



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 934 & 935 of 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 1521 of 2003

of the Chief Magistrate’s Court at Kibera (Ms. Mwangi – SPM)

MAXWELL MUSALIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

PIUS OTIANGA and **MAXWELL MUSALIA** were the 1st and 2nd accused persons before the lower court. They were jointly charged with two counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. They were alleged to have robbed one **PETER KIMUYU**, not called as a witness and who was the Complainant in count 1 and one **FRANCIS MASERA** PW2 in the case and the Complainant in count 2. The particulars of the charge alleged that the offences were committed on 12th February 2003 at Kangemi and that the Appellants in company with others, and while armed with dangerous weapons including pistols, knives and pangas, robbed the Complainants of mobile phones, cash and other personal belongings. The Appellants were convicted on both counts and sentenced to death as by law prescribed.

They were aggrieved by the convictions and therefore lodged their appeals which we have consolidated for convenience, having arisen out of the same trial.

The prosecution called three witnesses, PW1 Maclus and PW2 Francis were together at 8.30 p.m. on the material day, walking. On reaching the road near Jehovah’s witnesses church in Mountain View, four people surrounded them. The two witnesses did not say clearly who of them was armed but both witnesses said that one of them had a pistol and another a panga. The group identified themselves as police officers. They were robbed of cash and mobile phones. In addition, Francis was also robbed of his jacket. On realizing that these were not Police Officers but thugs, Maclus and Francis raised alarm whereupon, the thugs decided to run away. The two, Maclus and Francis captured and held on to the 1st Appellant who was on of the thugs. Members of public nearby also came to their assistance. Just then PW3, a Police Officer in a police patrol vehicle with other police officers came by. PW3 re-arrested the 1st Appellant from P’W1, PW2 and members of public. The 1st Appellant later led police to his house where 2nd Appellant was arrested. Both were charged.

The two Appellants denied the offences. The 1st Appellant said that he had been stopped by Police Officers who first asked him for his identity card. Then the police officers stole his money, beat him up and asked him to produce his accomplices to a crime he did not commit. The 1st Appellant admitted leading police to his house where the 2nd Appellant was arrested. The 2nd Appellant in his defence

repeated the events leading to his arrest as narrated by PW3 and the 1st Appellant.

The Appellants have raised different grounds of appeal in their petitions. In the 1st Appellant's petition, he raises four grounds. That the evidence adduced was insufficient to convict, two that the charges were defective, three that the case lacked essential witnesses and exhibits and finally that the learned trial magistrate rejected the Appellant's defence erroneously yet it was plausible and had out weighed the weak prosecution case.

The 2nd Appellant in his petition raised five grounds. One, that the charge was defective, two failure to take the Appellants' mitigation before pronouncing sentence, three that the Appellant was not identified, four that material contradictions which remained unresolved and finally that the learned trial magistrate failed to give due consideration to the Appellants' defence.

We have analyzed and evaluated the evidence adduced before the trial court afresh while bearing in mind that we neither saw nor heard the witnesses and giving due consideration in line with the Court of Appeal decision of **OKENO vs. REPUBLIC 1972 EA 32**.

We propose to first deal with the 2nd Appellants appeal because in our view it is quite straight forward. The 2nd Appellant was not arrested until 2 days after this incident and even then, it was the 1st Appellant who led police to his house. The evidence of 1st Appellant against the 2nd Appellant was that of dock identification. It is now trite law that dock identification is worthless unless it is preceded by identification of the accused person in properly mounted identification parades. (See **generally Kiarie vs. Republic (1989) KLR 735** and **Njoroge vs. Republic (1987) KLR 19**). In the instant case, there were no identification parades conducted for the identification of the 2nd Appellant before the dock identification in court. We have also closely examined the evidence of identification adduced against the 2nd Appellant by both witnesses and we find it quite scanty. In the first place, PW1 confused the 2nd Appellant as the one who was arrested on the spot. In his evidence in chief he said that the 2nd Appellant was arrested on the spot and PW2's identity card was recovered from him. In cross-examination by the 2nd Appellant, PW1 seems to have realized that he made a mistake and he changed his story and stated as follows:-

“I saw you in the group that robbed us. I was able to identify you after arrest. I was able to identify you after the parade.”

In re-examination PW1 stated: -

“I saw the 2nd accused when they were 4. I can't tell how he was arrested.”

Earlier on when the 1st Appellant cross-examined PW1, he stated: -

“You were caught at the scene.”

PW1 was not consistent in his evidence concerning the arrest of both Appellants. That also affected his evidence of identification especially against the 2nd Appellant since he was arrested much later. The learned trial magistrate in her judgment does not seem to have noted the discrepancy in the evidence of identification by PW1 and therefore did not resolve the conflict in that evidence. PW2 on his part did not give any evidence to indicate the basis of identifying the 2nd Appellant as one of those who robbed them. All he said was: -

“I realized the 1st accused was being held by PW1 so I helped too... The 2nd Accused was being called by them (sic) OCS he is the one who took my items....Where we met has a security light, so we could see them.”

