



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 994 of 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 6983 of 2003 of the Chief Magistrate's Court at Kibera (Ms. Siganga – SRM))

SIMON WAINAINA NJERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

SIMON WAINAINA NJERI alias **PETER MWANGI** was charged with two counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. It is alleged that on 12th April 2003 at Afri Post Bar Kandisi Village, Ongata Rongai Township, jointly with others not before court while armed with dangerous weapons namely pistols, swords and pangas, robbed **JOSEPH MILLA SANINGO** in count 1, of a jacket and cash Kshs.40/- and **PAUL MBUGUA NGANGA** in count 2 of cash Kshs.200/-. They also threatened to use violence on both Complainants. The Appellant was convicted in both counts and sentenced to death as by law prescribed. He immediately lodged this appeal challenging both the conviction and sentence. The appeal is unopposed.

We have carefully considered this appeal together with the grounds of appeal as filed, submissions both written by the Appellant and oral by the State. We have also subjected the entire evidence adduced before the lower court to fresh analysis and evaluation.

The Appellant's appeal is grounded on visual identification by the Complainants in this case, PW1 and PW3. Both these witnesses were in a bar at 9.00 p.m. on the material day when a man entered and asked for a cigarette. That five minutes later, the man was back with company and armed with a pistol. The others, five, according to PW1 and six according to PW3 were unarmed. The two were robbed as were the bar cashier and two other customers. The incident took five minutes. The light that enabled the two Complainants to identify the Appellant was described by PW1 as a hurricane lamp which was in the ceiling. PW3 described it as a tiley lamp placed on the counter 2 to 3 meters from where he sat. The Appellant denied the offence and gave an alibi defence.

The Appellant's first ground of appeal challenges the conviction on the basis of this evidence. The Appellant submitted that the learned trial magistrate gave too much weight to the evidence of identification which was made in conditions that were not favourable for positive identification. The learned counsel for the State, **MR. MAKURA**, could not agree more. Counsel submitted that the evidence of identification was that of a single witness and the learned trial magistrate should have warned

herself before relying on it. That was in fact not correct. There were 2 identifying witnesses PW1 and PW3. The learned counsel submitted further that the kind of lighting used to identify the Appellant was a chimney lamp. That the Appellant was seen one and a half months after the commission of the offence. Counsel submitted that in the circumstances there was a likelihood of mistaken identity.

In the case of **CLEOPAS OTIENO WAMUNGA vs. REPUBLIC CA No. 20 of 1982** the Court of Appeal warned as follows: -

“Evidence of visual identification in Criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whether the case against the Defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution on the correctness of the identification...”

That summarizes our view concerning the evidence before us. The learned trial magistrate ought to have considered the evidence of identification with circumspection especially because the conditions prevailing at the time the identification was alleged to be made were both not clear and also not conducive for positive identification. Both witnesses contradicted each other as to the nature and source of light. A hurricane lamp and a pressure or tilly lamp do not produce the same intensity of light. If PW1 and PW3 could not give consistent evidence on that point, then it remains doubtful. What kind of lamp was in use at the bar at the time? The bar owner, PW2 referred to it as a lamp. That did not help much. Both witnesses, PW1 and PW3, were also inconsistent as regards the position of the lamp in the bar. That was also a very crucial issue as it could help determine whether the assailants ever went close enough to the lamp as to enable a positive identification to be made by witnesses. That was also not cleared by the trial court in her judgment. Instead the trial court found the evidence consistent and corroborative thus misdirecting herself and drawing the wrong conclusion.

We have considered the fact that the Appellant was a total stranger to the two Complainants as a factor which should have called for more caution before arriving at a conviction. The fact that he was ‘spotted’ one and a half months later by the Complainants is not a ground to find the evidence of identification any more safe.

In the Appellant’s own defence he raised an Alibi that on the date of the robbery, he was in Huruma with his wife and which is where he lives. The Appellant owed no burden or duty to prove his alibi or his defence. Yet the learned trial magistrate in her judgment found that he should have called his wife to prove his defence. The trial magistrate’s finding shifted the burden of proof against the Appellant and in so doing, we find that the Appellant suffered prejudice.

On these grounds alone we find that the appeal can safely be disposed off. The Appellant’s appeal has great merit. Learned counsel for the State did not support the conviction and as we have demonstrated hereinabove, he was right not to do so.

In the result, we allow the Appellant’s 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.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellants

Mr. Makura for State

CC: Erick/Ann

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LESIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE