REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO.201 OF 2001
(From Original Conviction and Sentence in Criminal Case No.65 of 2001 of the Senior Resident Magistrate's Court at Kangundo: B Maloba)

NDOLO NDILU NDOLO…………………………….. APPELLANT

VERSUS

REPUBLIC………………………………………….. RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.202 OF 2001

MUSEMBI MUYA MAKASA…………………………….. APPELLANT

VERSUS

REPUBLIC……………………………………………. RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.203 OF 2001

BENSON MUTINDA ISAIAH……………………………. APPELLANT

VERSUS

REPUBLIC……………………………………………. RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.204 OF 2001

BASILO NDOLO MUTUA..…………………………. APPELLANT

VERSUS

REPUBLIC…………………………………………… RESPONDENT

JUDGEMENT

The appellants herein being appellant Ndolo Ndilu Ndolo appellant in No. 201/01; Musembi Muya appellant in appeal No.202/01, Benson Mutinda appellant in appeal No.203/01 and Basilio Ndilo appellant in appeal No. 204/01 were charged jointly in the lower court with another with the offence of Robbery with violence contrary to section 296 (2) of the Penal Code.

They were tried by the lower court convicted and sentenced to suffer death in the manner provided by law. They were aggrieved by those orders. They appealed to this court separately but their appeals were consolidated and heard together. The appellants filed separate grounds of appeal which were similar in material particulars and which are that; they pleaded not guilty to the charge, the Learned Trial Magistrate erred when he believed P.W.2's evidence of recognition which was under difficult circumstances; the Learned Trial Magistrate did not adhere to the principle of first report to a person in authority, there was no corroboration, the conviction was meted out against innocent men, their defences were plausible and yet they were rejected for no apparent reason and that the conviction was against the weight of the evidence on record. They urged the court to allow their appeals, quash the conviction and set the sentence aside and set them at liberty.

The memorandums of appeal do not have a date stamp to show when they were received in court but some receipts have a date stamp of 30.11.2001. Further perusal of the record revealed presence of grounds of appeal filed by counsel on behalf of the appellant in criminal appeal No.202/01; Musembi Muya. This was brought to the counsels attention informally by the court clerk after the appellant had argued his appeal in person to find out if counsel wished to have the matter re-opened for him in order for him to be heard on his memo of appeal and he gave an okey to proceed with the writing of the judgment. The said memo raises pertinent issues to this appeal and we shall not ignore it. They are to the effect that the Learned Trial Magistrate erred in law and fact when she misdirected her mind on the following issues by shifting the burden of proof to the appellant by saying that the appellants did not account for their whereabouts on the material night, when she held that once you recognize someone their description is not necessary as recognition means that you know them, misdirected her mind in law when she found that Dock identification was reliable in the circumstances of this case, misdirected her mind both in law and fact when she held that failure by the prosecution not to call the investigating officer was not fatal to its case and that it was incumbent upon the defence to show how this failure prejudiced them, erred in law and misdirected himself on basic cardinal principle of criminal law when she held that the appellant was under a duty to raise a doubt in the mind of the court, that the Learned Trial Magistrate erred in law and in fact when she made a finding that the appellant was particularly recognized by P.W2 and 4 and failed to address her mind on the following namely that no evidence was adduced whatsoever on the conditions prevailing at the scene, the trial court in its judgment did not evaluate the evidence relating to the lighting (lantern) and did not conducively make its own conclusion as to whether the light was adequate to enable P.W.2 and P.W.4 recognize and or identify the appellant, did not address her mind to the circumstances at the locus in quo which circumstances did not favour a correct and unmistakable recognition of the appellant and erred in law and fact when she held the evidence on record in relation to identification was watertight yet there was other factors negating this finding, the Trial Magistrate failed to sufficiently analyze the evidence of the lantern light as to its clarity and intensity, erred in law and in fact when she relied on evidence of recognition in convicting the appellant yet the same evidence was merely perfectionally dealt when presented to court. The evidence on the record as against the appellant is not free of error or mistake, that the Learned Trial Magistrate failed in fact and proceeded to hold that the prosecution had proved its case beyond reasonable doubt yet it had vital breaks and omissions and it failed to form a chain irresistibly pointing to the guilt of the appellant. That is to say that the prosecution gave no explanation as to why the investigating officer and the arresting officer were not called, no explanation was tendered as to why no identification parade was conducted to corroborate evidence of P.W.2 and 4, no explanation was given as to why after report to police by complainant of having been robbed by persons known to him no immediate search or inquiry was done to ascertain the whereabouts of the appellant. If the appellant was well known to the complainant and his home only 1/2 kilometer from that of the complainant why did it take 3 days to arrest him? Non of the members of the public who came at night on the fateful night was recognized and or identified by the witness and non was called. The Trial Magistrate assumed the role of the prosecution by going out of her way to give ex planation and fill gaps left by the prosecution instead of giving the appellant the benefit of doubt. The appellants defence on oath was not shaken and or challenged by the prosecution. The judgment is undated and the same falls

short of the provisions of the Criminal Procedure Code, the evidence on the record is not safe and positive enough to support the appellants conviction.

In their oral submissions in court the appellants reiterated their grounds of appeal and stressed the following points. That there is no mention that he was flashed with a torch in order for him to be recognized, that no neighbour was identified, the court to scrutinize the evidence of P.W.2 and 4 who said that they were in one house when the robbery took place and that the investigating officer did not come to give evidence.

The second appellant Musembi Muya stated that nobody came to tell the court why he was arrested, although P.W.4 said that she had known him for over 18 years and yet she did not report him to the police immediately after the robbery, no exhibit was recovered from him at the time of arrest, that none of the neighbours who came to their rescue was named nor was told about those who had attacked the complainants; P.W.4 did not name him when she made the first report, that the court should scrutinize the evidence of the complainants.

The 3rd appellant Benson Mutinda submitted that there was no mention that he was identified with the help of torch light, P.W.2 did not lead to his arrest, no exhibit was recovered from him, P.W.2 and 4 did not name the neighbours who came to their rescue, that the Trial Magistrate found him guilty because he did not say where he was on the day of the incident.

The 4th appellant Basillo Ndolo submitted that the complainant P.W.2 who alleges to have known him before the incident did not name him in his first report to police, he did not also give his name to the neighbours who came to his rescue after the robbery, the complainant should have led to his arrest since they knew him, he was not booked with anything in connection with this offence. Since P.W.4 says that she was under the bed and she woke up to raise an alarm after the robbery had taken place it is not possible that she saw any of the robbers, she never named the neighbour and neither did she give his name to those neighbours. D.W.6 was told that they did not identify any of the assailants, that the torchlight was from the robbers and since it was directed away from them he could not have been identified using that light, he was convicted because he was unable to say where he was on the day of the robbery. They do not agree with the assertions of the trial Magistrate that lack of investigating officer in a case is not important as an investigating officer will come to tell the court why he arrested and charged a particular person.

They urged the court to allow their appeals, quash their convictions and set them at liberty.

The state on the other hand supports the conviction because from the evidence on the record there is no doubt that violence was used on P.W.2 who was the victim of the robbery, the evidence of P.W.2, 4 and 5 mutually corroborated each other. On the issue of identification which was difficult she was right when she ruled that P.W.2, 4 and 5 had ample time to register the appearance of the robbers as the appellants in court. That this was a case of recognition and not identification. P.W.2 and 4 are husband and wife who were in the same room while P.W.5 was their son who was in a separate room. That there was bright light from the torches being flashed around, that to persons known to each other torches are sufficient light to enable a person recognize a familiar face. That there is evidence that when P.W.2 gave the robbers money to the tune of 10,000.00 they threw caution to the wind and lit a lantern and started counting and sharing out the money and this gave a better opportunity for identification in the room and that P.W.2 saw the second accused Benson armed with a huge hammer which was used to smash the door. Benson also had a distinct mark on his face and he was also a neighbour which features made identification easy, that Basilo Ndilu who was a village mate was seen armed with a panga while the 4th accused was armed with a bow and arrow. That identification of neighbours was not necessary as they did not form part of the gang more so when the neighbours arrived after the gang had left and the victim were shocked and so they were not expected to recite to the whole village who the robbers were and failure to name neighbours did not prejudice the appellants in any way. That by the Learned Trial Magistrate giving reason for disbelieving the defence that did not in any way shift the burden of proof on to the appellants neither did this weigh heavily on the mind of the court, that it is not necessary that exhibits be recovered before a conviction can be made. On the basis of the foregoing the Learned State Counsel submitted that

the convictions are safe and that the same should be upheld.

This being an appeal; our duty is to re-evaluate the evidence before the lower court and determine whether the conclusion received by the lower court are to stand or not (see the case of **Peters Versus Sunday Post (1958) EA 424)**

We have duly done so and find that the findings of the Learned Trial Magistrate in her judgment were as follows.

(1) That on identification the complainant herein identified the accused person and what acts, each one did not constitute a robbery charge under section 296 (2), the robbers had torches and when he gave them 10,000/= the second accused lit a hurricane lamp and with the light from the lamp, he identified accused 1 – 4 he was able to identify the mark on the 1st accused face meaning that the condition for identification were more than favourable, identification of the accuseds was recognition, the accused persons were the complainants neighbours and he has known them for many years for a period raging from 18 years to 22 years, he recognized the robbers and he talked to them and the robbery took more than 30 minutes and therefore this is the best identification, that the evidence of identification by the complainant is given more credit by his wife P.W.4 who also saw and recognized the 1st, 2nd, 3rd and 4th accused persons. That the evidence of the couple is corroborated by their own detail of the account of the robbery which was neither contradicted or shaken by cross-examination of Mr. Ndolo and 3rd accused person and on the 3rd accused it is further corroborated by P.W.5 that the accuseds have given evidence which mainly dwelt on the fact of arrest and being beaten by the complainant. They did not state where they were on the night of 7th January 2001 and they did not support themselves fully on their whereabouts that night except for the 5th accused who is the son of .D.W.5 and whom D.W.5 said that he wasn't there and he was not identified by the witnesses leaving the evidence of P.W.2 uncorroborated. Secondly it was said that he was recognized by voice but evidence of recognition of an accused persons voice has always been held unreliable. The submissions by Mr. Ndolo that the circumstances were not favourable cannot have any impact on the evidence on record. There was sufficient light from the lantern while the accused persons counted the money robbed from the complainant. That the accused themselves had powerful torches which they were using to get items and also clothes from the wardrobes. There is an amazing corroboration from the complainant and his wife which makes the court to believe that the conditions were favourable. That on the issue of identification parade although the offence took place at night and it was prudent to hold an identification parade, identification was by recognition which would make an identification parade unnecessary. It is clear that the identification of the accused 1,2,3, 4 and recognition was watertight, that it was not necessary that the complainant names the assailants to the members of the public who came to his residence because this would have facilitated the accused persons escape. His duty was to inform the law enforcement agency which he did. Once he knew their names it was not necessary that he identified them for purposes of being arrested. He mentioned a special feature on the 1st accused and so if it is not necessary that he describe them because recognition means that you know them. It is not true that identification was dock identification and it is not true that it is unreliable. That the police did not call the investigation officer but this is not fatal to the prosecutions case. There is identification evidence which is watertight and the investigating officer not having been availed does not deter this court from considering the evidence on record. However the defence has not said how this affected their case or the prosecutions case. That it is not true that the police evidence is disjointed as P.W.3 received the report from the complainant and booked the report in the O.B. IP. Rukinga gave evidence of how he visited the scene and what he saw and that evidence cannot be said to be disjointed. That it is true that where there is doubt that doubt has to be resolved in favour of an accused person but there is no doubt in this case but watertight evidence. That it is the duty of the accused persons who has a duty to raise this doubt in the mind of the court and it is only the 5th accused who had succeeded in raising that doubt. That on the evidence before the court the ingredients of robbery with violence were satisfied as the robbers were armed with offensive weapons namely they had pangas, hammer,

bows and arrows as the evidence of P.W.2, 4 and 5 indicate. Secondly they were in the company of one or more persons as the evidence of P.W.2, 4 and 5 shows they beat and actually caused grievous harm to the complainant who was treated for whiplash marks and P.3 form produced as exhibit 1".

On the basis of the foregoing the Learned Trial Magistrate gave the benefit of doubt to the 5th accused and acquitted him but convicted accused 1 – 4 as charged.

We have considered the foregoing findings of the Learned Trial Magistrate in the light of the evidence adduced before her and in the light of the submissions from both sides and our findings in respect of the same are as follows.

1. The evidence show clearly that there is no doubt that the Complainant was attacked on the material night and items listed in the charge sheet stolen from them. This was confirmed by the evidence of the police officer P.W.6 who visited the scene and confirmed the damage done to the doors that the house was ransacked. We have no doubt that such a damage to doors and ransacking could only be done by robbers. We also find that it is normal day to day behaviour no sane person can damage his own properly and then fain robbery. We therefore agree with the finding of the Learned Trial Magistrate that there was a robbery on the material night in the house of the complainant.

2. Secondly we also find that the issue of the identification of the robbers is very central to the case. We have noted the findings of the Learned Trial Magistrate that the same was watertight for the reasons given. On our own we wish to state that there was no challenge to the complainants evidence to the effect that he knew the accused persons before the incident. It is indeed correct that there was black out and the night was dark. The source of light was from the powerful torches. It was conceeded by P.W.2 that he was roughed up by the robbers and that his wife P.W.4 was praying while looking at the robbers. It is also clear that they were shocked and shaken. P.W.4 conceeded that the light of the powerful torches was being flashed around the room as the robbers gathered the items they were taking and it was also directed at the victims. It is our view that since the torch light was directed away from the robbers to the victims and the items being gathered and bearing in mind that it was dark inside and outside that source of light alone cannot be relied upon to say that identification was positive.

However we also agree with the submissions of the state that there is evidence that a lamp was lit when money was handed over to the robbers. As per the evidence of P.W.2 and 4 when money was handed over the robbers started counting it using the light of the lantern. Their attention was drawn away from the victims to the money. The victim say they had ample time to see the robbers and recognized them as people they knew before as local residents. The victims were not blindfolded during the robbery neither were the robbers hooded. For these reasons we agree as the Learned Trial Magistrate did and as submitted by the state that the circumstance were conducive to positive identification of the robbers in so far as accused 1, 2 and 3 are concerned.

P.W.3 also stated that he lit a lamp in his room and that the 3rd accused came to his room and he saw him. He P.W.5 was not roughed up and so he had ample time to observe the person who came to the room.

3. As regards the identification of the 4th accused who was said to have been keeping watch and patrolling the corridor the evidence does not state how far the corridor was from the lamp neither is there mention that he was flashed by the torches from other assailants. We feel that on the evidence as it is on record the identification of the 4th person is in doubt.

4. The 3rd aspect of the case is that dealing with the issue of an identification parade. The appellants complained that there was no identification parade. It is our finding that where a victim says that he knows the assailant and even leads to the arrest of the assailant an identification parade is not necessary. In this case it is correct that the witnesses claimed to

have known the assailants. What we have to look for is the factors which will go to show that the assailants were known. The first factor is that they be named at the earliest opportunity. P.W.2 said that after the robbers left; neighbours came and he gave the names of the robbers to them. P.W.4 said she did not disclose this fact to the neighbours who came. P.W.2 and 4 said that it was dark and they did not identify the neighbours. None of these neighbours came to testify.

The appellants took issue with this piece of evidence.

The Learned Trial Magistrate stated that it was not material. That what was material was to name them to those in authority and that is what P.W.2 said.

It is our view that it is now settled law that the action of a victim naming the assailant at the earliest opportunity either to those who arrive to the scene immediately after the robbery or to police when the report is made goes to cement the truthfulness of the account of the sequence of events. It also rules out the possibility of rehearsal and fabrication of the evidence and cements the truthfulness of the evidence on identification. Applying that principle to the facts of this case we find that it is correct that neighbours who came to the scene were not named neither did they come to give evidence. We agree that it is not necessary to call a whole village but a few will surfice. In the absence of that; all that we have as to what transpired after the robbery is the evidence of P.W.2 and 4 the victims. We would like to note that it is only P.W.2 who said that he mentioned the robbers to the neighbours. P.W.4 did not. D.W. 5 tried to introduce the names of the neighbours who named the appellants but that evidence was dismissed by the Learned Trial Magistrate and we agree with that action as that would have been prejudical hearsay evidence. However it is our view that evidence of this nature is important evidence as it is evidence of consistence.

Turning to the evidence of reporting we find that P.W.6 is the key witness on this. He says a report was made of robbery on 7.1.01. He was accompanied to the scene by P.C. Mwangi and they found the doors had been damaged which they took and produced them in court as exhibits. P.W.6 recorded the statement from the complainant. There is no mention that the complainant named the assailants to P.W.6 when he reported. This is contrary to the finding of the Learned Trial Magistrate that this was the position. Further in the absence of evidence of a neighbour who came to say that the assailants were named to him or her it means that there is nothing to show that the assailants were named to the neighbours. As regards the evidence of P.W.3 all that it amounts to is that he received the 3rd accused from the complainant and members of the public contrary to what P.W.2 said that he did not lead to the arrest of the assailants and he found them arrested at the police station.

This brings us to consider the issue of the evidence of the investigating officer or lack of it. The appellants have contended that lack of this evidence is fatal to the prosecution’s case. The State and the Learned Trial Magistrate have stated that it was not fatal to the prosecution case.

We have considered this aspect of evidence and our view is otherwise. This is because we only have an account of how the 1st and 3rd accused reached the police station. There is no account on how the rest of the appellants and the one who was acquitted reached the police station. This is a gap left in the prosecution’s case. It is so glaring that anybody could see it. The same is still gaping and glaring as at the time of the disposal of this appeal and we cannot ignore it. The investigating officer would have answered the question as to why P.W.2 said he only saw the accused persons at the police station when P.W. 3 said that he was among the members of the public who took 3rd accused to the police station. The investigating officer would also have stated why he did not bother to record a statement from the members of the public who arrested the 3rd accused.

P.W.6 also said that one Kioko took 1st accused to him on allegation that he was a suspect in the robbery. The presence of an investigating officer would have given reason as to why he did not record a statement from those who arrested the 1st accused and why they were not called as witnesses.

The investigating officer would also have told us how the 2nd and 4th appellants were arrested and

by whom and why those who arrested them did not give a statement to the police or come to court to give evidence. We have taken the above stand because the appellants have challenged the reasons for the arrest. It is on record from the evidence of P.W.2 and 4 that they knew the houses of the parents of the appellants. It is also on record that they did not lead to the arrest of the appellants. It is members of the public who did the arrest to come and give reason as to why they did the arrest and how they came to know that the appellants were involved in the robbery.

More so when it is on record that the names given in evidence as those ascribed to the appellants are not the official names that the appellants have used in the proceedings. It was necessary for evidence to be led to show that the appellants are also known by the names mentioned by P.W.2 in evidence.

Turning to the defence of the appellants we find that the same was faulted by the Learned Trial Magistrate for three (3) reasons:-

1. It merely dwelt on arrest and beating by the complainant

2. They did not give an account of where they were on the night of the robbery.

3. It did not raise doubt in the mind of the Learned Trial Magistrate in order to enable the court resolve that doubt in their favour.

Our view on those finding are that the cardinal principle the Learned Trial Magistrate had to bear in mind when assessing the appellants defence should have been.

1. To consider the appellants defence in conjunction with the rest of the prosecution case and determine whether the same has been ousted or not. 2. To note and bear in mind that in all criminal proceedings the onus and or burden of proof always lies on the prosecution.

It never shifts to an accused person to prove his innocence.

It is our most considered view that by the Learned Trial Magistrate requiring the appellants to give an account as to where they were on the night of the robbery and also by requiring them to raise doubt in the mind of the court in order for the court to resolve that doubt in their favour amounted to requiring the appellants to prove their innocence and this was prejudicial to them.

It should also be borne in mind that statements from the victims were recorded after arrests had been made. The Learned Trial Magistrate should have exercised a little caution when considering the possibility of appellants being named by the victims because they had seen them after arrest and before the victims recorded statements naming them.

Following the foregoing assessment of the evidence it is our view that when the evidence is taken in its totality it is evidently clear that the conviction cannot stand for the following reasons:-

1. The 4th accused who was said to have been patrolling the corridor was not shown to have either been flashed with torches or to have come near the lamp so as to be able to be recognized by P.W.2 and 4.

2. There is a gap left in the prosecutions case as to who pointed out the 1st and 3rd accused to the members of the public who arrested them came and handed them to police or how those who arrested them came to know that they were involved in the robbery. Also no explanation was given as to why these persons did not volunteer their statements to police and to come forward to be crossexamined.

3. There is a mystery as to how, when, why, by whom the second and fourth appellants were arrested and how they reached the police station.

It is our most considered view that the foregoing go to the very core of the prosecution case thus robbing it of the roots on which it is meant to stand.

The appeals are allowed in their entirety, convictions quashed, sentence set aside and appellants ordered to be set at liberty forthwith unless otherwise lawfully held.

Dated, read and delivered at Machakos this 3rd day of June 2002.

R. NAMBUYE

JUDGE

R.M. MUTITU

JUDGE