REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 1075 of 2003

(From original conviction and sentence in Criminal Case number 97 of 2003 of the Chief

Magistrate's Court at Nairobi, W. Juma, (Mrs. - SRM)

JAMES MWANIKI KARANJA..…….....……..…..…….....…
APPELLANT

VERSUS

REPUBLIC …….....……..…….....
…..RESPONDENT

JUDGMENT

The Appellant, ***JAMES MWANIKI KARANJA*** was convicted for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. Consequent upon the conviction, the Appellant was sentenced to death as required by the law. He was aggrieved by the conviction and sentence and hence lodged the instant Appeal.

The Appellant has challenged his conviction and sentence on the grounds that the charge was defective, prosecution evidence was full of contradictions and inconsistencies and finally that his defence was not given due consideration by the trial Magistrate.

The brief facts of the Prosecution case were that ***DAVID MUTEGI NJAU***, the Complaint (PW1) was on 7. 1. 2003 at about 8.00 p. m. walking from Mfangano Street towards Tom Mboya Street in Nairobi to catch a vehicle to Mathare North. On reaching Odeon Cinema, a gang of 6 people ambushed him, held and strangled him. He lost consciousness but soon regained the same and started struggling with the attackers. In the process the attackers took his Nokia Mobile phone and Kshs.600/- from his shirt pocket. Plain clothes Police officers who were on the beat in the vicinity came by and managed to arrest one of the attackers who was still holding the Complainant by the neck. The other attackers ran away on seeing the Police. The one arrested as aforesaid is the Appellant herein. The Appellant was then taken to Central Police Station and was later charged with the instant offence.

According to the Complainant the incident took as about 45 seconds and that he was only able to see the Appellant as he was being held by the Police officers who had come to his rescue. That he as able to see the Appellant well as there were street lights. None of the items stolen form the Complainant were however recovered.

In the Appellant's sworn defence, he states that on the material day he worked in a matatu until 9.30 p.

m. The matatu developed a mechanical problem and they were forced to drop the passengers. The last batch of passengers were dropped at Odeon Cinema. It was then that Police officers approached the Appellant to assist them with the names of thieves in the area. When the Appellant told them that it was not his duty to know the thieves, one P. C. Thuku (PW2) claimed that he was being disrespective and warmed him that he could hold him until he provided the information. A police land rover then came by and the Appellant was forced into it and taken to Central Police Station. He was then charged with the instant offence he knew nothing about.

Mr. Makura, Learned State Counsel represented the State and opposed the Appeal. Counsel submitted that sufficient evidence was adduced against the Appellant to prove that the Appellant with five others not arrested robbed the complainant of Kshs.600/= and a mobile phone and in the process used violence on him. It was the contention of the Learned Counsel that at the scene of crime there were streetlights that enabled the Complainant to identify the Appellant. He further submitted that PW2 and PW4 both Police officers witnessed the incident as it took place and managed to arrest the Appellant on the spot. Counsel submitted that the chain of events from the time of the offence to the time of arrest of the Appellant were not broken at all. Counsel submitted that the identification of the Appellant by PW1 and his arrest by PW2 and PW4 was sufficient evidence to sustain a conviction. With regard to the Appellant's sworn defence, Counsel submitted that the Appellant did not deny that he was at the locus in quo. His only contention was that his arrest and subsequent identification was mistaken. In the Counsel's view PW1, PW2 and PW4 could not all have been mistaken regarding the participation of the appellant in the crime.

On the part of the Appellant, he tendered written submissions in support of his grounds of Appeal. He solely relied on the written submissions. We have carefully read and considered the said written submissions.

We have also subjected the entire evidence adduced before the trial Court to fresh analysis and evaluation bearing in mind however that we neither saw nor heard the witnesses as they testified and giving due allowance in terms of ***OKENO VS REPUBLIC (1972) EA 32***

On the question of the charge sheet, it is the contention of the Appellant that the same was defective in that the evidence led did not disclose the ingredients of robbery with violence. According to the Appellant in the process of robbing the Complainant no dangerous or offensive weapon or any kind of weapon was used as the charge sheet reflects. That although the charge sheet indicates that the robbery took place at 10.05 p. m. the evidence on record however shows that the offence was actually committed at 8 p. m. Further the Appellant pointed out that the charge sheet indicates that actual violence was used against the Complainant but no medical evidence was tendered. It was the Appellant's view that if any offence was committed, it was certainly not robbery with violence but simple theft bearing in mind the aforesaid inadequacies in the Prosecution case.

As we have had occasion to state in the past, there are three ingredients in the offence of robbery with violence, any one of which if proved is sufficient to constitute the offence. If the offender is armed with a dangerous or offensive weapon or instrument that would be sufficient to constitute the offence. Secondly, if one is in company with one or more other person or persons that would constitute the offence as well. And lastly if at or immediately before or immediately after the time of robbery he wounds, beats, strikes or uses any other violence to any person that would be yet another set to constitute the offence. ***SEE JOHANA NDUNGU VS REPUBLIC – CRIMINAL APPEAL NO 116 OF 1995 (UNREPORTED).*** In the present Appeal evidence was adduced and accepted by the trial Court that those who robbed the Complainant were more than one person. Infact PW1 claimed that they were a gang of 6 people who caught hold of him. That falls in the second category of the ingredients of the offence state above. Clearly then, the offence of robbery with violence was committed. Whether or not violence was visited upon the Complainant in course of the robbery or whether the robbers were armed with dangerous or offensive weapons are but other ingredients of the offence. All that prosecution has to do is to prove to the satisfaction of the Court one of the three ingredients. To our mind the Prosecution discharged this task with regard to the second ingredient of the offence under Section 296 (2) of the Penal code. We would in the premises reject this ground of Appeal.

On the issue of identifications we note that the evidence on this aspect of the matter was given by PW1, PW2 and PW4. According to PW1:-

"……. ***The incident took about 45 seconds, I saw accused as he was held by Police officers and he released me. I turned and saw him, there were streetlights. I was able to see him well….***"

From the foregoing it is quite clear that the Complaint had not managed to identify any of the attackers before or during the robbery. He only managed to do so after the Appellant had allegedly been arrested by the Police in the act. With regard to the arrest of the Appellant PW2 testified thus:-

"….***The I got hold of the accused person forcing him to release PW1's neck, the Complainant took to his heels. It was apparent he was to aware we were Police officers. My colleague chased him and got hold of him. He brought him back to where I was with the suspect….***"

This evidence is a complete departure from the evidence of PW1 regarding the identification of the Appellant at the scene of crime. It would appear that the Complainant was only able to see the Appellant when after running away, he was chased by one of the Police officers and brought back to the scene of crime where PW2 was holding the Appellant. In those circumstances we doubt whether the Appellant could have said anything else regarding the Appellant apart from stating that indeed the Appellant was one of the robbers.

It should not be forgotten that the offence was brazenly executed and at some point the Complainant was rendered unconscious. Many people were involved. In our view, PW1's evidence regarding the identification of the Appellant ought to have been disregarded by the trial Magistrate as clearly, the Complainant never identified the Appellant or his alleged accomplices before or in the process of execution of the offence.

With regard to the evidence of PW2 on the issue, he testified interalia:-

"…… ***We saw a man being mugged and strangled by six people. They were about 100 metres….***"

As for PW4 he testified:-

"…….***The incident was taking place at 8 p. m.. We it happens (sic) for about 5 minutes. I was about 50 metres from the scene of robbery. It was at night and there was light….***"

According to the Complaint, the incident took about 45 seconds. This is a very short time indeed. If the two witness were 100 or 50 metres away, how could they have been able to make it to where the Complaint was being mugged and rescue him as he was still being held as alleged?

Further the incident occurred at night. The two witnesses claim to have seen the Complainant being mugged from the aforesaid distance yet according to the same witnesses:-

"……***There were people walking on the streets….***"

The witnesses also claim that there we streetlights that enabled them to see the Appellant and his cohorts as they executed the robbery. However, no evidence was let by the Prosecution as to the intensity of the said streetlight and its position in relation to the Appellant and the victim of the robbery and for how long the said witnesses had kept the appellant under observation. Though the prosecution filed in this task the Court was duty bound to at least take up the duty and make the inquiries.

