



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 933 of 2003

EZEKIEL MEMUSI KEYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

EZEKIEL MEMUSI KEYA alias Kauzi was found guilty and convicted of **ROBBING EVALYNE MWENDE KIMONYI** of her make-up kit with powder ponds and deodorants, lipsticks and one mobile phone on 9th July 2003 at Ongata Rongai. It is alleged that the Appellant and another robbed the Complainant as she walked home from work of the said items while armed with swords and at the time of the said robbery threatened to use actual violence on the Complainant. The offence was committed at 8.45 p.m. along a lonely stretch of the road. The following morning the Complainant found her make-up in a house and she led police, PW4, who recovered the same. The house was unoccupied. Two weeks later, the Appellant was arrested and he led to PW2 and PW3 and from the latter a mobile phone exhibit 4 was recovered. It was identified by the Complainant as hers from the name of company which sold it to her. The Appellant was upon conviction as aforesaid thereafter sentenced to death as by law prescribed.

MR. KANG’AHI argued the Appellant’s appeal and relied on grounds 1, 2, 3 and 4 of the amended petition of appeal. The four grounds were as follows: -

One that the evidence adduced was insufficient to prove the charge.

Two, that crucial ingredients of the offence of Robbery with Violence were not proved.

Three, that the weight of evidence did not support the charge and,

Four, the trial magistrate erred in both law and fact in failing to appreciate that the Complainant never identified the Appellant.

In his submission, Mr. Kanga’hi submitted that despite the charge alleging that the Appellant was armed with dangerous weapons namely; swords, the Complainant did not give any such evidence. Further that at no time did the Complainant identify the Appellant nor claim that she could be able to identify him as her assailant. That the two persons PW2 and PW3 from whom the Complainant’s phone was recovered gave self serving statements to save themselves. That the Complainant did not give the basis of identifying the siemens phone as hers. Mr. Kang’ahi submitted that there was insufficient evidence and doubt that ought to have led to the Appellant’s acquittal.

MISS GATERU, learned counsel for the State supported the conviction and sentence. It was her submission that despite the fact that the evidence did not support the charge that the Appellant was armed with a sword, the omission was not fatal to the prosecution case neither did it prejudice the Appellant since the evidence proved that he was in company with another person at the time of the offence. Learned counsel submitted that the Complainant had also noted the house where her assailants entered after the attack. That she also saw the Appellant emerge from the same house from which her makeup was recovered. The learned counsel submitted that the identification was safe because PW4 knew the Appellant's house before and that it was from that house that the Complainant's items were recovered. Learned counsel submitted that the mobile phone recovered from PW3 was identified by the Complainant as hers by means of its serialization and a scratch she put on it.

While dealing with the issue of identification, the learned trial magistrate observed at page J2 as follows: -

“Although she did not see the robber’s faces, she said she ran after them and saw them enter and leave accused’s house. That is the same house where her property – exhibits 1 to 3 were recovered. That is the same house where the investigating officer herein, PW2 knew to be occupied by the accused herein... Further, as the two robbers left the said house, the Complainant said she clearly saw accused from the light – lights at the houses...”

The learned trial magistrate was convinced of the Appellant's involvement in this crime due to three things. One the fact that the Complainant saw him leaving a house the same night of the offence from which her make-up was subsequently recovered. Two, the fact that PW4, investigating officer knew that the house in which make-up was recovered belonged to the Appellant and three, due to the recovery of the mobile phone from PW3 who said that the Appellant sold it to him.

We have carefully analyzed and evaluated afresh the entire evidence adduced before the lower court as recorded as required of us as a first appellate court. See **OKENO vs. REPUBLIC 1972 EA 32**. We are concerned about the quality of the Appellant's identification by the Complainant in this case. While it is quite clear from the Complainant's evidence that the incident took place at 8.45 p.m. and therefore at night, no mention was made of the presence of any lighting of any kind at the time of the alleged robbery. The Complainant mentioned lights only in cross-examination by the Appellant after she had been re-called. The Complainant stated that she saw the Appellant emerge from a house and recognized him because of 'night lights'. No inquiry was made either by the prosecution or the trial magistrate to try and establish exactly what the Complainant meant by night light.

The Court of Appeal dealing with the issue of the quality of identification had this to say in **Maitanyi vs. Republic 1986 KLR 198**:

“...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 important matters helping to test the evidence with the greatest care. It is not careful test of one if these matters are unknown because they are not inquired into. In days gone by, 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 safe guards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these inquiries...”

The Appellant requested for the OB report made by the Complainant to the police at the very first instance. In it, no mention was made of any descriptions of person(s) allegedly involved in the alleged robbery or any names. It has been held in many cases that a first report is very important as it assists the court to determine the consistency of the Complainant statement. In **Peter Ochieng Okumu vs. Republic Cr. App. No. 185 of 1987** the Court of Appeal observed: -

“Failure to make a prompt report giving names of the assailants in the first instance causes uneasiness in believing the witnesses evidence.”

We considered the evidence of PW4 and saw clearly that he admitted informing the Complainant that

the Appellant, in whose house he recovered exhibits 1 to 3 was a known criminal. PW4 also said that the Complainant pointed out the Appellant as one "KAUZI" the robber at the police cells 20 days after the incident. No identification parade was conducted. We cannot emphasize enough the importance of holding an identification parade especially in this case as it would have served the important purpose of removing any doubt in the Complainant's ability to identify her assailant. It was especially important in this case where PW4 the investigating officer had 'corrupted' the Complainant's mind by discussing the 'known' character of the Appellant instead of investigating the case objectively in order to establish whether or not he had committed the offence. PW4's statement to the Complainant the very next day after the incident may be the reason of the Complainant's subsequent identification of the Appellant as her assailant. The possibility of a mistake in the Complainant's identification of the Appellant cannot be ruled out.

On the identification of the make-ups, the Complainant did not state the basis of identifying the three exhibits, 1 to 3, as hers. She just said they were hers. The learned trial magistrate took the Complainant's evidence of identification of these items without establishing further whether that evidence was credible. This was important given the fact that such make-ups were common and can commonly be carried in many a woman's hand-bag.

On the mobile phone, even if the evidence of PW2 and PW3 were to be believed that the Appellant sold it to PW3, there is inconsistency on its identification. The Complainant identified it on the basis of scratches and the company name on the phone and battery. The Complainant actual evidence on this point was; "*Identified it as my phone as I had scratched it on its screen previously. I had bought it from Rimco Communication Ltd. and its make is on the phone and the battery*". Scratches on the screen of a mobile phone can hardly be considered a fool proof mark for purposes of identification. Scratches could even occur when not intended at all by the phone owner. On the other hand the company names on the mobile phone must be common features in all phones sold by the same company. The learned trial magistrate did not discuss the basis of identification of the mobile phone by the Complainant in her judgment. The learned trial magistrate merely stated that the Complainant had identified it as her stolen phone. We are not satisfied with this evidence of identification and find it quite shallow indeed and wholly insufficient as a basis of conviction for an offence as serious as the one at hand.

The charge was not fully supported in evidence as learned counsel for the Appellant submitted. Indeed no mention was made of Appellant being armed. Further even though the Complainant states he was in company with another, we are not satisfied that other person was involved in this crime. The said accomplice passively watched as the Complainant was robbed and ran away after the Complainant started screaming. He neither participated in the crime nor uttered a word. His involvement in this offence is doubtful. Therefore the evidence adduced in evidence does not support the charge that the Appellant was in company with another at the time he committed the offence.

Having carefully considered this appeal, we are fully satisfied that the conviction was unsafe and could not be sustained. Consequently we allow the appeal, quash the conviction and set aside the sentence. The Appellant may be set free forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 5th day of May 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA, M.

JUDGE

Read, signed and delivered in the presence of;

Mr. Kang'ahi for the Appellant

Appellant present

Miss Gateru for the State

CC: Wambui/Erick

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LESIT, J.

JUDGE

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MAKHANDIA, M.

JUDGE