REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 1087 of 2003

(From Original Conviction and Sentence in Criminal Case No. 5875 of 2003 of the Chief Magistrate's Court at Kibera – Ms Mwangi SPM)

JOHN MURIITHI NYAGAH ……………….........................…….………… APPELLANT

VERSUS

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

JUDGMENT

At about 9.40 p.m. on the 28th of July, 2003, the complainant, Kipkemboi Mbungei, the officer in-charge Telekom Kenya, Ongata Rongai station was on his way home. When he neared his house he saw 3 people ahead of him standing. One came towards him and told him "***Mzee tunaanza kazi".*** He also reminded him he was the man from Posta and that they knew him. That man then called the other two and said that because they knew him they would let him go. As the complainant proceeded on he was suddenly slapped and ordered to give each of three persons Kshs.20/= for cigarettes. Before then the three had informed him that they had a mobile phone which they wanted the appellant to sell on their behalf. The complainant had agreed with them that they bring the said mobile phone to his offices the following day. Apparently the three even new the complainant's offices. The appellant herein whom the complainant knew as Mureiithi then allegedly spoke to the leader of the group and who had all along been the one speaking to the complainant. At this juncture the leader asked the complainant if he knew any one of them and the complainant denied. As the complainant proceeded on, the appellant and another stood behind. It was then that he was suddenly attacked and stabbed 4 times by a knife. The complainant asked them why they were killing him and yet they could take his money. It was then that they frisked his trouser pocket and took Kshs.4, 000/= and another Kshs.700/= from the shirt pocket, as well as a mobile phone and shoes. The three however continued to stab the complainant repeatedly until he fell down unconscious. When he came round, a lady and a gentleman came and took him to his house which was about 80 metres away. Subsequently he was taken to hospital for treatment. Thereafter the complainant made a report to the police station regarding the incident and recorded a statement wherein he indicated that he had identified the appellant during the robbery. The complainant maintained that though it was at night he was able to identify the appellant at the scene of crime through the security lights of the three houses that were adjacent to the scene which enabled him see three people very

clearly. He knew the appellant very well as he worked in a butchery next to where the complainant worked and the complainant used to eat at the said butchery. Because the complainant had identified the appellant, he led the police to his arrest at his place of work. Upon arrest the appellant was then charged.

Put on his defence, the appellant stated that he lived in Rongai. He used to work in a butchery where he slept with two others i.e. Joseph and Waweru. That on the material day he went to work as usual and was on duty until 10.00 p.m. On 28th July 2003 whilst at his place of work he saw policemen come and they then asked for his names. He was then arrested and taken to the police station where he was told that he had beaten somebody. The charges were then read to him and was subsequently arraigned in court. According to the appellant he could not have committed the offence on the complainant as he was a customer.

On this basis, the appellant was charged with one count of robbery with violence contrary to section 296(2) of the Penal Code. He was convicted of the charge and accordingly sentenced to death as required by the law.

Being dissatisfied with the conviction and sentence, the appellant lodged the instant appeal. In his petition of appeal the appellant faults his conviction by the trial Magistrate on three grounds to wit:-

(i) THAT the learned trial Magistrate erred in both law and fact in convicting the appellant when essential witnesses were not called.

(ii) THAT the learned trial Magistrate fell into error in convicting the appellant in reliance on the evidence of a single witness and failed to warn herself of the dangers of convicting on such evidence.

(iii) The trial Magistrate erred in law and fact in rejecting the alibi defence advanced by the appellant.

In support of the aforesaid grounds of appeal, the appellant tendered written submissions which we have carefully read and considered.

The appeal was opposed by the state. In opposing the appeal, Mrs. Gakobo, learned state counsel submitted that the evidence on record disclosed the offence of robbery with violence. That the complainant recognized the appellant during the commission of the offence at the scene due to the security lights from the three houses adjacent by. Counsel further pointed out that the offence took about 10 minutes which according to her was sufficient time for the complainant to see and identify the appellant. The identification of the appellant by the complainant was fortified by the fact that the complainant led PW2 to the arrest of the appellant. Regarding the appellant's defence, the learned state counsel submitted that the trial Magistrate considered the same before rejecting it. According to the counsel, the conviction of the appellant was safe and cannot be faulted.

As the first appellate court in the instant appeal, we are required and indeed duty bound to subject the evidence tendered in the lower court to thorough re-evaluation and analysis so as to reach our own conclusion as to the guilt or otherwise of the appellant. In doing so we must give allowance to the fact that we neither saw nor heard the witnesses as they testified and therefore cannot comment on their demeanour. See ***OKENO – VS – REPUBLIC (1972) E.A. 32.***

Despite the three grounds raised by the appellant in his petition of appeal, we are of the considered view that the grave men of this appeal really turns on the issue of identification, nay, recognition of the appellant by the complainant. The offence was committed at night and hence the means by which the complainant was able to identify the complainant becomes critical. According to the complainant there was light at the scene of crime that enabled him to see the appellant clearly. The complainant testified on this issue as follows.

"… It was at night but where they attacked me are 3 houses which were just next to where they attacked me. They had security lights. I could clearly see the 3 very well. They took around 10 minutes before

robbing me.

Under cross examination by the appellant on the issue the complainant maintained *"….. Where you attacked me was well lit….."*

Commenting on the issue, the learned trial Magistrate in her judgment stated

"…….. The court has gone through the evidence on record and observed that although the complainant was attacked at night, he said they attacked him near three houses which had security lights. He was able to see the accused very clearly….."

From the foregoing what emerges is that the appellant was identified by the assistance of the security lights from 3 houses adjacent to the scene of crime. That being the case it was necessary for the court to test the reliability of such identification. In testing the reliability of the evidence of identification at night, 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 etc – see ***MAITANYI –VS- REPUBLIC*** (1986) KLR 198. Unfortunately the learned trial Magistrate did not at all evaluate the said evidence of identification. In the absence of such evaluation, we would have been prepared to hold that the evidence of identification by the complainant was not waterlight as to comfortably find a conviction. However, as we shall demonstrate shortly, the presence of the light and what transpired before and after the robbery convingly proves that the appellant was positively identified by the complainant.

The appellant did not dispute the fact that there were 3 houses whose security lights were on at the scene of crime. The robbery according to the complainant took about 10 minutes. This fact too was not disputed by the appellant either in cross-examination of the witnesses or in his defence. It is also common ground that the appellant and the complainant knew each other. Prior to the robbery the appellant and his cohorts engaged the complainant in a discussion. First they told him:

"mzee tunaanza kazi….. Then, so you are the man from posta. We know you…."

Thereafter they told him that they had a mobile phone which they wanted him to sell on their behalf. The complainant agreed and the robbers told him that they would bring the same to his office as they knew it. At this point the appellant, whom the complainant knew as Mureiithi spoke to the gang leader who then demanded to know from the complainant whether he knew any of them. The complainant said no deliberately as he knew the consequences of saying he had recognized any one of them would have been catastrophic. What emerges from the foregoing is that the robbers or some of them knew the complainant very well. They knew where he worked and his offices. The complainant says he recognized one of the robbers as Mr. Mureiithi, the appellant herein. The appellant did not dispute the fact that part of his name is Mureiithi either in cross-examination of the witnesses or in his defence. The complainant also stated that he had known the appellant for over 1 year as he worked in butchery where the complainant frequented as a customer. The appellant in his statement of defence confirmed that indeed he worked in butchery and he knew the complainant as a customer. The offence was committed by three people according to the complainant. It was at about 9.40 p.m. In his defence the appellant states that he used to sleep at his place of work with two others – Joseph and Waweru. Is it a coincident in the circumstances that the complainant states that he was attacked by a gang of three people one of whom was the appellant and yet the appellant used to sleep with two others at his place of work! His place of work was the butchery next to where the complainant worked. We also note that the attack on the complainant was not sudden. He was not at all harassed by the robbers as they engaged him in a discussion before the robbery. In the course of the discussion and fearing that the complainant could have recognized all or one of them the robbers asked the complainant whether he knew any of them. Finally we note that in the evidence there was no claim by the appellant that the complainant bore any grudge or vendetta against him that would have spurred him to frame the appellant with the offence. The two had not at any time fallen out. All the foregoing taken into totality together with the presence of security lights at the scene of crime leaves us in no doubt at all that the appellant was positively identified at the scene of crime. In the case of ***ANJONONI & OTHERS –VS- REPUBLIC (1080) KLR 59*** the Court of Appeal held

"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was however, a case of recognition, not identification of assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable that identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other…………".

The facts of this case are on all fours with what is stated above. We hold therefore that the absence of inquiries as to the light condition at the scene of crime by the trial Magistrate notwithstanding, conditions were positive and sufficient show that the complainant was in a position to positively identify the appellant.

The appellant raises the issue that certain essential witnesses were not called to testify. He mentions such witnesses as the man and woman who came to the assistance of pw1 at the scene of crime and took him to his house 80 metres away and also the investigating officer. The law in this respect is that the prosecutor has, in general, discretion whether to call or not to call someone as a witness. If he does not call a vital witness without a satisfactory explanation he runs the risk of the court presuming that his evidence which could be and is not produced would, if produced, have been unfavourable to the prosecution (see Section 119 Evidence Act, Sarkar's Law of evidence – 12th Edition (1971) Pages 1005 – 1007 and the case of ***NGODIA –VS- REPUBLIC (1982-88) 1 KAR 454.*** According to the appellant, these witnesses would have been able to confirm whether the complainant had sustained any injuries. In our view such evidence was provided by PW3, police surgeon who examined the complainant on 31.7.2003 who confirmed that the complainant sustained injuries to the eye and on the neck caused by a sharp and blunt object. They were three days old. He filed P3 form that was tendered in evidence. The findings by the doctor tallies with the evidence of the complainant. As for the investigating officer, the appellant wanted him summoned to testify as to the circumstances that led him to prefer the charge against the appellant and be subjected to cross-examination. On this issue, we can do no more than reiterate what was stated by the Court of Appeal in the case of ***EDWIN WAFULA KEYA –VS- REPUBLIC, CR. APP. NO. 43 OF 2004*** (unreported)

"………… ***that there is no law to the effect that in every case the arresting officer must come and testify. Such cases are confirmed to their peculiar facts and circumstances. In our view, the failure to call all or any of the three police officers who arrested the appellant some two months after the offence left an unbridgeable gap in the prosecution case….."***

The evidence of the investigating officer would be necessary in our view if there was unbridgeable gap in the prosecution case. We do not find such unbridgeable gap in the circumstances of this case.

We are thus satisfied that failure by the prosecution to call the said witnesses to testify did not weaken the prosecution case nor did it prejudice the appellant in any way.

The appellant has also raised the issue that he was convicted on the evidence of a single identifying witness without the magistrate warning herself of the dangers therein. This is a valid complaint. IN the case of ***RORIA VS REPUBLIC (1967) E.A. 583*** at page 584 **Sir Clement De Lestang V-P** stated

"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L.C said recently in the house of Lords in the course of a debate on S.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts.

"*There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is a question of identity".*

That danger is of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification….."

Whereas it is desirable and indeed a duty for the trial Magistrate to caution itself of the dangers of convicting the appellant on the evidence of a single identification, we doubt whether in view of what have already stated, that failure occasioned a miscarriage of justice. We have cautioned ourselves of the danger of convicting on the evidence of single identifying witness. We have considered that the appellant was known to the complainant; hence this was a case of recognition rather than identification. However, this fact does not lessen the burden on the trial court to approach such evidence of recognition/identification with greater circumspection. As the first appellant court we have duly cautioned ourselves on the issue but do find that taking into account all the circumstances of the case, we are convinced that the appellant was positively identified by recognition by the complainant.

Regarding failure by the trial Magistrate to consider the appellant's defence, we are in agreement with the appellant on this point. The appellant raised an Alibi defence. However, in the light of what we have already stated in the course of this judgment that defence failed and was incapable of displacing the prosecution case. The alibi defence was never raised or advanced in the cross-examination of witnesses by the appellant. It was only raised by the appellant in his unsworn statement of defence thereby giving the prosecution little or no time at all to investigate it at all. We think that these were some of the difficulties envisaged when the court of appeal made a qualification to the general principle that:

when an accused raises an alibi to the charge made against him he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in the unsworn statement at his trial, the prosecution (or police) ought to test the alibi wherever possible;

but different considerations may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution. See ***WANG'OMBE V REPUBLIC (1980) KLR 149….."***

Having considered this appeal at length and the submissions by the learned state counsel and the appellant, we are satisfied that the appellant was convicted on very sound direct and circumstantial evidence. His conviction was inevitable. We see no reason to disturb the conviction and sentence entered against the appellant. Consequently the appeal is hereby dismissed in its entirety.

Dated at Nairobi this 25th day of May, 2006.

…………………………….

LESSIT

JUDGE

……………………………….

MAKHANDIA

JUDGE