



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 307 of 2004

(From Original Conviction and Sentence in Criminal Case No. 1342 of 2003 of the Principal Magistrate's Court at Nyahururu – G. A. MMASI - S.R.M)

DAVID EREGAI KERIO APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Daniel Eregai Kerio was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars of the charge stated that on the 3rd day of February 2003 at Gatundia shopping centre in Laikipia District of the Rift Valley Province jointly with others not before court while armed with a gun robbed **Esther Wanjiru** of cash approximately 20,000/- and at or immediately before or immediately after the time of such robbery shot dead **Robert Kibiriri Gichuhi**.

After a full trial by the Senior Resident Magistrate at Nyahururu, the appellant was convicted of a lesser charge of robbery contrary to **Section 296 (1) of the Penal Code**. He was sentenced to two years imprisonment.

The appellant has appealed against both the conviction and sentence basing his appeal on the grounds that there was insufficient evidence to support the charge, the appellant also faulted the evidence of identification by a single identifying witness in circumstance that can be said to be difficult. The appellant attacked the prosecution for failure to avail crucial witnesses such as the arresting officers and the police officer who conducted the identification parade. The evidence that led to the conviction of the appellant was given by a total of seven prosecution witnesses.

Briefly stated the prosecution's case was that on the 12th February 2003, **Esther Wanjiku** (PW1) was selling at her shop at Gatundia shopping centre at about 7.30 p.m. when her husband the late Robert Kibiriri Gichuhi drove in with a visitor by the name **Kuria Mwangi** (PW6) came in. PW1 told the court that her deceased husband was carrying sodas and while the sodas were being offloaded, one person whom she identified as the appellant entered the shop. He was not armed. Suddenly, she heard gun shots and after taking cover somebody demanded for money and she showed him the cash box where they removed the money.

At the time the husband had been shot dead and she started screaming. Later on PW1 was called at

Rumuruti police station where an identification parade was conducted but she was not able to identify anybody. A second identification parade was held and she managed to identify the appellant. She said there was solar light which enabled her to identify the appellant who was the first to enter the shop then the other robbers followed only after two minutes.

Musyoka Munyasia Njema (PW2) was guarding the premises when the robbers knocked him down and covered him with a sack. He could not identify any of the attackers.

Similarly PW6, Kuria Mwangi who was present when his friend was shot at the shop was not able to identify the robbers. This is basically the evidence of the three witnesses who were present during the robbery incident. The other witnesses identified the body of the deceased during the postmortem and **Dr. John Weru** (PW5) performed the postmortem.

It is on the basis of the above evidence that the appellant was put on his defence. He denied any involvement with the incident. He claimed he was walking to his home on 1st April 2003 when he was arrested by police from Rumuruti police station. He was charged with the offence of robbery with violence.

After considering the evidence the trial court held that;

*”PW1 told the court that when accused entered she vividly saw him. She said he was not armed and while standing there, three other people entered and she heard a gun shot. She went on her knees. Hence it is evident that the accused is not the one who shot the deceased. PW 1 said she stood and three other robbers confronted her and demanded for money. She showed them the cash box and they went and took the money. She said when the three were demanding for money, the accused was nowhere to be seen. She said she saw the accused’s face vividly and identified him from his appearance. There is no other witness who identified the accused ... Thus accused is found guilty on the lesser charge of robbery contrary to **Section 296 (1) of the Penal Code.**”*

This appeal was opposed by Mr. Koech on behalf of the State. He supported the conviction and sentence and submitted that the appellant was positively identified by PW 1 when he entered the shop shortly before robbery took place. There was sufficient light at the time from the solar lamp and she saw the appellant for about two minutes. She later identified the appellant at an identification parade.

I have carefully considered all the evidence as mandated by the law this being the first appellate court I have a duty to reconsider and subject the entire evidence to a fresh scrutiny. This appeal turns on the issue of identification of the appellant by PW 1 in circumstances that can be said to have been difficult because immediately PW 1 said she saw the appellant entered the shop, there were gun shots, this was within a glance of about two minutes and under stressful conditions. She said that she later identified the appellant at an identification parade but there was no evidence adduced in court by the police officer who conducted the parade. This would have afforded the appellant an opportunity to ask him/her questions about the conduct of the parade.

All the other witnesses who were present with PW1 could not identify any of the assailants. I am satisfied that this identification by PW 1 which the trial court relied on to implicate the appellant was not water tight to justify a conviction and the trial magistrate was bound to warn himself as was held in the case of **Maitanyi –Vs- Republic [1986] IKAR 75.**

“Subject to well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but his rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult in such circumstances what is needed is other evidence, whether circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on a testimony of a single witness, can safely be accepted as from the possibility of error.”

In view of the above analysis, I have come to the conclusion that the conviction was unsafe. I allow the appeal, quash the conviction and set aside the sentence of two years. The appellant is hereby set at liberty forthwith unless otherwise lawfully held.

Judgement read and signed on 13th July 2006.

MARTHA KOOME

JUDGE