



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 216 OF 2013

JOHN MAINA MBOGO.....APPELLANT.

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence from the Chief Magistrate's Court at Kibera in criminal Case No. 892 of 2012 delivered by Hon. Juma, SPM on 8th October, 2013)

JUDGMENT

Background

The appellant was charged with two counts of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars of the first count were that, on the 14th day of February, 2012 at the junction of Benin Drive and Pan Africa Avenue in Runda within Nairobi County, with others not before the court, while armed with dangerous weapons, namely two pistols, robbed Stephen Onserio Ontita of a Toyota Corolla car registration number KBL 461K valued at Kshs. 800,000/, identity card number 20869275, cooperative bank ATM card for account number 0116410512600, Post Bank ATM card and a wallet valued at Kshs. 500/ all amounting to a value of Kshs. 804,000 and immediately after the said robbery threatened to use personal violence on the aforementioned Stephen Onserio Ontita.

The particulars of the second count were that on the 14th day of February, 2012, at the junction of Benin Drive and Pan Africa Avenue in Runda within Nairobi county, jointly with others not before court, while armed with dangerous weapons, namely two pistols, robbed Inge Germaine Celestine of Kshs. 20,000/ in cash, BNP Bank ATM card, camera worth 40,000/, Samsung mobile phone worth 16,000/, shopping worth Kshs. 12,000/, UN Laisser Passport all valued at Kshs 88,000/ and immediately after the said robbery threatened to use personal violence to the aforementioned Inge Germaine Celestine.

The appellant was convicted in count I but acquitted in Count II on ground of lack of sufficient evidence. He was accordingly sentenced to death. Being dissatisfied with the conviction, he preferred the appeal herein. He filed a Memorandum of Appeal on 20th November, 2013 in person but was thereafter represented by a counsel, M/s Betty Rashid. In brief, he was dissatisfied that the learned trial magistrate erred in finding that he was properly convicted whereas the conditions for a favorable identification were not available. He was also dissatisfied that the learned trial magistrate convicted him based on the evidence of a single witness without warning herself of the dangers of so doing. Further, he faulted the prosecution for failure to call crucial witnesses and relying on contradictory and inconsistent evidence.

Further, he was dissatisfied that his alibi defence was not properly considered and on the whole, that the case was not proved beyond all reasonable doubt.

Submissions

The appeal was disposed of by way of filing written submissions. Submissions for the appellant were filed by learned counsel Ms. Betty Rashid on 16th March, 2016. In brief, she submitted that the appellant was not properly identified. She noted that the robbery occurred at night and PW2 who was the only complainant who testified did not state the kind of light and its strength that enabled him to identify his attackers. In particular, she noted that PW2 would not have identified the robbers because in his testimony, he stated that the robbers kept on shouting at them to look down. PW2 would not have had an opportunity to identify the robbers who were in his car. Furthermore, it was contended that PW2 did not state that the car had any lights inside that would have created a conducive and favourable environment for identification.

Learned counsel submitted that nothing was recovered from the appellant despite the fact that PW2 testified that he and his customer were robbed of various items. She further submitted that the prosecution failed to dislodge the appellant's alibi defence. She faulted the learned trial magistrate for introducing new evidence in her judgment by observing that **'PW2 kept stealing glances, looking up as they drove from Runda to Muthaiga Road up to Thika Super Highway'** whereas nowhere in his evidence that PW2 testified that he kept looking at the robbers. Finally, she submitted that the conviction of the appellant was against the weight of the evidence which did not prove the case to the required standard.

Submissions for the Respondent were filed by Ms. L. M. Nyauncho, Prosecution Counsel on 22nd March, 2016. She submitted that the prosecution proved their case beyond any reasonable doubt. On identification, she submitted that the same was watertight in that PW2 was with the robbers for 45 minutes between 8.45 to 9.30 p.m. Furthermore, PW2 testified that the vehicle had sufficient light that enabled him to properly see the appellant who was the only unarmed robber. Furthermore, PW2 grabbed him when he and his customer shouted for help and the appellant attempted to leave the car. Members of the public responded to the call of distress and assisted PW2 to ensure that the appellant did not escape. The appellant was thereafter rescued by PW1 who was a traffic police officer manning the traffic at the scene of crime.

Evidence

This court being the first appellate court is under a mandate to reevaluate and re-examine the evidence before it afresh and come up with its own independent conclusions. See **Okeno Vs Republic (1972) EA 32**.

