



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
Criminal Appeal No. 36 of 2003

JACOB KIMATHI KABERIA
APPELLANT

AND

REPUBLIC
RESPONDENT

**(From original conviction and sentence in
Criminal case No. 2226 of 2002 of the
Principal Magistrate's Court at Maua dated 25.2.2003)**

JUDGMENT OF THE COURT

The appellant, Jacob Kimathi Kaberia was charged before the Principal Magistrate's court at Maua with one count of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that **on the 1st day of November, 2001 at Kangeta Location in Meru North District within the Eastern Province, jointly with others not before court while armed with dangerous weapons namely axes and unknown type of raffle robbed Joyce Muthenya M'Imana Kshs.150,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Joyce Muthenya M'Imana.** The appellant was tried, convicted and sentenced to death. He has appealed against both conviction and sentence.

Briefly the facts of the case are that on 1/11/2001 at about 1.00 a.m, the complainant Joyce Muthenya PW1 was asleep in her house at Kangeta. PW1 is a maize and beans trader. She then heard dogs barking and on opening the curtain she saw a group of more than twenty people outside her house. She started screaming and that is when one Daniel (PW2) responded by assuring her he was coming to her rescue. The robbers shot once in the air. The main door to the house was smashed with a big stone while the door to her bedroom was cut with an axe. Five of the more than twenty people entered the bedroom and demanded Kshs. 300,000/= from her. The robbers spoke in Kimeru and Kiswahili.

PWI gave them Kshs. 50,000/= and after that, the robbers returned to the house and demanded more money. She was pulled from under the bed where she was hiding. They pointed a pistol at her. They took another Kshs. 100,000/= that was in the box. The appellant picked a fork jembe and hit PW1's left hand, breaking it. The robbers then went away promising to come after a month. Before going away, the appellant asked PW1 whether she knew him and though she knew him well she said no for fear of being killed by the appellant. That same night PW1 was taken to Maua Methodist Hospital for treatment. She was later transferred to Chogoria Hospital for metal implants to fix her broken arm.

When the police visited her in the hospital, she gave them the name of the appellant as one of the robbers. The stolen money was not recovered. The other robbers disappeared. PW1 testified that earlier that day the appellant had been to her store asking for change of Kshs. 1000/= which she declined to give him.

In answer to questions put to her during cross-examination, PW1 stated that she knew the appellant well.

That the incident took about one hour and that it was the appellant who actually pulled her from under the bed. That the appellant and other robbers did not have their faces covered and that the robbers had torches with which they lit the house as they ransacked the house for money and that during that time she was able to clearly identify the appellant in the process. PWI also stated that she did not let the appellant know she knew him for fear of being killed, and especially so because some of the members of the public who answered her screams included the appellant's relatives.

In answer to further questions in cross-examination, PWI stated that as the appellant pulled her from under the bed, his hat fell down. PWI denied a suggestion by the appellant that she was suspect in High Court Criminal Case No. 6 of 2002 and further denied that she was the appellant's lover and that she had even visited him in prison. PWI later identified the appellant's hat which had fallen in her bedroom on the night of the robbery. PWI told the court when cross-examined further by the appellant about the hat that the appellant had worn the same hat when he went to PWI'S store during the day before the robbery and she remained adamant that she identified the appellant during the robbery.

The prosecution called five other witnesses besides PWI. PW2, Daniel Mirithu blew a whistle when he heard screams from PWI's home. Then he heard a gunshot and was ordered to stop blowing the whistle. He neither saw the robbers nor recognized their voices. He said PWI never told him who the robbers were that night. PW2, Judy Kinya who was in the same house with PWI only heard the demands for money but never saw any of the robbers. PW4, Samuel Itirikia heard the gunshot from PWI's house. He came out of his own house and blew the whistle as he ran to the tea factory. He never saw any of the robbers though there was moonlight.

