



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CR. APPEAL NO. 63 OF 2016**

*(From Original Conviction and Sentence in Criminal Case No. 272 of 2016*

*of the Senior Principal Magistrate's Court at Wang'uru, D. NYABOKE – R.M)*

**PETERSON BUNDI KARIERA.....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant Peterson Bundi Kariera has filed an appeal against the conviction and sentence in Wang'uru Senior Principal Magistrate's Court Cr. Case No. 272/2016. The appellant was charged with robbery with violence contrary to **Section 296(2) of the Penal Code** and upon conviction he was sentenced to death. He filed this appeal which initially raised Nine grounds. He however filed amended grounds confirming the appeal to Three (3) grounds. The grounds are:-

**a) That, the trial magistrate erred law and facts while basing my conviction in reliance of identification by recognition as alleged by the complainant without considering no first report was ever tendered into the record with my descriptions which has confirmed by PW4 Investigating Officer and the trial court never warned itself with the danger of relying with single identifying witness.**

**b) That, the trial Magistrate further erred in law while convicting I the appellant with charges which were not adequately proved particularly on the evidence of P3 form and the registration numbers of the alleged stolen motorcycle while no motor vehicle registration office was called to proof the ownership of the same.**

**c) That, the trial court lost direction after being influenced with the whole set of prosecution witnesses testimonies and rejected my defence which was not displaced by the adduced evidence as per **Section 212 of the Criminal Procedure Code Cap 75 Laws of Kenya.****

The appeal was opposed by the State.

2. The facts of the case are that the complainant Peter Kihungi Wachira (PW-1-) who was a boda boda rider was on 13/5/2016 riding the motor cycle registration Number KLDL 282V make Skygo black in colour within Ngurubani Township at Merica area. While there he was approached by one person who requested him to take him to Kingati village. The person pretended to be new in the area and gave the complainant his phone so that he could talk to somebody they were to meet. They proceeded and met another man who was waiting for them. The suspect alighted and PW-1- waited to be paid, PW-1- recognised the man who they found waiting. That person who PW-1- found at the scene hit the complainant causing him to drop the motor bike. The other suspect hit PW-1- on the head. PW-1- tried to flee. The suspect took the motor cycle and ran away. The complainant (PW-1-) identified the appellant as the person who took the motor cycle and drove off with the customer who had hired him.

3. The complainant sustained an injury on the back. He called his friend, one Willi who went to where he was. They then proceeded to the police station and reported the matter. PW-1- informed the owner of the motor cycle, Chege Muriithi. PW-1- was treated at Kimbimbi Sub County hospital. Later on 16/5/16 PW-1- spotted the appellant at Kiamucege. He called boda boda riders and they arrested the appellant. As he was being escorted to the Police station, the appellant managed to escape. Later the appellant was arrested by police officer. He was then charged.

4. The appellant was issued with a P3 form which was filled at Kimbimbi Hospital. The appellant was then charged.

5. I have considered the appeal. This is a 1<sup>st</sup> appeal and this court has a duty to consider the evidence tendered before the trial court analyse it and come up with my own independent finding. However, I have to leave room for the fact unlike the trial Magistrate I did not have an opportunity to see the witnesses when they testified and leave room for that. This was held in the case of **Okeno –v- R (1972) E. A 32**. I Have gone over the record in details. The prosecution relied on the evidence of a single identity witness. Though the complainant stated that he had recognised the appellant, he was the only eye witness. His evidence ought to have been treated with caution. While testing the reliability of the evidence of identification during the night, it is important that the court considers the relevant circumstances such as the king of light, the position of the light in relation to where the suspect was and the intensity or otherwise to enable positive identification.

