REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 518 OF 2001

(From original conviction(s) and Sentence(s) in Criminal case No. 8251 of 2000 of the Senior Principal Magistrate's Court at Kibera (Mwangi (Miss) – P.M.)

JACKSON LESKEI……..……..……..APPELLANT

VERSUS

REPUBLIC…… ……..……....RESPONDENT

J U D G M E N T

The Appellant, **JACKSON LESKEI** was charged and convicted of the offence of ROBBERY WITH VIOLENCE contrary to Section 296(2) of Penal Code. He was sentenced to death as mandatorily provided in the law. He was aggrieved by the conviction and sentence and thus lodged this Appeal.

He raised five grounds of Appeal which he amended and reduced to three and which we shall consider in this Appeal. These are: -

1) That the evidence of identification was not positive

2) That charges against him were not proved.

3) That the Appellant defence was not considered

MISS GATERU, learned counsel for the State opposed the Appeal. On the issue of identification the Appellant's contention was that the Complainants could not have identified their assailants because of the state they were in. He says that both Complainants had just woken up from sleep. The Complainant was in her bedroom at the time people entered and took her money. That PW2, the husband of the Complainant went outside before the assailants robbed the Complainant.

GATERU submitted that PW1's evidence was that the Appellant knocked at his door, and when he opened, thieves went in and robbed the Complainant. That after the incident the Appellant disappeared only to surface one month later. That both PW1 and 2 identified the Appellant and that the identification was safe.

We have re-evaluated the evidence adduced at the trial. The record shows that the Appellant was working as a guard for the Complainant and PW2. His duty included waking PW2, the Complainant's husband at 3.30 a.m. so that he could escort him to go to work. On the material day PW1's door was knocked earlier than usual. PW2 noticed it was 3.00 a.m. and told Appellant it was too early. That the knocking persisted and he decided to go outside his house. On opening the door, he saw the Appellant

standing near a shop. Three men attacked him demanding for money. He managed to escape. However, the three entered the house and found the Complainant. The Complainant heard the Appellant direct verbally that the Complainant should be given the torch her husband had. She was then robbed of 10,000/-. From that day, the Appellant disappeared for one month.

On issue of identification, the evidence of PW2 was clear that he was woken up, just as the Appellant's duty was. Only he was woken half an hour earlier. PW2 said he saw the Appellant outside near a shop which was well lit. PW2 decided to go for help but turned back when he realized that his wife was being robbed.

On the other hand, the Complainant's evidence was that he was attacked by 3 men who demanded money. She claimed that she heard the Appellant direct that she should be given PW2's torch so as to get that money.

The Appellant contented that both PW1 and 2 had just woken up and so were in no position to identify anyone. However, PW2's unchallenged evidence is that he not only woke up from bed but opened his house and went out hoping to talk to the Appellant. PW2 had not just woken up when the robbery took place as the Appellant alleged.

In addition, the Complainant's evidence was he heard and recognized the Appellant's voice.

It is correct to say that the basis of the identification of the Appellant was recognition both by visual and voice recognition. In **SIMEON MBELLE vs. REPUBLIC (1982 – 88) 1 KAR 578**, it was held: -

> ***"In relation to the identification by voice, care would obviously be necessary to en sure (a) that it was the accused's voice (b) that the witness was familiar with it and recognized it and (c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it."***

As we have already said, we have evaluated the evidence adduced before the trial court afresh. In relation to voice identification, we are satisfied that the Complainant knew the Appellant's voice well. He had worked for her for over 3 months. He had woken up the Complainant's husband daily at 3.30 a.m. The words spoken were to the effect that the Complainant be given the torch her husband was carrying. Those were many words, enough to enable a person recognize and distinguish a voice from another.

That however, was not the only evidence adduced. PW2 saw the Appellant when he went outside the house. The Appellant did not want to talk to him. Instead, 3 men accosted him prompting him to run off before deciding to return. The Complainant says the conditions outside were good for identification because it was well lit. that evidence was unchallenged.

The evidence of the two witnesses has to be considered against the evidence of the Appellant's conduct during and after the robbery. The Appellant played the role of waking PW2 so that he could open his house. It was then that the attack took place. After the attack, the Appellant disappeared for one month. The Appellant did not explain his conduct in his defence and the learned trial Magistrate was right to find that he acted in concert with the robbers. We do agree that the Appellant was a principle offender. That he acted together with others with a common intention of robbing the Complainant of her money. We do find that the Appellant's conduct of disappearing after the said robbery amounts to circumstantial evidence. We find that the inculpatory facts irresistibly point at the Appellant, and are incompatible with the innocence of the Appellant and incapable of any explanation upon any other hypothesis than that of guilt.

We have checked the evidence and facts surrounding the Appellant's conduct during and after the robbery together with the Appellant's own defence. We are satisfied that there are no other co-existing circumstances which would weaken or destroy the inference.

Two other issues were raised which, we wish to mention in passing. The first one is the issue of the first

report and the Provisions Section 165 of the Evidence Act. That issue is tied up with the second issue raised of the Prosecution's failure to bond all witnesses in the case. It was the Appellant's contention that the case was not reported to the police until the date of his arrest. He also submitted that a guard and other witnesses were not called.

The issue of first report was never raised during the trial. However, it is clear to us that the only Police Officer called to testify in this case was the one who arrested the Appellant. There is nothing to suggest that the case was not reported to the police. PW3, the arresting officer stated in passing that the report of the robbery was indeed in the Occurrence Book (OB) before the date of the arrest. We see no merit in the Appellant's Complaint.

On the issue of witnesses, and in particular the one who was described by PW2 as Appellant's co-guard: It was not clear how the other man was the Appellant's Co-guard, or whether he worked during the day and the Appellant at night. It is however, clear that this person was not mentioned in relation to the robbery incident. We do note think that his evidence was of any significance to the Prosecution case.

As regards the Complaint that the Appellant's defence was not considered, we do find that it was analyzed, in the judgment, even though briefly. We have considered it and do find that it dwelt on the date of arrest, and suggests that the Appellant was arrested on behalf of others. We find that defence a basic denial to the charge, but which did not challenge or shake the evidence adduced against the Appellant by the Prosecution witnesses.

We have also re-evaluated the evidence vis-à-vis the charge. The Appellant was in company of others whom he aided and abetted. His accomplices robbed the Complainant of some money. We therefore find the Appellant was a principle offender and that the ingredients of a charge of robbery with violence contrary to Section 296 (2) of Penal Code were met.

The upshot of this Appeal is that it had no merit and it fails. We dismiss this Appeal, uphold the conviction and confirm the sentence.

Dated at Nairobi this 26th day of October 2004.

LESIIT

JUDGE

OCHIENG'

Ag. JUDGE

Read, signed and delivered in the presence of;

LESIIT **OCHIENG'**

JUDGE **Ag. JUDGE**