



REPUBLIC OF KENYA

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

Criminal Appeal 703 of 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 16895 of 2002 of the Chief Magistrate's Court at Makadara (Mrs. Kimingi – PM)

HUSSEIN HASSAN ABDULLAHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

HUSSEIN HASSAN ABDULLAHI was charged with one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the Penal Code. The particulars of the charge were: -

“On the 9th May 2002 at Kariobangi 1 South Estate Nairobi within Nairobi area, jointly with others not before court while being armed with crude weapons namely pistol, robbed MAURICE ODUOR of Kenya police certificate of appointment, mobile phone make NOKIA model 6150 and cash Kshs.1,800/- all valued at Kshs.20,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said MAURICE ODUOR.”

The Appellant was convicted and sentenced to death. It is from that conviction that he now appeals to this court.

The facts of the prosecution case were that the Complainant a Police Officer went to a bar to visit a scene of a previous crime reported by the owner of the bar. He said that the bar owner bought him beer and left him taking it. It was 9th May 2002 at 6.30 p.m. That five people entered the bar and robbed him of a mobile phone and cash while another, the Appellant stole from the counter. Two months later on 13th July 2002, the Appellant was taken to the Police Station where the Complainant worked in connection of another offence and he recognized him. The Appellant denied the offence and gave a detailed account of the cause of his arrest by others who had no nexus to the Complainant and how the Complainant charged him with this offence.

The Appellant has raised five grounds of appeal. The first ground was that the evidence of the Complainant was not free from error or mistake, that other witnesses needed to be called to supplement the Complainant's evidence, that the Appellant's arrest had no nexus with the instant case, that his defence was not adequately considered and finally that the learned trial magistrate failed to evaluate the evidence as required.

Miss Nyamosi for the State did not support the conviction. The learned counsel submitted that the

Complainant was robbed in a bar and that one Judith, whom the Complainant mentioned in his evidence was not called as a witness. The learned counsel submitted that she doubted the possibility that the Appellant was one of those who robbed the Complainant.

We have carefully analyzed and evaluated afresh the evidence adduced before the trial court. There was only one prosecution witness who was also the Complainant in this case. It is the Appellant's submission that the Complainant's evidence required corroboration that it was lacking in this case.

It is trite law that a fact can be proved by the testimony of single witnesses. See **RORIA vs. REPUBLIC 1961 EA 583** and **KARANI vs. REPUBLIC 1985 KLR 290**. However for such evidence to form the basis of a conviction, there is need for testing such evidence with the greatest care especially when it is known that the conditions favouring a correct identification were difficult. See **MAITANYI vs. REPUBLIC [1985] 2 KAR 75**. There are two tests to be applied to the evidence where the prosecution is relying on the evidence of a single witness. The first test is whether the conditions of identification favoured a positive identification. The conditions of the Appellant's identification are known to have been difficult. The Complainant was seated at a table at 6.30 p.m. The Complainant said that there was electricity light on inside the bar by the time the five robbers struck. It must have been dark for the Complainant to notice that electricity lights were on. The Complainant said the room was a 10 by 10 and therefore fairly small. He then said that the Appellant was one of the three who went to the counter to sit there before entering the counter.

The Complainant did not say how far from the counter he sat or whether he had any occasion to see the Appellant's face. The Complainant just said that he was one of those who sat at the counter. The Complainant did not describe how the Appellant sat, whether with his back facing him or on the sides where he could see him. The circumstances under which the Complainant saw the Appellant are therefore not quite clear.

The second test to apply to such evidence is whether standing on its own, the evidence of a single witness would be safe to sustain a conviction. We do not think that the Complainant's evidence was strong enough to sustain a conviction. Not only is his evidence not clear as to which part of the Appellant the Complainant saw, it is also not clear at what distance he saw him. We have also taken into account that the Appellant was arrested 2 months after the incident for a different offence and that the Complainant did not know him before. No identification parade was conducted and unfortunately it could not have been conducted since the Appellant was taken to the Complainant at the Police Station where the Complainant happened to be on duty. For a person he did not know before and considering the 2 months lapse without the support of identification in a properly conducted identification parade, the Complainant's identification of the Appellant as the one who robbed him was unsafe.

Where the evidence relied upon to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction. See **KIARIE vs. REPUBLIC 1984 KLR 739**. The Complainant's visual identification of the Appellant need to be treated with greatest care given the fact that it was basically similar to dock identification. See **PETER MAINA vs. REPUBLIC CA No. 111 of 2003 (NYERI)**. In such circumstances, the Court of Appeal in the case of **ODHIAMBO vs. REPUBLIC CA No. 77 of 2001** (Mombasa) held: -

“Where the evidence of identification rests on a single witness and circumstances of identification are known to be difficult, what is needed is other evidence, either direct or circumstantial, pointing to the guilt of the accused person from which the court may reasonably conclude that identification is accurate and free from the possibility of an error.”

We have looked for other evidence whether direct or circumstantial that can be said to point at the Appellant's guilt and we find none. Nothing was recovered from the Appellant which could have connected him to the offence. The evidence before court clearly fell short of meeting the required standards of proof beyond any reasonable doubt in a case in Criminal Case.

We are aware that the Appellant raised other grounds in his petition of appeal and written

submissions. However, we believe that this ground alone is sufficient to dispose of the appeal.

We allow this appeal for the reasons we have given above. The Appellant's conviction is quashed and the sentence set aside. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 25th day of July 2006.

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Miss Nyamosi for the State

CC: Huka

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE