



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 1052 OF 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 180 of 2003 of the Senior Principal Magistrate's Court at Kiambu (M. W. Wachi ra-SPM)

DANIEL CHONGO GAITHO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDEN

J U D G M E N T

The Appellant **DANIEL CHONGO GAITHO** was convicted of the offence of **ROBBERY WITH VIOLENCE** contrary to Section 296 (1) of the Penal Code. This is after the court heard the case and in its judgment reduced the charge from Robbery with Violence contrary to **Section 296 (2)** of Penal Code to Robbery. The Court invoked **Section 279(2)** of the **Criminal Procedure Code** to reduce the charge. The Appellant was then sentenced to seven years imprisonment.

The Prosecution case was that on the night of 5th December 2002, at 1.00 a.m. the Complainant, PW1, was attacked by a group of people and robbed of Kshs.1500/-, a hammer, a panga and a knife. He was also assaulted on his person and injured. The next morning, PW1's daughter, PW3 recovered a voters card bearing the Appellant's name. The Appellant was eventually arrested and charged.

The Appellant filed amended grounds of Appeal in which he raises three grounds which can be summarized as follows: -

1. That the learned trial magistrate erred in law and fact in holding that the Appellant was positively identified by the Complainant.
2. That the learned trial magistrate erred in law by placing inordinate weight on the recovery of the voting card which was circumstantial evidence that was not strong enough to sustain conviction.
3. That the learned trial magistrate erred in law and fact in rejecting the Chief's letter.

On the first ground of Appeal it was the Appellants contention that the Complainant never said to the police that he knew any of those who attacked him. He challenges the trial magistrate's finding that the Complainant positively identified him during the offence. **MISS GATERU**, learned counsel for the state submitted that the Complainant positively identified the Appellant during the incident. The basis of her

submission was that the Complainant had identified the Appellant as the only one, in the large group of attackers who raided his home, to physically assault him.

It is important to bear in mind that the offence was committed at night. The only source of light inside the Complainant's bedroom where he was attacked, were torch lights held by the attackers themselves both inside and outside the house. The evidence of identification was by a single witness and the need for caution was crucial before a conviction could be entered. The Court of Appeal in the case of **ODHIAMBO vs. REPUBLIC C.A. NO. 77 OF 2001**, CHUNGA CJ, LAKHA and KEIWUA JJA held as follows:-

“1. Courts should receive evidence on identification with the greatest circumspection particularly where the circumstances are difficult and do not favour accurate identification.

2. Where 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.”

Having re-evaluated the evidence adduced before the trial court, I find that the circumstances of identification by the single witness were difficult. Apart from the incident having taken place at night, the Complainant was not consistent concerning his ability to identify any of his attackers. This is more so considering that the basis of the Appellant's arrest was not the identification by the Complainant but the fact that a voters card bearing the Appellant's name was recovered in the Complainant's compound after this incident. It is quite clear from the evidence of the Investigating Officer PW4, that the Complainant at the time he reported the incident, did not say that he was able to identify anyone of those who had attacked him. The evidence is clear then that the first time the Complainant said he could identify anyone was in court. In the circumstances the evidence of identification by the Complainant was shaky and unreliable.

On the second test to apply on this case, in line with the second holding in **Odhiambo's case**, there was other evidence against the Appellant and that was the voter's card. It was PW3's evidence that she recovered a voter's card bearing the Appellant's names, whom I must add, she did not know, at a spot where she had seen the attackers converge to share out the loot after the robbery. **MISS GATERU** submitted that the wallet linked the Appellant to the offence. The Appellant on the other hand relied on his defence that he had lost the voting card, and submitted that even though he did not explain how, the loss was nevertheless a possibility. In this case, the Appellant was convicted on the basis of the Complainant's evidence of identification and the recovery of the Appellant's voters card in the Complainant's compound. In determining whether the recovery of the voting card is strong circumstantial evidence on which to base a conviction regard must be had of any coexisting circumstances. In deciding such an issue, the Court of Appeal in the case of **GICHUHUI vs. REPUBLIC CA No. 138 of 2003** at page 6 held;

“Before a court can base a conviction exclusively on circumstantial evidence, it must be satisfied that the inculpatory facts irresistibly point at the accused and are incompatible with the innocence of the accused and incapable of any explanation upon any other hypothesis that that of guilt. The court must also be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

Does the recovery of the Appellant's voting card irresistibly point to the Appellant's guilty? And are there co-existing circumstances which would weaken or destroy the inference? I do not find that the recovery of the voting card irresistibly pointed to the Appellant's guilt more so because of his defence which was under oath and which was unchallenged, that he had lost it. I find that there are co-existing circumstances which destroys the inference of guilt on the circumstantial evidence against the Appellant. This coexisting circumstance is the possibility that the Appellant could have lost the card earlier and that it was not him who dropped it.

The Appellant's last ground was that the learned trial magistrate rejected the Chiefs letter which according to the Appellant was an error on her part. The Chiefs letter was produced as proof that the Appellant had reported the loss of his voting card to a person in authority. I agree that the fact the Appellant went to the Chief instead of the Police who were the only authority that could issue an abstract for the loss, was in itself suspect. It is even more suspect considering the Complainant's unchallenged evidence that the said Chief was the Appellant's brother-in-law. However, the Appellant had no burden to prove his innocence. All the appellant needed to do was to create a doubt in the Prosecution case. The learned trial magistrate erred in rejecting the Chiefs letter as the Appellant's defence. All she may have done was to give it less weight for having come from an authority that is not instituted to issue such abstracts. She could not dismiss it altogether as she did in her judgment.

There is another factor which fatally affects the conviction entered against the Appellant in this case. From the record of the proceedings, the entire Prosecution case was heard by one **MRS. JANE ONDIEKI, SPM** as she then was. The case was eventually taken over by **MRS. MARGARET WACHIRA, SPM**, who heard the defence case. When **Mrs. Wachira** took over the case, she did not comply with the provision of **Section 200** of the Criminal Procedure Code in that she did not inform the Appellant of his right to either recall witnesses who had given evidence before the preceding magistrate, or to have the case heard afresh. That omission to inform the Appellant of his rights under **Section 200 of Criminal Procedure Code** is fatal to the case. The provisions under that section are in mandatory terms and failure to comply renders the entire case fatally defective. Even though the Appellant did not raise this ground, being a legal issue, I will nevertheless take it into consideration.

Having considered this Appeal, I find the conviction unsafe, both for insufficiency of evidence and on technical ground. Accordingly I allow the Appeal, quash the conviction and set aside the sentence. The Appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 21st day of January 2005.

LESIIT

JUDGE

Read, signed and delivered in the presence of;

LESIIT

JUDGE