this 24th day of October, 2007.

FRED A. OCHIENG

JUDGE