



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Criminal Appeal 273 of 2002

JOHN GICHUNGE MITIEAPPELLANT

V E R S U S

REPUBLIC RESPONDENT

**(Being an Appeal against both conviction and sentence in
Criminal Case No. 619 of 2002, Before P.M. N. Kimani Esq
Principal Magistrate at Maua.)**

J U D G M E N T

1. The Appellant, John Gichunge Mitie was charged in Maua P.M.'s Court Criminal Case Number 619/2002 with the offence of attempted robbery with violence contrary to s.297(2) of the Penal Code. It was also alleged that he assaulted one Kenneth Mwiti and occasioned him bodily harm with intent to steal contrary to s.298 of the Penal Code. Both offences were said to have been committed on 2.3.2002 at Miathene Location in Meru North District. The trial Magistrate having heard six (6) prosecution witnesses convicted the Appellant on both counts and sentenced him to death in respect of the offence of attempted robbery and for the offence of causing grievous harm he sentenced him to serve three (3) years in prison.

2. The Appellant now appeals to this court and in his Petition of Appeal he sets out the grounds of appeal as that:-

(i) The learned trial magistrate erred in law and fact in proceeding on incomprehensible evidence by P.W. 1 without considering that it was contradictory and inadmissible.

(ii) The learned Magistrate erred in law and fact in accepting the evidence by prosecution witnesses in regard mode of arrest and failing to find and to consider that it was inconsistent and incredible.

(iii) The trial magistrate erred in law and fact in rejecting the defence without a considerable

determination drawn from both the defence case and prosecution case.

3. Before returning to the said grounds, we think it our duty to set out the evidence before the lower court, evaluate it and see whether there was sufficient reason for the accused to have been convicted (see *Shantilal M. Ruwala vs R* [1957] E.A. 570 as well as *Pandya v. R* 1957 E.A. 336, decisions all approved in the celebrated case of *Okeno vs R*. [1972] EA 32). In the instant case, P.W.1 Susan Ikolomi was in her house on 2.3.2002 at 8.30 p.m. together with her minor children when two people entered the house, attacked her. One of the two men had a simi and cut her on the forehead but she held onto it. Another hit her on the back with a gun butt and as she was screaming, her brother, Kaume, came to her rescue and the two men ran away. The attack took less than ten (10) minutes and nothing was stolen during the attempted robbery. It was her evidence that she did not recognize her attackers but later in evidence, she said that “the accused personcut” her on the forehead and that she was also cut on her fingers as she held on to the simi. She also said that she did not know the Appellant before but in cross-examination, she stated that the Appellant was arrested five(5) minutes after the incident, near P.W.1’s house.
4. In any event, P.W.1 testified further that she reported the incident at Miathene Police Station and later was treated at Miathene Clinic and Meru Hospital.
5. P.W.2, Joshua Kabutha said that on the material night he was at home when he heard P.W.1 screaming and as he ran to her rescue he saw three men running towards his farm. He said that there was moonlight and when he followed them, he found the Appellant hiding in napier grass and he with others arrested the said Appellant. He later said that the simi allegedly used in the attack was found at the house of P.W.1. He said that the Appellant was wearing a cap and a jacket. P.W.2 was one of those who assisted in taking the Appellant to Miathene Police Post where he was re-arrested and the police took charge of the simi. He said that he did not know the Appellant before but that he was arrested alone minutes after the attack on P.W.1.
6. P.W.3 Kenneth Mwiti, son of P.W.1 was in a different house from P.W.1 when he heard her screams. He rushed out and shouted to her but he met a man who slashed him on the cheek. He did not know who that person was but it was his evidence that the Appellant was arrested shortly thereafter and P.W.3 was taken to hospital, treated and discharged.
7. P.W.4 William Kaume was at his home on the material night when he heard P.W.1 screaming. He rushed to her aid, found that she had injuries on the forehead and that her son, P.W.3 was injured on the cheek. He did not know who had cut them but together with other neighbours searched the area and found the Appellant hiding in napier grass. The appellant was then arrested and taken to Miathene Police Station. P.W.1 was taken to hospital and treated. P.W.4’s further evidence was that although it was a “dark night”, it was not “Pitch dark.” He added that he did not know the Appellant before but that he was arrested without any weapon on him.
8. P.W.5 P.C. Joseph Ng’eno re-arrested the Appellant, took possession of the simi. What is of interest was that when P.W.1 and P.W.3 made their report, P.W.1 “mentioned accused’s name John Gichunge as the one who had cut her.” That “later accused was brought by members of the public over this case same night *sic*” P.W.5 then produced the simi and reiterated in cross-examination that “Complainant Susan mentioned the accused’s name to him when she filed her complaint”.
9. P.W.6 Haron Gitonga Miriti examined both P.W.1 and P.W.3, and found that they had been assaulted by a person known to P.W.1. P.W. 1 had injuries to the face, 2nd, 3rd and 4th fingers and a cut wound to the arm and produced the P3 forms which he had signed and dated. It is important to note that he examined the two persons on 19.4.2002 while their injuries were allegedly inflicted on 2.3.2002.
10. When put to his defence, the Appellant said that he left home on 2.2.2002 and went to the market to buy cows. He was then arrested for “nothing by a mob, and taken to the complainant’s home” and after being beaten, he was taken to Miathene Police Post and later to court.
11. The Appellant now argues that the evidence against him was wholly unsatisfactory and could not

sustain a conviction. Further, that the identification by P.W.1 and P.W.2 was not beyond reproach as the circumstances surrounding the scene of the attack were not favourable to such identification. He also argues that his defence was ignored and rejected without any cogent reason being given.

12. Mr. Muteti Learned Counsel for the State concedes the Appeal in respect of the offence of assault with intent to steal but supports the conviction in respect of the offence of attempted robbery and argues that there was moonlight to enable the witness identify the robbers and the Appellant was found hiding in nappier grass and he had no reasonable explanation for his action. Further, that the evidence of P.W.1 was unchallenged and she identified the Appellant as one of her attackers. He urged that the Appeal be dismissed.

13. For our part, we are in complete agreement with Mr. Muteti that the Appeal in respect of the offence of assault with intent to steal must be allowed. P.W.3, Kenneth Mwititi was attacked when he rushed out of the house he was in, to heed to his mother's cries. He was attacked at the door of that house and before he could reach his mother's house. P.W.2 had said that there were three (3) men he saw running away. P.W.1 said that two (2) men were in her house including the Appellant. It is more likely than not that P.W.3's attacker was the third man who was not in P.W.1's house. Even if we are to agree with the assertion that the Appellant was in the group of three, there is completely no evidence to link him with the specific assault on P.W.3 who was categorical that he did not know who cut him on the cheek. We shall allow the appeal in that regard and for these reasons we shall therefore quash the Appellant's conviction on that count and set aside the sentence of three (3) years imprisonment.

14. Turning now to the offence of attempted robbery with violence it will be noted that P.W.1's evidence was full of contradictions. On one hand, she said that she did not recognize any of her attackers but went on to say that it was the Appellant who cut her on the forehead. She also said that she had not known the Appellant before, yet P.W. 5 P.C. Joseph Ng'eno said that P.W.1 mentioned the Appellant's name, i.e. Joseph Gichunge as one of her attackers while P.W.1 herself said no such thing. P.W.6 Haron Gitonga Miriti, the clinical officer also examined P.W.1 and P.W.3 on 19.4.2002 and it was his evidence that the person who assaulted them was known to P.W.1 which was contrary to her evidence given on 3.6.2002 and in any event, the Appellant was charged on 19.3.2002 long before the medical examination had been done and P.W.1 was aware at that time who had been charged with the attempted robbery at her home. To this extent we would agree with the appellant that with such conflicting evidence on straightforward matters, the trial court ought to have been confronted with other evidence to support that of P.W.1. We would however hesitate to say, as does the Appellant, that P.W.1 is a witness without credibility as that is a matter for the trial magistrate to make an assessment of (see *Ogol vs Muriithi* [1985] KLR 359) but we are still entitled to evaluate her evidence and reach our own conclusion as to its veracity vis-a-vis the charge.