6. The Court of Appeal in the case of **John Muriithi Nyaga –v- Republic (2014) eKLR** while dealing with a case where the complainant was the only witness who alleged to have identified/recognised the appellant stated –

**“The evidence in the trial court was by a single identifying witness. Evidence of a single identifying witness must be examined with considerable circumspection to ensure that it cannot but be true before a conviction is founded on it. It was in Kiilu & Another –v- Republic differently constituted held –**

**“subject to certain well known expectations it is trite law that a fact may be proved by 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 such circumstances what is needed is either 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, can safely be accepted as free from the possibility of error.”**

7. The question is whether the evidence of the complainant is free from the possibility of error. When the complainant testified, he referred to two people, that is, the one who hired him and the one who they found at the scene.

8. In his evidence the complainant testified that he identified the person he found at the scene using his headlights on him. He further testified that he recognised the person due to gap in his front teeth and Jordan haircut and his beard.

9. This tends to show the description rather than recognition and by that time he had already seen the suspect.

10. The trial Magistrate did not warn himself on the dangers of relying on the evidence of an identifying witness. The trial Magistrate relied on the fact that the accused admitted that he was a tout at the stage. This however did not lessen the need for the trial Magistrate to consider with caution the testimony of PW-1- on identification. Mistake can arise even where one states that he had recognised a person. In **Maitanyi –v- Republic (1986) KLR 198**, the court of Appeal held inter alia –

**“When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available, conditions and whether the witness was able to make a true impression and description. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to want itself after making the decision it must do so when the evidence is being considered.”**

The court further stated –

**“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 all important matters helping to test the evidence with the greatest care. It is not a careful if none of these matters are known because they were not inquired into -----**

**In the absence of all these safeguards it now becomes the great burden of Senior Magistrates trying cases of capital robbery to make these enquiries themselves.”**

**In this case, the trial magistrate stated at Page 34 line 3 & 4. On reaching the destination PW-1- said he recognised the other person that were (sic) meet since the headlights from the bike fell on his face. Line -10 – PW-1- recognised the accused as the person who took away the motor cycle while the customer rode off with the accused.”**

Then page 37 at Line 20 –

**“Complainant recognised as the accused since the complainant used to see the accused in Ngurubani Town where he (accused) worked as a tout.”**

Page 38 line 10. **“The accused admitted he worked as tout within Mwea confirming what the complainant had said. I find indeed the accused was properly identified by the complainant as one of the attackers.”**

11. The fact that the appellant used to work as tout was not in dispute as he readily admitted it. He denied involvement. It is common knowledge that a stage usually has many touts. The trial Magistrate was supposed to interrogate the evidence on the king of light, where the appellant was and the possibility of the light being sufficient to afford positive identification. There was no enquiry. It is expected that the suspect did not stand on the road so that the lights could be shown on him. Even then the trial Magistrate was supposed to make enquiry to elucidate the possibility of mistake. The trial Magistrate did not consider the defence of the appellant who had given his defence on oath and stated that on 13/5/2016 he was in his house. This was a plausible defence. The appellant had no burden to prove his innocence. On the

other hand, the prosecution had to discharge the burden of proof against the appellant beyond any reasonable doubts.

12. Having considered the evidence, I find that there were gaps which left doubts in the prosecution case.

13. Firstly, the fact of the robbery was not proved as the testimony of the complainant was not corroborated. The complainant testified that immediately after the robbery he called a friend, one Willi who went to the scene and he reported to him that the motor bike had been stolen. He further testified that some 'onlookers' came to the scene on hearing the screams. The said Willi was not called as a witnesses. The onlookers who heard screams and went to the scene were not called as witnesses. It was only the word of the complainant that the motor bike was robbed from him on the material night. There was no evidence to corroborate the evidence of the complainant that where he was robbed there were security lights near the shops. The trial Magistrate did not consider which light the complainant used to recognise the appellant. Thomas Wangengi the C.I.D Officer did not visit the scene. It was not proved that where the scene was there were security lights. It means that as stated in the above quoted case the possibility of mistake or error could not be ruled out as the offence was committed at night.

14. The prosecution did not call the police officer who received the report from the complainant to confirm whether the complainant had reported that he had identified the appellant as the person who robbed him. PW-4- P. C. Thomas Wangengi testified on the happenings of 16/5/2016 when the appellant was arrested. This was not in dispute in view of the defence of the appellant. It turned out from his statement that the complainant recorded the statement after the appellant was arrested.

15. The appellant in his submissions stated that the charge was not proved the trial Magistrate failed to consider that the report made by PW-1- was not produced did not consider the time PW-1- took to see and recognise him and the light which he relied on to recognise him. These points out the gaps in the prosecution case.

16. In the case of John Mureithi Nyaga –v- R which I have cited above the Court of Appeal stated that:-

***“The only evidence before the court on the basis of which the trial court convicted the appellant was by the complainant. Evidence of a single identifying witness especially where the conditions for positive identification are difficult must be tested with greatest caution especially where the life of an accused person is at stake and the predecessor of this court in the case of Abdallab Wendo & Another (1953) 20 E.A.C.A 166 held that what is needed in such circumstances is “other evidence, whether it be circumstantial or direct pointing to the guilt, from which a Judge or Jury can reasonably conclude that the evidence of identification though based on the testimony of a single witness can safely be accepted as free from the possibility of error.”***

17. I have pointed out that the trial Magistrate erred did not test the evidence of PW-1- as he did not consider the source of light and how reliable it was to enable the PW-1- to positively identify the appellant and also failed to realise the gaps which were glaring in the prosecution case. The recognition which the trial Magistrate relied on was not full prove.

In R –v- Turnbull (1976) 3 ALL ER it was stated –

***“Recognition maybe more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the Jury should be reminded mistakes in recognition of close relatives and friends are sometimes made.***

***All these matters go to the quality of the identification evidence. If the quality is good and at the close of the accused’s case the danger of mistaken identity is lessened, but the poorer the quality the greater the danger.”***

18. The trial Magistrate erred as he did not consider the quality of the evidence but shifted the burden on the appellant after he admitted he was out. The trial Magistrate by not addressing his mind as to whether the circumstances favoured positive identification threw all caution to the wind.

19. The appellant was under no duty to prove his innocence or his alibi. His alibi could have been true and hence the need for the prosecution to prove even the fact of robbery beyond any reasonable doubt which I find they did not as there was no corroboration to that by other independent witnesses. This was not a case which was proved to the required standard by the evidence of a single witness. There was need for corroboration by circumstantial evidence which I find was completely lacking. I am aware that there was evidence tendered by PW-2- the Clinical Officer that the appellant had sustained injuries which were bodily harm as per treatment notes and the P.3 form, exhibit 1 & 2. But the treatment notes show he had been attacked by unknown people but the 'Un' was cancelled. The P3 form shows that it was issued on 18/5/2016 after the appellant was arrested it does not add value to the allegation that the complainant had known the person who attacked him.

20. In any case, the circumstantial evidence needed to corroborate in view of the facts of this case relates to inculpatory facts. Inculpatory evidence is defined as evidence that shows or tends to show a person’s involvement in an act or evidence that can establish guilt – Wikipedia. Such evidence to corroborate the evidence of the complainant was absolutely lacking. The medical evidence in this case does not amount to inculpatory facts. What was needed in prove that he was robbed as he alleged. This evidence was not forth coming.

21. Having evaluated the evidence, I have come to the conclusion that the evidence tendered by the prosecution was insufficient and did not prove the guilt of the appellant beyond any reasonable doubts. The evidence of PW-1- could not be safely relied on to convict.

22. He was entitled to an acquittal. I order as follows:-

**1. The appeal is allowed.**

2. The conviction and sentence are set aside.

3. The appellant be set at liberty unless he is otherwise lawfully held.

Dated at Kerugoya this 8<sup>th</sup> day of May 2020.

L.W. GITARI

JUDGE