



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal No. 234 of 2004

JOHN NGUGI KANYANJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant, John Ngugi Kanyanja was charged with the offence of **robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars of the offence were that on the 4th of March 2004 at Mukinyai Trading Centre Nakuru, the appellant, while armed with an iron bar and a knife robbed Moses Kitur Langat of Kshs 13,000/= and a certificate of appointment and immediately before or immediately after the time of such robbery used actual violence to the said Moses Kitur Langat. The appellant pleaded not guilty to the charge. After a full trial, the appellant was convicted as charged. He was sentenced to death as is mandatorily provided by the law. He was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant has raised several grounds of appeal challenging the decision of the trial magistrate in convicting him. He was aggrieved that the trial magistrate had relied on the evidence of a single identifying witness to convict him when the said identification was made in difficult circumstances. He was aggrieved that he had been convicted based on insufficient and contradictory prosecution evidence. He faulted the trial magistrate for arriving at the said decision of convicting him without putting into consideration the evidence that was adduced in his defence. He was finally aggrieved that the trial magistrate had not properly addressed himself on the issues put before him and had thus found the appellant guilty of the charge without prosecution discharging the burden of proof placed upon it of establishing its case against him to the required standard of proof beyond reasonable doubt.

At the hearing of the appeal, the appellant with the leave of the court presented to this court written submissions in support of his appeal. Mr Gumo for the State made oral submissions urging this court to uphold the conviction of the appellant. He submitted that the trial magistrate had considered all facts and circumstances of the case and had properly found the appellant guilty of the offence as charged. He urged the court to disallow the appeal. Before giving the reasons for our judgment, it is imperative that we set out the facts of this case.

On the 4th of March 2004 at about 10.00 p.m. the appellant met with the complainant, PW1 Police Constable Moses Kitur Langat outside a bar called “*Three in one*” at Sachangwan Trading Centre. The appellant and the complainant knew each other. According to the complainant, he had a conversation with the appellant after which he offered to buy him a beer. The two of them went into a bar but unfortunately the bar attendant refused to sell them beer because the said bar attendant told the complainant the appellant had earlier in the evening started a fight at the bar. The appellant and the

complainant then walked out of the bar. They agreed that they were going to meet the following day so that the complainant could fulfil his promise to buy beer for the appellant. The complainant parted company with the appellant outside the bar. According to the complainant he walked for a distance of about fifty metres when he testified that the appellant attacked him and hit on the head with a piece of metal.

The complainant alleged that he tried to resist being robbed by the appellant but was overpowered when the appellant threatened to stab him with a knife. He testified that the appellant robbed him of Kshs 13,000/= and also took away a notebook which contained his certificate of employment. The complainant further testified that the appellant then destroyed his certificate of employment and left it by the roadside. The appellant then left the complainant. The complainant who was injured in the attack, managed to walk home. He informed his wife of the incident. On the following day, he made a report to the police at Sachangwan Police Patrol Base. He was issued with a P3 form which he took to PW5 Dr. Gathura Wambui who testified that the complainant had been injured on the left side of the head. The complainant had also sustained a cut wound on the left side of the head and another cut wound on the left arm. PW5 assessed the degree of injury as “*harm*”.

PW2 Lucy Wanjiru, a barmaid at Sachangwan Trading Centre testified that she was selling beer at the bar on the 4th of March 2004 when the appellant and another man came and asked to be served with beers. PW2 asked them to first pay for the beer. The appellant refused to pay the money. PW2 refused to serve them. PW2 testified that the appellant and the person he was with went outside the bar and after fifteen minutes came back. She testified that the appellant then gave her Kshs 300/= and demanded to be served with beer. After a while, the appellant removed the sum of Kshs 13,000/= in one thousand shillings notes from his pocket and put it on the counter saying that he now had money. Soon thereafter the police from Sachangwan Police Patrol Base came and arrested the appellant and took him to the police patrol base.