The prosecution's case was that on the date in question the first complainant, who worked as a taxi driver, picked up the second complainant at the Village Market in the course of his employment and he was tasked with the duty of taking him to his hotel, Casablanca Guest House in Runda. En route at the junction of Benin and Pan Africa Avenue they were accosted by three men, two were armed with pistols. The men entered the vehicle. Two of them occupied the front seats relegating the first complainant to the space between them before throwing him to the back seat where he sat between the appellant, on his right, and the second complainant, on his left. One of the robbers who sat on the front passenger seat, and who was in possession of a pistol, jumped into the space between the front and back seat and proceeded to rob the two complainants of most of their possessions as outlined in the particulars of the charges above. He proceeded to procure their ATM pin codes under threat of violence and wrote them all down. In pursuit of greater loot the robbers headed toward the central business district in a bid to withdraw money from the accounts of the complainants. The appellant who was at the back kept asking the complainants to keep their heads down.

According to PW2 who was the complainant in count I, the robbers drove toward Thika Road. The Thika Super Highway was still undergoing construction and as such when they approached Pangani there was

a traffic snarl up with traffic police officers trying to guide it accordingly. PW2 on glimpsing around and realizing that this was a golden opportunity to escape opened the car door and let out a scream. The second complainant screamed as well and two of the robbers on realizing all was not well jumped out of the car and ran off. The appellant who sat at the back also tried to escape but PW2 held tightly onto him and was assisted by members of the public who responded to the alarm raised. The mob set upon the appellant and started instilling mob justice when they were interrupted by PW1, No 76905 P.C. Dickson Kimanthi, a traffic police officer who was near the scene controlling traffic.

The appellant was taken to Pangani Police Station. He was presented before court on 16th February, 2012. The plea is deferred to 23rd February, 2012 as he was unwell following the beating by the members of public.

The prosecution called three witnesses. PW1 and 2's evidence comprised the summary of the prosecution case. PW3 who was the investigating officer corroborated the same and after analyzing the same formed an opinion that the appellant was culpable and he charged him accordingly.

The appellant gave an unsworn statement of defence in which he denied committing the offence. His defence was that he was a case of a mistaken identity. He stated that he was going home in Mathari. He alighted from a matatu at Pangani. A vehicle brushed him. Some people alighted from a matatu and one of them hit him and he fell down. That is when PW2 started shouting 'thief' 'thief' and members of the public started beating him senselessly. A police officer rescued him from the mob. He called for a vehicle and he was taken to hospital and later to Gigiri Police Station. The appellant stated that he lost a mobile phone, a watch and shoes.

DW2, Monica Njoki Maina a sister to the appellant testified that on 15.2.2012, the appellant's wife told him that the appellant had not been at home for the last two days. He visited Gigiri Police Station where he was informed that the appellant had been taken to court. He further testified that he had bought the mobile phone the appellant lost in Saudi Arabia. He gave it to him through a friend, one Anne as a present for his birthday.

I have now considered the said evidence alongside the rival submissions. I have summarized the issues for determination as here under;

- I. **Whether the appellant was properly identified.**
- II. **Whether the defence raised by the appellant at the trial was considered.**
- III. **Whether the charge was proven beyond reasonable doubt.**

Determination

The first issue that this court must consider is whether the appellant was properly identified. Identification is a key ingredient of the charge of robbery with violence. The appellant contended that the conditions for identification were such that a proper identification was not possible given that there was no light when the complainants were accosted as it was at night. It is also factual that the identification was of a single witness in which case the trial court ought to have warned itself of the dangers of convicting based on such evidence especially when conditions of identification are difficult. I am minded of this position because there lies the possibility of a mistaken identity even when a person strongly believes he identified his assailant. There exists an avalanche of case law in this area. One, of course, is the well reknown case of **R vs Turnbull & another 63 Cr. App. R. 132** in which it was observed that;

“First, whenever 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 special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reasons for the need for such 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. Provided this is done in clear terms the judge need not use any particular form of

words.

Secondly, the judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have this accused under observation? At what distance? In what light? Was the observation impeded in any way as for example by passing traffic or press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the prescription of the accused given to the police and the witness when first seen by them and his actual appearance?"

Again in John Muriithi Nyaga vs Republic Nairobi Court of Appeal Cr. Appeal No. 201 of 2007 the court stated that:

"Evidence of a single identifying witness especially where the conditions for positive identification are difficult must be tested with greatest care especially where the life of an accused is at stake."

Taking into account the above decided cases, it is now the onus of this court to re-evaluate whether indeed the appellant was properly identified and whether conditions for a proper identification were suitable. I bear in mind that the robbery took place at night and therefore, relooking at the events of the night is of utmost importance. The court will start with PW2, who was in the vehicle with the appellant from about 8.45 pm to around 9.30 p.m. The complainant was in the middle at the back seat with the appellant next to him on the right. The complainant contended that the appellant together with another not before the court had stolen their belongings and had also gained from them their ATM PIN pass codes which had been written down. The particulars of the events and particularly the fact that the appellant, according to PW2, kept telling them to keep their heads down is an indication that they were looking up from time to time therefore the constant need of a reminder by the appellant. The fact that PW2 was also very conversant with their location at all material times shows that he was in a position to see and make out his surroundings which enabled him to grab the opportunity to seek help when it presented itself. This is buttressed by the fact that he was able to notice the location where there was a traffic snarl up which was the best place he and his customer would have called out for help. More importantly is the fact that the complainant also got hold of the appellant when he tried to escape and was assisted by members of the public. That means that the appellant was caught on the spot and no time had elapsed between the time the offence was committed on the one hand and when PW2 was held captive up to the time of the arrest of the appellant on the other. His assertion that he was arrested by PW2 as he fell after a brush up with a pedestrian is not true. Instead, the PW2 hang on to him as he attempted to escape from the car. He could not therefore, have been mistaken for another person.

In the circumstances, although the learned trial magistrate did not warn herself of the dangers of convicting the appellant on the identification of only PW2, the evidence available was watertight and leaves no doubt that the appellant was in the company of two other armed robbers who escaped.

Besides, the evidence of PW2 was corroborated by that of PW1 Police Constable Dickson Kimanthi who rescued the appellant from the wrath of a mob. Upon enquiry, PW3 was informed by the complainants that the appellant was one of the robbers who had accosted them. PW3 on the other hand summed up the evidence of the prosecution and confirmed that indeed the appellant was rescued from mob justice after being arrested as part of a gang that had robbed PW2. This court is therefore satisfied that the identification of the appellant was water tight.

The second issue pertains the appellant's contention that the alibi defence he set out at the trial was never disproved which fact the trial court did not consider. The appellant, in his unsworn testimony stated that on the material date he was crossing the road, after alighting from a matatu on his way

to Mathari when his wife called and asked him where he was whereupon he explained that he was on his way home. There was traffic and as he was crossing the road he saw a car hit a pavement and one of the men who emerged from the vehicle came out and knocked him down. As he was trying to wake up PW2 caught him and started shouting that he was a thief whereupon members of the public set on him and beat him senselessly.

It is trite that when an accused raises an alibi defence, the onus to disprove the same lies with the prosecution. In considering an alibi defence, all that the court is required to do is to determine whether the accused's alibi casts doubt in the mind of the court that he did not commit the offence. See the case of Kiarie vs Republic [1984] KLR, 739 in which the Court of Appeal sitting in Nairobi in Criminal Appeal No. 93 of 1983 held that;

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge, does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces in to the mind of a court a doubt that it is not reasonable. The Judge had erred in accepting the trial magistrate's finding on an alibi because the alibi had not been supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi

I have given a chronology of the events of the fateful day. I have given reasons why I think the appellant was properly identified as a culprit. I need not add more save to emphasize that the identification of the appellant sufficiently dislodged his alibi defence.

One more issue of attention regards the Sony Ericsson phone produced in court. The appellant contended that the phone belonged to him as did PW2. PW2 testified that the robbers abandoned the phones in the car after they took off prematurely while the appellant contended that it was taken from him during the beating. This court has glimpsed at the record and found that the trial court did look at this question. This court has re looked at the same and given that the phone was found in the motor vehicle and the fact that the appellant at no point contended that PW2 or any other party took his phone, its presence in the motor vehicle lends more credence to the assertion of PW2 than it does to that of the appellant.

The appellant also submitted that his defence was not considered at the original trial. I have read the judgment of the trial court which summarized the appellant's defence. The learned trial magistrate also properly tested the veracity of the prosecution's case and was satisfied that the same was cogent and water tight. I am of a similar view. That ground of appeal thus lacks merit.

The final issue that this court must consider is whether the charge was proven beyond reasonable doubt. The prosecution established that all the elements of the offence of robbery with violence were proved. The appellant was in the company of other robbers who were armed. They successfully robbed PW2 and his customer of various items by use of force and threats. There is no doubt then that the burden of proof was discharged to the require standard.

Having re-evaluated the entire prosecution evidence, I arrive at a finding that the case was proved beyond all reasonable doubt. This appeal lacks merit and the same is hereby dismissed.

DATED AND DELIVERED in NAIROBI this 12TH day of MAY, 2016

GRACE NGENYE-MACHARIA

JUDGE

In the presence of:

Miss B. Rashid for the Appellant.

Miss Aluda for the Respondent.