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

Criminal Appeal 992 & 993 of 2003

(From Original Conviction and Sentence in Criminal Case No. 2223 of 2004 of the Senior Resident Magistrate's Court at Githunguri Lucy Mutai SRM).

JOSEPH WAINAINA WANJIRU…….....……...APPELLANT

VERSUS

REPUBLIC …….....……..RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 993 OF 2003

(From Original Conviction and Sentence in Criminal Case No. 2223 of 2004 of the Senior Resident Magistrate's Court at Githunguri Lucy Mutai SRM).

JOSEPH GICHERU KIMANI…….....……..APPELLANT

VERSUS

REPUBLIC…….…….....……..RESPONDENT

JUDGMENT

JOSEPH WAINAINA WANJIRU and **JOSEPH GICHERU KIMANI**, hereinafter referred to as the 1st and 2nd appellant respectively were jointly charged with one count of robbery with violence contrary to Section 296(2) of the Penal Code. The 2nd appellant alone however faced an alternative count of handling stolen property contrary to Section 323(2) of the Penal Code. Following a trial in which the prosecution called 5 witnesses, the appellants were convicted on the joint count. Upon conviction, they were both sentenced to death as required by the law. The appellants were aggrieved by the conviction and sentence. They lodged the instant appeals which we have deemed it necessary to consolidate as they arose from the same criminal case in the subordinate court.

The appellants fault the learned magistrate for convicting them whilst relying on identification evidence without considering that the circumstances obtaining at the scene of crime were not conducive for positive identification. The appellants also fault the trial magistrate for failing to resolve in their favour material contradictions and in consistencies in the prosecution case. Finally, the appellants complain that their defences were not given due consideration by the trial magistrate.

The brief facts of the prosecution case are that on 27th July 2003 at about 9 p.m. the complainant

(PW1) was on his way home when he opted to take a taxi. In the process, he saw the appellants. According to the complainant, the 2nd appellant suddenly held the complainant and placed a knife on his stomach while others did so at the back demand money. They then took PW1's mobile phone, wallet, ID, cash Ksh.4,500/= and voter's card and left him. The complainant knew both the appellants. He had known the 1st appellant for 2 years as he used to work in a butchery. As for the 2nd appellant, he had known him as they came from the same village. The complainant was able to identify the appellants at the scene of crime with the assistance of the light from the club. He reported the matter to the police and gave the name of the 2nd appellant. On 28th July 2003 with the assistance of security committee of the area, PW1 went looking for the 2nd appellant when they traced his whereabouts, they alerted the police who came and arrested the 2nd appellant. He was searched whereupon the complainant's mobile was recovered. On 29th July 2003, the 1st appellant was arrested and upon search, nothing was recovered from him. They were then charged as aforesaid.

In support of their grounds of appeal, the appellants tendered written submissions which we have carefully perused and considered. The 1st appellant further orally submitted that although the complainant had said that he had known him for 2 years, he never gave his name to the police when he made his first report. The appellant referred the court to the OB entry in that regard. The appellant further submitted that PW1 testified that a person sprang on him from behind. It was 9 p.m. It was his submission that those circumstances the complainant could not have seen or identified the appellant from the back.

The appeal was opposed. Mrs. Obuo learned state counsel, in opposing the appeal submitted that there was sufficient evidence on record to sustain the conviction of the appellants. That the complainant identified the appellants with the assistance of the light from the club. While recognising that the complainant did not give the distance between where he was robbed and the club, nonetheless the complainant reported the incident to the police and gave the name of the 2nd appellant. Counsel further submitted that the evidence of the complainant was corroborated by that of PW2. The 2nd appellant was arrested the following day by PW4 and upon search, a recovery was made of the complainant's mobile phone. Recovery being recent, counsel submitted that the doctrine of recent possession applied.

We have subjected the evidence tendered in the subordinate court to fresh evaluation so as to reach our own conclusion as to the guilt or otherwise of the appellants. In doing so we have given due allowance to the fact that we neither saw or heard the witnesses as they testified. See ***OKENO VS. REPUBLIC (1972) E.A. 32.***

The conviction of the appellants was grounded on the evidence of identification and or recognition by the complainant and PW2. The incident happened at night, 9 p.m. to be precise. The only light according to these witness came from the nearby club. According to PW1

"……..there was light which came from the club……..".

As for PW2, she testified as follows:-

"…….. **There was light from the bar….."**

Going by these extracts, it is clear to us that the said lights were not properly described as to make one know whether they could have enabled witnesses to identify anybody. For instance, was the light electrical? Further the intensity of the light and its position in relation to the appellants and or scene of crime was not inquired into. Another inquiry which ought to have been made but was not was with regard to period under which the witnesses had the appellants under observation as to be able to recognise them. It is also noteworthy that the distance between the club and the scene of attack was not disclosed. All these inquiries were absolutely necessary if the evidence of recognition by the two witnesses was to be accepted. The need to make these inquiries were succinctly stated by the Court of Appeal in the celebrated case of ***CHARLES MAITANYI VS (1986) KLR 108*** in the following manner:

*"……**It is at least essential to ascertain the nature of the light available. What sort of light, its size and its position relative to the suspect are all matters helping to test the evidence with the greatest care. It is***

not careful test if one of these matters are unknown because they were not inquired into. In the days gone, there would have been a careful inquiry into these matters by the committing magistrate, state counsel, and defence counsel. In the absence of all these safeguards it is now become burden of Senior Magistrates trying cases of capital robbery to make these inquiries themselves."

Having failed to make those inquiries we doubt whether the evidence of these witnesses on recognition of the appellants can be said to be watertight. Considering the brazen manner in which the robbery was executed there was little or no time at all for the witness to have recognised the appellants. PW1 testified on the issue thus:

"……***they were three, accused 1 held me and placed a knife on my stomach. Accused 2 and another picked a knife at the back. They demanded money……."***

PW1 identified the 1st appellant as having been one of those who attacked him from behind. However, there is nothing on record to show that at some point in time, he got opportunity to turn round in order to see those who had attacked him from behind.

It is also important to point out that the complainant was not even sure of the number of the attackers. Whereas he initially testified that the attackers were three, later on he changed his story and said "**they were many"**. "**They were eight**". Now this can only mean that either the lights were not sufficiently bright to enable him see and determine the number of the attackers or that he was in such shock that he could not be able to tell or ascertain the number of his attackers.

The other issue worth noting with regard to the 1st appellant is that the two witnesses claimed to have known him. Indeed the complainant stated that he had known him for 2 years. He also told the court that this appellant used to work in a butchery. Yet when he made a report at Dagoretti Police Post he never mentioned the appellant. The only person mentioned in the OB report is one Gicheru, the 2nd appellant herein. If indeed PW1 had seen the 1st appellant at the scene of crime and even knew his place of work he could in our view easily have told the police so in his first report.

All in all we are not satisfied that the condition obtaining at the scene of crime were such that they could have accorded the two witnesses an opportunity to identify and or recognise the appellants.

The 2nd appellant when arrested had in his possession a mobile phone that was positively identified by PW1 as his. This was a day after the robbery. In our view the doctrine of recent possession applies with regard to the 2nd appellant. The 2nd appellant did not deny possession of the mobile phone. His explanation was that he was given the mobile phone by the complainant to keep for him as he was drank. The learned trial magistrate rejected this defence and rightly so in our view. The complainant reported the robbery to police immediately it occurred and gave the name of the appellant. If indeed the complainant had given the appellant the mobile phone voluntarily for safe custody, why would he then turn around and accuse the appellant of robbery and cause a report to that effect report to be made to the police? There is no evidence that the appellant and complainant had any misunderstanding and or grudge in the past that would perhaps propelled the complainant to frame the appellant with the case. To our mind this defence is not credible at all.

In our view, the appellant's possession of the complainant's Mobile phone only a day after robbery was recent. The trial court having rejected the appellant's defence meant that the recent possession was not explained by the appellant. That being the case, it raises a presumption of fact that the 2nd appellant was either the robber or guilty receiver. See ***REPUBLIC VS. HASSAN S/O MOHAMED (1948) EACA 121***. However in the circumstances of this case, the irresistible conclusion that can be drawn is that the 2nd appellant was among those who robbed the appellant.

That being our view of the matter, we have no doubts at all regarding the conviction of the 2nd appellant on the doctrine of recent possession. The conviction was safe and sound and should not be disturbed. However as regards the 1st appellant, in the light of what we have said with regard to identification, we are not persuaded that his conviction was anything but safe.

In the end then, we allow the appeal of the 1st appellant, quash the conviction and set aside the sentence. The 1st appellant should forthwith be set at liberty unless otherwise lawfully held.

As for the 2nd appellant, we dismiss his appeal and confirm the conviction and sentence.

Dated and delivered at Nairobi this 16th day of May 2006.

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LESIIT

JUDGE

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MAKHANDIA

JUDGE