PW5 PC Lawrence Angawa, attached to Maua P/Station received a report of the robbery at PWI's house during the night. He visited PWI at Maua Methodist Hospital. PWI informed him that Kshs. 150,000/= had been stolen from her and also gave names of some of the robbers as Muriithi Maida, Gitonga Kamancha and Jacob Kimathi, the appellant. PW5 recorded PWI's statement at the hospital. He also visited the scene from where he recovered the stone that had been used to smash the door and also recovered a hat collected from inside PWI's house. The stone and the hat were produced as exhibits 1 and 2. The appellant was arrested on 13.11.2001 and later charged.

In answer to a question by the appellant, PW5 maintained that the appellant's name was among those given by PWI as the robbers of that night. PW6, one Dr. John David Huts who examined PW1 at Chogoria hospital confirmed to the court that PWI suffered broken radius and ulna of the left forearm and had a bruise of the right little finger. He classified the injury as harm. P3 form was produced as exhibit.

The appellant gave an unsworn statement in which he stated that he was arrested at 2.00pm on 2.11.2001 from their hotel. He denied any involvement in the offence. The appellant also called DWI – no. 217781 Inspector of Police Francis Mwangi the Deputy O.C.S. Maua Police Station for purposes of producing the Occurrence Book (OB) of 1.11.2001, being OB No. 9 of same date. The OB No. 24 of 1.11.2002 showed that the names of the suspects of the robbery at PWI's house were given as Mworira Makunda, Nanger Gitonga and Kimathi Jacob.

The learned trial magistrate convicted the appellant after finding as he did that the single witness evidence of PWI was reliable. The trial magistrate also duly warned himself of the inherent dangers of relying on such evidence. See **RORIA V REPUBLIC (1967) EA 583**. The learned trial magistrate found that the appellant was known to the complainant before that day and that she recognized the appellant with ease during the robbery. The learned trial magistrate also found that the robbery took about an hour and that the robbers, among them the appellant had torches which enabled her to recognize the appellant and the two other robbers whose names she gave to the police – PW5 PC Mwenda. He noted that the complainant even talked with the appellant when the appellant asked her if she knew him. The learned trial magistrate concluded that the reason why PWI did not tell the appellant that she knew him was reasonable – the fear of being killed by the appellant, and further that the reason for PWI not giving the names of the robbers to those who came to her rescue was also reasonable – fearing that those people among them the appellant's relatives would inform him and that she feared the appellant could run away.

The learned trial magistrate considered the appellants defence and rejected it for the reason that the same was a sham, a mere denial and was also unmeritorious.

In his submissions, the appellant contended that the evidence against him in the lower court was insufficient. The appellant also complained that crucial witnesses were not called to testify for example one by the name Karithi Bwereru; and further that two other police officers who visited the scene of crime were not called. On identification, the appellant complained that there was no identification parade and that no evidence was adduced to show that PWI was placed in such a strategic position during the robbery as to have positively identified the appellant.

The appellant also contended that the learned trial magistrate erred in concluding that the hat found at the scene of crime belonged to him and finally that the learned trial magistrate erred in rejecting the appellant's defence.

Mr. Oluoch for the respondent argued that the issue of identification by recognition was proved beyond any reasonable doubt by the prosecution. That PWI had seen the appellant during the day at her store, asking for change and that the one-hour period within which appellant was at PWI's house was sufficient for PWI to positively identify the appellant.

We have carefully read, evaluated and reconsidered the evidence on record and we are satisfied that the learned trial magistrate was perfectly right in basing his conviction on the evidence of single witness PWI. We have found that the learned trial magistrate duly warned himself of the dangers of convicting on the evidence of a single witness and we in turn have duly warned ourselves of such dangers. In **RORIA V R** – above – the Court of Appeal expressed itself as follows:-

“A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDNER, L.C. said recently in the House of Lords in the course of a debate on S. 4 of the Criminal Appeal act of 1966 of The United Kingdom which is designed to widen the power of the court to interfere with verdicts:-

“There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity.

“That danger is of course greater when the only evidence against an accused person is identification by one witness and although no one would suggest that conviction based on such identification should never be upheld, it is the duty of this court to satisfy itself that in all circumstances, it is safe to act on such identification. In **ABDALLA BIN WENDO & ANOTHER V R (1953) 20 EACA 166**, this court reversed the finding of the trial judge on a question of identification and said this at page 168:-

“Subject to certain well known exceptions, it is trite law 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 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 it be circumstantial or direct, pointing to the 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.”

We have subjected the evidence of PWI to anxious scrutiny. We have noted that the offence was committed at 1.00am. We have reached the conclusion that the appellant's conviction though based on the evidence of that single witness can be safely accepted as free from the possibility of error. We believe as learned trial magistrate did, the testimony of PWI and the detailed description of the events of that night ending up with the appellant's hat remaining at the scene of the robbery. It was the evidence of PWI, when questioned by the appellant that the appellant had worn the same “kofia” during the day and that it fell off the appellant's head when the appellant was dragging PWI from under the bed. We also believe, as the learned trial magistrate did that PWI had ample time to positively identify the appellant

during the one-hour ordeal noting that it was the appellant who hit PWI's left hand with the fork jembe. It was the appellant who asked PWI whether PWI knew him. We are satisfied that having talked with the appellant during the day when the appellant was at PWI's store at 2.30pm asking for change, PWI was under no illusion in our view that her assailant was the appellant. PWI took the earliest opportunity to give the names of her attackers to the police among them the name of the appellant. That was done on the same day of the robbery.

We have also considered the reasons given by PWI as to why she did not give the names of her attackers to the neighbours who answered to her screams, and we accept those reasons as being genuine. The encounters PWI had with the appellant – when appellant hit her with the fork jembe, when he pulled her from under the bed, when he asked her whether she knew him all point to the guilt of the appellant.

During the cross-examination, of PWI, the appellant suggested that he and PWI were lovers and that infact PWI had visited the appellant in prison. When the appellant gave his unsworn testimony, he made no mention whatsoever of such an affair between him and the PWI. To our mind, the appellant brought up the love affair issue in an attempt to explain the presence of his “kofia” at PWI's house on the night of the robbery. There was light from the torches which the appellant and the other robbers were flashing. We have considered the sum total of the evidence on record and have reached the conclusion that there can be no doubt that the learned trial magistrate properly applied the principles for evidence of identification by a single witness and reached the correct conclusions. We also find the same. The case of **KUTEGANA V UGANDA (2001) EA 420** followed.

The appellant has also complained that his defence was not adequately considered by the trial court. In his judgment, the learned trial magistrate said of the appellant's defence:-

“Accused's defence which I have considered in totality of the entire evidence on record is a sham, mere denial and unmeritorious. I reject it as such.”

It is unfortunate that this was the typical style of the learned trial magistrate in dealing with the accused's defence. It was the last issue he dealt with just before convicting. We have carefully considered the appellant's complaint and though it is true his defence was not given as much prominence as the case for the prosecution, we nevertheless are satisfied that the appellant suffered no prejudice. The appellant gave a three sentence, four-line defence. In any event, the appellant did not even have to say anything. The onus of proof in a criminal case is always on the prosecution and never shifts to an accused. The prosecution evidence against the appellant was over-whelming. We are satisfied that he was one of the robbers. That the appellant and others stole from PWI and that during the robbery, the appellant used actual personal violence on PWI.

In our view, the offence of robbery with violence under section 296(2) of the Penal Code was proved against the appellant beyond any reasonable doubt. We agree with the learned trial magistrate that the appellant's defence was a sham, mere denial and unmeritorious and we too reject the same.

In essence therefore, we find no merit in the appeal and accordingly dismiss it. We uphold the conviction by the learned trial magistrate and confirm the sentence imposed against the appellant.

It is so ordered.

Dated and delivered at Meru this 16th day of March 2005.

D.A. ONYANCHA

JUDGE

RUTH N. SITATI

Ag JUDGE

