



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL APPEAL NO. 88 OF 2011

Ann Wairimu Kimani.....Appellant

Versus

Republic.....Respondent

(Appeal against Judgement, sentence and conviction in Criminal case number 1171 of 2010,

R vs Ann Wairimu Kimani at Nyeri, delivered by Hon. S. A. Okato,

S.P.M., delivered on 18.5.2012).

JUDGEMENT

Ann Wairimu Kimani (hereinafter referred to as the appellant) was charged with the offence Robbery with violence contrary to section **296 (2)** of the Penal Code^[1] at the Chief Magistrates Court at Nyeri. It was alleged that on the 21st day of December 2010 at Nyeri Golden Lodge in Nyeri County of Central Province, jointly with others not before the court while armed with dangerous weapon namely, a knife, robbed **Lucy Wanjiru Muguku** the items listed in the charge sheet and immediately before such robbery wounded the said **Lucy Wanjiru Muguku**.

The principles to be kept in mind by a first appellate court while dealing with appeals are:-^[2]

- a. There is no limitation on the part of the appellate court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
- b. The first appellate court can also review the trial court's conclusion with respect to both facts and law.
- c. It is the duty of a first appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
- d. When the trial court has breached provisions of the constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.

PW1 Lucy Wanjiru Muguku testified that she was working at New Golden Lodge as a receptionist and that 20th December 2010 at around 8.00pm a male customer paid for a room and asked whether it was in order for his brother to come and sleep in the room. She replied that was possible provided that the brother came with the receipt she had issued to him. Later at around 3.00am a man came in the company of the appellant, asking for a room and as she started issuing a receipt the man said he had already paid for the room and he produced the receipt prompting her to recall the earlier arrangement. She took a towel, key and soap and went to open the room for them and as she switched on the lights, she was pushed into the room. She was pulled inside, the man produced a knife from his coat and aimed at cutting her throat while the appellant was holding her at the shoulders from behind. The appellant warned her not to scream or make noise and that the man would not kill her if she told them the truth about what they asked. They wanted to know where the money was. They put her on the bed, the appellant covered her face with her jacket. The appellant had a water bottle, she ordered her to drink the water or she would be killed. She drunk 3/4 of the water which was bitter.

She told them that the money was at the reception, the appellant took the keys and gave them to the man who made a call and another man entered the room, the two men left as she remained with the appellant. The appellant kept on threatening her if she did not drink the water. The two men came back and this time they left with the appellant. They locked her from outside. She started feeling dizzy but managed to go to the door and started banging it drawing the attention of her colleague who came and opened for her. She went to the reception, the lights were off, all the money including three phones were missing. Calculations revealed the lost sum was Ksh. 28,000/=.

She lost consciousness and regained it at the Hospital. She had a cut wound on the left hand. She saw the appellant at the police station and was able to identify her. Her evidence was that there was light and she was with the appellant for about 20 minutes and that the appellant held the water for her.

PW1 was later recalled for cross-examination by the appellants counsel and upon cross examination she reiterated that she identified the appellant at the police station and that the appellant was in the same clothes she was wearing at the time of the offence.

PW 2 a taxi operator stated that on 21st December 2010 at around 4.30 am a lady customer asked for taxi services to Impala Hotel and on arrival she asked to be taken to Temple Road and again asked to be taken to Karatina and on the way they were followed and stopped by person on a motor bike and was asked to return and upon going back the lady customer was asked by police officers to disembark from the car. This witness was also recalled for cross-examination and he maintained his earlier account. **PW3** was the Boda Boda rider whose evidence was that a lady came from Spinners bar screaming that she was being robbed, asked that he takes her to the police station and she was there for between 10-20 minutes and came out and asked to be taken to Impala Bar where she could get help from guards but again asked to be taken to where she could get a taxi.

PW4 re-arrested the appellant after she had been apprehended by boda boda operators while **PW6** was the investigating officer.

The trial magistrate ruled that the appellant had a case to answer and put her on her defence. The appellant opted to give unsworn evidence. She stated that prior to her arrest, she used to sell second hand clothes which she used to buy at Gikomba, that on 20th December 2010 she bought clothes from Gikomba and went to Karatina Market to sell and as for the clothes that remained, she came with them to Nyeri Town shop, that she had leased a house at St. Mary's School where she used to keep the clothes which she had not sold.

She stated that she woke up at 4 am to prepare to go to Nairobi, that she called a one Ndungu, a hand cart pusher to help her carry the clothes, that he carried one sack, came for the second one and delayed to come for the third one prompting her to call him and he stated that he had not gotten someone to leave with the two sacks he had carried. She went to the stage only to find that he had not reached there. She proceeded to a stage near Golden stage and asked for a Boda Boda rider to take her to the police station, that she was at the police station for 30 minutes and the police finally told her the issue could be handled

by the chief. She asked the Boda Boda rider to take her to the stage to check if Ndungu had arrived, but she did not find him. She then asked for a taxi to be taken to Karatina, that they passed through the house and informed a neighbour what Ndungu had done, then they proceeded to Karatina but near a petrol station at Nyeri they were intercepted and she was taken to the police station where she was told she was required regarding a robbery incident. She also stated that the police searched her house but found nothing.

After evaluating the above evidence, the trial magistrate found the appellants guilty of robbery with violence and convicted her of the offence and sentenced her to death. Aggrieved by the said finding, the appellant appealed to this court and advanced **10** grounds of appeal in the amended petition of appeal which in my view can be safely reduced to **one**, namely whether the prosecution proved the charges to the required standard to warrant the conviction.

The appellants counsel filed written submissions and cited several authorities which I have considered.

Counsel for the DPP also filed written submissions and maintained that the learned magistrate rightfully and thoroughly analysed the evidence and the law and arrived at the correct decision.

Counsel for the appellant has strongly faulted the evidence of identification and submitted that it was totally unreliable and unsafe to support the conviction. The key question that arises is whether indeed the appellant was positively identified. In answering this question, I have looked at the evidence of **PW1** on record with great care, and in particular whether or not she was able to give some description of identification of the appellant.

Identification evidence is defined as evidence that a defendant was or resembles a person who was present at or near a place where the offence was committed, or an act connected with the offence was committed. It is an established principle that there is a special need for caution before accepting identification evidence.

In the case of *Charles O. Maitanyi vs Republic*,^[3] it was held *inter alia* that it is necessary to test the evidence of a single witness respecting to identification, and that great care should be exercised and absence of collaboration should be treated with great care. The court in the said case added as follows:-

“.....There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his assailants, to those who come to the complainant’s aid, or to the police...if the witness received a very strong impression of the features of an assailant; the witness will be able to give some description..”

In *Kariuki Njiru & 7 others vs Republic*,^[4] the court held *inter alia* that the “*law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.*”

In the case of *Wamunga vs Republic*,^[5] the court of appeal held as follows:-

“.....Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification.”

As correctly held in the above cited case, I strongly hold the view that evidence based on identification in criminal cases can bring about miscarriage of justice and that it is of vital importance that such evidence is examined carefully to minimize this danger. The court must warn itself of the special need for caution before convicting the defendant.

Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted of it. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. Because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given, the law does permit a guilty verdict on the testimony of one witness identifying the accused as the person who committed

the charged crime. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the charged crime have been proven and that the identification of the accused is both truthful and accurate.

With respect to whether the identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony that are listed below.

With respect to whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person. I am also alive to the fact that it is necessary to test the evidence of a single witness respecting to identification, and take great care and caution to ascertain whether the surrounding circumstances were favourable to facilitate proper identification. These in my view include light, time spent with the assailant, clothes or any item that the witness may positively identify. Such evidence may be reinforced by sufficient collaboration and where there is no collaboration the court needs to treat it with caution.

Thus, in evaluating the accuracy of identification testimony, the court should also consider such factors as:-

- i. What were the lighting conditions under which the witness made his/her observation?
- ii. What was the distance between the witness and the perpetrator?
- iii. Did the witness have an unobstructed view of the perpetrator?
- iv. Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?
- v. For what period of time did the witness actually observe the perpetrator?
- vi. During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?
- vii. Did the witness have a particular reason to look at and remember the perpetrator?
- viii. Did the perpetrator have distinctive features that a witness would be likely to notice and remember?
- ix. . Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?
- x. What was the mental, physical, and emotional state of the witness before, during, and after the observation?
- xi. To what extent, if any, did that condition affect the witness's ability to observe and accurately

remember the perpetrator?

The positive identification of an accused is an essential element of any offence. It is a fundamental part of the criminal process. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution.

I have considered the evidence of PW1. A man and a lady came to the reception, she led them to a room, switched on the light, was pushed inside, forced to drink a bitter liquid, it was the lady who held the liquid and remained with her when the man took the keys, the lady kept on threatening her and forcing her to drink the liquid and more important at the police station she was able to identify her and also she was able to describe the clothes the appellant was wearing. She spent about 20 minutes with the assailants and particularly the lady who remained with her. There is nothing to suggest that her mental, physical, and emotional state before, during, and after the observation was such that she could not remember the assailants. There is nothing to show that her view or observation of the assailants was obstructed in any manner or to the extent that her view was substantially or wholly obstructed. Having carefully considered the questions I listed above, I find that the identification was reliable, positive and free from error.

In *Anil Phukan vs State of Assam*^[6] it was held as follows:-

“A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone”

A similar position was reiterated by the Court of Appeal of Tanzania in *Ahmad Omari vs The Republic*.^[7] Also discussing the same issue, the Court of Appeal of Uganda in *Okwang Peter vs Uganda*^[8] held as follows:-

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by the 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 in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is 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 witness, can safely be accepted as free from possibility of error”

The Supreme Court of Zambia in *Mwansa vs The People*^[9] citing previous decisions had this to say:-

“it is always competent to convict on evidence of a single witness if that evidence is clear and satisfactory in every respect, where the evidence in question relates to identification there is the additional risk of an honest mistake, and it is therefore necessary to test the evidence of a single witness with particular care. The honesty of the witness is not sufficient; the court must be satisfied that he is reliable in his observations.”

The law is also clear that there is no particular number of witnesses required for proof of any fact^[10] and that subject to well known exceptions, a fact may be proved by the testimony of a single witness. On the other hand, the burden weighs heavily on any Court considering the solitary evidence of a witness in respect of identification. The caution is that such evidence must be tested with greater care.

The case of *Abdulah Nabulele & Two Others vs Uganda*^[11] is one of the leading cases on identification by a single witness and the following rules are stated therein:-

- a. The testimony of a single witness regarding identification must be tested with the greatest care.
- b. The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.

c. Where the conditions were difficult, what is needed before convicting is other evidence pointing to the guilt.

d. Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge is alive to the danger of basing a conviction on such evidence alone.

I am fully aware that there is no formula to apply when it comes to consideration of the credibility of a single witness. The trial Court must weigh the evidence, consider its merits and demerits and having done so, decide whether or not it is trustworthy despite the fact that there are shortcomings and / or defects or contradictions in the testimony. In *Hassan Juma Kanenyera and Others v Republic*,^[12] it was stated that it is a rule of practice, not of law, that corroboration is required of the evidence of a single witness of identification of the accused made under un favorable conditions; but the rule does not preclude a conviction on the evidence of a single witness if the court is fully satisfied that the witness is telling the truth. I have reviewed the conditions prevailing at the time of the alleged offence and I find that the conditions cannot be said to have been un favorable. In fact as stated above, the conditions were favorable for the witness to identify the assailant.

Thus, even if the trial court is convinced beyond reasonable doubt that a crime was committed by someone, it cannot convict the accused of that crime unless it is also convinced beyond reasonable doubt that he/she is the person who committed that crime.^[13]

It is my finding that from the evidence adduced right from PW1 to the rest of the witness; a strong chain has been established showing that the appellant participated in the robbery. I also find that the prosecution evidence was not shaken on cross examination.

I have also carefully scrutinized the sworn defence tendered by the appellant and I find that the same is totally unconvincing. The appellant talked of a shop at Nyeri and that she had rented a house at St.Mary's School. It would have been prudent for her to either adduce evidence in support of the fact that she had rented a house including producing a lease document or calling a witness to support the said allegation.

The appellant stated that she proceeded to a stage near Golden stage and asked for a Boda Boda rider to take her to the police station. It would have been prudent to call the Boda Boda rider as a witness. She also alleged that she was at the police station for 30 minutes and the police finally told her the issue could be handled by the chief. This contradicts the evidence of PW3 who said that they went to the police station and the appellant never got out of the car and asked that they leave. In any event, she ought to have called the duty officer at the material time or ask for the production of the OB to ascertain whether she made such a report if at all she did. That piece of evidence, is in my view highly incredible in the circumstances. The appellant also said they passed through her house and she informed a neighbour what "Ndungu" had done to her. In my view this neighbour ought to have been called as a witness. On the whole, I find that the defence tendered by the appellant did not cast any doubts on the prosecution case.

Counsel for the appellant took issue with the fact that the workmate who responded after PW1 banged the door seeking for help was not called as a witness. Section 143 of the Evidence Act^[14] provides as follows:-

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

In *Julius Kalewa Mutunga vs Republic*^[15] the Court of Appeal held as follows:-

“..As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive”

The Court of Appeal reiterated the above position in the case *Alex Lichodo vs Republic*.^[16] Perhaps the

leading authority on this issue is the case of *Bukenya & Others vs Uganda*^[17] where the East African Court of Appeal held that:-

- i. *the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.*
- ii. *The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.*
- iii. *Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.*

But in the same vein the court was categorical to state that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. My re-evaluation and analysis of the evidence submitted in the lower court concludes that this is not a proper case for the court to make an adverse inference because as concluded below, the evidence tendered was sufficient to prove the facts in issue.

I hasten to support my above conclusion by reiterating that it should be made clear that the rule in *Jones vs Dunkel*^[18] which outlines the circumstances under which an adverse inference may be drawn where a witness is not called is grounded on common sense. The prosecution has discretion to assess the importance that the testimony of a witness would play, or would likely have played in relation to the issue concerned. Nonetheless, I should outline what I apprehend to be the basic jurisprudence that has developed in relation to the rule and that has governed the way I approach the issue at hand.

The unexplained failure by a party to give evidence or call a witness or tender certain documents may, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case. The failure to call a witness or tender documents can allow evidence that might have been contradicted by such witness or document to be more readily accepted. Further, where an inference is open from the facts proved, the absence of the witness or documents may be taken into account as a circumstance in favour of the drawing of the inference. But the absence of a witness or document cannot be used to make up any deficiency in the evidence. Thus it cannot be used to support an inference that is not otherwise sustained by the evidence. The rule cannot fill gaps in the evidence or convert conjecture and suspicion to inference.^[19]

Whether the failure to call a witness or tender a document gives rise to an inference depends upon a number of circumstances. In *Fabre vs Arenales*^[20] Mahoney J (Priestly and Sheller JJA agreeing) said that the significance to be attributed to the fact that a witness did not give evidence depends in the end upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. There are circumstances in which it has been recognized that such an inference is not available or, if available, is of little significance. The foregoing position was cited with approval by Miler JA in *Hewett vs Medical Board of Western Australia*^[21] and also the same position has authoritatively been stated by Heydon J D in *Cross on Evidence*.^[22]

The rule only applies where a party is required to explain or contradict something. What a party is required to explain or contradict depends on the issues in the case as thrown in the pleadings or by the course of the evidence in the case. No inference can be drawn unless evidence is given of facts requiring an answer. This position was upheld in the following cases, namely; *Schellenberg vs Tunnel Holdings*,^[23] *Ronchi vs Portland Smelter Services Ltd*^[24] and *Hesse Blind Roller Company Pty Ltd vs Hamitovski*^[25] and its also reiterated in *Cross on Evidence*.^[26]

When no challenge is made to the evidence of witnesses who are called, the principle in *Jones vs Dunkel* cannot be applied to make an inference in respect of other witnesses who could have been called to give the same evidence.^[27] A look at the record shows that PW1's evidence is largely unchallenged. As

explained in *Cross on Evidence*,^[28] the rule does not require a party to give merely cumulative evidence.

In order for the principle to apply, the evidence of the missing witness must be such as would have elucidated a matter.^[29]The appropriate inference to draw is a question of fact to be answered by reference to all the circumstances of the case.

I also find that the ingredients of the offence of robbery with violence pursuant to Section **296(2)** of the Penal Code^[30] as set out by the Court of Appeal in the case of *Johana Ndungu vs Republic*^[31] were satisfied. These ingredients as follows:-

- i. If the offender is armed with any dangerous weapon or instrument; or*
- ii. If he is in the company with one or more other person or persons, or;*
- iii. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person.*

It is also trite law that proof of any one of the ingredients of robbery with violence is enough to sustain a conviction under Section **296 (2)** of the Penal Code.^[32] The undisputed evidence of **PW1** is that the man was armed with a knife and aimed at her as the appellant held her from behind, and that satisfies **(i)** above. She said the appellant threatened her that the man would kill her if she did not tell the truth and she forced to drink the water. There was a threat to use violence, the witness sustained a cut wound on the hand and was forced to drink the bitter water and later lost consciousness.

I find that from the evidence adduced, the offence of robbery with violence as defined under Section **296 (2)** was proved. Accordingly, I hereby uphold the conviction and sentence imposed by the learned Magistrate.

The upshot is that this appeal is dismissed.

Signed, Delivered and Dated at Nyeri this **13th** day **September** 2016

John M. Mativo

Judge

^[1] Cap 63, Laws of Kenya

^[2] See *Ganpat v. State of Haryana* {2010} 12 SCC 59

^[3] {1988-92} 2 KAR 75

^[4] Criminal Appeal no. 6 of 2001 (Unreported)

^[5] {1989} KLR 424

^[6]{1993} AIR 1462

^[7] Criminal Appeal No. 154 of 2005, Ramadhani C.J, Munuo JA and Mjasiri J.A

^[8] Criminal Appeal No. 104 of 1999

^[9] Appeal No. 68 C/2004 {2012} ZMSC 67 (15TH August 2012)

[10] See Section Evidence Act, Cap 80, Laws of Kenya

[11] Court of Appeal of Uganda Criminal Appeal No 9 of 1978

[12] {1992} TLR 100 CA

[13] See People v. Knight, 87 N.Y.2d 873, 874 (1995) ("The court held that the reasonable doubt standard applied to identification.")

[14] Cap 80, Laws of Kenya

[15] Criminal Appeal No. 31 of 2005

[16] Criminal Appeal No. 11 of 2015-Visram A, Karanja W, and Mwilu P. JJJA.

[17] {1972}E.A.549

[18] {1859} HCA 8; {1859}101 CLR 298, 308, 312

[19] See Schellenberg vs Hesse Tunnel Holdings Pty Ltd {P2000} HCA 18

[20] {1992} 27 NSWLR 437, 449-450

[21] {2004} WASCA 170

[22] 7th Edition, Page 1215

[23] Cubillo (No. 2) 355

[24] {2005} VSCA 83

[25] {2006} VSCA 121 28

[26] Supra at page 1215

[27] See Cross on Evidence, Supra.

[28] Supra

[29] See Payne vs Parker, 202 Cubillo (No. 2) 360

[30] Supra

[31] Criminal Appeal No. 116 of 2005 (UR)

[32] See Olouch vs Republic {1985} KLR 549