



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Criminal Appeal 5 of 2006

TONY EKIRU SIRIKWA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and sentence dated 8.2.2006 in Eldoret C.M.CR. Case No. 1329 of 2005, by Mr. W. N. Njage P.M.)

J U D G M E N T

Tony Ekiru Sirikwa was arraigned together with another before the Principal Magistrate Eldoret on 25/2/2005 where they were charged with the offence of Robbery contrary to section 296 (1) of the Penal Code.

The particulars of the offence were that, “*on the night of 19th/20th day of February 2005 at Iten Stage within Eldoret township in Uasin Gishu District of the Rift Valley Province jointly with another not before court robbed BEN CHESOSI KIBET of Kshs. 4,000/-, a pair of safari boots and a wrist watch all valued at Kshs. 5,100/- and at or immediately before or after the time of such robbery threatened to use actual violence to the said BEN CHESOSI KIBOR*”

Sirikwa and his co-accused pleaded not guilty to the charge, and after a full trial, which lasted a year, and in which the State called three witnesses, two of whom were the police officers who claimed to have arrested the appellant.

Sirikwa’s co-accused was acquitted under section 215 of the Criminal Procedure Code, but Sirikwa was found guilty as charged and convicted. He was accordingly sentenced to serve seven years imprisonment.

Being dissatisfied with both the conviction and the sentence Sirikwa, whom I shall henceforth refer to as “the appellant”, and who acted in person, has preferred this appeal and as I discern it, his grounds are that the learned trial Magistrate erred in both law and fact by basing the conviction on the complainant’s evidence, which evidence was not corroborated by the two arresting officers; by holding that he was arrested at the scene of the crime without considering the fact that the evidence could have been fabricated; that his defence was rejected without any cogent reason, and finally that the prosecution had not proved its case beyond reasonable doubt.

Briefly, the case for the prosecution was that as Ben Chesos Kibor (PW1) a Kenya Army Officer, stood at the Iten Stage in Eldoret on 20/2/3005 at 3.30 a.m., he was attacked by three men who were fully clothed

in the uniform of **HEDLEY SECURITY GUARDS** (Hedley), one of whom grabbed him by the neck, while the others removed his watch and shoes, but that his assailants' efforts to remove his jacket were thwarted when a police vehicle approached the scene, at which point two of them run away, but that he managed to grab the third one.

The other two witnesses who were the Police Officers, who had approached the scene at the time of the attack, recounted how they had found four people struggling at the said stage. Cpl. Ngesisi (PW2) testified how he arrested the appellant at the scene. The stolen property was never recovered. P.C. Esaiiah Kibii (PW3) testified how while on patrol duties in the company of PW2 and another, they had found PW1 being robbed and how they managed to arrest the appellant. Like PW1 and PW2, he testified that the appellant was fully dressed in a guard's uniform.

The appellant who chose to give an unsworn statement of defence, stated that he was a waiter in Highlands Inn in Eldoret; that he had left his place of work for home at 3.00 a.m., that as he passed by Uganda Road in Eldoret, he found Policemen running after people; that the policemen asked him for his identity card and as he made to produce it, a man who claimed that he (the appellant) had stolen from him approached him at which point he was arrested and taken into custody. He denied having committed the offence.

The learned trial Magistrate, considered the evidence for the prosecution and the appellant's defence. He found that the appellant was a guard with Hedley, and that he had left his place of work at Highlands Inn to commit the offence. Having found that his defence was a mere denial, he chose not to believe it and he found him guilty as charged and convicted him accordingly.

As I discern it several issues arise from this appeal, namely, whether there was need to corroborate the evidence of PW1, and if so whether it was corroborated; whether the appellant's defence was given due credence and finally whether the prosecution was able to prove its case to the expected standards, it being that the prosecution must prove its case beyond reasonable doubt.

Indeed Miss Oundo for the State contends and rightly so, that a fact can be proved by one witness if, he is truthful and it need not be corroborated. I therefore proceed with the knowledge in mind that there is no rule in law that places the court under an obligation to look for corroboration in all criminal trials. The legal position was indeed well laid down in *Abdullah Bin Wendo v. R* [1953] 20 EACA 66 as *"subject to certain well known exceptions it is trite that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care evidence of a single witness respecting identification especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."*

It was Miss Oundo's submission that PW1 had narrated how he was attacked by three persons, how he was able to get hold of the appellant; how the police had arrived at the scene and arrested the appellant; how both arresting officers (PW2 & PW3) testified that they had found four people struggling at the scene and how they arrested this appellant.

In her view, the learned trial Magistrate acted fairly and properly when he rejected the appellant's defence as it was found to be misplaced, and that in the circumstances, both the conviction and the sentence were proper. She thus urged the court to dismiss the appeal.

I have as is expected of me, this being the first appellate court re-evaluated the evidence on record with a view to establishing whether the learned trial Magistrate's finding was well founded, bearing in mind the fact that I have not had the advantage of seeing the witnesses and examining their demeanor.

It was PW1's evidence that the appellant was the one who had grabbed him by the neck during the attack, but he conceded that he had not been able to see the appellant's face during the attack. Indeed he was very

categorical that he did not see the face of the person who had strangled him. Perhaps this would explain PW2's testimony, that he summoned PW1 who was able to identify the appellant as one of his assailants; the only logical explanation would have been that the appellant was arrested away from the scene, and hence the need to call PW1 to identify the appellant. The fact that the appellant was not arrested at the scene as alleged by PW1 was further explained by PW3 who testified that the appellant was actually arrested along a corridor which he had apparently run into after the attack, which was away from the scene. I find that given the circumstances surrounding the arrest it was necessary for the prosecution to establish that the appellant was positively identified, this is further compounded by the fact that PW1 had clearly stated that he had not seen the face of his assailant face during the attack. It is interesting to note that despite the fact that the incident occurred at around 3.30 a.m., in an area which was apparently lit, there was however no indication as to the intensity of the light at the scene and one would be right in assuming the prevailing circumstances were not conducive to positive identification, more so because PW3 conceded that though he had found four people at the scene, he could not tell for sure whether the appellant was one of the four. This was also compounded by the fact that the appellant was actually arrested from a corridor.

I find that the prosecution's case failed especially in view of the fact that, the fact that the complainant had not seen his assailant clearly during the attack; that the appellant was arrested away from the scene and that PW1 had therefore lost his grip, meant that his evidence required, but lacked corroboration, and there was no sufficient proof that he was involved in the robbery.

In view of the above, I find that had the learned trial Magistrate given the appellant's defence some consideration, and especially the fact that the appellant claimed to have been a waiter, he would have found it credible, in view of the fact that the guard's uniform which the appellant was allegedly arrested in was never produced in court.

In my humble opinion, had the learned trial Magistrate taken the above issues into account, he would have arrived at the conclusion that the prosecution had not proved its case against the appellant beyond reasonable doubt and would have acquitted him accordingly.

I do in the circumstances, allow the appeal, quash the conviction and set aside the sentence. The appellant should be released forthwith unless otherwise held in lawful custody.

Dated and delivered at Eldoret this 16th day of November 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Omutelema holding brief for Miss Oundo for the State

Appellant in person