REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 388 & 390 of 2003

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in

Criminal Case No. 2119 of 2002 – J.S. KABURU (S.P.M.)

GIDEON KIPROP SALGONG…….....…..1ST APPELLANT

PATRICK CHEPKOK…….....…..2ND APPELLANT

VERSUS

REPUBLIC……...….....…….RESPONDENT

JUDGMENT OF THE COURT

The appellants, Solomon Kibet, Patrick Chepkok and Gideon Kiprop Salgong were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the 18th of October 2002 at Kabonyony estate in Koibatek District, the appellants jointly armed with dangerous weapons namely pangas and rungus robbed Samson Chemirmir of Kshs 6,000/=, a mobile phone make siemens valued at Kshs 26,000/=, a Smith & Wesson revolver with six rounds of ammunition and a motor vehicle registration number KYC 477 Peugeot Pick-up valued at Kshs 400,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Samson Chemirmir. The appellants pleaded not guilty to the charge. After a full trial, the appellants were convicted as charged. They were sentenced to death as is mandatorily provided by the law. The appellants were aggrieved by their conviction and sentence and have appealed to this court.

At the hearing of the appeal, this court was informed that Solomon Kibet, the appellant in Appeal No. 389 of 2003 had died on the 6th of October 2004 during the pendency of the hearing of this appeal. His appeal was therefore marked as abated. The appeals by the two other appellants were consolidated and heard as one as they arose from the same proceedings of the lower court. In his petition of appeal, Gideon Kiprop Solgong (*hereinafter referred to as the 1st appellant*) raised six grounds of appeal faulting the trial magistrate for convicting him for the offence charged. He was further aggrieved that the trial magistrate had relied on flimsy and fabricated evidence of the prosecution witnesses to convict him; He was aggrieved that the trial magistrate had failed to consider the fact that no evidence of identification linked him to the robbery; or that he was convicted on contradictory and uncorroborated evidence which was insufficient in law to sustain a conviction; that the trial magistrate erred in failing to scrutinise and analyse the evidence, which clearly showed that the 1st appellant was innocent. The 1st appellant was further aggrieved that his defence was not considered by the trial magistrate when he reached the decision to convict him.

On his part, Patrick Chepkok (*hereinafter referred as the 2nd appellant*) raised five grounds of appeal

faulting the decision of the trial magistrate in convicting him. The 2nd appellant was aggrieved that he had been convicted on the evidence of a single identifying witness who had failed to make an initial report to the police indicating the description of the robbers. He was further aggrieved that the trial magistrate had relied on the evidence of identification in an identification parade which had not been conducted in accordance with the established rules. He faulted the trial magistrate for convicting him on the insufficient prosecution evidence which could, in normal circumstance, not sustain a conviction. The 2nd appellant was finally aggrieved that the trial magistrate had not considered his defence before reaching a decision to convict him.

During the hearing of the appeals, Mr Oumo, Learned Counsel for the appellants made persuasive submissions urging the court to allow the appeal. Mr Koech, Learned State Counsel did not oppose appeal filed by the 1st appellant. He submitted that he did not support the conviction of the 1st appellant. He however opposed the appeal filed by the 2nd appellant. He urged this court to find that the evidence that was adduced by the prosecution witnesses was sufficient to sustain the conviction of the said 2nd appellant. We have considered the submissions made by the opposing parties to this appeal. Before we give our reasons for our judgment, we will set out the facts of this case albeit briefly.

PW1 Samson Kipketer Chemirmir, the complainant in this case, testified that on the 18th of October 2002 at about 5.00 p.m., he was at his home at Eldama Ravine. He saw the 1st appellant pass through his homestead while going to a local posho mill. The complainant asked the 1st appellant why he was passing through his homestead, yet he knew that there was no public road which passed through his homestead. A heated conversation appears to have taken place. The 1st appellant told the complainant that he should behave like a good neighbour because if tragedy were to befall him, it is only his neighbours who could come to his assistance. After the conversation, the 1st appellant went on his way. According to the evidence of the complainant at about 6.00 pm, he went outside his house. He saw three people standing outside his door. From their voices he concluded that the three were not his employees. He tried to make small talk with them as he looked for a way to retreat to the safety of his house. He succeeded in entering his house and locked the door. The three people however broke into his house and assaulted him using a panga. The complainant testified that he was able to recognise the 2nd appellant as the one who cut him five times with a panga. He fired one round of ammunition in a bid to defend himself. The bullet did not hit the target. The revolver jammed. The complainant was subdued after being seriously cut with a panga. The robbers took Kshs 6,000/= from the complainant. They also took his mobile phone and two sets of car key. They tried to steal motor vehicle registration number KYC 477 but they were unable to disengage the reverse gear. The robbers abandoned the motor vehicle and ran away.

