



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 71 OF 2015

ISAAC MWANGI WAWERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Nakuru Chief Magistrate's Court Criminal Case No. 6836 of 2009 by Hon. J. Mwaniki P M on 12/03/15).

J U D G M E N T

1. On the 4th day of **October, 2009, Julius Osono**, the Complainant passed by the club where he was drinking alcohol with others. The Appellant who was at the pub forced him to buy him alcohol but he declined as he did not have money. This angered him such that he held his collar. **Kamau** who was in company of the Complainant removed his hand. He threatened to make him 'see'. The Complainant and his two (2) mates left the pub at about **7.00 p.m.** They were stopped by a person he alleged to be the Appellant along the way who was armed with a panga. He assaulted him with the weapon an act that made him loose consciousness. He gained consciousness to find himself at the Provincial General Hospital. The matter was reported to the police who investigated, arrested the Appellant and charged him.
2. When put on his defence the Appellant stated that he was implicated as one of the police officers who dealt with the case utilized the Complainant's father's land. He denied having been in the pub.
3. The learned trial Magistrate considered evidence adduced and convicted the Appellant and sentenced him to **ten (10) years imprisonment.**
4. Aggrieved, he appealed on grounds that: he was convicted on evidence of a single witness; the mode of arrest was inconsistent with the charge and it was a case of mistaken identity.
5. The State/Respondent filed a Notice of Enhancement of Sentence under **Section 354(3) (a) (ii)** and **Section 354(3)(b)** of the **Criminal Procedure Code.**
6. The Appellant canvassed the Appeal through written submissions. He argued that at the outset the police did not have a police file which insinuated that no report was made to the police.
7. That the Complainant was in company of other people who were not called as witnesses yet they were crucial witnesses, such that their evidence would have been prejudicial to the Prosecution's case.
8. That the Appellant was arrested by unknown people. On identification he urged that the conditions that prevailed were not favourable to positive identification. It was therefore a case of mistaken identity.
9. In response, the State through the Senior Assistant Deputy Director of Prosecutions **Mr. Kemo**, opposed the Appeal. He urged the Court to consider reviewing evidence adduced, injuries sustained that were grave and impose an appropriate sentence. He argued that the complainant was attacked and he would not have made a report to the police as he was undergoing treatment. That the Appellant was arrested two (2) days later. He noted anomalies that were evident on the date and stated that the issue was addressed at trial. He called upon the Court to find that if the single witness is telling the truth and the Court is satisfied such evidence should be relied upon. That the Appellant was sufficiently identified.
10. This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**
11. It is not in doubt that the Complainant sustained serious injuries that were described as grievous harm by the Doctor who examined him

two (2) months later. He was cut on the head three (3) times, he sustained a depressed skull that fractured. He suffered paralysis of the left hand side of the body and his speech was impaired.

12. In his testimony the Complainant stated that he was sent by his father to buy seeds. He then went to the bar with **Kamau** and **Ndegwa** but he did not specify the exact time when they entered the bar. Inside the pub were the Appellant and two (2) other people. When the person he referred to as the Appellant and by the name '**Isaac**' forced him to buy them alcohol he declined hence being threatened. They left the pub at **7.00 p.m.** and he was attacked along the way. On cross examination he stated that it was the first time he saw the Appellant. He did not know him before. Therefore it was a case of identification.

13. In the case of **Wamunga vs. Republic (1989) KLR 424** the Court of Appeal held at **Page 426** that:

“..it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

14. In the case of **Chogo vs. Republic (1985) KLR 12** the Court stated that:

“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person’s voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.”

15. In the case of **Karani vs. Republic (1985) KLR 290** the Court stated that:

“Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification.”

The Complainant stated that:

“When we were going home, I heard Isaac tell me to stop. Accused came with a panga and cut my head three times. I have three scars..... I became unconscious. I gained consciousness after three months at medical..... I was with Kamau and Gatumu.”

16. Having left the bar at **7.00 p.m.** it must have been dark. It was imperative for the witness to state what enabled him to see his assailant. He stated that the Appellant told him to stop. What he did not state is what made him believe it was his voice because in examination-in-chief he said that when he forced him to buy him alcohol it was the first time he saw him. Though he had contradicted himself by stating that he used to see him on a motor-bike.

17. The Appellant has faulted the Court for relying on a single witness evidence. **Section 143** of the **Evidence Act** provides that:

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

In the case of **Keter vs. Republic (2007) 1 EA 135** it was stated that:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses who are sufficient to establish the charge beyond any reasonable doubt.”

18. The two (2) individuals who were with the Complainant did not testify to support his allegations. It was indicated that **Kamau** recorded a statement but he was not availed to testify. **Kamau** and **Ndegwa** were the only persons who would confirm the fact that the assailant of the complainant was the Appellant.

19. It was stated that the Appellant was arrested by **Gambirie, Kinga** and **Waiganjo** but these persons were also not called as witnesses to shed some light on how the Appellant was arrested and what prompted them to act if indeed they arrested him.

20. This is a case where neither the arresting officer nor the Investigating Officer testified. In the case of **Jeremiah Gathiku vs. Republic (Criminal Appeal No. 73 of 2008)** it was stated that:

“..... the effect of failure to call police officers in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate.”

21. This is a case where circumstances clearly demonstrated the need to expound on how investigations were carried out that culminated into the arrest of the Appellant. Evidence that was adduced by the Prosecution was barely adequate. It can be authoritatively stated that an adverse inference can be drawn that if **Kamau** and **Ndegwa** had testified probably their evidence could have been adverse to the Prosecution (See **Bukenya vs. Uganda (1972) EA 549**).

22. For reasons given, it was unsafe to convict the Appellant. In the premises the Appeal is meritorious, therefore, I quash the conviction and set aside the sentence imposed. The Appellant shall be released forthwith unless otherwise lawfully held.

23. It is so ordered.

Dated, Signed and Delivered at Nakuru this 13th day of December, 2018.

L.N. MUTENDE

JUDGE