



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAKAMEGA**

**CRIMINAL APPEAL NO. 42 OF 2014**

**SILAS MAKANI LUVEMBE .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(appeal arising from the original conviction and sentence by C. Kendagor, SRM, in Kakamega CMC's Criminal Case No. 2433 of 2012 dated 28<sup>th</sup> March, 2014)*

**J U D G M E N T**

1. The appellant herein was facing three counts of robbery with violence contrary to section 296(2) of the penal code. He was acquitted of counts 2 and 3 but for count 1 he was found guilty of simple robbery contrary to section 292(1) of the penal code and sentenced to serve five years imprisonment. He was aggrieved by the said conviction and sentence and hence has filed this appeal on the grounds that:

1. That the learned trial Magistrate erred in law and fact by relying upon evidence of a single identifying witness whose testimony was similar to those of the other state witnesses which the learned trial magistrate had found lacked veracity.
2. That the learned trial magistrate erred in law and fact by relying upon evidence of identification under unfavourable circumstances.
3. That the learned trial magistrate erred in law and fact by convicting the appellant upon evidence which neither proved that a crime had been committed nor ownership of any alleged stolen properties.
4. That the learned court erred in law and fact by failing to invoke the principle of '**benefit of doubt**' in favour of the appellant given the fact that the learned trial magistrate had conceded to the fact that there was bad blood between the complainants and the appellant.

2. The particulars of the offence in count I were that on the night of 22<sup>nd</sup> and 23<sup>rd</sup> November, 2012 at Sheasaba sub – location Shibuye location in Kakamega East District within Western Province jointly with others not before court while armed with dangerous weapons namely pangas and rungas robbed Alice Anyika Mwembi of Kshs. 7,000/= and a mobile phone make Nokia valued at Ksh. 3000/= and immediately before the time of such robbery threatened to use actual violence to the said Alice Anyika Mwembi .

3. The evidence of the complainant in count 2, Alice Mwembi ( PW3 in the case) was that on the material night at around 4 am she was sleeping in her house when she heard a knock on the door. Some people said that they were Police officers and ordered her to open the door. She woke up and lit a tin lamp ' koroboi' and placed it on a stool. The people broke the door open and entered into the house. They found her standing in her bed room . She recognized the first person who had entered into the bedroom as the appellant. He was dressed in a green marvin cap, a police jacket and a trouser. She knew the appellant very well. When she tried to look at the people the appellant ordered her to stop staring at them. He ordered her to lie down. She complied. The people started to shake her bed and ransacking the entire place demanding for her husband. They found her purse under the mattress with Kshs.7000/= and too the money. They also took her Nokia phone. The people then left. She screamed but nobody went to her assistance . At 10 am she learnt that the appellant had been arrested. She went to Shinyalu Ap camp where she found the appellant. Policemen from Kakamega went to the place and picked the appellant. They went with him to Kakamega Police station. She recorded a statement.

4. The evidence on how the appellant was arrested was given by Gladys Murere Busietsa PW4. Her evidence was that the appellant was having an affair with her daughter. That when she learnt about it she strongly objected to the affair because she had a previous relationship with the father. That the appellant then went to her and threatened to harm her for opposing the affair. She made a report to the police at Shinyalu. That on the 23<sup>rd</sup> November, 2012 at 2 am she was at her house when some people went to her home and knocked the door. The people said that they were police officers from Shinyalu. They ordered her to open the door. She declined. She screamed and the people run away .She had recognized the voice of the appellant among the people . In the morning at 11 am, the appellant went to her gate and threatened that if anybody mentioned his name, he will face the music . The brothers to the witness who were there then arrested the

appellant .He was taken to Shinyalu Police Station.

5. Apc Paul PW5 testified that the appellant was taken to Kakamega East Sub – County offices by members of the public. Three complainants said that the accused and other people had robbed them on the previous night. One other complainant Gladys Murere said that the appellant had threatened her with death on the previous night. They re-arrested the appellant.

6. PC Sagero PW4 stated that the appellant was taken to Kakamega Police Station . There were three complainants. The appellant was then charged.

7. When placed to his defence the appellant stated in a sworn statement that the daughter to Gladys (PW4) called Faith was his lover . That when PW4 heard about it she opposed the affair on the grounds that she was his father's friend. He was not aware of that. That on the 23/1/12 he went to the home of Gladys to see Faith . He was then arrested. He denied that he had threatened PW4.

8. The trial magistrate convicted the appellant of count 1 because the complainant in that count Alice Anyika recognized the appellant during the robbery as he was a person well known to her as a neighbour. That the witness described how the appellant was dressed and what he did when in the house. That the witness had described the appellant in his statement to the police as ' Makani wa Bushiluka'. That she had known him as son of Karako. The trial court found that the circumstances for positive identification were free from the possibility of error as there was a tin lamp on when the accused entered into the house. The court also considered the time spent in the house. The magistrate was satisfied that the complainant PW2 was robbed of Kshs. 7000/- and a mobile phone. The magistrate found no evidence that there were weapons used during the robbery hence reduced the charge to simple robbery contrary to section 296(1) of the penal code and convicted the appellant accordingly.

9. The advocates for the appellant, **K.N. Wesutsa & Co. Advocates**, submitted that the appellant was convicted on the evidence of a single identifying witness, PW2. That it is trite law that when faced with the evidence of a single identifying witness, the court ought to caution itself of the dangers inherent on convicting on such evidence. That the trial magistrate herein did not caution himself of this danger. On this score the advocates cited the holding in the cases of Kiilu Vs Republic(2005)1KLR 174 and Maitanyi Vs Republic(1986) KLR 198.

10. The advocates further submitted that the findings of the trial court were erroneous as it stated that the circumstances were conducive for identification supposedly based on the time spent by the robbers in the house when the record of the court does not indicate for how long the robbers stayed in the house.

11. It was submitted that the state did not lead evidence to prove that PW2 was either in possession of the amount of Kshs. 7000/= or that she possessed the Nokia mobile phone. Therefore that the case was not proved beyond reasonable doubt. The advocates urged the court to acquit the appellant of the charge .

12. The state prosecution counsel **Mr. Ngetich** did not make any submissions but relied on the decision of the trial court in opposing the appeal.

13. I have considered the evidence that was placed before the court, the judgment of the learned trial magistrate and the submissions by the advocates for the appellant. The incident complained of accused at night. The appellant was convicted on the evidence of a single identifying witness PW2. It is trite law that before the court convicts of the evidence of a single identifying witness it ought to warn itself of the dangers of acting on such evidence. The evidence has to be thoroughly examined and ruled to be free from the possibility of error .These principles were clearly set out in the this cases cited by the advocates for the appellant . In Kiilu Vs Republic( Supra) the Court of Appeal held that :

*' subject to certain well known exceptions , 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 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 , although based on the testimony of a single witness, can safely be accepted as free from the probability of error''* See also **Abdalla Wendo & Another Vs Republic ( 1953) 20EACA(166) KLR 198**

In Maitanyi Vs Republic ( supra) the same court held that :-

*' 1. Although it is trite law that a fact may be proved by the testimony of a single witness, this 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.*

*2. 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.*

*3. 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 warn itself after making the decision. It must do so when the evidence is being considered and before the decision is made.*

The court continued and held that:

*'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 the 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 test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. 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''.*

14. Alice Anyika testified that she lit a tin lamp when the knocks on the door persisted. That the appellant was the first person to enter into her house and she recognized him as he was a person well known to her. That when he tried to look at them the appellant ordered her to stop staring at them and ordered her to lie down. They then started to ransack the house.

15. The witness stated in cross- examination that the appellant was flashing a torch when he entered into the house but that he did not flash the torch on her face. She stated that the appellant was flashing the touch all over the place when he was ordering her to lie down.

16. The question then is how the witness managed to identify the appellant when the appellant was flashing a torch as he entered into the house. Its common knowledge that when one enters a place while flashing a torch the person at the other end cannot manage to identify the person behind the torch. How then did the witness, identify the appellant in this case?. The witness did not state whether she had any other opportunity after that of identifying the appellant as she was immediately ordered to lie down.

17. Further to this, the witness did not indicate whether she identified the appellant from the torch light or from the light from the tin lamp. She did not state the intensity of the light from the torch and from the tin lamp. The trial court did not make an enquiry on this. There was thereby doubt whether the circumstances in the room were favourable for positive identification.

18. The witness stated that she knew the appellant very well and that she saw him clearly . However, the court has to bear in mind that mistakes sometimes do occur in identifying even persons well known to the other.

In **Wanjohi 2 Others Vs Republic (1989) KLR 415**, the Court of Appeal cited with approval the holding in **Republic Vs Turnbull & Others (1976) 3 ALLER 549** where the court held:

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

19. The learned trial magistrate based the conviction on the time that the robbers spent in the house. However the court record does not indicate the period that the robbers stayed in the house. That finding was therefore not supported by the evidence before the court.

20. The evidence of a single identifying witness especially where the offence is committed at night must be tested with the greatest care. The court must be convinced that the circumstances were clearly favourable for positive identification. The learned trial magistrate did not warn himself of the dangers of convicting on the evidence of a single identifying witness when there was no other evidence pointing to the guilt of the appellant. In face of the aforesaid observations, it is my finding that the evidence adduced before the trial court cannot be said to have been free from the possibility of proved beyond all reasonable doubt.

20. In the foregoing the conviction and the sentence imposed on the appellant are quashed. The appellant is in the premises set at liberty unless lawfully held.

**Delivered, Dated and signed at Kakamega this 11<sup>th</sup> day of July, 2018**

**J.NJAGI**

**JUDGE**

In the presence of :

Miss Oduor holding brief for Kundu .....for appellant.

Juma.....state

George.....court assistant .

Accused.....present