



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CRIMINAL APPEAL 718 OF 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 1599 of 2002 of the Senior Principal Magistrate's Court at Kiambu (G.Njuguna – SRM)

KENNEDY GITAU NGUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant **KENEDY GITAU NGUGI** had been charged with another with two counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. After a full trial, the Appellant's co-accused was acquitted of both counts. The Appellant was however acquitted on count 1 but convicted on count 2 which was reduced to simple robbery. He was subsequently sentenced to 7 years imprisonment. It is against the conviction and sentence that he now appeals to this court.

The Appellant relies on his supplementary grounds of appeal in which he cited four grounds as follows: -

1. Evidence of identification by recognition was obtained under difficult and inconclusive circumstances in that the offence took place at night.
2. That the evidence of identifying witnesses was unreliable since they did not mention the Appellant's name to PW7 or PW8 during their report.
3. That Appellants conduct of returning to the area 2 days after alleged offence was inconsistent with his guilt.
4. That his defence and evidence of his three witnesses was not given due consideration.

The facts of the case were that the Complainant in count 2, Joseph, PW2 was sleeping in his house when the heard a loud bang. He woke up to find 15 people or so in his sitting room. He says he looked through the door and saw the Appellant among them. He knew him before having married his neighbours daughter. PW3, John, a brother to Joseph whose house was opposite that of Joseph also heard the commotion and screams from Joseph's wife. He went out and saw the 1st Appellant carrying a panga or with another person carrying a TV.

On 23rd, 2 days after the incident the Appellant was arrested by PW4 Senior Chief George, PW6 Mwaura and PW2 Joseph. The Appellant denied the offence and explained that what took him to the neighbourhood on 23rd June 2002 was to get his wife back from her parents, DW2 and DW3. He was in the company of his mother DW1, his co-accused and others. The Appellant and all witnesses were consistent that the visit of 23.6.02 was a return visit and that the date had been set on 9th June 02 when the Appellant had made the first visit in the company of his father.

We have analyzed and evaluated afresh the evidence adduced before the trial court while bearing in mind that we neither saw nor heard the witnesses and giving the due allowances. See **NGUI vs. REPUBLIC 1984 KLR 729**.

The appeal was opposed by **Mrs. Kagiri**, learned State Counsel on behalf of the State. Prior to the hearing of the appeal the State had put the Appellant on notice that it would be asking the court to enhance the conviction to **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** and sentence to death if the conviction were upheld. The Appellant opted to pursue his appeal despite the warning.

The Appellant challenged the evidence of identification by recognition on the basis that it was made under difficult circumstances. **Mrs. Kagiri** submitted that PW2 the Complainant, saw the Appellant clearly by lights in the sitting room where the Appellant was with 10 other people. Counsel submitted that PW2 also saw the Appellant by lights that were coming from his sitting room and his security light.

We have considered the law relating to identification of an accused person particularly that of recognition and which is made under conditions that are known to be difficult. In the celebrated case of **Republic vs. Turnbull & Others (1976) 3WLR 455** while determining the issue of the reliability of the evidence of identification gave guidelines that could be considered before the evidence of identification is accepted as good and free from the possibility of error or mistake. The court suggested the following issues ought to be addressed: -

“How long the witness had been under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before?”

We shall use the suggested tests to see whether the evidence of identification by PW2 and PW3 was safe. PW2 said he saw the Appellant through the door. PW2 described that there was light in the sitting room where the Appellant was. What PW2 did not say is whether he opened the door to the sitting room fully or partially. It is however clear that inside the room where he claims he saw the Appellant, there were 15 people. The issue whether PW2's view was impeded in anyway was never addressed yet it was a critical issue given the number of people that PW2 said he saw in the room. The length of time that PW2 saw the Appellant was not addressed. However it does not seem to have been for long given the evidence of PW3.

PW2 stated this: -

“I saw about 15 people in the sitting room. They were immediately with pangas, iron board. They had overcoat. The sitting room light was on. I identified the 1st accused he had a red jacket. He was carrying a TV. I then locked the door”.

From this excerpt one gets a clear picture that the Complainant PW2 had a fleeting view of the robbers.

PW3 on his part said he heard the screams of PW2's wife and woke up and went out. He then said he saw the Appellant. This witness claimed he saw the Appellant with the help of lights from his sitting room and his security lights outside. This is how PW3 described the scene and the Appellant: -

“My house is opposite PW2's. The sitting room lights of my side were on and the security light

outside. I saw the first accused. He had a weapon that looked like a panga or iron bar. He had an iron box. I saw them walking out.”

Considering the evidence of these two witnesses in circumstances, it is very clear that they were not describing the same person. Yet if PW2 saw the Appellant going out of his house and PW3 saw the Appellant leaving their house, it must have been at about the same time. This is more recalling PW3's evidence that his house was opposite PW2's house. Therefore if PW2 saw the Appellant carrying a TV and dressed in a red jacket and PW3 soon thereafter saw him with a weapon and an iron box, the two could not have been describing one and the same person. A TV set cannot be mistaken for an iron box and a weapon. Subsequently none of them gave the Appellant's name to the police officer who visited the scene soon thereafter.

In **Karaton Ole Lesaran vs. Republic CA No. 78 of 1988** (unreported) **Gachuhi, Masime JJA & Kwach Ag. JA** had this important observation to say about identification: -

“In our judgment the identification evidence in this case was of a very poor quality thus making the danger of mistaken identity even greater. If the lower court had taken into account the fact that between the date of his attack on 13th May 1983 and the Appellant's arrest at Taveta Hospital 3 days later the Complainant had not mentioned to anyone that the Appellant was a member of the gang that had attacked him.... It would become plain to them that this evidence was of little if any probative value and should have been rejected outright.”

The same court cited **from Republic vs. Turnbull** (Supra), at page 552 letter d, thus: -

“All these matters go to the quality of the identification evidence if the quality is good and remains good at the close of the accused's case, the danger of mistaken identity is lessened, but the poorer the quality the greater the danger.”

We find the quality of the evidence of identification by recognition of both PW2 and PW3 to be of very poor quality indeed. Both had a fleeting glance of the robbers. The description each assigned to the Appellant was not fitting and was inconsistent. Besides it was not given to PW7 **IP Wandeto** who visited the scene of crime the same night of incident. In fact PW7 stated specifically that she found both Complainants, which included PW2, at the scene that night and was categorical that he gave her no names and no descriptions. The learned trial magistrate's finding of fact that PW3 gave the Appellant's name to PW7 or other police officer had no support in the prosecution evidence.

Considering all these factors and there being no other evidence, we agree with the Appellant that the two witnesses could not have seen him that night. PW3 knew his name before and even if PW2 did not know him by his name he knew that he had married the neighbours daughter. Had they seen him, they definitely would have mentioned it to PW7 **IP Wandeto**. We agree with the Appellants second ground of appeal that the alleged identification by PW2 and PW3 was in all the circumstances of this case, an afterthought.

The Appellants last two grounds have to do with his conduct after the robbery in issue. That he went back 3 days or 2 days later and that same ought to have been considered as evidence of his innocence and clear conscience along with his good defence. We tend to agree with the Appellant's argument considering it in its full perspective. The defence case was that the Appellant's visit at the scene on 23rd June 2002 had been planned 2 weeks earlier and the date given by DW2, the Appellants father-in-law. It is more likely that had the Appellant committed this offence he may not have turned up in the same area within 2 or 3 days of the commission of the offence. We bear in mind however that the Appellant had no obligation to prove his innocence. The onus was on the prosecution throughout this case to prove their case beyond any reasonable doubt. We find that the prosecution did not prove its case on the required standard and that the conviction was unsafe.

We wish to point out two issues before we end this judgment. We note from the learned trial magistrate proceedings that he did not conduct a *voire dire* examination of PW5 before taking his

evidence as required under **Section 19(1)** of the **Oaths and Statutory Declarations Act**. Even though no prejudice was caused as the learned trial magistrate dismissed the evidence of PW5 for some other reasons, the learned trial magistrate should be cautious to ensure that he conducts such an examination before taking evidence from children of tender years. See **David Ouma vs. Republic Cr. Appeal No. 204 of 2004.**

The second point is also a caution to the trial magistrate. The law is now settled as to what ingredients constitute the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. See **Aluoch vs. Republic 1983 KLR.** Definitely lack of physical violence is not a reason to reduce a charge of capital robbery under **Section 296(2)** of the **Penal Code** to that of simple robbery contrary to **Section 296(1)** of the **Penal Code**.

Having said this we now conclude the judgment. The Appellant's appeal has merit and we allow the same, quash the conviction and set aside the sentence. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 31st day of July 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant(s) – present

Miss Okumu State Counsel for Respondent

Tabitha – Court clerk.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE