REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

Criminal Appeal 445 of 2003

MOHAMMED SWALE KAEZE……..……..……..APPELLANT

VERSUS

REPUBLIC…… ……..RESPONDENT

J U D G M E N T

MOHAMED SWALE KAEZE was convicted of violently robbing the Complainant **JANE WAITHERA** of her money Kshs.5,000/-, TV set, radio cassette, video machine, wall clock and two sweaters. He was sentenced to death as mandatorily required by law. He now appeals against the conviction.

In brief the facts of the case were as follows – **JANE WAITHERA** PW1 was at her kiosk working on 22nd October 2001. At 8.00 p.m. 3 people entered and one pointed a gun at her. They ordered her to lie in the bed. She was then robbed of her property. Her 13 year old daughter, **PAULINE,** witnessed the robbery and testified in court. Her evidence is in tandem with that of the Complainant. On 5th November 2001, PW4 arrested the Appellant. PC ROTICH, PW3 then organized identification parades which were conducted by PW5 on 30th November 2002. The Complainant identified the Appellant and so did her daughter PW2. PW3 the investigating officer said that he had received the Complainant's report on the same night of the incident. PW5 said that the Complainant gave the name of one of those she could identify as 'SWALEH'. The Appellant's name is **SWALEH.**

In defence, the Appellant denied committing this offence. He said he was arrested on 5th November only as a suspect.

The Appellant raises three grounds of appeal. One, that the learned trial magistrate erred in failing to find that the prosecution witnesses were not trustworthy in that though the Complainant in her evidence said she did not know the Appellant before, she told PW3 she knew him even by name. Two, that the identification parade was dubious because the Complainant had already seen the Appellant before hand and was therefore, valueless. Three, that the learned trial magistrate failed to give due consideration to his defence.We have considered his written submission in which he further expounded on these grounds.

This appeal was opposed. **MISS GATERU** learned counsel for the State submitted that the evidence adduced against the Appellant was overwhelming and that the conviction was safe. She further submitted that the ingredients for the offence charged were fully met in that the Appellant was in company with two others and that the Appellant was armed with a pistol.

On identification, **MISS GATERU** submitted that it was safe and free from any mistake.We have re-evaluated the entire evidence adduced before the trial court as is our duty as the first appellate court. The incident in question took place at 8.00 p.m. The Complainant did not come out clearly on the condition of lighting at her kiosk cum house at the time of the robbery. All the Complainant said was that the electric lights were on. At the time that she testified in chief, the Complainant did not indicate that she knew any of the robbers before. In cross examination she stated two important facts. One, that the Appellant was identified to her as he sat at a hotel. Two, that at the time the

Appellant was identified to her, he had not been arrested. The Complainant did not give a complete disclosure when she gave her evidence in chief. In fact it was only when PW3 testified that it became apparent that the Complainant had given out the name of one of her attackers to PW3.

MISS GATERU did not think that the inconsistency in the Complainant's evidence was material. The learned counsel submitted that the fact that the Complainant did tell the court, one that she could identify one of the robbers and two, that she had told the Police so was a minor inconsistency which should not demolish the prosecution case.

We do not agree with the learned counsel. The inconsistency in the Complainant's evidence goes to the very substance of the case. It goes to the core of the evidence of identification. The credibility of a key witness is so important that the Court of Appeal in the case of **NDUNGU KIMANYI vs. REPUBLIC 1980 KLR 282** held;

> ***"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence."***

The Appellant was pointed out to the Complainant before his arrest. Yet the Complainant did not disclose this to PW5 the investigating officer or PW3 the identifying parade officer. Since the Appellant was pointed out to the Complainant before the appellant was arrested, the identification parade was worthless and did not add any strength to the Complainant's evidence of identification. In fact not only was the Appellant identified to her, she also got his name which she passed on to PW3. At the time she gave PW3 the name, the Complainant told him that she could identify one of those who robbed her both by name and appearance. That does not sound to be a trustworthy person. The Complainant's integrity was quite questionable in the circumstances. The fact that she did not even try to describe any of those who robbed her and failed to disclose that the Appellant was pointed out to her until she was cross-examined by the Appellant raises great suspicion concerning the Complainant's trustworthiness.

We have re-evaluated the entire evidence afresh. We could not fail to note the great similarity between the evidence of the Complainant and that of her daughter PW2. Considering she was 13 years of age at the time she testified, it appears that she could have been coached as to what to say in court.

On the weight of the evidence adduced by the prosecution, the Complainant was the sole evidence on which the prosecution case hinged. PW2 was a child and her evidence in the circumstances needed corroboration. Since the Complainant's evidence was questionable. It cannot afford the corroboration required for the evidence of PW2. It too would need corroboration. The evidence which itself needs corroboration cannot be used to corroborate either evidence. In the circumstances the evidence of both the Complainant and PW2 was weak and could not sustain a conviction. The Appellant's grounds of appeal have merit. The Complainant knew the Appellant before yet went ahead to participate in an identification parade to identify him. The basis of identification are not clear whether the Complainant was identified as the one who robbed her or the one who was identified to her as the one who robbed her. The person who identified the appellant to the Complainant was himself not a witness. Consequently even that evidence carries no weight and cannot sustain a conviction.

After considering this appeal we find that the conviction entered herein was unsafe. We 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 22nd day of September 2005.

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE