



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
Criminal Appeal 98 of 2003

(From the original conviction and sentence in Criminal Case no. 750/02 of the Senior Resident Magistrate’s court at Narok – S. M Githinji – SRM)

KOIPUTARE OLE TURANA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT OF THE COURT

The appellant was charged with **robbery with violence** contrary to section 296(2) of the **Penal Code**. The particulars of the offence were that on the 9th day of November, 2002 at about 1.00am at Mararianda trading centre within Narok District of the Rift Valley Province the appellant jointly with others not before court, being armed with dangerous or offensive weapons namely masai swords and rungu, robbed Hellen Korieta of Kshs.6,450/- and immediately before or immediately after the time of such robbery struck the said Hellen with a rungu. He was tried, convicted and sentenced to death. He has appealed to this court against the conviction and sentence.

The complainant testified that on the nights of 8th and 9th November, 2002 she was asleep in her house. She was sleeping with a young girl aged about 9 years. In the same house, an elderly neighbour, PW2, was also asleep but in a different room. The complainant said that at about 1.00am she heard the sound of a stone hitting the iron sheets of the roof. She also heard some people talking outside. She was scared and started screaming. Suddenly the door to her bedroom was smashed with a big stone and two men who had torches entered the house. She said that the appellant approached her holding a club and ordered her to stop screaming. He was speaking in Masai language and demanded money from her. She said that she had no money and the appellant hit her on the left shoulder. She gave him her bag which she said contained Kshs.6,450/- and the man left. She then woke up her neighbours and told them what had happened and they took her to hospital where she was treated and discharged. The complainant said that she was able to recognize the appellant by the light of the torch. She said that the appellant was familiar to her as she used to see him at the local market during market days.

PW2, David Mzee testified that after the house was broken into he saw two men in the house. One man

who had a torch, club and two simis confronted him and demanded to be given money. He threw to him a jacket that contained Kshs.500/-. He then heard a man saying in Masai language – “lets now go.” He said he recognised the voice as being that of the appellant. He testified that he was the one who had attacked PW1, the complainant. He said he had met him earlier at about 7.00pm at a local bar but had not known him before. He further said that he had been in the bar for about three to four minutes. PW2 said that he did not see the appellant when the house was broken into but he heard his voice. He said that the appellant had been taking alcohol with **PW3, Rotuno Ole Peres** but in his evidence, PW3 said that he did not know the appellant although he had seen him at the same bar where the PW2 had been.

PW5, Administration Police constable **James Muchiri** said that after the robbery report was made to him, he was also informed that the man who had committed the offence had been seen taking beer with PW3 at a local bar. PW5 denied knowledge of the appellant but he took PW3 and other people to Narok Police Station where their statements were recorded. On 12.11.2002, the area Chief and Assistant chief took the appellant to PW5 and had him charged in court the following day.

PW7, Alice Wangari Mbugua, was a bar attendant at Carlos Bar where the appellant was said to have been taking alcohol on 8.11.2002 but in her evidence she denied ever having seen him. **PW8**, Police constable **Benjamin Kiplating** testified that on 13.11.2002 PW5 took the appellant to Narok Police Station. He re-arrested the appellant, having earlier received a report of robbery with violence. **PW9**, Inspector **Agnes Mwangi** testified that on 13.11.2002 PW8 took the appellant to her and she was requested to take his statement. She said that she administered the usual caution before she recorded the appellant’s statement in Kiswahili language which the appellant seemed to understand. She said that the appellant admitted having committed the offence as charged. The appellant denied having voluntarily made such a statement, saying that he did not understand the Kiswahili language. A trial within a trial was conducted and thereafter the appellant’s statement was admitted in evidence.

In his defence, he denied having committed the offence as charged. He said that he was arrested by two elders and a chief on his way home from Transmara. He said that there existed a grudge between him and the chief because he had taken cattle to graze at the chief’s area for three months. The chief had even threatened to report the appellant and other Masai morans to the appropriate authorities allegedly for killing a wild animal.

The appellant faulted the learned trial magistrate for relying on the evidence of recognition by PW1 without considering that the same lacked merit.

Secondly, he faulted the learned trial magistrate for putting undue reliance on the appellant’s retracted confessionary statement.

