



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 11 OF 2003

JOHN OUYA LIFUMIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

The appellant was convicted of one count of Robbery with violence contrary to **section 296(2)** of the penal code by PARENO, SENIOR RESIDENT MAGISTRATE on 17th January, 2003. Having been dissatisfied with the conviction, he filed his petition of appeal on January, 24th 2003 in that petition he raised four grounds. His advocate, Mr. Mutuku adopted the said grounds in his submissions on his behalf.

Mr. Omirera, counsel for the respondent, has opposed the appeal on behalf of the state. In brief, the grounds raised by the appellant in this appeal can be summarized into two.

One that identification by recognition was made under difficult circumstances. Two the offence of Robbery with violence was not proved.

In this appeal, it is not in contention that the appellant was present at the scene of incident where some people robbed the complainant of Kshs.550/=, a handbag, a TV set and video deck, one mobile phone and of personal documents. It is the appellants contention that he was present at that scene having been abducted from his employers compound, which was within the neighborhood, where he worked as a watchman.

The appellant was represented in this appeal by Mr. Mutuku advocate. The advocate urged us to find that there were two incidents on the night in question. One where the complainant and PW2 was robbed of her handbag and mobile phone and another where the TV and video was taken. That it was in the second incident that the appellant was involved. Further that his involvement was innocent.

The learned counsel for the state, Mr. Omirera, addressing that point argued that under **section 111** of the Evidence Act, it was incumbent upon the appellant to give an explanation to negate the necessary presumption that he was at the complainant's home that day to rob from her.

Section 111 of the Evidence Act does not put such a heavy burden on an accused as the learned counsel put it. All the appellant needed to do is to raise a reasonable doubt. However, that requirement would only be called for after the prosecution has proved the case against him beyond a reasonable doubt.

We have considered the evidence of the prosecution as against the appellant. PW1's evidence was that she saw the appellant after she had been robbed of her handbag and money. That had taken place at her car as she parked it outside her home. After the two who robbed her went, the complainant said that she

walked into her house and soon thereafter saw the appellant and another. She said that the appellant disconnected her TV and video then went upstairs and then away. PW2 on her part did identify the appellant as their neighbour's watchman. However she did not say who between him and another disconnected the TV. She then said that after the appellant had gone upstairs tried in vain to lift the refrigerator.

PW 4, the complainant's nephew was unable to identify the appellant in court but he said he saw the neighbour's watchman in the complainant's compound lying down next to him as the robbery took place. He was emphatic that he knew the said watchman and said that in fact he was arrested the next day after PW1 identified him to the police PW4's evidence was that the said watchman lay next to him during the robbery and after the robbers left, they both sat up and spoke before he left the compound.

The prosecution had the burden to prove that the appellant had been to the complainant's compound to rob or in the very least, assist in the said robbery. There is a dispute that the appellant was a watchman in a neighbouring home. Going by that description, the prosecution witnesses were inconsistent as to the role he played in the alleged robbery PW1's evidence implicates him with having entered the house, having moved towards a TV and video and having tried in vain to lift a refrigerator. PW4 implicates him as having been forced to lie next to him by the robbers.

On the other hand, the appellant, who had no duty to resolve the inconsistency in the prosecution case admitted having been into the complainant's house and having disconnected the TV.

RAMANLAL TRAMBAKLAL BHATT VERSUS REPUBLIC 1957 EA 332, Sir Worley, P., Sir Sinclair, V.P., and **BACON**, J. A., held:-

“(i) The onus is on the prosecution to prove its case beyond any reasonable doubt and a prima facie case is not made out if, at the close of the prosecution, the case is merely one “Much on full consideration might possibly be though sufficient to sustain a conviction.”

“(ii) The question whether there is a case to answer cannot depend only on whether there is ‘some evidence irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence.’

We are of the view that at the close of the prosecution's case the evidence before the court was discredited and inconsistent. We are also of the view that the learned trial magistrate erred in failing to resolve the inconsistency in the prosecution case particularly on the issue of identity of the appellant since the evidence on record was that there was only one neighbour's watchman involved in the offence, was it the one who lay next to the complainant's nephew throughout the commission of the robbery or the one who entered the house and whom the complainant and PW2 saw albeit doing different things? That issue should have been resolved before putting the appellant on his defence.

The inconsistency in the evidence of these three prosecution witnesses becomes more vital when considered against the conditions under which the appellant was allegedly identified. PW 1 said he saw the appellant under a hurricane lamp. She did not say at what distance she saw him neither did she disclose the nature and intensity of the light. Nor the period under which she observed him.

PW 2 said she saw him under a light without saying what kind it was or from what distance. She said that the entire robbery took only five minutes. PW 4 on the other hand never said he saw the watchman under any light.

Taking all this into consideration we are of the view that at the close of the prosecution case the evidence before the court was a mere scintilla of discredited evidence which was insufficient to require the appellant to answer the charge.

Having put him to his defence the trial court had a duty to carefully consider the entire, evidence before it

and determine whether the prosecution had proved its case beyond any reasonable doubt. Turning now to the appellants defence, we do find that he did not deny having been to the complainants home that day, or even having disconnected the TV and video. He however claimed that he had been abducted by the robbers and that he informed his employer as much.

We have also considered the undisputed fact that after the robbery in question, the appellant continued to work for the same employer and that he was arrested the following day while on such duty. The employer was not called as a witness by either the prosecution or the defence.

Considering the evidence that was adduced before the lower court, we are of the view that the evidence against the appellant was circumstantial. In **MWANGI VERSUS REPUBLIC 1983 KLR 327 MADAN, POTTER JJA** and CHESON AG. J. A. held:-

“In order to draw the inference of the accused’s guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference. The circumstantial evidence int his case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused.”

It is our view that there were co-existing circumstances which weakened the inference of guilt. The appellant’s conduct after the said robbery was not that of a man with a guilty mind. He went back to his work taking even steps to ensure the safety of his employer’s property by setting on the car alarm. He also reported to his work the next day as usual. He was also candid in his defence admitting the role he played and giving an explanation for that role. We do find that his conduct negated any inference of guilt that could have been held against him. We also find that his explanation was reasonable and should have been accepted by the lower court. We find that there were co-existing circumstances in the appellants own defence, to wit that he had been abducted. That defence was not negated by the prosecution case. The appellants duty, in light of the circumstantial evidence adduced against him, was to create a reasonable doubt. We do find that he discharged his burden and that he ought to have been given the benefit of doubt.

After considering this appeal and re-evaluating the entire evidence we were of the view that the conviction was unsafe and should not be allowed to stand. Accordingly we quash the conviction and set aside the sentence. We order that the appellant be set at liberty unless he is otherwise lawfully held.

Dated at Machakos this 18th day of June, 2004.

LESIIT J.

JUDGE

WENDOH R.

JUDGE