After the robbery the complainant sought the assistance of his employees who had all been bound on both their hands and legs by the robbers. After the employees had been untied, the complainant was taken to Mercy Hospital, Eldama Ravine where he was admitted for seven days. He was later transferred to Nairobi Hospital where he underwent specialised medical treatment for another three days. At the time he gave his testimony before the trial court, he was still undergoing medical treatment as outpatient. He testified that he was cut on the head, jaws and on the shin. His ulna bone was fractured. The bones in his left hand and fingers were fractured. Metal plates were inserted to stabilise the fractures. The complainant testified that he was able to recognise the 2nd appellant as the robbery incident took place during daytime. Although he testified that he had seen the 2nd appellant for the first time on the material day, he was able to point him out in an identification parade which was conducted three weeks later. It was his testimony that the reason why the 1st appellant was implicated in the robbery was because he had said that the complainant would be attacked and that he would be forced to seek assistance from his neighbours. The blood stained pyjamas that the complainant was wearing during the night of the robbery was produced in evidence during the trial. The revolver which was stolen from the complainant but recovered from a suspect who was killed during the investigations of the robbery was also produced in evidence as an exhibit.

PW2 Stephen Tuwei, a driver employed by the complainant testified that on the material day he was at

his bed resting. According to him the time was about 6.00 p.m. Suddenly three people entered the house that he was sleeping in and flashed a torchlight on his eyes. He was dragged outside the house and restrained. He testified that he heard a bang emanating from the house of the complainant. After a while he heard the complainant screaming to be assisted. He went to his assistance. He found that the complainant had been injured. He was bleeding heavily from the injuries that he had sustained. PW2 assisted in untying the other employees who had been tied by the robbers. He also assisted in having the complainant taken to hospital. PW2 testified that he could not identify the robbers as they had blinded him when they shone the flashlight on his eyes.

PW4 Joseph Korosi Arap Marindai, another employee of the complainant narrated how he was inside his house on the material day and was accosted by two people who made him lie down. Two other employees were also made to lie down. They were all tied together. The robbers then went and attacked the complainant in his house. PW4 heard a gunshot. After a while, he was untied by the complainant and PW2. He saw the complainant. The complainant was seriously injured and was covered with blood. PW4 did not identify any of the assailant although he saw one of them wielding a panga. PW6 Geoffrey Kimutai Bore and PW9 Peter Mbugua Weru were also employees of the complainant. They were at the residence of the complainant where they were attacked by the robbers. They were unable to identify any of the robbers who attacked them on the material day. PW5 Chief Inspector Joseph Kioko testified that he conducted the police identification parade whereby the 2nd appellant was identified by the complainant. He testified that he complied with all the legal requirements for the conduct of the said identification parade. The duly filled parade identification forms were produced in evidence by PW5.

PW7 Police Constable Charles Getenda testified that on the material day he was manning the crime office at Eldama Ravine police station. At about 8.40 pm a report was made by the employees of the complainant that the complainant had been attacked by robbers. He visited the scene of the robbery. He met the complainant who was unconscious being taken to hospital. He went to the complainant's house. He noted that the house had been ransacked. There was blood on the floor. He went back to the station and continued with the investigation. On the same night, he received information that a suspect involved in the robbery had been beaten to death. He went to the scene where he was able to recover a revolver from the deceased. The revolver was later identified to be the complainant's.

PW7 further testified that he received information which led to the arrest of the 2nd appellant. He later issued a P3 form to the complainant. The duly filled P3 form was returned to him. PW8 Police Constable Musa Koech testified that at the material time he was attached to Eldama Ravine police station. On the 31st of October 2002 at about 5.00 pm he received information that persons who had committed the robbery at the complainants home were seen in town. PW8 went to where the four people were and arrested them. Among the four suspects arrested was the 2nd appellant. PW8 testified that he arrested the 2nd appellant in a changaa den. He denied that he had arrested the 2nd appellant for taking the illegal liquor.

PW10 Richard Bor, a medical officer based at Eldama Ravine hospital testified that he examined the complainant on the 20th of December 2002 and filled the P3 form indicating the injuries that the complainant had sustained. He established that the complainant had sustained cuts on his face, hands and neck. The probable weapon used was a sharp object. The duly filled P3 form was produced as an exhibit in evidence. The degree of injury was assessed as grievous harm.

When the appellants were put on their defence, the 1st appellant admitted that he had an altercation with the complainant on the material day. The altercation resulted from the fact that the complainant had questioned the 1st appellant and inquired why he was trespassing on his farm. The 1st appellant testified that he explained to the complainant that he was a neighbour and therefore they should have good relations because if anything happened, it is the neighbours who would come to the assistance of the complainant. They then parted company. In the night of the same day, the complainant was attacked by robbers. The 1st appellant was woken up by a gunshot. He took to his heels because of the gun shot that he had heard being fired. In essence, the 1st appellant denied that he was involved in the robbery. On his

part, the 2nd appellant testified that on the 31st October 2002 he went to a house where chang'aa was being sold with a friend. While there, the police came and arrested the people who were taking the illegal liquor. Before the people were arrested, the police asked those who had Kshs 200/= to pay so that they could gain their freedom. As the 2nd appellant did not have any money, he was arrested and taken to the police station. He denied that he had anything to do with the robbery.

This is a first appeal. As was held in **Okeno –versus- Republic [1972]E.A. 32** at page 36 para C,

"***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination*** *(Pandya –v- R [1957]EA. 336)* ***and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions,*** *(Shantilal M. Ruwalla –v- R [1957]EA 570)* ***it is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own findings and draw its own conclusions."***

In the instant appeals, it was the prosecution's case that the 1st appellant having argued with the complainant the day of the robbery was therefore involved in the subsequent robbery that took place on the night of the said date. According to the evidence of the complainant he saw the 1st appellant walking past his homestead. He inquired from him why he was trespassing through his homestead. It appears that the 1st appellant remarked that as a neighbour, the complainant should treat him well because if anything untoward were to happen, it is only neighbours who would come to his rescue. This conversation was confirmed by the 1st appellant when he was put on his defence.

As it came to pass, the complainant was attacked by robbers on the same night. According to the complainant, the 1st appellant must have known what was going to happen the said night that is why he made the fateful comments. The complainant testified that the 1st appellant must therefore have been an accomplice of the robbers. During the robbery, he however did not see the 1st appellant. All the prosecution witnesses who testified pointed out to the fact that the complainant had suspected that the 1st appellant must have been involved in the robbery because of his chance remark that some tragedy may take place at the complainant's residence which would have made him require the assistance of his neighbours.

We have re-evaluated the evidence that was adduced. It is without doubt that the 1st appellant was convicted based on the evidence of the complainant. Our analysis of the said evidence clearly shows that the basis upon which the complainant based his suspicion was the conversation that took place during the day between him and the 1st appellant. There is no other evidence connecting the 1st appellant to the robbery. None of the witnesses who testified saw the 1st appellant during the robbery. The complainant did not see him. He testified that after the robbery the 1st appellant disappeared from his homestead. Evidence adduced by the prosecution witnesses however disproved this allegation. The 1st appellant was arrested within his area soon after the robbery incident was reported to the police. The trial magistrate convicted the 1st appellant based on the strong suspicion that the complainant had that the 1st appellant, his neighbour, had participated in the robbery because of the chance remark that he made during the day that misfortune would befall the complainant and he would, as a result, require the assistance of his neighbours. In **Sawe –versus- Republic [2003] KLR 364 at page 375** the Court of Appeal stated as follows;

"***We have re-evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira –versus- Republic Criminal Appeal No. 17 of 1998 (unreported), suspicion, however strong, cannot provide a basis for inferring guilt which must be proved by evidence."***

We have re-evaluated the prosecution's evidence in this case. We disagree that the prosecution proved its

case against the 1st appellant beyond any reasonable doubt. The 1st appellant was convicted based on a chance remark that he made. The chance remark proved to be prophetic. The complainant was attacked by robbers on the night of the day that the said remarks were made. A remark, however prophetic cannot form a basis of a conviction. The prosecution was mandated in law to establish that the 1st appellant's remarks were not by any stretch of imagination a chance remarks but supported by evidence that indeed the 1st appellant participated in the robbery. In the absence of such evidence, we are not prepared to find that the prosecution proved its case beyond any reasonable doubt. There was no evidence to support the conviction of the 1st appellant. His appeal must succeed. Mr Koech, on behalf of the State did not support the conviction of the 1st appellant by the trial magistrate. We agree with him. In the circumstances therefore, the conviction of the 1st appellant was unsafe; The conviction is quashed and the sentence imposed set aside.

As regards the 2nd appellant, the prosecution's evidence against him was that of identification by the complainant. The complainant testified that he was able to positively identify the 2nd appellant during the night of the robbery. Although the complainant testified that the robbery took place between 6.00 pm and 6.30 pm, the evidence of the other witnesses especially PW2, PW4, PW6, PW7 and PW9 clearly shows that the robbery took place at night. The complainant in his testimony testified that when he was cut with a panga, blood soaked his clothes. The clothes that were produced in evidence by the prosecution, included a pyjama trouser. This evidence clearly proves that the complainant had already undressed from his day clothes and was ready to go to bed. He could not possibly have gone to bed between 6.00 pm and 6.30 pm. PW2 testified that when the robbers entered the room that he was resting on bed, he was blinded by the flashed torchlight which was directed at his eyes. If it was indeed 6.00 pm, PW2 could not have been blinded by a torchlight. Further PW7 testified that the report of the robbery was made to the police by an employee of the complainant about 8.40 pm. PW7 met the complainant, who was unconscious, being taken to hospital. We have re-evaluated the evidence and we hold that the robbery took place during the night and not at daytime as alleged by the complainant and some of his witnesses. None of the witnesses who testified before the trial court were able to identify the robbers except the complainant.

His evidence of identification was thus the evidence of a sole identifying witness. The complainant had not met with the 2nd appellant prior to the robbery incident. He did not know him. He testified that he was able to identify the 2nd appellant as being among the robbers who attacked him, even though, from the evidence the circumstances were not favourable to a positive identification. The complainant told the police in the initial report made that he did not identify his assailants, even though he would be able to identify them if he saw them. He did not give the physical description of his assailants. Neither did he indicate the clothes that the robbers were wearing on the material night. In the absence of such a description in the first report made to the police, the subsequent identification in the identification parade mounted by the police was useless. In **Maitanyi –versus- Republic [1986] KLR 198,** it was held at page 200 para 35 that:

"***Although the Lower Court did not refer to the well known authorities Abdulla bin Wendo & Anor vs Rep. (1953) 20 EACA 166 followed in Roria vs Rep [1967] EA 583, it may be that the trial Court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-***

"*subject to 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 the circumstances, what is needed is other evidence, whether 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 any error."*

In the instant case, the complainant was the sole identifying witness. The trial court ought to have warned itself of the dangers of convicting an accused person based on the evidence of a single identifying

witness, especially in circumstances where conditions favouring positive identification were absent.

On our re-evaluation of the evidence, we do hold that the identification of the 2nd appellant by the complainant was fraught with possibility of errors being committed. It cannot be ruled out that the complainant may have been mistaken in his identification of the 2nd appellant. In the circumstances of this case, his evidence on identification cannot be relied on. In the **Maitanyi's case** *(supra)* it was held that where a situation arises where the identification of an accused person is in doubt, other evidence should be adduced by the prosecution to establish its case. In the instant case, the prosecution did not adduce any other evidence to support its case that the 2nd appellant participated in the robbery in question.

The only evidence that the prosecution attempted to link the 2nd appellant with the robbery is that of PW8 who testified that he relied on information received from an informer that the 2nd appellant had participated in the said robbery. While it is accepted that the police are not required to disclose the identity of their informers, in the instant case, it was critical for the informer to testify to establish the basis of his information that indeed the 2nd appellant participated in the robbery. In the absence of any other evidence by the prosecution connecting the 2nd appellant to the robbery, the contention by the 2nd appellant that he was arrested in a chang'aa den and then charged with an offence which he was not aware of , cannot be dismissed off hand. We have re-evaluated the evidence and are of the opinion that the prosecution failed to prove its case against the 2nd appellant to the standard required by the law, that is, proof beyond reasonable doubt. The appeal filed by the 2nd appellant therefore has to succeed. The said appeal is consequently allowed, the conviction quashed and the sentences imposed set aside.

As the 1st appellant's appeal also succeeded, the appellants are ordered released from prison and set at liberty unless otherwise lawfully held.

DATED at NAKURU this 8th day of April, 2005.

MUGA APONDI

JUDGE

L. KIMARU

JUDGE