



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO.196 OF 2003

(From original conviction and sentence in Criminal Case No.1269 of 2001 of the Chief Magistrate's Court at Kisii)

RICHARD MOKORA MONIKO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant RICHARD MORARA MONIKO was convicted by Senior Resident Magistrate Kisii for the offence of Robbery with violence contrary to S.296(2) of the Penal Code. He was sentenced to hang. He had been charged jointly with GEORGE MORARA GETEBE who was however acquitted under S.210 C.P.C. The particulars of the charge were that on 24th June 2001 at Nyansiongo Location of Nyamira District, jointly with another not before the court, while armed with dangerous weapons namely a pistol, robbed FLORENCE KEMUNTO NYABUTO of her sewing machine, one radio, camera, wall clock, two suit cases, four long trousers, one sweater, three jackets, a shirt, two skirts, six blouses, six pair of shoes and shs.3,500/= all valued at shs.59,000/- and immediately before the time of such robbery used personal violence on the said FLORENCE KEMUNTO.

The prosecution called a total of six witnesses. The first was FLORENCE the complainant. She narrated to court how on the material day at 8.30 p.m. she was in her house with 3 children watching T.V. Electric lights were on.

There was a knock on the door. One child went and opened it. Two men went in. They were armed with pistol and had torches. They asked for Florence and she identified herself. They told her that they had been plaid shs.300,000/= to kill her but if she gave them shs.500,000/= they would spare her. She told them she did not have that kind of money. She gave them shs.3,500/= which was all she had. They however told her that they had information that her husband who was in America sends her shs.60,000/= every month. She told them this was not so. She pleaded with them to spare her life and take all they wanted. They took her to the bedroom and started packing her belongings in her two suit cases. They pack her clothes and those of her husband and other items.

One of them, whom she identified as the appellant took one of her husband's coats and wore it. They also asked for keys to her car which was parked outside. Eventually she and the children were put in the bedroom and ordered to lie down. The room was locked from outside and the robbers left. After about 10 minutes she raised an alarm and neighbours responded. They broke the door to the bedroom. They went and reported to Administration Police at Nyansiongo D.O. Camp. With APs they went and reported at

Keroka Police Station. They were using the complainant's car. On their way back they saw two men at a bus stage whom the complainant said resembled the robbers.

The two men however disappeared before the police could act. The A.P.s decided to lay an ambush. Next day complainant went to the D.O.s Camp and was informed one person was arrested. She was shown the appellant and she identified him. He was still wearing her husband's coat and a red cap. Appellant begged her for forgiveness and told her it was his step brother who had led them there. Complainant was also shown the two suit cases which had been recovered with the stolen items. She identified them as those stolen from her home.

PW2 SILAS NYAKUNDI is a neighbour of the complainant. He heard her screams and rushed to her home. He found her in shock and she told him and other neighbours how she was attacked. He was one of those who escorted her to report the robbery. He was with her the next morning when the complainant was shown the appellant and heard him beg for forgiveness.

PW3 AP SGT AUSTIN ONLANG and PW4 CPL. PETER OMBATI were the A.P.S to whom the complainant reported at Nyansiongo D.O.'S office. They then accompanied her to Keroka Police Station. On their way back they saw two men at a stage and complainant said they were the robbers. The men disappeared. PW3 and 4 and others decided to lay an ambush. They told court that at about 2 a.m. the appellant emerged from a bar called Central and headed towards a bus stage. He flagged down a Nairobi bound bus but it did not stop. They got suspicious and arrested him. PW3 searched him. From his pockets he found an A.T.M. card bearing the names of the complainant. He also found two Barclays Bank covers and in one of them was a passport size photograph of the complainant. He also had shs.850/- in his pocket. PW3 however told him to first show them where the other stolen items were.

He agreed. A bus came and they got in. They alighted after 2 km. He led them through a murram road and showed them a thicket where the two suit cases were hidden.

They took them and together with appellant went to D.O.'S camp. He was put in cells. Next morning the complainant went there. She was shown the appellant and identified the coat he was wearing as that of her husband. She identified the two suit cases and the items inside. Appellant was later handed over to Keroka Police Station. PW6 JACKSON MURAUNI a Clinical Officer stated that he examined the complainant on 27/6/01. She had a swollen tender upper eyelid inflicted by a blunt object.

Appellant gave an unsworn statement in his defence. He told court that he sells mitumba clothes in Nairobi. On 24/6/01 he left Nairobi at 8 p.m. in a linear bus to go home and report that his nephew had been knocked down by a vehicle and died. When they reached Nyansiongo they asked the driver to stop so that they can go for a call. He went to one bar for the call. When he was walking back to the bus he met the police officers who stopped and arrested him. He told he was a passenger in the bus. They searched him and took his shs.17,000/=. PW3 kept the money in his pocket. He started arguing with them and PW3 hit him on the head. He started bleeding. The watchman in the bar and bus driver went there and confirmed he was a passenger. The officers allowed him to go but the bus driver told them to take him for treatment. The bus left. PW3 tore his bus ticket. He was taken to D.O.'s Office. Next day PW1 went there and PW3 told her to look at him properly. He was later taken to Keroka Police Station.

He denied the robbery and stated that he was framed by PW3 who took his shs.17,000/=. The learned magistrate after considering the evidence was satisfied that the appellant robbed the complainant and convicted him. After reviewing all the evidence both by the prosecution, appellants defence we are satisfied that the magistrate reached the proper conclusion. PW1 the complainant narrated how the robbery took place. Indeed the robbery was at night and PW1 was the only identifying witness. It is now well settled law that where an offence takes place at night the courts must take great care on caution before basing a conviction on such evidence.

This was so held in the case of PAUL ETOLE & ANOTHER V.R. COURT OF APPEAL. CRIMINAL APPEAL NO.24 OF 2000 (unreported) and many other cases. It did not seem as if the magistrate warned himself of such dangers. Nonetheless the evidence if PW1 was very candid. She told the court that she

clearly saw the appellant. When the appellant and his colleague got in the house the lights were on. They were only switched off after about 2 minutes. By then PW1 had even noticed that the appellant had a scar on his face. After the lights were switched off the robbers started using their torches. PW1 again said she was able to see the appellant. The robbers were in the house for 1 1/2 hours. It is clear from the evidence that she was able to positively identify the robbers. PW3 said that when she first reported to them she described the robbers. She stated that appellant was wearing a red cap. When arrested he had the same cap. Indeed as appellant submitted no identification parade was held after his arrest. This should have been the proper thing to do instead of showing the appellant to the complainant. However this omission alone do not mean that he was not properly identified by the complainant. The identification was safe.

The evidence did not stop at the identification by the complainant alone. PW3 & 4 narrated how they arrested the appellant at about 2 a.m. the same night after laying an ambush. On arrest he was searched and a ATM Card belonging to complainant and bank covers with the complainant's photograph found in his pocket. The appellant then led them to a thicket where two suit cases and stolen items were found. Complainant identified all these things.

Though the appellant said PW3 took his shs.17,000/= and framed him the trial court rejected that as an afterthought and rightly so. He did not say he complained about the money to O.C.S. Keroka when he was taken there.

He did not raise the issue with court when he appeared for plea on 29th June 2001. Hearing started before Ms. Opondo SRM ON 26.7.2001 and again he did not raise the issue of shs.17,000/=. He raised the issue only on 24th February 2003 (not 24th August 2001 as stated by the magistrate). The magistrate was therefore right to find that the claim was an after thought.

As stated the appellant on arrest was found with the complainant's ATM card and photograph. He too was wearing the complainant's husband's coat which he wore at the time of the robbery. He also led police to where the other items were hidden. This was barely four hours after the robbery. This is a clear indication that indeed he was one of the robbers.

Appellant submitted that that the magistrate did not consider his defence. That was not so. In page 5 of the judgment he clearly considered the appellant's defence and dismissed it. This was more so on the issue of being framed after PW3 took his shs.17,000/=. From the foregoing therefore we find the conviction of the appellant was proper and safe. The appeal is therefore dismissed.

Right of appeal explained.

Dated at KISUMU this 23rd day of February 2005

B. K. TANUI
JUDGE

KABURU BAUNI
JUDGE