



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.340 OF 1998

(From Original Conviction and Sentence in Criminal Case No.2226 of 1998 of the Chief Magistrate's Court at Mombasa – L. Achode, Mrs. – S.R.M.)

FATUMA BARASA.....APPELLANT

=V E R S U S=

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant was charged with her younger brother and who was then the 2nd Accused with two Counts of Robbery with Violence contrary to Section 296(2) of the Penal Code. They were acquitted in respect of Count 1 but convicted for Count 2. Her said brother was placed under Probation for 3 years due to his age. He was under age. But the Appellant was sentenced to death. She appeals to this court against that conviction and sentence.

The prosecution case was that on the 1.7.98 at about 1 p.m. the Appellant visited the neighbour of the complainant. That neighbour was not in at that time. The Appellant asked the complainant for his stove to use to make lunch which he did. The Appellant was accompanied with the 2nd Accused, who was her younger brother. While the Appellant was having lunch two other men came to the house of the complainant and asked for the Appellant. He called the Appellant out and she talked with those men. The two men left and went away. Shortly thereafter the Appellant with her younger brother also left. At about 7 p.m. the Appellant came back again with another woman and requested him to allow them to enter his room but he declined since there was no light in his house. He went to a nearby shop and bought a candle and went to sleep. At about 5 a.m. he heard a loud bang at his front door. Someone shouted that I should open the door and that they were the Police. He got up and lit his candle. The door was forced open and a tall man came in and behind him were the Appellant and his said young brother. The tall man was armed with a panga and he ordered him to lie down which he did. Those assailants ransacked the room and stole a suitcase of clothes, a bag of clothes and bed sheets all the house utensils and cash shs.4,000/- which was in the suit case. He was able to identify all the 3 assailants. He went to Diani Police Station and reported the robbery and informed the police that he had seen the Appellant and his younger brother earlier in the day when they had visited his neighbour.

This is a case of identification in difficult circumstances by a single witness

The Appellant in her defence stated that on the material date she had borrowed the complainant's stove which she used to prepare lunch and after she had taken lunch she returned the stove to the complainant and went away. She denied any involvement in robbing the complainant. The issue here is identification by a single witness.

Before accepting visual identification, the court had a duty to warn itself of the inherent danger of such evidence.

A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the Accused person under observation, together with the need to exclude the possibility of error, was essential.

The way to approach evidence of visual identification was scantily stated by Lord Widgery CJ in the well known case of R. -v- TURNIBULL, [1970] 3 All E.R. 549 at page 552 where he said:-

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made”.

This need for caution was also reiterated by the Court of Appeal for East African in the case of ABDALLAH BIN WENDO -v- R., 20 E.A.C.A. 166 at page 168 thus:-

“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 greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it 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 error”.

In this case there is no other evidence, circumstantial or direct. The decision must turn on the need for testing with greatest care the evidence of the single witness. It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the length of light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of light available. What sort of light, its size, and its position relative to the suspect, are important matters helping to test the evidence with the greatest care.

Is that what the court below did? At page 2 of the Judgment the learned Trial Magistrate stated this:-

“The court is convinced of the sincerity of PW.1 (the complainant) in her testimony because it came across in her demeanour in court. The witness was so sure of the identity of her attackers that she went out to find out the whereabouts of her home on her own and she succeeded”.

He had no doubt in his mind as to the correctness of the identification. He then went on to warn himself of the danger of relying on the witness. There is no point in making the decision and then warning oneself afterwards. In this case, the robbery was committed at night. It was dark and the complainant in her evidence stated that she was assisted to identify the Appellant by light from a candle. There was a tall man in front of the Appellant so that the light from a candle was not bright enough to enable the complainant to observe and positively identify the Appellant who was behind a tall man.

It is clear that the requirements set out in ABDULLA BIN WENDO were not adequately adhered to. There was no careful testing of the evidence which is an error of law.

There was no supporting evidence. Had the evidence been thoroughly tested and analyzed, we cannot be sure that the Trial Magistrate would still have come to the same conclusion.

Therefore, we find that the conviction cannot safely be supported and therefore the appeal is allowed. The conviction of the Appellant is quashed, sentence set aside and the Appellant is ordered to be set at liberty forthwith, unless held for any other lawful cause.

Dated and delivered at Mombasa this 26th day of September, 2001.

J.L.A. OSIEMO

J U D G E

J. N. KHAMINWA

COMMISSIONER OF ASSIZE