It is the law that the evidence of visual identification at night and under difficult circumstances should be tested with greatest care and must also be completely watertight before a Court can convict on it **(see for instance**, ***KAMAU VS REPUBLIC (1975) EA 159, REPUBLIC VS REPUBLIC (1984) KLR 739.***

In testing the reliability of such evidence of identification in those circumstances, it is essential to make

an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects e.t.c. – see ***MAITANYI VS REPUBLIC (1986) KLR 198.*** The Learned trial Magistrate did not evaluate the evidence of identification as required with the consequence that it cannot be said that such evidence was watertight as to find a conviction.

The Learned trial Magistrate seems to have been persuaded by the mode of arrest of the Appellant to sustain the conviction. That the Appellant was caught red-handed in the act of the robbery by PW2 and PW4. However this view may not be completely correct. Whereas PW2 testified that:-

"…***He managed to get hold of the suspect who was holding the Complaint by the neck….***"

PW4 stated under cross-examination by the Appellant thus:-

"….***I cannot tell how far away you were from the Complaint because it is my colleague who arrested you…***"

This piece of evidence raises doubts as to whether the Appellant was actually caught red-handed in the act as claimed by both the Complainant and PW2. It would appear that the Appellant was actually arrested a distance away from the Complainant.

According to the charge sheet, the offence is alleged to have been committed at 10.05 p. m. However according to PW1 the offence was committed at 8 p. m. PW2 however testified that the offence was committed at 10 p.m. Although in ordinary circumstances we would have treated such discrepancy as minor and not going to the root of the prosecution, we find however that in the circumstances of this case and the sworn statement of defence advanced by the appellant, the discrepancy major and raises doubts as to the credibility of the evidence of PW1 and PW3. Although the Learned Magistrate was alive to this aspect she was nonetheless of the view that the confusion regarding the time was not fatal contradiction to the prosecution case. We do not agree with that finding in the light of what we have already stated above.

How was the Appellant's defence treated by the trial court? According to the Appellant, it was perfunctorily treated. However according to the Learned state Counsel it was properly considered and rejected. In our view the Appellant's Complaint is not without merit. The Appellant gave a sworn statement of defence in which he narrated in detail circumstances pertaining to his arrest. In rejecting the Appellant's defence, the Learned Magistrate delivered herself thus:-

"…..***The fact that such a weighty issue was not raised by way of challenging the Police officers only renders the defence of the accused an afterthought. The accused may not have been found with any of the stolen property but that alone cannot change the fact that he was there and other players escaped. I note that the Complainant says he was assaulted by the squeeze on the neck that he did not seek treatment so that there is no evidence of physical injury due to violence. I also note tat there is some confusion regarding the time of the incident but in my view that confusion is not fatal contradiction to the prosecution case….***"

It is clear from the foregoing that the trial Magistrate was alive to the contradiction in the prosecution case raised by the Appellant in the cross-examination of witnesses and also in his sworn statement of defence. In our view those contradictions ought to have been resolved in favour of the Appellant and not just mulled over. Further we note that the trial Magistrate rejected the Appellant's defence on the basis that during the trial the Appellant never raised the issue with the Police that they had arrested him because he had refused to give the names of the robbers that he knew in the area. The Appellant gave a sworn defence and the Prosecution could have disapproved the allegation though cross-examination. It appears to us that the Prosecution was not equal to the task. Further by that statement the trial Magistrate was clearly shifting the burden of proof to the Appellant. However as we all know, the burden of proof in criminal with a few exceptions always rests with the Prosecution.

After considering this Appeal at length, we find that it has merit. The conviction entered against the Appellant was therefore unsafe. We allow the Appeal, quash the conviction and set aside the sentence.

The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 25th day of May, 2006

……..

LESIIT

JUDGE

…….**…….**

MAKHANDIA

JUDGE