15. We should say one more thing about P.W.1's identification of the Appellant aside from the contradictions raised above; even if she could identify him it is unclear to us what led her to say that it was the Appellant in the attack that lasted less than ten (10) minutes who actually cut her on the forehead. P.W.2 said that when the Appellant was arrested "he had a cap and jacket." P.W.1 said that she had a lit lamp in the house at the time of the attack and she failed to state how she was able to say that it was the appellant, a person she did not know before, who attacked her. How was he dressed? What made her say that it was he and not any other who assaulted her? P.W.5 said that P.W.1 and P.W.3 made a report before the Appellant was taken to the police station but P.W.1 gave no description of the Appellant to P.W.2 and P.W.4 who came minutes later and arrested the Appellant shortly thereafter. Was the lamp such as to give enough light for P.W.1 to identify the Appellant with a cap on and which she said nothing about? These matters are important in determining the case against the Appellant and without evidence in positive answer to the last question, the benefit must be given to the Appellant more so where circumstances for a favourable identification are lacking (see *Wendo vs R* [1953] 20 EACA 166 and *Roria vs R* [1967] E.A. 583).

16. Having said all the above, there is the worrying question about the arrest of the Appellant. P.W.2 said that he saw three men running away from the home of P.W.1 and shortly thereafter the Appellant was arrested in nappier grass within P.W.2's land. P.W.4 corroborated that evidence as did P.W.5 who re-

arrested him after he was taken to Miathene Police Post. This evidence is not denied by the Appellant who said in his evidence that he was indeed arrested by a mob and taken to Miathene Police Post. He chose to say nothing about the place of arrest nor the hour of arrest. It does not matter because that evidence stands. If that be so, what was the Appellant doing there, in land that does not belong to him, in napier grass minutes after an attack on P.W.1 and he was unable to give a reasonable explanation for his presence? He says that his defence was ignored by the trial court but having admitted the circumstances of his arrest, it would be expected that he would give such a reasonable explanation as would amount to a credible defence. As it is, the defence on record is a sham and a half-hearted attempt at answering the charge. Granted, the onus of proving the charge lies on the State but once an accused person has been put on his defence, he has the onus of answering any adverse evidence against him. The appellant failed to do so in respect of this particular aspect of the case against him.

17. We now have two matters that we must resolve; the contradictory evidence as articulated above and the circumstantial evidence of the presence of the Appellant near the scene of the attempted robbery without explanation. Which evidence must prevail? There is no doubt that P.W.1 and P.W.3 were attacked by three (3) men whose motive in the absence of any other evidence may have been robbery. When P.W.1 raised an alarm, the robbers took to their heels and headed in the direction of P.W.2's land. Shortly thereafter the Appellant was arrested hiding in napier grass within that land. This was five (5) minutes or so after the attempted robbery. He had no weapon with him and the simi used to attack P.W.1 was actually found in P.W.1's house and it was produced in evidence. He goes on to admit the circumstances of his arrest but gives no reasonable explanation for it. In those circumstances what would any court confronted with that evidence decide other than that the Appellant with or without the evidence of identification was one of the robbers? In Margaret Wamuyu Wairirioko vs R Cr Appeal No. 35/2005 (unreported), the Court of Appeal cited these words as made in R. vs Taylor, Weaver and Donoran [1928]21 Cr.App. R. 20 to explain the worth of circumstantial evidence;

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

18. It is our considered view that taking all circumstances of this case into account and removing the contradiction highlighted, the Appellant was involved in the attempted robbery at the house of P.W.1 and that is the only conclusion that we can reasonably reach and even the benefit of contradictions being given to the Appellant, he cannot escape the consequences of his participation in it.

19. Having considered the matter as we have, we can only conclude that the Appeal in respect of count 1 cannot stand and is hereby dismissed.

20. The following orders therefore attract the collective mind of this court;

1. The appeal on count II is allowed the conviction is quashed and the sentence set aside.
2. The Appeal on count I is dismissed and the conviction and sentence of death is upheld.
3. Orders accordingly.

Dated, signed and delivered in open court at Meru this 28th Day of September 2006.

ISAAC LENAOLA

JUDGE

RUTH N. SITATI

JUDGE