REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 422, 423 & 424 of 2004

STEPHEN NJUGUNA NJERI ……...…..……..…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 423 OF 2004

FRANCIS KAMAU MUTHORA……...……...…….. APPELLANT

VERSUS

REPUBLIC ……...…….....…….…… RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 424 OF 2004

PETER GACHERU KIMANI…….…..…….. APPELLANT

VERSUS

REPUBLIC …….…….....….…… RESPONDENT

(From original conviction and sentence in criminal case number 8980 of 2003 of the Chief Magistrate's Court at Thika, S. Mogaka, SRM)

JUDGMENT

STEPHEN NJUGUNA NJERI, the 1st Appellant, ***FRANCIS KAMAU MUTHORA,*** 2nd Appellant, and ***PETER GACHERU KIMANI*** the 3rd Appellant, were found guilty and convicted for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code after a full trial. They were each sentenced to death in accordance with the law. It is against the conviction and sentence that each one of then lodged an Appeal to this Court. We have consolidated the three Appeals for ease of hearing since they arose out of the same trial.

The Appellants have raised similar grounds of Appeal in which they fault their convictions on the basis

of alleged recognition, defective charge sheet, failure to call essential witnesses and rejection of their defences which were plausible and outweighed the weak Prosecution case.

The facts of the Prosecution case were that the Complainant PW1 on 9th October at about 5 a. m. left her house at Kabati for Thika where she used to sell tomatoes. As she waited for the means of transport at a bus stage, she saw three men who had torches, pangas, clubs and iron bars approach her. They told her that they were Police officers and started searching her. PW1 told them that she was carrying tomatoes but the three men claimed she was carrying an illicit drink Mungari. In the process of searching her the three men came across her purse which contained Kshs.772/- which they took. When she protested, she was hit with an iron bar. The three men however gave back to her Kshs.100/= for transport. The three men then ordered PW1 to run away. After sometime, PW1 went back to the scene to pick her book when again she saw two of the men emerge and claim that there appeared to have been some thieves at the scene. PW1 told the two men that they were the ones who had robbed her earlier. It was PW1's evidence that she had recognised the three men who robbed her with the assistance of the moonlight as well as their voices. PW1 further testified that she had known the three men for a long time and that infact one of them was her relative. The three men she was referring to are the Appellants herein. PW1 further testified that soon after the incident, she went to the home of the 3rd Appellant and reported to PW2, the mother of the 3rd Appellant about the incident and demanded that the Appellants refund to her the money they had taken from her. She claimed that she did not scream as she feared she could be killed and also because she wanted the matter hushed up. PW2 informed the Appellants of what PW1 told her and they denied having been involved in the incident and refused to refund the money. PW1 then decided to report the matter to Kabati Police Station. The Appellants, in a bid to clear their names also proceeded to the Police Station. PW1 found them at the Police Station. Upon hearing the story of PW1 and upon PW1 identifying the Appellant at the Police Station, PW3 arrested them and locked them up at the Police. He later charged them with the instant offence.

Put on their defence, the Appellants in their unsworn statement of defence advanced alibi defences. They stated that they were all in their homes at the time of the alleged offence. That they all later reported at their place of work where they used to slaughter pigs at about 6.45 a. m. and worked all through the day. It was while at work that the 3rd Appellant informed them that his mother had informed him of a complaint against them by PW1. They arranged to meet PW1 and when she failed to prove her allegation they proceeded to Kabati Police Station in attempt to clear their names. It was whilst there that PW1 came and caused their arrest. They were subsequently charged.

In support of their Appeals, the Appellants tendered written submissions which we have carefully read and considered. The Appeals were opposed. Mrs. Kagiri, Learned State Counsel in opposing the Appeals submitted that the Prosecution adduced evidence that supported the charge against all the Appellants. That the offence was committed at 5.30 a. m. by three men whom the Complainant recognised as she had known them before. She also recognised them by their voices. PW1 was able to identify and or recognise the Appellants with the assistance of the moonlight. Counsel further submitted that immediately after the incident the Complainant made a report to PW2. That PW2 reiterated what PW1 had said to her that she was attacked by 3 people well known to her. Finally Counsel submitted that while analyzing the evidence the trial Magistrate duly warned himself if the danger of convicting on the evidence of a single identifying witness before proceeding to convict the Appellants.

As required of us as the first Appellate Court we have subjected the evidence adduced by the Prosecution and the defence during the trial to close scrutiny by conducting fresh analysis and evaluation of the same whilst bearing in mind that we neither saw nor heard any of the wittiness and giving due allowance. See ***OKENO VS REPUBLIC (1972) EA 32***

The entire evidence that was adduced before the trial Court clearly shows that the Appellants were convicted on the evidence of a single identifying witnesses or recognition. It is now trite law that when the evidence before a Court of Law is mainly that of a single identifying witness, the Court has to be extra careful before entering a conviction. That need for extra care is not reduced even when the evidence is that of recognition for there may be cases where even people who know each other very well may still make mistakes. In such circumstances, the Court needs to see if there is other evidence to lend credence

to the evidence of identification of the suspect before it, before it can confidently enter a conviction. In the well know case of ***ABDALLA BIN WENDO AND ANOTHER VS REREPUBLIC (1953) 20 EACA 166,*** the Court of Appeal stated as follows:-

"……***Subject to certain well know exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the condition favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to the guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free form the possibility of error……."***

And in the case of ***REPUBLIC VS TURNBULL (1976) 3 ALL ER 519 Lord Wirgery C. J***. stated:-

"……***Recognition may be more reliable than identification of a stronger, but even when the witnesses in purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made….."***

In this case, the Appellants were allegedly recognized by PW1. They disputed the same evidence and stated in their defence that they were nowhere near the scene of the robbery. The offence took place at about 5.30 a. m. It would appear that it was dark and that is why PW1 stated that he was able to recognize the Appellant's with the assistance of the moonlight. Strangely however the Learned Magistrate did not undertake any inquiries as to the intensity of the moonlight, the position of the moonlight in relation to the Appellants and the time taken by PW1 to observe the Appellants as to be able to recognize them. These inquiries are absolutely necessary. See ***WANG'OMBE VS REPUBLIC (1980) KLR 149 and MAITANYI VS REPUBLIC (1986) KLR 198***. Infact in the latter case, the Court of Appeal stated specifically that:-

"……***Failure to undertake such an examination is an error of law and such evidence cannot safely support a conviction. We find that failure by the Prosecutor to lead evidence and are the trial Court to conduct inquiry as to the nature of the lighting condition available, knowing very well that the condition favouring a correct identification were difficult was fatal to the Prosecution case….."***

This holding is applicable to the circumstances of this case. Further it does appear to us that the claims of recognition of the Appellant's are doubtful in that according to PW1, whilst approaching her the Appellants had torches on. If indeed there was moonlight that was illuminating sufficient light and which enabled PW1 to recognize the Appellants, could the Appellants have required the assistance of the torchlight to find their way to PW1? The evidence on record also shows that before attacking PW1, the Appellants are alleged to have directed the torchlight on the face of PW1 which blinded her. In these circumstances, how could PW1 have been able to see the Appellants, if at all, sufficiently to be able to recognize them? Finally it was also in the evidence of PW1 that she thought the Appellants had not recognised her because she had covered her face. Now if PW1 had covered her face with the clothes in such away that the Appellants who are persons well known to her could not see nor recognise her, how then was she able to see and recognise the Appellants? It is an incredible story. Further there is doubts as to the ability of PW1 to identify the Appellants is lend credence by what PW1 said in her first report to PW2 regarding the incident. According to PW2, PW1 told her:-

"…..***She told me she had been robbed of her money by people who appeared to be Kamau…."***

If indeed PW1 had recognized the Appellants or one of them, then there would have been no need to guess. It was either Kamau or not. It does appear to us that PW1 merely assumed that she had been robbed by people she believed to be the Appellants whom she used to meet on the road at 5 a. m daily going on duty. In this regard PWI testified under cross-examination by the Appellant's Counsel that:-

"…....***I used to meet you on this hour 5 a. m. everyday prior to this……."***

PW1's report to PW2, which was the initial report, was clear that PW1 was uncertain as to who robbed her. This we think, was due to the fact that the circumstances obtaining were not favourable for positive identification due to darkness. This conclusion is supported by the fact that the assailants had torches which they flashed at her face and blinded her. Had the moonlight been sufficient, there would have been not need to resort to torches.