The learned trial magistrate acted on this evidence and convicted the 2nd Appellant of this serious offence. The trial court failed in its duty to examine the evidence carefully and be satisfied that the circumstances of identification were favourable and free from the possibility of error before arriving at a conviction. In the case of KIARIE vs. REPUBLIC (1984) KLR 739, the Court of Appeal held: -

“Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction.”

The evidence of identification against 2nd Appellant was not watertight. Furthermore since PW1's evidence was inconsistent as to who was arrested at the scene, the evidence of identification against the 2nd Appellant was that of a single witness. Identification at night time by a single witness is to be treated with great caution. See WAFULA & 3 OTHERS vs. REPUBLIC (1986) KLR 627. In the instant case we are satisfied that there was absolutely no basis for concluding that the circumstances of the identification by either witness were conducive to a positive identification of the 2nd Appellant. The 2nd Appellant's conviction was in our view unsafe and should not be allowed to stand. Consequently we allow his appeal, quash the conviction and set aside the sentence.

For the 1st Appellant's appeal there is no dispute both in the evidence of PW2, Complainant in count 2 and PW3, the re-arresting officer and also the 1st Appellant's defence, that he was arrested at the scene of crime. Even though PW1 mistook him for the accused who was arrested later, we do not think that that inconsistency in PW1's evidence affects our finding that indeed the 1st Appellant was the one arrested at the scene of crime. PW1 was the one who held onto the 1st Appellant before PW2 came to assist. Subsequently members of public also assisted to tie him up before PW3 and other officers re-arrested him at the scene.

Both witnesses described how the offence was committed. They said that a group of 4 surrounded them, identifying themselves as police officers before demanding various items like identity card and eventually taking all their valuable belongings. It was at that point that both suspected the group to be thugs and PW1 pounced on one and held onto him. The one so held was tied and later handed over to the police. The 1st Appellant does not deny being arrested at the scene but in his unsworn defence he said he was stopped by Police Officers and money was taken from him before being beaten and told to produce his accomplices. He then led to his co-accused the following night.

In our consideration of the evidence against the 1st Appellant, it was watertight since he was arrested at the locus in quo of the offence. PW1 and PW2 said there was light at the scene from a nearby church. That light was sufficient for the two witnesses to see the number of people who stopped them and enable them apprehend one. We have no doubt that even though the light at the scene was not described, that since the 1st Appellant never left the scene from the time he and his co-accomplices approached the Complainants to the time he was handed over to PW3, there is no possibility of error that he was not one of those who stole the Complainants' things. The evidence of identification has to be considered together with the evidence of ones on cross-examination of PW1 and PW2. The Appellant did not suggest to them that he was an innocent bystander or passerby or that he was arrested in circumstances as were explained by him in his defence.

The 1st Appellant's defence that police stopped him as he went home and demanded he shows who his accomplices in crime were was incredible in the circumstances. PW1 and PW2 and not police officers first arrested the 1st Appellant and there was no connection between PW1 and PW2 on one hand and Police Officers including PW3. PW3 were on mobile patrol duties and they were on duty when they came across the 1st Appellant under the arrest of PW1, PW2 and members of public. The learned trial magistrate was right to dismiss the 1st Appellant's defence.

The evidence against the 1st Appellant was watertight. The 1st Appellant's contention that the evidence adduced by the prosecution was inadequate to justify a conviction that the essential witnesses were not called and that his defence was not given due consideration have no basis and we dismiss these

grounds of appeal.

The 1st Appellant also relied on the ground that the charge against him was defective. The reason advanced for this contention was that the person named as the Complainant in the first count, one **PETER KIMUYU** was never called as a witnesses. On the 2nd count, the 1st Appellant contended that there was a defect in the charge because the items listed as having been robbed from PW2 were not supported in evidence. The 1st Appellant submitted that whereas the charge read that a purse with Kshs.2000/-, a mobile phone T190 Motorola and a jacket were stolen from PW2 in evidence, PW2 said of cash that he lost only Kshs.200/-.

We have already stated that the Complainant in count 1 was never called as a witness. The trial court ought to have ascertained with the person named in count 1 really existed or whether instead of writing PW1's name the wrong name was written. The 1st Appellant in his submission claims that the later was the case. We agree that there is a conflict between the names of the first Complainant and that of PW1. However, we are unable to resolve that conflict and in the result, the conviction entered against the 1st Appellant in count 1 and the sentence passed are hereby quashed and set aside respectively.

The second count in our view was not defective and the discrepancy between stolen sum as quoted in the charge and that adduced by evidence by PW2 was minor and in our view does not affect the credibility of PW2 nor the prosecution case. The defect is clearly curable under **Section 382** of the **Criminal Procedure Code** being only that of details.

Having considered the 1st Appellant's appeal in respect to his conviction in count 2, we find that it has no merit and we dismiss it accordingly. We uphold the conviction and confirm the sentence.

The upshot of this appeal is that the appeal against the 1st Appellant in count 1 is allowed, conviction quashed and sentence set aside. The Appeal by 2nd Appellant in counts 1 and 2 is allowed, convictions quashed and sentence set aside. The appeal by 1st Appellant against conviction is upheld and sentence confirmed. The 2nd Appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 16th 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;

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE