



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 173 OF 2003
CONSOLIDATED WITH
CRIMINAL APPEAL NO. 174 OF 2003

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 1500 of 1999 – G. A. NDEDA)

ROBERT SALLY KASACHI.....1ST APPELLANT

ROBERT SIMIYU KHAEMBA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The Appellants, Robert Simiyu Khaemba and Robert Sally Kasachi were charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the offence were that on the night of the 30th and 31st of July 1999 at Millenium Hotel, Nakuru the Appellant, jointly with others not before Court robbed Arthur Ngang'a Peterson of a motor vehicle registration number KXU 404 Toyota Corolla and Kshs 700/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Arthur Ngang'a Peterson. The Appellants pleaded not guilty to the charge. After full trial the Appellants were convicted as charged. They were sentenced to death as is mandatorily provided by the law. The Appellants were aggrieved by their convictions and sentence and have appealed to this court.

In their Petitions of Appeal, the Appellants presented more or less similar grounds of Appeal. The Appellants faulted the trial magistrate for convicting them based on the evidence of identification when no identification parade had been held; that the trial magistrate erred in failing to consider that there was no evidence adduced connecting the Appellants to the robbery; that the prosecution did not prove the case against the Appellants beyond any reasonable doubt due to the fact that not all the evidence that was required to be adduced was ever adduced in court; that the defences of the Appellants were not considered by the court before arriving at the said decision convicting them.

At the hearing of the Appeal, the separate appeals filed by the Appellants were consolidated and heard as one as the two appeals arose from the same proceedings of the trial magistrate. Mr Gatumu Learned Counsel for the 1st Appellant, Robert Sally Kasache urged this court to allow the Appeal, as no evidence was adduced connecting the 1st Appellant with the robbery. The 2nd Appellant, Robert Simiyu Khaemba, with leave of the court, presented written submissions in support of his Appeal. In summary, he urged this court to allow the Appeal as he was not properly identified nor did the prosecution adduce any evidence to connect him with the robbery. Mr Koech, Learned State Counsel, did not support the conviction of the 1st Appellant. He however urged the court to dismiss the Appeal filed by the 2nd

Appellant as the prosecution had proved the case against him beyond any reasonable doubt. We shall revert back to the arguments made in these Appeals, after briefly setting out the facts of this case.

PW 1 Arthur Ngang'a Peterson, a taxi operator in Nakuru testified that on the 30th of July 1998 (*he most probably mean 1999*) he went to work at the Millennium Hotel. At about midnight, he was approached by two people who wanted to be ferried to Agip Petrol Station. On the way, the passenger who was seated at the rear seat put a wire on the neck of PW 1. They then robbed him of the cash and his identification papers. He was then thrown out of the car after having his hands bound. PW 1 managed to untie himself and went and reported the incident to the police. Three weeks later, he was informed by the police that his motor vehicle had been recovered at Bungoma. He went to Bungoma and identified his motor vehicle. PW 1 was then shown the people who had been arrested in connection with the motor vehicle. He identified the 2nd Appellant, Robert Simiyu Khaemba, as being among the two people who had robbed him. PW 1 testified that prior to the robbery incident he had not seen the 2nd Appellant. PW 1 testified that when he made the report to the police, he told the police that he could identify the people who had robbed him.

PW 2 Bernard Wafula Kwoba testified that he was an acquaintance of the Appellants. He testified that they used to work at his workshop at Kaptembwa market.

It was his testimony that both Appellants borrowed Kshs 2000/= from him with an undertaking that they would pay him later. They did not pay him as promised. Later PW 2 and the 2nd Appellant went to Bungoma where PW 2 had been promised that he would be paid his money. They travelled to a shopping centre called Brigadier. They found a motor vehicle registration number KXU 404 in a workshop. At that moment they were arrested by the police who took them to Bungoma. PW 2 was later released by police. He testified that the 2nd Appellant had told him that he was selling the said motor vehicle. PW 2 was not aware that the 2nd Appellant owned a motor vehicle. He had not seen the 2nd Appellant with the said motor vehicle before the material date. He testified that he had gone to Bungoma with the 2nd Appellant to pursue the payment of his money.

PW 3 A P Inspector Isaac Shitieni testified that he received information from a Chief stationed at Manyanja on the 17th of August 1999 that there were two men who were selling a motor vehicle kept at Brigadier Centre, Tongaren. The Chief was suspicious. PW 3 sought the assistance of the Police and went to the place where the motor vehicle had been kept. They laid an ambush. Three men came. PW 3 arrested them. One of the persons arrested was the 2nd Appellant. The 2nd Appellant told PW 3 that the motor vehicle belonged to his brother based in Nakuru who had instructed the 2nd Appellant to sell the vehicle. When the 2nd Appellant was unable to produce the documents of the motor vehicle, he was arrested and taken to Bungoma. PW 3 testified that the 2nd Appellant was identified and pointed out to him by the owner of the workshop where the motor vehicle had been kept.

PW 4 Inspector Brikati Chesire, a Police Officer attached to the Provincial CID Scene of Crime Office, produced the photographs that were taken of motor vehicle registration number KXU 404 after the same had been recovered by the Police. PW 5 Police Constable Patrick Lorin testified that on the 17th of August 1999 he was given an assignment to investigate a report which had been made concerning two men who were suspiciously trying to sell a motor vehicle. PW 5 in the company of other Police Officers went to the place where he was told he could find the two men. He was able to arrest them and had the motor vehicle towed to Bungoma Police Station. PW 5 testified that among the two men arrested was the 2nd Appellant. He testified that the 2nd Appellant was unable to produce any documents to prove the ownership of the motor vehicle.

When the Appellants were put on their defence, the 1st Appellant, Robert Sally Kisachi testified that he was at his place in Shabab on the 21st of August 1999 when he was arrested by the Police. They searched his house but did not recover anything. He was later taken to the Police Station and charged with the offence of robbery with violence which he was convicted. The 1st Appellant denied that he was arrested with the motor vehicle in question. He denied that he was involved in the robbery. The 2nd Appellant Robert Simiyu Khaemba denied that he was involved in the robbery. It was his testimony that he was arrested at Manyanje trading centre while he was negotiating with one Yakub Mohammed to lease

his land. He denied that he was arrested with the motor vehicle belonging to PW 1. He denied knowledge of the offence which he was charged with.

This is a first Appeal. It was held in **Thomas Mwaluma Mwimwa –versus- Republic C.A. Cr. App. No. 264 of 2003** (unreported) by the Court of Appeal that;

“It has been stated from time to time that it is the duty of the first Appellate Court to remember that an accused is entitled to demand of the Court of first Appeal a decision both questions of fact or law, and the Court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind that it has neither seen nor heard the witnesses and make due allowance for this – See Okeno –versus - Republic [1972] E.A. 32 at page 34.”

In the instant Appeal, the Prosecution adduced three pieces of evidence in support of the charge against the Appellants. The first piece of evidence is the evidence of identification of the 2nd Appellant by the Complainant, PW 1. He testified that on the material day he was robbed of his motor vehicle registration number KXU 404 Toyota Corolla which he operated as a taxi. It was his testimony that he was approached by two people when he had parked his motor vehicle outside the Millenium Hotel. The two people requested him to take them to Agip Petrol Station. A fee of Kshs 100/= was negotiated and agreed. Along the way, the two passengers put a wire on the neck of the Complainant. They tied his hands and threw him off the motor vehicle. PW 1 reported the incident to the Police. Three weeks later, he was summoned to Bungoma Police Station where he was shown his motor vehicle which had been recovered. He also saw the 2nd Appellant whom he recognised as being one of the men who robbed him of his motor vehicle. The 2nd Appellant has argued that this evidence by PW 1 should be disbelieved. It was his argument that the incident took place at night and therefore there was a possibility that the Complainant could have been mistaken in his identification of the Complainant.

We have re-evaluated the evidence adduced against the 2nd Appellant in respect of the identification by PW 1, the Complainant. We are aware that the said identification was made by a single identifying witness. We have warned ourselves on the dangers of relying on the evidence of a single identifying witness to convict the Appellant. In **Maitanyi –versus- Republic [1986] KLR 198**, it was held at page 200 that:

“Although the Lower Court did not refer to the well known authorities Abdulla bin Wendo & Anor vs Rep. (1953) 2 0 EACA 166 followed in Roria vs Rep [1967] EA 583, it may be that the trial Court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition: - “subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In the circumstances, what is needed is other evidence, whether be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of any error.”

In the instant case the evidence of PW 1 taken alone on the identification cannot be relied on. The circumstances under which the said identification was difficult. It was at night. The source of light was not indicated by PW 1. PW 1 was however emphatic that it was the 2nd Appellant who had robbed him.

In the above referred case of **Maitanyi (Supra)** it was held that where the evidence of a single identifying witness cannot be relied on, then the Court should consider other evidence to corroborate the evidence of identification by a single identifying witness. In the present case, PW 2 testified that the 2nd Appellant who was a person whom he knew asked him to accompany the 2nd Appellant to go to Bungoma.

The 2nd Appellant had assured PW 2 that when they would reach Bungoma, he would pay him the sum of Kshs 2000/= that he was owed by the 2nd Appellant. When they reached a centre called Brigadier in

Bungoma District, the 2nd Appellant showed PW 2 a motor vehicle which he claimed he was selling on behalf of his brother who was based at Nakuru. PW 2 testified that he was not aware that the 2nd Appellant owned any motor vehicle. The motor vehicle that PW 2 was shown was motor vehicle registration number KXU 404 Toyota Corolla which had been robbed from PW 1 the complainant.

PW 3 and PW 5 arrested the 2nd Appellant with the motor vehicle. The 2nd Appellant did not deny that the motor vehicle was in his possession. PW 3 and PW 5 were not convinced by the story of 2nd Appellant that the motor vehicle belonged to him. PW 3 and PW 5 asked the 2nd Appellant to produce the ownership documents of the said motor vehicle to prove that the motor vehicle was his. The 2nd Appellant was unable to produce any documents. The evidence of PW 2 and that of PW 3 and PW 5 related to the recovery of the stolen motor vehicle and further connected the 2nd Appellant to the robbery of the said motor vehicle from the complainant. These are the other two pieces of evidence that the prosecution relied.

On our re-evaluation of the said evidence adduced, it is our finding that the 2nd Appellant was identified by the Complainant as being among the two men who robbed him. The 2nd Appellant was found in possession of the motor vehicle three weeks after the same had been robbed from the Complainant. The 2nd Appellant was thus found in recent possession of the stolen motor vehicle which was robbed from the Complainant.

It is our finding that the evidence of PW 1, PW 2, PW 3 and PW 5 taken in totality sufficiently connects the 2nd Appellant to the robbery. It is our considered opinion that the Prosecution established the case against the 2nd Appellant for the offence of robbery with violence beyond any reasonable doubt. All the ingredients of the offence of robbery with violence were present; the 2nd Appellant, in company of another person threatened to use actual violence to the Complainant as a result of which they subdued him and robbed him of his motor vehicle. We do not find any merit with the defence of the 2nd Appellant. The said defence was rightly rejected by the trial magistrate as not being of any evidential value as to dislodge the strong case established by the prosecution against the 2nd Appellant. We have considered the written submissions made by the 2nd Appellant and the grounds of Appeal put forward by him and we do not find any merit in them. The Appeal by the 2nd Appellant is consequently dismissed.

In respect of the 1st Appellant, Robert Sally Kasachi, apart from the evidence of PW 2 who testified that the 1st Appellant was in the company of the 2nd Appellant, when they borrowed money from him, there is no other evidence which was adduced by the Prosecution to connect the 1st Appellant with the robbery. The 1st Appellant testified that he was arrested by the Police while he was resting in his house. At the time of his arrest, his house was searched. Nothing was found that could be said to even remotely connect the 1st Appellant to the robbery of the Complainant, PW 1. PW 1 was categorical that he did not see the 1st Appellant during the night of the robbery. Mr Koech, Learned State Counsel, conceded to the Appeal filed by the 1st Appellant. In our view he was right to so concede.

In the circumstances therefore, the Appeal filed by the 1st Appellant Robert Sally Kasachi is hereby allowed, his conviction is quashed and the sentence imposed set aside. The 1st Appellant is set at liberty unless otherwise lawfully held. As regards the 2nd Appellant, Robert Simiyu Khaemba, his Appeal is hereby dismissed. The conviction and the sentence by the trial magistrate of the 2nd Appellant for the offence of robbery with violence contrary to **Section 296(2) of the Penal Code** is hereby confirmed.

It is so ordered.

DATED at NAKURU this 3rd day of December 2004.

MUGA APONDI

JUDGE

L. KIMARU

AG. JUDGE