REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 201 OF 2003
(From Original Conviction and Sentence in Criminal Case No. 1599 of 2002 of the Senior Principal Magistrate's Court at Machakos: S. M. Kibunja Esq. on 9.7.2003)

MUTINDA KWEA .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

J U D G E M E N T

Mutinda Kwea the appellant herein was charged with the offence of robbery contrary to section 296(1) of the Penal Code. This was in Criminal Case 1599/2002 at Machakos Senior Principal Magistrate's Court. He was convicted of the offence and sentenced to serve 2 years imprisonment and 2 strokes of the cane. It is against the conviction and sentence that he appeals.

The appellant cited 5 grounds in his petition of appeal. A summary of these grounds is that the appellant was not properly identified as having been one of the robbers; and therefore that the charge was not proved beyond any doubt as required.

Briefly the facts of the case are that the complainant (P.W.1) was walking to his house on 15.7.2002 at about 7.30 p.m. when he met 3 people and that he knew one of them. They got hold of him, squeezed his neck and robbed him of a mobile phone, wallet, with identity card, voters card and other documents. The 3 disappeared in the darkness while the complainant ran home and went to report to police station after some minutes. He told police that he had recognized one of them. He later spotted the appellant, called police who included P.W.2 Police constable Otieno who arrested the appellant on 5.8.2002. P.W.3 Administration Police Constable Duncan Aumini said that on 15.7.2002 at 8.00 p.m. he was proceeding to Grogon. He found 3 people along Ngei Road and he recognized one. He turned to go towards the police station. He was cycling. Next day the complainant asked if he had recognized the 3 people the previous day and he accepted having recognized one who is accused. He knew accused to have been a mechanic in town. He did not witness the robbery.

The State conceded the appeal on grounds that there was doubt as to whether P.W.1 recognised the appellant; that the light at the scene was not tested by conducting of a parade and that the trial magistrate never warned himself of the dangers of basing the conviction on a single identifying witness.

Though the complainant claimed to have recognised one of the robbers, it is clear from the record that on making the report at police station, he never mentioned who it was that robbed nor did he describe the person to the police or to anybody else. It would have been expected that if the complainant recognized the robber, he should have named or described him in the first report to police. In the Court of Appeal case of **CHARLES OUMA V. REPUBLIC CR.A 222/0**2 it was held that a description of the appellant should have been given to police in the first report. In this case the complainant was not clear whether he only knew the appellant physically or even by name. P.W.2 the arresting officer denied that any description or names of appellant were given to him. The appellants conduct is not consistent with one who had recognized one who robbed him and this raises doubt as to whether he did recognize any of his assailants.

The incident allegedly took place at 7.30 p.m. which was night. Apart from the complainant stating that

there was a street light nearby, the court was not told how far the light was, the intensity of the light and whether it would have enabled the complainant to see the assailants. In the case of L**EBOI OLE TOROKE V. REPUBLIC CR.APP. 204 of 1987 t**he Court of Appeal held that in such cases the court has to consider the intensity of the light, the location of the source of the light so as to avoid error in identification. The court did not address any of the above. P.W.1 never mentioned that somebody else saw the appellant before or during the robbery. We then had the evidence of P.W.3 who claimed to have seen the appellant at the scene. It is not clear whether P.W.3 was cycling or driving. Infact his evidence was quite unhelpful it is the complainant who went and described the appellant to him. It is not clear at what time P.W.3 saw the appellant at or near the scene if at all. He never witnessed the robbery. What we have here is evidence of a single witness P.W.1. In the **OLE TOROKE** case as in many others, especially where there is a single identifying witness, the court has to warn itself of the dangers of basing a conviction on evidence of a single identifying witness which the magistrate did not do in the present case.

Indeed the evidence against the appellant on identification was shaky and weak and the magistrate did not properly direct himself regarding the evidence before him. The evidence was too weak to find a conviction and I find that the conviction is unsafe. It is hereby quashed, sentence set aside and the appellant is set at liberty forthwith unless otherwise lawfully held.

Dated, read and delivered at Machakos this 19th day of October 2004.

R. V. WENDOH

JUDGE