REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
Criminal Appeal 109 of 2004
(From Original conviction (s) and Sentence (s) in Criminal Case No. 863 of 2003 of the Senior Resident Magistrate's Court at Kajiado (S.D Ndungu H.N. (Miss) PM)

PETER MWAURA ALIAS KOFI …………………………………...APPELLANT

VERSUS

REPUBLIC ……………………………………….....…………… RESPONDENT

J U D G E M E N T

PETER MWAURA ALIAS KOFI was convicted of the first count of Robbery with Violence Contrary to Section 296 (2) of the Penal Code and sentenced to death as by law prescribed. He was acquitted of the second and similar count.

The facts of the prosecution case was that at 2.a.m., the complainant in count 1, Ndete, PW1, was sleeping in his mother's house, PW2, Yapaso, when people broke the main door and entered. The people had torches. That while one went to Yapaso's bedroom; two went to Ndete's room. A thud stood at the door guarding. That Ndete was robbed of Tanzania shillings 8,000/=, a coat and a radio.They also took a paper bag with a T-shirt, shoe polish and brush. Ndete was also cut with a panga and injured in various parts of his body. Yapaso was hit on her head and ordered to lie down. When the robbers left, Yapaso said she realized that her shuka was missing.

The appellant denied the charge in his written submissions and petition of appeal, the appellant raises six issues. After considering these issues, we find that they can be summarized as follows:

1) That the conditions of identification were not conducive.

2) That the evidence of the prosecution was inadequate to prove the charges in that there was no first report and further that certain important witnesses were not called.

3) That the appellant's defence was not given due consideration.

We have carefully evaluated the evidence adduced before the trial court a fresh, bearing in mind that we neither saw nor heard the witnesses and given due allowance for same in light with the Court of Appeal decision of ***OKENO*** *versus* **REPUBLIC 1972 E.A 32.**The appellant was convicted on the basis of identification by recognition on evidence made by Ndete, PW1, and Yapaso PW2. The appellant was also convicted on the basis of recovery of cash 8,500/= in Tanzania shillings. We shall first deal with the issue of identification. Both Ndete and Yapaso were asleep in different rooms when the robbers struck. The only light that each of these two witnesses talk about is torch light in the hands of the attackers. The size of the torches and the intensity of the light was not inquired into.Mule Yapaso said that the appellant was the one who entered her room and hit her ordered her to lie down. She says he had a torch and that as he directed his torch to clothes she saw and recognized him as her neighbour. According to Yapaso, the

appellant first came into her bedroom alone carrying a panga. He ordered her to lie down and hit her on the head with the panga. She said that the appellant went away and a second man went to her bedroom carrying only a torch. That shortly later the appellant went back to her room with a firearm and using it to threaten her ordered her to produce money.That she then told the appellant that she had no money.

Ndete on the other hand said that after hearing the thugs break into his home, two went to his bedroom. As they beat and cut him with a panga demanding money and valuables, the complainant, Ndete, contended that he saw and recognized one of them as the appellant. The complainant said that he saw the appellant's face when the appellant lifted the torch he had to wear his, Ndete's coat. In the case of ***KIARIE*** versus ***REPUBLIC (1984) KLR 739***, the Court of Appeal heed:

> ***"Where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction…..It is possible for a witness to be honest but mistaken and for a number of witnesses to be all mistaken"***

In this case both Ndete and Yapaso appear to have impressed the learned trial magistrate to be honest in their evidence that they had recognized the appellant. The recognition was based on usual identification. None claimed they recognized the appellant's voice despite the fact that each had alleged that he had spoken to them as he demanded money. They only said they saw his face with light from a torch that the appellant was holding. In the case of ***CLEOPAS OTIENO WAMUNGA*** versus ***REPUBLIC C.A No. 20 of 1982 (KISUMU)*** the Court of Appeal held:

> ***"Evidence of visual identification in criminal cases can bring about mistaken of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever a case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special needs for caution before convicting the defendant in reliance to the correctness of the identification."***

We noted that the learned trial magistrate did not examine the evidence of recognition adduced by Ndete and Yapaso with the care itself. If the learned trial magistrate had done so, we are convinced that she could have arrived at a different conclusion. The two key witnesses in this case Ndete and Yapaso claim that the appellant went to their bedrooms. Mule Yapaso claimed that the appellant was the first to go to her room, and that after hitting her with a panga he left and returned shortly later with a gun.Ndete said differently. Ndete said that two people entered his room and that they remained in the room all the while, robbing him and assaulting him before leaving the home. Ndete's evidence does not tie up with Yapaso's evidence. If those who entered Ndete's room did not leave until they were through with the robbery, they could not have entered the Yapaso's room in the course of the robbery. Ndete said the two did not leave until they were through. Infact Ndete's evidence was very clear that he vividly saw one man stand at the entrance while a second one went into his mother's room and two others entered his. It is clear in our minds therefore that at no time did the one who entered Yapaso's room enter Ndete's room that night.

The light of the torches used in the robbery were never described. Yapaso's evidence is very clear however that she maintained that it was dark that night. We are unable to find from this evidence that the light was good for positive identification free of error or mistake. Infact from the evidence of the two witnesses, we are very clear that their evidence of recognition was not free from error or mistake. The two witnesses contradicted each other materially as the issue of identification and as a result a serious miscarriage of justice occurred.

On the other issue of the recovery of exhibits, the appellant's contention is right. The witness who allegedly recovered the 8,500/= Tanzania Shillings from his was not called as a witness. It is unknown where the money was recovered and whether in the circumstances of the recovery it could have correctly been said to have been in the appellant's possession. In absence of that evidence, PW7's evidence that he was handed over the exhibit is not proof that it was recovered from the appellant. That evidence of recovery was worthless and ought to have been disregarded.

Having re-evaluated the prosecution evidence, we agree with the appellant that it did not sufficiently discharge its burden of proof and was therefore insufficient to sustain a conviction. Even without going into other issues raised, we find that the conviction entered in this case was unsafe and should not be allowed to stand. We allow the appeal, quash the conviction and set aside the sentence. The appellant should be set free unless otherwise lawfully held.

Dated at Machakos this 24th day of November 2005.

D.A. ONYANCHA

JUDGE

LESIIT J

JUDGE