



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 441 OF 2002

(From original conviction (s) and Sentence(s) in Criminal case No. 2109 of 2001 of the Chief Magistrate's Court at Nairobi (S. Ndambuki - S.R.M .)

HARUN MWANGI KANENE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

HARUN MWANGI KANENE has lodged an Appeal against the conviction and sentence meted against him by the Chief Magistrate's court at Nairobi. He had been tried and convicted for the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296 (2) of Penal Code**, and sentenced to death as mandatorily provided by law.

The case of the Prosecution was that at least four men attacked the Complainant, PW1, at his clothing materials shop along Munyu Road at about 5.00 p.m. on the 13th September 2001. Two of them were armed with pistols which they used to threaten the Complainant, his two sales girls on duty with him at the time, (PW2 and 3) and some lady customers. It was the Prosecution case that the Appellant was one of the attackers and that he was arrested at the locus in quo before he could escape, as did his accomplices.

The Appellant was represented in this Appeal by **MR. KINGARA**. Mr. Kingara adopted the Petition of Appeal filed by the Appellant in person. The first ground he argued was that of identification. It was his submission that the evidence of PW1, the sole identifying witness, was unreliable. He based his contention on two points. One, that PW1's evidence lacked corroboration and two, it was inconsistent. On the issue of inconsistency he submitted that since the learned trial magistrate did not record the evidence in circumsppection, it left doubt whether the Appellant had a pistol or not. The learned counsel also submitted that the evidence seemed tailored to implicate the Appellant as having been armed with a pistol. The counsel went further to submit that PW1 committed perjury and therefore, his evidence should not be believed. **MR. KINGARA** took issue with the lack of witnesses to corroborate the evidence of the Complainant despite the fact that the incident took place at a café. He also challenged what he termed inconsistency of the Complainant's evidence about where exactly the Appellant was caught, whether inside the shop or outside.

MRS. TOIGAT learned counsel for the State did not agree with **MR. KINGARA**. It was her contention that the evidence of identification was not mistaken and that the same was proper in the circumstances. **MRS. TOIGAT** submitted that the sequence of events that led to the arrest of the Appellant were consistent, and were not broken. That when the Complainant grabbed the Appellant, both of them fell and fought until members of public intervened. That after members of public arrived on the scene, the Appellant was taken outside the shop and beaten, until police came to the scene of crime.

It is true that only the Complainant identified the Appellant in this case. The other eye-witnesses of the incident were two sales ladies PW2 and 3, who were also working at the Complainant's shop. Both were busy with 2 lady customers each, when the robbers struck. PW2 was ordered to lie down by a gun totting robber while his colleague watched before one jumped over the counter to steal from them. PW3 was also ordered to lie down as she tried to stand up from where she had bent over to pick some materials for her customers to see.

PW3 did not see the men who confronted her at all since she was ordered to lie down. PW2 only saw the robbers fleetingly.

It is important to note that PW2 was farthest from the Complainant and PW3. PW3 was nearer where the Complainant was. It is therefore, a fact that the men whom PW2 saw are not the ones who approached the Complainant. Having re-assessed the evidence adduced in this case, we are convinced that the Complainant was telling the truth and was not mistaken in any way. The learned trial magistrate, in her judgment at page 55 found as follows: -

“PW1 clearly identified t he accused as one of the armed robbers who went to his shop, and who was left struggling with him as his colleague escaped and the same person who was arrested by members of the public and who had been beaten up by the mob.

... The incident took quite somet ime and it was during the day. There was nothing or circumstances which could have made it difficult for PW1 to identify the accused.”

The learned trial magistrate saw a sequence in the evidence of the Prosecution. That sequence was clear to her and was unbroken. She made a specific finding that the Appellant was one and the same person: -

- 1. Who went to the Complainant's shop to steal from the Complainant,**
- 2. Who was left struggling with the Complainant as his colleagues escaped from the scene,**
- 3. Who was arrested by members of public,**
- 4. Who was beaten up by a mob,**
- 5. By implication, whom police re-arrested from the mob.**

We have re-evaluated the Complainant's evidence step by step. We agree that the learned trial magistrate did not record the evidence in circumspection. However, that affected only the bit of evidence which covered the moment the assailant entered the shop, apparently in batches of at least two groups and before they produced guns or pistols and ordered everyone to lie down. It is therefore, not clear at that point who had the gun. That however, changed and the Complainant's evidence is quite clear that as guns were being flashed and people ordered to lie down as they were robbed of valuables, two men approached him. The two men included the Appellant. From that point, the two men did not leave the Complainant's company. They jumped over the counter and stole from the cash box. They then ordered him to take them to his office which was at the back of the shop near where the Complainant also ran a Fast Food Restaurant. As they reached the door to his office area, the Complainant first tried to lock the two men outside but was unsuccessful.

Then he decided to grab the one with the gun, whom he identified as the Appellant. He struggled with the Appellant as the latter fired once but missed his target. PW1 did not release the Appellant until members of public came, dragged the Appellant outside the shop, where they beat him up until the police, led by PW4 went to his rescue.

We are satisfied from this evidence that the issue of mistaken identity is totally ruled out. First of all the

conditions of identification were good and conducive for positive identification. The offence took place at 5.00 p.m., in broad daylight. Further the Complainant did not lose sight of the Appellant from the moment he and his accomplice approached him, totting a gun, to the time the police re-arrested him. The gun the Appellant had, and which the Complainant managed to wrest from him was not only produced as exhibit 1 together with one bullet – exhibit 2, one spent cartridge – exhibit 3 and its magazine, but the Prosecution went further to call PW6, a ballistic expert who confirmed that it was a gun, and therefore, a dangerous weapon and which was capable of being fired.

We are unable to agree with **MR. KINGARA'S** submission that the Complainant's evidence was mistaken or fabricated or that he perjured himself as submitted. We agree with **MRS. TOIGAT** that there was no likelihood of mistaken identity in this case and further that the Complainant's evidence was not inconsistent. We also agree with the learned trial magistrate's finding on the issue of identification.

It is trite law that where the sole evidence against an accused person is that of visual identification, then such evidence must be water tight. See **MOHAMED MAFHABI & 2 OTHERS vs. REPUBLIC C.A. No. 15 of 1983.**

The court should exercise extreme caution when dealing with evidence of identification by a single witness and such evidence should be received by the court with the greatest circumspection especially where the circumstances of identification are difficult and do not favour accurate identification. See **RAYMOND ODHIAMBO vs. REPUBLIC C.A. No. 77 of 2001.**

In this case, we have re-evaluated the evidence of identification with circumspection. As noted above, the circumstances of identification were not difficult. In addition the Appellant was arrested at the locus in quo, which, in our view, rules out any possibility of error or mistake in his identification.

It is trite law that a fact can be proved by a single witness. However that rule does not lessen the need to test with the greatest care the evidence of a single witness. See **KARANI vs. REPUBLIC [1985] KLR 290.**

We have dully warned ourselves of the dangers of relying on the evidence of a single witness to base a conviction. Having so warned ourselves, we find that the evidence of identification in this case was strong and safe to found a conviction.

One of the authorities relied on by **MR. KINGARA** on behalf of the Appellant was **JOHN KURIA GATEMBU vs. REPUBLIC C.A. No. 25 of 2000.** That authority sets out the role of the Appellate Court to re-evaluate the case and draw its own conclusions. We have done exactly that in this Appeal.

Next was **PATRICK NABISWA vs. REPUBLIC C.A. No. 80 of 1987.** In that case the problems posed by visual identification of suspects are considered at length. The said problems concern visual identification where the suspect is not arrested immediately. The cited case does not apply to the instant case and is easily distinguishable in that the Appellant was arrested at the scene of crime immediately after the robbery.

BONIFACE OKEYO vs. REPUBLIC C.A. No. 52 of 2000 was a case dealing with corroboration. In that case, it was ruled that corroboration would be necessary, where the witness failed to describe a suspect to the police in his first report and where the identification parade is conducted several days after the event. That case does not also apply to the circumstances in the instant case. The Appellant was arrested by the Complainant himself and at the scene of the incident. In those circumstances we hold that corroboration of the Complainant's evidence would not be required.

The other issue raised in the Appellant's grounds of Appeal concerned the ingredients of a charge of **ROBBERY WITH VIOLENCE** under **Section 296 (2) of the Penal Code.**

We have considered the submissions by **MR. KINGARA** and also **MRS. TOIGAT**. It is now well settled that offence of robbery with violence contrary to **Section 296 (2) of the Penal Code** is committed

in any one of three distinct modes.