The third ground of appeal was that the learned trial magistrate erred in law by accepting the evidence of PW2 that he recognized the voice of the appellant on the material night when there was no proof that PW2 knew the appellant prior to the date of the robbery.

The last ground of appeal was that the learned trial magistrate erred in law by rejecting the appellant’s defence without assigning any good reasons for so doing.

This being the first appellate court, we are by law mandated to reconsider the evidence that was tendered before the trial court and re-evaluate the same and reach our own independent conclusion – see **OKENO V REPUBLIC [1972] E.A 32**.

PW1 said that the robbery was committed at about 1.00am at night and that the appellant and his accomplice had a torch which lit the room where she was sleeping. The torch light was directed to PW1 and it was therefore difficult for her to see clearly. The robbery took a few minutes and PW1 was in a state of shock after her house was broken into. PW1 further purported to have recognised the appellant as a person she used to see at the local market during market days. She did not state for how long she had seen him so as to dispel the possibility of mistaken identity.

The complainant also did not know the name of the appellant. When she reported the robbery incident to her neighbours and to the police she did not describe the appellant at all. We are of the view that the circumstances that prevailed were not favourable for positive identification of the appellant by PW1. The evidence of a single identifying witness has to be tested with the greatest care especially where the conditions favouring a correct identification were difficult as was held in ***MAITANYI VS REPUBLIC [1986]KLR 198***.

Regarding the retracted confessionary statement of the appellant, although at the time of the trial such statements were admissible in evidence if the trial court was satisfied that the statement was voluntarily obtained, there were serious doubts as to whether the appellant actually understood the Kiswahili language in which the statement was originally made before it was translated into English. During the trial within a trial, the appellant challenged the statement and said that it had been recorded in a language which he did not understand. He testified in Masai language and said that he never went to school and neither did he know how to read. He said that he was a moran, a fact which was also confirmed by the complainant and PW2. During the hearing of the appeal, the appellant conducted his appeal through a Masai interpreter, Mr. Kisonko, an employee of the judiciary, and it was apparent that the appellant was illiterate and did not understand Kiswahili language. In the circumstances, it was therefore unsafe to admit his confessionary statement and put any reliance on the same in convicting the appellant.

Turning to the third ground of his appeal, that is, regarding recognition of the appellant by PW2, we observe that the witness said that he had met the appellant earlier at about 7.00pm in a bar where he had been for about three to four minutes and that he was therefore able to recognise his voice. He had not known him prior thereto. While identification by voice can be a sound and reliable method of identifying a person who was prior to the occurrence of an event well known to a witness, such purported identification is of no value where the person allegedly identified through his voice has had only casual contact or acquaintance with a witness. (see ***LIBAMBULA VS REPUBLIC [2003]KLR 683***). In our view, the evidence of PW2 was totally unreliable as to form any basis for conviction of the appellant. We uphold that ground of appeal.

The appellant's last ground of appeal was that his defence was rejected by the trial court without any reasons having been advanced for such rejection. We have carefully perused the judgment of the trial court and we are of the contrary view to the submission made by the appellant. The learned magistrate considered the appellant's statement of defence and gave his reasons for rejecting the same. As was held in ***OUMA VS REPUBLIC [1986] KLR 619***, at the time of evaluating the prosecution's evidence, the court is required to consider the accused person's defence and satisfy itself that the prosecution had by its evidence left no reasonable possibility of that defence being true. A trial court evaluates the prosecution's evidence against the accused's defence in an objective manner guided by the facts and the circumstances of the case and once it has been shown that the trial court did so, whether the evaluation accords with the accused's views or not, the fact remains that the accused's defence has been taken into consideration.

The upshot of this appeal is that grounds number 1, 2 and 3 of the appeal as set out hereinabove are allowed and ground number 4 thereof is rejected. We consequently allow the appeal and quash the conviction of the appellant by the trial court. We set aside the sentence that had been pronounced against the appellant. We order that he be set at liberty forthwith unless otherwise lawfully held.

DATED AT NAKURU this 3rd day of April, 2006

D. MUSINGA

JUDGE

3/4/2006

L. KIMARU

JUDGE

3/4/2006