REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 622 OF 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 8874 of 2002 of the Chief Magistrate's Court at Kibera (Ms. Mwangi - P.M.)

MIKE LAWRENCE OKOTH....……..APPELLANT

VERSUS

REPUBLIC…… ……....RESPONDENT

J U D G M E N T

The Appellant MIKE LAWRENCE OKOTH was charged with ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code. He was however, convicted of THEFT FROM PERSON contrary to Section 279(a) of the Penal Code and sentenced to 3 years imprisonment and 4 strokes of the cane. He has appealed against both the conviction and sentence. The Appellant raises five grounds of Appeal which I summarize as follows: -

That the learned trial magistrate erred in law and fact: -

i) In convicting the Appellant for the offence on circumstantial evidence.

ii) In failing to give due consideration to the Appellant's defence.

iii) In meting out a harsh and excessive sentence.

The learned counsel for the state, MISS MWENJE opposed the Appeal. She contented that the evidence adduced by the Prosecution was sufficient to prove the charge and that the conviction and sentence were proper.

The simple facts of the case were that the Complainant was going home from work at about 8.00 p.m. when a group of youths among them the Appellant whom he knew before, attacked and stole cash, a cap and identity card from him. PW2 who was nearby said he was able to identify the Appellant as one of those who robbed the Complainant. The Appellant was apprehended the next day wearing the Complainant's stolen cap. From the Complainant's evidence, it does not disclose the nature of light at the place the incident occurred. He only said that it was 8.00 p.m. and further that he was able to see the Appellant. It is only PW2 who said that there was light at the scene emanating from lamps whose source or intensity was not disclosed.

In REPUBLIC vs. TURNBULL & OTHERS {1976} B All ER 549 it was held;

"Whenever the case of an accused person defends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convic ting in reliance on the correctness of the identification… Furthermore, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made."

This authority has been quoted with approval in some of our local cases. To name but a few, KARANI vs. REPUBLIC 1988 KLR 290. In the above case, the Court of Appeal held that the evidence of identification especially by a single witness must be treated with extreme caution especially where the conditions favouring correct identification were difficult.

In the instant case, the Complainant and PW2 saw the Appellant at night. The nature and intensity of the light is not disclosed. However, going by PW2's evidence that the light came from lamps used by roadside hawkers to sell their wares, then the light must have been poor as opposed to street lighting. Furthermore, PW2 did not disclose how far he was from the Appellant when he saw him, or which part of his body he saw and for how long. PW2's evidence is not useful at all.

As for the Complainant's evidence, besides not saying under which lighting he saw the Appellant, he does not say for how long he was under his observation. He does not disclose what made him identify the Appellant. All he said in the cause of his evidence, in a manner that suggests it to be an after thought, was that he knew him before because he used to see him. He did not say how he knew him or for how long. He then said that the Appellant was the one who threw him in a tunnel and that the next day, he caught him wearing his cap.

As for the day of incident, the Complainant's evidence of identification is not water tight as required in trite law. See MAINA vs. REPUBLIC C.A. NO. 111 OF 2003 (Nairobi); ODHIAMBO vs. REPUBLIC MOM C.A. NO. 77 OF 2001. As for the cap, the Complainant did not say how he was identifying it as his stolen cap. A cap is an item of common use and available easily it is an item that is used by everybody and is not restricted to any class of people. The cap was not identified by any particular or peculiar mark or feature that would enable the learned trial magistrate to say with certainty that the Complainant had identified it as exclusively his and as the one that he was robbed of at the time of incident.

In addition to that, the Appellant in his defence stated that he had collected it somewhere. The learned trial magistrate did not in her judgment deal with that aspect of his defence which the Appellant was entitled to.

On considering this Appeal, I find that the conviction was unsafe and should not be allowed to stand. I will quash the conviction and set aside the sentence and order that the Appellant should be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 17th day of September 2004.

LESIIT

JUDGE

Read, signed and delivered in the presence of;

LESIIT

JUDGE