Those modes are: -

- 1. If the offender is armed with any dangerous or offensive weapon or instrument, or**
- 2. If the offender is in company with one or more other person or persons or**
- 3. if at or immediately before or immediately after the time of the robbery the offender wounds, beats or uses any other personal violence to any person.**

In the instant case, the Appellant was in company with one or more persons and dangerous weapons, to wit, pistols were used. In fact the Appellant was caught with one of the two pistols brandished by the robbers in this incident. It was in fact the Complainant's evidence that the Appellant fired one shot which fortunately missed the target. Therefore, more than sufficient ingredients of the offence were proved. We find that the learned trial magistrate's finding that the offence as charged was proved cannot therefore be challenged. See **KARANJA and ONYANGO vs. REPUBLIC Mom C.A. No. 271 of 2002, OLUOCH vs. REPUBLIC [1985] KLR 549.**

On the inconsistency in the handling of the firearm, it was **MR. KINGARA'S** submission that the gun recovered at the scene of incident was not the same as the one examined by PW6, the Firearms Examiner. The basis of that submission was the difference in the Serial Number of the pistol cited in the charge sheet which is A8621944N and that stated by the Firearms Examiner in his evidence and report which is No. A862. In addition, that whereas PW6 said that he received it from one **IP PETERE NJOROGE, PW5 P.C. BERNARD MWANGI** said he escorted it to the Firearms Examiner.

MRS. TOIGAT dismissed the inconsistency alleged by the Appellant's counsel as minor on grounds that PW5 merely said he escorted the Firearm to the Firearms Expert but did not say that he was alone at the time. To our minds, it is not material whether the firearm was handed over to PW6 by **IP PETER NJOROGE** or PW5. The important issue is whether or not the Firearm examined by PW6 and later adduced as an exhibit, at the trial, was the same as the one recovered from the Appellant at the scene of crime. If, from the evidence on record, it is clear that it was the same firearm, it would matter little who handed it over to the Firearms expert. We propose to make that analysis a little later, with a view to ascertaining if the gun examined by PW6 was the same one as that which was recovered from the scene of crime.

Meanwhile, on the issue of the serial numbers being different, **MRS. TOIGAT** submitted that the same was curable under **Section 382** of the **Criminal Principal Code**.

We have considered the inconsistency in the serial number by the Firearms Expert PW6, and one quoted in the charge sheet. The first letter A and the first three numbers 862 are common in both quoted numbers. The learned trial magistrate does not seem to have noted the inconsistency in the serial number of the gun, and so did not resolve that issue during the trial.

We have considered the totality of the evidence adduced before the trial court concerning the firearm. PW1 held it as he struggled with the Appellant and before members of public went to the scene. He gave it to PW4, the first Police Officer to get the scene soon after the incident. PW4 gave it to PW5 who prepared an exhibit memo form and took the same to the laboratory where PW6 is stationed. The most important link between the gun recovered from the Complainant at the scene and the one examined by PW6 was the results of the examination of the firearm by PW6. It was the Firearms Expert's evidence that the spent cartridge, Exhibit 3, which PW4 recovered at the scene was fired from the same pistol – exhibit 1. The basis of his conclusion was the results of examination of three spent cartridges test fired by him using the same pistol, whose markings matched those on the recovered cartridge. He concluded that the same pistol fired the ammunition recovered at the scene.

We have already dwelt on the evidence of PW1, 2 and 3 all who heard the gun shot at the scene. PW1

stated that it was from the Appellant's gun and was targeted at him but it missed.

Having considered the totality of the evidence adduced, we find that there was overwhelming evidence with which to found a conclusion that the pistol recovered by PW1 and 4 at the scene was the same one examined by PW6. In that regard, it is our view that the error on the serial number as per the charge sheet is a curable defect under **Section 382 of Criminal Procedure Code** and could not, on its own, justify the quashing of the conviction entered by the Court in this case.

The final issue raised was that of the defence; that the learned trial magistrate did not consider the Appellant's defence. **MRS. TOIGAT** submitted that the same was considered.

Even though that issue was one of the grounds raised in the grounds of Appeal, it was not dwelt on by **MR. KINGARA**.

We have nonetheless evaluated the judgment of the learned trial magistrate and are satisfied that the defence was given due consideration. He said that he had been an innocent shopper at the shop where the robbery occurred. However, the said defence did not cast any doubt on the overwhelming evidence adduced against him by the Prosecution. Even after considering the said defence, we still come to the same conclusion, that the learned trial magistrate's findings were correct and the conviction safe. We find no reason to overturn the learned magistrate's finding.

The upshot of this Appeal is that it lacks in merit and fails in total. We dismiss it, uphold the conviction and confirm the sentence.

Orders accordingly.

Dated at Nairobi this 7th day of December 2004.

LESIIT

JUDGE

F. A. OCHIENG'

Ag. JUDGE