How about voice recognition? In the case of ***LIBAMBULA VS REPUBLIC (2003) KLR 683*** the Court of Appeal stated:-

"……***Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it is the accused person's voice the witness heard, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it. See CHOGE VS REPUBLIC (1985) KLR 1……"***

In the instant case, we have already held that the conditions prevailing at the scene of crime could not favour positive identification and or recognition of the Appellants by PW1. Though PW1 claimed to have recognised the voices of the Appellants, she does not say how she was able to do so. Did the Appellants speak to her in unison? If so it is unlikely that she would have been able to recognize any of the Appellant's voices. Even if she was able to do so, could she have been able to assign the said voice to any of the Appellant? To our mind this is well nigh impossible. According to PW1, she recognized the voices of the Appellants when she demanded her money back from them. PW1 does not state if any of the Appellants responded to her demands and if so which one and what did he exactly say that would have enabled her to recognize the voice. Taking all the foregoing into account, we are not satisfied that the evidence of voice recognition was reliable as to found a conviction.

What we have said is sufficient to dispose off this Appeal. However we shall comment very briefly on the submissions by the Appellants that the charge sheet was defective because the weapons used in the robbery were not described at all in the charge sheet. In our view the fact that the weapon or instrument used in the robbery is not disclosed in the charge sheet does not necessarily make the charge sheet defective. Just as failure to describe such a weapon or instrument as a dangerous or offensive weapon would not necessarily make the charge sheet defective. It is sufficient, if the weapon though not described in the charge sheet is shown by evidence to have been intended for use to cause injury. It is also sufficient if the other ingredients of robbery with violence under Section 296 (2) of the Penal Code are proved. In this case the robbers were more than one and caused injury to PW1 during the robbery. We are satisfied therefore that if the other ingredients of robbery were met by the Prosecution that the charge of robbery with violence under Section 296 (2) of the Penal Code could have been proved.

Finally, we have anxiously pondered over the conduct of PW1 and the Appellants after the alleged incident.

As for the Appellants, after allegedly robbing the Complainant without as much as disguising themselves and knowing that the victim would recognize them did not at all disappear from the scene. It was the evidence of PW1 that when she retuned to the scene of crime moments later, she found 1st and 3rd Appellants at the scene who told her about the thieves who had been at the scene. Although PW1 claimed that they were the ones who had robbed her, they did not take any steps to avoid arrest. Indeed they took it upon themselves to go to the Police station to clear their names regarding malicious accusations by PW1 that they had robbed her. It was whilst at the Police station that PW1 came and caused their arrest. It is also instructive that before proceeding to the Police Station, they had confronted PW1 over the accusations in the presence of PW2 and demanded to know where they had robbed her but she did not respond. On the issue PW2 testified as follows:-

"…***From the evening PW1 came to my house to find out whether I had got the money the accused person I replied in the negative. I told her that i would call the accused person. I called them and they asked her thrice where they had robbed her. She did not respond. The accused persons said they***

would sort out the matter at the Police Station when they went to the Police Station the accused person were remanded in custody……..”

In our considered opinion, the conduct of the Appellants is inconsistent with their guilt. Had the Learned Magistrate considered this aspect of the matter, we are certain that he could have come to a different conclusion.

The totality of the above is that we are not satisfied that the Appellants’ conviction was based on sound consideration. We see every reason to interfere with conviction. These Appeals are hereby allowed, conviction quashed and sentences set aside. The Appellants should forthwith be set at liberty unless ofcourse they are held for any other lawful cause.

Dated at Nairobi this 1st day of February, 2006.

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LESIIT

JUDGE

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MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant

Mrs. Kagiri Gateru for State

Erick/Tabitha Court clerks

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LESIIT

JUDGE

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MAKHANDIA

JUDGE