



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIIAYA

CRIMINAL APPEAL NO. 30 OF 2016

(CONSOLIDATED WITH CRIMINAL APPEAL NO. 19 OF 2016)

JARED OCHIENG OGOMA.....1ST APPELLANT

WYCLIFFE LIBOI WASENGO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Originating from an appeal against both conviction and sentence dated 26.12.2015 in Cr. Case No. 67 of 2014 in Siaya Law Courts before Hon. H. Wandere – P.M.)

JUDGMENT

1. The Appellants **Jared Ochieng Ogoma** and **Wycliffe Liboi Wasengo**, (the 1st and 2nd Appellants respectively) were charged with one Count of **Robbery with Violence Contrary to Section 296 (2) of the Penal Code**. The particulars of the offence are that on the 22nd day of January 2014 at Nyandiwa Sub-Location in Gem District within Siaya County jointly robbed Felgona Omire Musula of her personal documents, cash KShs.200,000/= and Electa torch worth KShs.300/= and immediately before such robbery did cut the said Felgona Omire Musula.

2. The Appellants were tried and at the conclusion of the trial were found guilty, convicted and sentenced to suffer death.

3. Aggrieved by both the conviction and the sentence each of the appellant filed separate appeals, urging different grounds which can be summarized as follows:-

(i) The conditions at the material time were not conducive to positive identification.

(ii) The trial was not properly conducted and vital witnesses were not availed for cross-examination.

(iii) The Prosecution case had fundamental contradictions and inconsistencies which ought to have been registered in favour of the appellants.

(iv) That the appellants' defence was not considered.

4. The Appellants appeared in person whereas Mr. Ombati, Learned State Counsel appeared for the State.

5. I am first appellate court and I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the case of **Kiilu and Another V. R (2005) 1 KLR 174** where the court of Appeal held thus:

“an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions.”

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

6. The facts of the prosecution case form part of the record of appeal and I need not reproduce the same save to summarize the prosecution case and the defence.

7. The Prosecution case is that: - on 22.1.2014 during the night herein the complainant, PW1 herein, was asleep in her house with her grandson E.O. PW2, a minor aged 5years, in different rooms, when she heard people breaking into her house. This was at around 2.00a.m. Her bedroom door was not locked and PW1 started screaming but no one came to her aid. PW1 saw people enter her room shining bright torch lights on her and that she saw them very well. That those people were asking for money. The complainant saw the 2nd accused, Litole and heard his voice, as she knew him very well as he is her leasee over part of her land for the last 12years. That PW1 had lit her torch but Litole ordered her to look down when she looked at him, cutting her on the middle of the head and her legs severally at the lower side. The 2nd accused as he was swinging the panga he kept on picking complainant's things and giving them to the 1st appellant. The complainant was robbed cash Ksh.200,000/=; a torch worth Kshs.300/=, documents and proceedings of a case at Ukwala court in respect of a land dispute between the complainant and the 2nd appellant. That after robbery the complainant was assisted by PW2, E.O. a minor aged 5 years to another grandson's house. PW1 was then taken to Yala Hospital for treatment, then reported the matter to Yala Police Station and gave the names of Ochieng and Litole as her assailants to the Police. The complainant stated Ochieng's brother had married her daughter called Margaret Ngesa whereas the 2nd Appellant is a close neighbour. PW1 stated the intention of the 2nd appellant is to take over her land but the court had issued an injunction order. The appellants were subsequently arrested and charged with this offence.

8. The 1st Appellant denied the offence. He told the court that on 6.1.2014, he witnessed a land sale agreement between one Collins Okumu Omoro and the complainant over the sale of 2acres of land at Kshs.200,000/=. That the agreement was executed before M/s. Maxwell Ogonda, Advocate. That on 22.1.2014, Collins informed the 1st Appellant that the complainant was attacked and robbed her money. That the 1st Appellant went to the complainant's home and called a *Boda Boda* to take the complainant to the hospital and he accompanied her to the police where complainant told Police the 1st Appellant was one of the robbers and that the 2nd Appellant wanted to purchase her land and she had declined to sale it to him.

9. The 2nd Appellant denied the offence and gave a defence of alibi. He told the court that on 16.6.2006, he met the complainant before Chief for his first time when she sold her a parcel of land to him but she declined to put him in possession hence he filed a case at Ukwala Law Courts which is still pending. That the case was set up for hearing on 22.1.2014 but the 2nd Appellant's Counsel advised him the matter had been taken out of the cause list.

10. The Appellants put in written submissions in support of their grounds of appeal. The first Appellant in his written submissions has urged that the conditions prevailing at the alleged scene were not

conducive for a positive identification being a dark night. That the appellant was at his home working. He discovered that the Police were looking for him so he decided to go to Police Station to inquire about it and upon identifying himself to the police he was put in cells. He stated that PW2 stated in his evidence he was told by Richard Ouma to mention the 2nd Appellant, that he has a land case with Felgona that the prosecution did not prove their case beyond any reasonable doubt, that the 1st Appellant was framed as he had witnessed the land sale between the complainant and the purchaser.

11. The 2nd Appellant on his part urged that he was convicted on identification by recognition, which he urged was not free from error, that the prosecution's evidence was fabricated and uncorroborated, that the prosecution's evidence was contradictory and riddled with inconsistencies to justify a conviction and lastly the defence was not considered.

12. Mr. Ombati, Learned State Counsel opposed the appeals urging that the recognition of the assailants was free from any error. He however, stated though there were contradictions of the evidence of PW1 and PW2 on voice identification, such contradiction cannot be overstretched as PW1 was 70 years old, elderly and PW2 a minor aged 5 years, whose evidence could be relied upon, stating the contradiction on the P3 form is minor and do not take away the fact that the complainant was injured and that contradiction is not material as the complainant was injured. PW2 admitted he was coached on what to tell the court.

13. **Whether the conditions at the time of the commission of the offence were conducive to positive identification of the assailants?** The robbery in the instant case took place at night at around 2.00a.m. in a rural set up. The trial Court made findings that the appellants were positively recognized as the assailants. It is well settled principle that evidence of visual identification in criminal cases can cause a lot of miscarriage of justice if not carefully tested. In the case of **R V Turnbull and others [1976] 3 All ER 549** Lord Widgery C.J. had this to say:-

“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?”

14. PW1, (Felgona Omire Musula) testified that she was able to recognize the Appellants with the aid from torch lights shone on her and as she lit her torch when she was ordered to look down. In the case of **Maitanyi V Republic (1986) KLR 198**, the Court of Appeal at page 201 held thus:

*“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 test if none of these matters are unknown because they were not inquired into See **Wanjohi & Others –vs- Republic (1989) KLR 415.**”*

15. PW1, Felgona Omire Musula testified that the light shone at her by the assailants was bright to enable positive recognition of the Appellants. I note the complainant also stated at the material time she had lit her torch and was ordered to look down. The complainant stated she was able to see the Appellants very well and heard the voice of the 2nd Appellant. I note in this case, the complainant did not state that, her torch light was directed at the Appellants or not. She did not state how long the Appellants were under her observation, from what distance, she did not state the intensity of her lit torch and whether there was anything impeding her observation.

16. PW2, E.O. a minor who was in the same house with the complainant was brief in his evidence. He mentioned that at the time of the attack it was night and that he saw people enter the house but he did not mention what enabled him to see the attackers. He did not mention any source of light. That if PW2, saw the attackers he should have mentioned the source of light. He even in his evidence during cross-examination stated as follows:-

“Ouma told me to say it was LITOLE”

He thus admitted that his evidence was hearsay and PW2 being a minor aged 5 years, his evidence needed corroboration. I have very carefully searched for corroboration of PW2’s evidence but I have not found any in the proceedings and I find his evidence should not have been relied upon. What therefore remained for consideration is the evidence of the complainant alone.

17. I note that the evidence against the appellants is a testimony of a single witness. In the case of **Charles Maitanyi V R (1986) KLR 198** the Court of Appeal held that:

“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 greatest care, the evidence of as single witnesses respectively the identification.”

18. The Appellants contend that the trial court failed to reconcile the inconsistencies in the prosecution’s case. It is the Appellants’ contention that the complainant’s, PW1, evidence is inconsistent, the inconsistencies were not considered by the trial Court and that the Appellants were framed. The Appellants contend that PW1’s evidence is that she was attacked on the night of 22.1.2014 yet PW5, Emmanuel Muoko, the Clinical Officer stated he treated her on 21.1.2014 at night. The P3 form exhibit P1 show the date and time of the alleged offence to be 21.1.2014 and time of report on 21.1.2014 at 0720hours. PW5 contradicted the evidence of PW1 who had stated that she was attacked on the night of 22.1.2014 and that she went to the hospital on 22.1.2014. Similarly, PW3, PW4 and PW1 contradicted the evidence of PW6. On how the assailant’s gained entry into PW1’s house, PW1 stated the assailants broke the doors whereas PW6 contradicted PW1 by stating her mud wall had been dug then entry gained to the bedroom. I have examined the evidence of PW1, PW2, PW5 and PW6 and I am satisfied that there are fundamental inconsistencies that dent the prosecution’s case. That the Appellants’ have succinctly identified the alleged inconsistencies and how they dent the prosecution’s case.

19. In **Karani V Republic (1985) KLR 290** it was held:-

“Identification by voice nearly always amounts to identification by recognition; however, care must be taken to ensure that voice is that of the appellant.”

In the instant case the complainant testified that she heard the voice of “LITOLE”, the 2nd Appellant and was able to recognize him.

20. I have now to consider whether the complainant was able to recognize and identify the Appellants by visual appearance and voice as that of the 2nd Appellant. I note at the material time of the attack it was dark, that the attack was fast, sudden in that the first door was hit with a stone and it gave in, whereas other doors were not locked, torch light was flashed at the complainant, she was asked for money and cut. It is from that position she claimed to have recognized the 2nd Appellant’s voice. I note the Appellant did not in her evidence in chief, state in what language the attackers were speaking to her. She did not state the last time she had spoken to the 2nd Appellant and in what language. She did not state though they were neighbours that they used to talk regularly and that she had known the 2nd Appellant’s voice. The complainant did not as per evidence of PW3, PW4 and PW6 tell any of them she was able to identify the assailant by his voice. She did not state she was familiar with the 2nd Appellant’s voice and what it was that made her recognize the voice as that of the 2nd Appellant.

21. Upon evaluation of the evidence of PW1, I am not satisfied that in all circumstances of this matter, the

complainant was able to positively and correctly recognize the attackers as the Appellants nor the voice of the attacker as that of the 2nd Appellant.

22. The Appellants contend that the trial was not conducted properly as vital witnesses were not availed for cross-examination. The prosecution in proving a fact need not call a particular number of witnesses to prove a fact. **Section 143 of the Evidence Act** provides:-

“(143). 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.”

23. However, when prosecution avails a witness and the witness gives evidence and the case is adjourned for cross-examination, such a witness has got to be produced for cross-examination by the prosecution. In this case, PW4 gave evidence and was not availed for cross-examination inspite of the prosecution having promised to do so and the reason given was not sufficient. PW4’s evidence was part of the evidence relied upon by the prosecution and as such evidence was not tested through cross-examination, I find the Appellant’s Constitutional Rights to fair hearing was violated **under Article 50 (1) (2) (b)(k) of the Constitution of Kenya 2010** which provides:-

“Section 50 (1) (2) (b) of the Constitution of Kenya 2010 provides:-

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a)

(b) to be informed of the charge, with sufficient detail to answer it;

(k) to adduce and challenge evidence

I find failure to avail PW4 for cross-examination violated the Appellants Constitutional Rights to a fair hearing. I find that failure prejudiced the appellants and the proceedings before the trial Court were null and void.

24. The Appellants urged that their defences were not considered. The appellants’ defence were defences of alibi. That they were not at the scene of the robbery. The trial court did not consider the Appellants’ defence. PW1 in her evidence did not adduce evidence that placed the Appellants’ at the scene of robbery. PW2 stated he was coached to implicate the 2nd Appellant. PW1 did not tell PW4 who her attackers were but PW4 stated he was told by two of the grandsons of PW1 who the attackers were. The trial Court did not consider the defence of the 1st appellant, that he was a mere suspect as he witnessed the sale of the land by the complainant whereas the 2nd Appellant had a grudge over land dispute with the complainant. The Accused do not have any burden to prove the alibi defence they put forward is true but all they had to do is put some doubt in court’s minds. In this case, there are doubts as to whether the offence was committed by the Appellants. I find the trial Court erred in failing to give the appellants the benefit of doubt as the prosecution case had not been proved beyond any reasonable doubt.

25. The upshot is that the appellants’ appeals are meritorious. I allow the appellants appeals. I accordingly quash the conviction, set aside the sentence. Accordingly I direct the appellants be forthwith set at liberty unless otherwise lawfully held.

DATED AND SIGNED AT SIAYA THIS 16TH DAY OF MARCH, 2017.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 16TH OF MARCH 2017

In presence of:

The 1st Appellant in person - Present.

The 2nd Appellant in person - Present.

M/S. Ombati: for State.

Court Assistant:

1. George Ngayo
2. Patience Ochieng
3. Sarah Ooro

J. A. MAKAU

JUDGE