



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO. 172 OF 1999
AND
CRIMINAL APPEAL NO. 173 OF 1999

SAMUEL RONO KIGEN.....1ST APPELLANT

DAVID KIPKEMBOI KIPCHUMBA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The Appellants, Samuel Rono Kigen and David Kipkemboi Kipchumba 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 night of the 26th of January 1998 at Mutukanio “A” Farm Solai, Nakuru District jointly with others while being armed with dangerous weapons namely simis and pangas robbed Simon Njoroge Miano of various items valued at Kshs. 45,000/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Simon Njoroge Miano. After a full trial the Appellants were convicted as charged and sentenced to death as mandatorily provided by the law. The Appellants were aggrieved by the said conviction and sentence. They have appealed to this Court against the said conviction and sentence.

During the hearing of the Appeals filed by the Appellants, their separate appeals were consolidated and heard as one as they arose from the same trial before the lower Court. In their Petitions of Appeal, the Appellants raised more or less similar grounds of Appeal faulting the decision of the trial Magistrate in convicting them. Both Appellants faulted their conviction by the trial Magistrate on the basis of insufficient evidence adduced by the prosecution against them. They further faulted the trial Court for convicting them on circumstantial evidence which could not stand up to legal scrutiny. They further faulted the trial Magistrate for convicting them on evidence of identification that was inadmissible in law. They further faulted the trial Magistrate for failing to consider the totality of the evidence on record which exonerated the Appellants. They were further of the view that the trial Magistrate erred in convicting them without considering their plausible defence offered.

The facts of the case briefly stated are that on the 26th of February 1998 PW 1 Simon Njoroge Mwangi was asleep in his house at Solai, Bahati. It was about 9.30 p.m. He woke up to discover that there were people in his bedroom They were three men. One was armed with a panga. They demanded to be given money or else they were going to kill PW 1. He gave them the money he had which was about Kshs 11,000/=. They also took his clothes and shoes. They took his Television Set and a spray kit. After the robbery, the robbers went away. PW 1 then raised alarm. His neighbours came to his assistance. An ambush was laid and some items which were stolen from PW 1’s house were dropped by the robbers. PW 1 was not able to identify any of the robbers when they robbed him.

PW 2 Francis Mukono was in the house of PW 1. He testified that about eight men invaded the house of PW 1. PW 2 was sitting in the sitting room. During the robbery his head was covered with a head scarf. He was unable to identify any of the robbers. PW 3 Police Constable Steven Mathenge attached to Solai Police Station testified how on the 17th of April 1998 he received information that the persons involved in the spate of robberies in the area had been identified. He went to the house of the 2nd Appellant and recovered there in several items including a pair of shoes which PW 1 later identified to be his. PW 4 Jeremiah Kamau, a neighbour, of PW 1 testified how he heard screams emanating from the house of PW 1. He responded to the alarm that was raised and was knifed in the process of trying to apprehend the suspects. He was not able to identify any of the robbers.

PW 5 Mary Njoroge, a daughter of PW 1 told the trial Court of the robbery incident that took place on the material night. She was not able to identify any of the robbers. When put on their defence, the 1st Appellant Samuel Rono Kigen denied that he was involved in the robbery. He testified that when the Police went to his house, they searched his house and took away several of his household items including three blankets and seven dresses belonging to his wife. He was arrested and later charged with the offence for which he was convicted. The 1st Appellant testified that he knew nothing of the offence for which he was convicted. The 2nd Appellant David Kipkemoi Kipchumba narrated the incidence of his arrest. He testified that Police Officers went to his house and woke him up at 6 a.m. A search was conducted in his house. Several items were taken away including a pair shoes, which PW 1 later identified to be his. The 2nd Appellant denied that he was involved in the robbery at PW 1's residence. He produced a receipt which showed that the pair of shoes in question were his, having lawfully purchased them from a shop.

The High Court as the first Appellate Court is mandated to look at the evidence adduced before the trial Magistrate afresh, re-evaluate and re-assess the same and reach its own independent conclusion whether or not the Appellants' conviction ought to be upheld. In so deciding the High Court has to put into consideration the grounds of Appeal put forward by the Appellants in their Petitions of Appeal. The High Court also has to put in mind the fact that it did not have an opportunity of seeing the witnesses as they testified before the trial Magistrate's Court and cannot therefore be expected to give its opinion on the demeanours of the witnesses. (See Okeno – versus- Republic [1972] E. A. 32). We have considered the evidence that was adduced before the trial Magistrate. It is not in dispute that indeed robbers attacked PW 1 in his house, threatened to kill him, and stole therefrom several household items including cash. It is further not disputed that the Complainant and the other witnesses who testified in Court were not able to identify the robbers on the night of the robbery. Even when the neighbours of PW 1 assisted him to track down the robbers, none of the robbers was apprehended. The only significant evidence which the Prosecution latched on to charge the Appellants was the evidence of the pair of shoes which the Complainant PW 1 allegedly identified as his, which pair of shoes was recovered from the house of the 2nd Appellant when a search was conducted. PW 1 did not testify what unique features the said shoes possessed that enabled him identify them as belonging to him. He testified that he had purchased the shoes at plutos. He said that the shoes were pointed and were Trade-marked "zak". He also testified that the shoes were new. On his part the 2nd Appellant produced a receipt to prove that the shoes were his.

In our re-evaluation of the evidence which was adduced before the trial Magistrate, it is evident that an undue reliance was placed by the trial Court on the evidence of the pair of shoes. The trial Court did not at any moment consider the fact that both the 2nd Appellant and PW 1 could have purchased similar shoes and of the same trade mark. The Court takes judicial notice of the fact that fashion often dictates that similar items are mass-manufactured to suit the demands that will then be obtaining. In the instant case it cannot be ruled out that the 2nd Appellant and the Complainant could have owned similar pairs of shoes. We find this evidence to be tenuous to say the least. There was no other evidence linking the Appellants to the crime in question. In the premises therefore, we find the Appellants' appeals have merit. Mr. Gumo, learned Counsel for the State, did not, in our view rightly so, support the conviction. No recoveries were made as a result of the robbery which could connect the Appellants to the robbery in question.

For the reasons given above, the Appellants' Appeals are allowed, their convictions quashed and their sentences set aside. The Appellants will be set at liberty unless otherwise lawfully held.

DATED at NAKURU this 4th day of May 2004.

D. K. MUSINGA

AG. JUDGE

L. KIMARU

AG. JUDGE