PW3, Richard Kibet Tuikong was at the bar when the police arrested the appellant. He saw the appellant show PW2 the sum of Kshs 13,000/=. He also saw him give PW2 the sum of Kshs 300/= to purchase beer. PW3 was arrested together with the appellant and taken to the police patrol base. At the police patrol base, the two were released and told to report back to the police patrol base the following day. The police however retained the sum of Kshs 12,000/= which had been found in possession of the appellant. PW4, PC Willie Kandie then based at Sachangwan Police Patrol Base testified that he received information about the suspicious conduct of the appellant. He went to the bar and arrested the appellant. When he searched the appellant he found in his possession the sum of Kshs 12,000/= and a knife. He arrested the appellant and took him to the police patrol base where he detained him until the following day. On the following morning, the complainant went and made a report of the robbery. PW4 went to the scene of the robbery and was able to recover the complainant’s certificate of employment which had been torn. He told the court that the complainant had identified the appellant as his assailant.

When he was put on his defence, the appellant testified that on the material day he had sold his maize and had been paid Kshs 12,000/=. He also had in his possession Kshs 800/=. In the evening he went to Sachangwan Trading Centre where he met the complainant whom he requested to accompany him to a bar so that he could buy him a drink. When they entered the bar, a quarrel ensued between them and the owner of the bar refused to sell them beer. The appellant testified that both of them walked out of the bar and parted ways. Later, the appellant returned to the bar and was able to buy beer for himself and his friends. It was while he was drinking beer with his friends that the police came and arrested him. The appellant testified that he asked the police the reason why they were arresting him yet he had committed no crime. He refused to accompany the police to the police patrol base in the absence of a witness. He asked the owner of the bar to accompany him to the police patrol base. At the patrol base he was asked to surrender the sum of Kshs 12,000/=. He was then released by the police but told to go to the police patrol base the following day to collect his money. When he returned to the police patrol base he was arrested and charged with the offence of robbery with violence, an offence which he denied committing.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced by the witnesses so as to arrive to its own independent decision whether or not to uphold the conviction of the appellant. In reaching its determination, this court is required to put in mind that it neither saw nor heard the witnesses as they testified. (*See Njoroge –vs- Republic [1987] KLR 19*). The issue for

determination by this court is whether the prosecution proved its case against the appellant on the charge of robbery with violence to the required standard of proof beyond reasonable doubt. We have carefully considered the submissions made before us by the appellant and by Mr Gumo on behalf of the State. We have also re-evaluated the evidence adduced by the prosecution and that offered by the appellant in his defence.

In the instant appeal the prosecution relied on basically the evidence of the complainant to secure the conviction of the appellant. The complainant testified that on the material evening, he met the appellant at Sachangwan Trading Centre. In his evidence he stated that he was at a bar at the said trading centre from about 7.00 p.m. to 10.00 p.m. When he got out of the bar he met the appellant. They walked for a distance of about twenty metres. They parted company. He testified that after walking for a distance of about fifty metres, he was attacked by the appellant with a piece of iron. He testified that he was able to identify the appellant because they had a conversation while he was being attacked. The complainant however did not tell the court if there was light that would have enabled him to identify the appellant. He did not tell the court how he was positive that it was the appellant and no one else who had attacked him. In fact at the time of his attack, he testified that he had been temporarily blinded by the headlights of a car which was traveling from the opposite direction. He testified that he was robbed of Kshs 13,000/= during the robbery. He was also injured. After the robbery the complainant went home and slept.

On the following day, he went to Sachangwan police patrol base and reported the incident. He told the police that he had identified the appellant as his attacker. This evidence is however contradicted by the evidence that the appellant offered in his defence. His narration of the events that took place on the material night is rather different. He testified that he met with the complainant at Sachangwan Trading Centre and offered to buy him a drink. However, before they could enter the bar they quarreled and parted ways. The appellant's evidence was corroborated by the evidence of PW3 who testified that he was at the bar when the appellant returned to the bar and was refused service by PW2 the barmaid. PW2 stated that she could not serve the appellant because earlier in the night, the appellant had fought with someone in the bar. PW3 testified that he persuaded PW2 to serve beer to the appellant. The appellant testified that while he was at the bar, the police came and arrested him. This evidence is corroborated by the evidence of PW3 who testified that he and the appellant were arrested by the police but were released at the police patrol base and ordered to return the following day. PW3 corroborated the appellant's evidence that the police retained the sum of Kshs 12,000/= which had been removed from the possession of the appellant when he was searched. The appellant testified that he was detained by the police the following day when he went to collect the money that had been retained by the police.

We have carefully re-evaluated the evidence adduced by the witnesses before the trial magistrate's court. We have also considered the submissions made before us. It is clear that the evidence of the complainant as to the circumstances of his attack raises doubt as to the person who robbed him. The complainant had drunk beer from 7.00 p.m. to 10.00 p.m. At the time he went home, he was obviously drunk. He testified that he was attacked by a single robber fifty metres from the bar. It was during the night. The complainant did not tell the court what source of light enabled him to identify his attackers. In fact his evidence clearly shows that he was blinded by the headlights of a motor vehicle which was passing by at the time of his attack.

Although he claims that he had a conversation with his assailant, he was not categorical in his evidence as to how he was able to identify the voice of the assailant to be that of the appellant. The evidence of the complainant was that of a single identifying witness made in difficult circumstances. As was held in the case of **Maitanyi –vs- Republic [1986] KLR 198** by the Court of Appeal, evidence of a single identifying witness should be treated with caution especially when the said identification is made in difficult circumstances. Although the complainant told the court that he had recognized the appellant as his assailant he did not tell the court how he was able to do so. Further, his evidence that he had been robbed of Kshs 13,000/= is not supported by the evidence of PW2 who told the court that the appellant had more than Kshs 13,000/= when he entered the bar. In fact her evidence was to the effect that the appellant had Kshs 13,300/=. In the circumstances of this case it is doubtful as implied by the prosecution that the money which was in the possession of the appellant was the one that he had robbed from the complainant.

There are certain inconsistencies and contradictions in the evidence that was adduced by the prosecution witnesses which was exposed by the evidence of the appellant in his defence. From the said evidence it is clear that the appellant and the complainant who were persons known to each other, quarreled and in fact were refused service at a bar earlier in the evening. The evidence of PW3 in this regard is critical. He testified that the appellant was arrested in his bar while they were having a drink. Both the appellant and PW3 were taken to the police patrol base but were released. The money which was in possession of the appellant was however retained by the police. PW4 the police officer who arrested the appellant gave a different version of events. He testified that he arrested the appellant on a different complaint altogether and detained him at the police patrol base until the following day when the complainant identified him as the person who had attacked him. Another inconsistency is the behaviour of the complainant after his alleged attack. The complainant being a police officer knew that he was required to report the said attack to the police as soon as possible. He chose not to report the incident to the police but instead went to his house and slept. It is only on the following day that he went to the police and made a report. In our view it was convenient for him to point out to the police that it was the appellant who had attacked him because of the differences that he had had with him the previous night.

The sum total of our re-evaluation of the evidence adduced is that the prosecution failed to establish its case against the appellant to the required standard of proof beyond reasonable doubt. The inconsistencies and the contradiction in the prosecution case raise reasonable doubt that the complainant identified the appellant as his attacker. The appellant's evidence in his defence gives a reasonable explanation of the events that took place on the material night. The possibility that the complainant was motivated by malice to make the allegations against the appellant cannot be ruled out. It ought not to have been dismissed off-hand by the trial magistrate.

In the circumstances of this case and after re-evaluating the totality of the evidence, we find that the appeal filed by the appellant has merit. We allow the same. We quash his conviction. We set aside his sentence. The appellant is acquitted of the charge of robbery with violence. He is ordered released from prison and set at liberty unless otherwise lawfully held.

DATED at NAKURU this 1st day of March 2006.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE