



IN THE HIGH COURT OF KENYA

AT MERU

HCRA NO.13 OF 2013

LESIT, MAKAU, JJ

EVANS MWENDA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case no. 220 of 2012 the Senior Resident Magistrate Court at Chuka.)

JUDGMENT.

1. The Appellant Evans Mwenda was charged with one count of Robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were

“On the 19th February 2012 at Mitheru Market, Mitheru Location, in Tharaka-Nithi County, with others not before court, while armed with a piece of wooden frame, jointly robbed Patrick Mutegi of cash Ksh,10,000/- and immediately before or after the robbery wounded the said Patrick Mutegi.”

2. The Appellant was convicted of the offence and sentenced to death. Being aggrieved by the conviction and the sentence the Appellant filed this appeal. He has raised six (6) grounds of appeal namely:
 - i. **That I pleaded not guilty against the charge of robbery contrary to section 296(2) of the Penal Code.**
 - ii. **That the trial magistrate erred in both law and facts in failing to observe that the prosecution had not proved their case to a standard required by law.**
 - iii. **That the learned trial magistrate further erred in both law and facts in failing to observe that the prevailing circumstances at the scene could not have warranted a positive identification.**
 - iv. **That the learned trial magistrate still erred in both law and fact by failing to observe that I was not arrested on the spot.**
 - v. **That the learned trial magistrate erred in both law and facts by failing to give due consideration to my defense.**
 - vi. **That the grounds herein has been drafted in absence of certified copy of the trial proceedings, I pray to be served with the same to enhance me draft further film supplementary grounds of appeal.**

3. When this appeal came up for hearing the first thing we noted is the Appellant's youthful age. When we inquired from him, he said he was born in 1993, and in 2012 when he was charged with the offence out of which this appeal arises, he may have been 18 years, given the date when the alleged offence was committed was early in the year.
4. The Appellant relied on written submissions for his appeal. We have considered them.
5. Mr. Jalson Makori, the Prosecution Counsel, represented the State in this appeal. Mr. Makori conceded the appeal on grounds the particulars of the charge did not support the offence charged.
6. We are a first appellate court and have subjected the evidence adduced in the lower court to a fresh evaluation and analysis and have drawn our own conclusions, while bearing in mind that we neither saw nor heard any of the witnesses.
7. We have been guided by the principles set out in **Okeno Vs. Republic 1972 EA 32** where the Court of Appeal observed:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (ShantilalM. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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, see Peters Vs Sunday Post [1958] E.A 424.”

8. The Appellant has raised issues with identification saying that the security light at the alleged scene of attack was not described. We have evaluated the complainant's evidence. We note that the complaint was clear he came out of Nithi Slopes Bar after eating meat when he was confronted and eventually robbed.
9. The complainant's evidence was that he was in Nithi Slopes Bar where the electricity lights were switched on. He ate meat and that at 10 pm he left the bar to go home. The complainant did not describe the condition of lighting, if any outside at the scene of the incident. There was no evidence of how far the scene was from Nithi Slopes Bar where there was light.
10. The burden lay with the prosecution to prove the Appellant guilty of stealing from the complainant in company with others. Being evidence of a single identifying witness, the learned trial magistrate should have considered the evidence of the complainant carefully, and should also have warned himself of the danger of relying on the evidence of a single identification witness made under difficult circumstances.
11. In **CHARLES O MAITANYI VS REPUBLIC(1985) 2 KAR 75** the Court of Appeal held:

It must be emphasized what is being tested is primarily the impression received by the single witness at the time of the incident of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness so the chances of a true impression being received improve. 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 greatest care. It is not a careful test if none of these matters helping to test if none of these matters are known because they were not inquired into.

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 or her assailants to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify the accused, the recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters."

12. The evidence of the complainant was that he held onto one of the assailants until help came. PW2 says he was the help who went to complainant's aid. He says he found the complainant lying on the ground and the Appellant lying on top of him.
13. We considered other evidence and found inconsistency that was unresolved and also unexplained. The complainant stated that he was attacked at 10pm on 19th February 2012. He stated that he took the Appellant to Mitheu AP Camp same evening and handed over the Appellant to Administration Police Officers. PW2 corroborated the evidence of the complainant that indeed the Appellant was handed over to PW5.
14. PW5, who took over the Appellant from PW1 the complainant, and PW2 testified that he received the Appellant from an old man who was the complainant, and other young men who were with him. He said that the time was 11.30 pm and the date 20th February, 2012.
15. It may be argued that PW5 made a mistake concerning the date the Appellant was handed over to him. After all, the Appellant does not raise the date of arrest as an issue. We shall therefore treat that matter as a no issue.
16. The Appellant's defense was that he was walking home at 9.30 pm when three young men pounced on him from a motor bike. They interrogated him wanting to know what he did for a living and whether he abused alcohol. He was then apprehended and eventually taken to AP camp. He denied the charge.
17. The accused person does not bear any burden to prove his innocence. It is sufficient if the person charged creates a doubt in the mind of the court as to the veracity of the prosecution case.
18. We have analyzed the Appellant's defence vis-à-vis the prosecution evidence. As we noted earlier there is absolutely no evidence of the nature or condition of lighting at the scene of the alleged incident. Without evidence of lighting, the court cannot assume that there was any form of visibility at the scene. Given those circumstances, there is no certainty that the person the complainant grabbed and held onto was one of three who accosted and took his money. As the Court of Appeal held in Maitanyi case, supra:

"It must be emphasized what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible."

19. Given the lack of evidence of the conditions of lighting at the scene of the incident, we find that the evidence of the complainant that he caught one of the thieves at the scene of incident unsafe to accept. Given it may have been dark at the time of theft, there is no assurance that the possibility the complainant made a mistake when he caught the Appellant cannot be ruled out. We are impressed that the complainant appears to be sincere in his belief that the Appellant was one of those who stole from him. However, he may be sincere but sincerely wrong.
20. We are mindful that the standard of proof in criminal is one beyond any reasonable doubt. There is doubt in the evidence adduced before the court against the Appellant and that renders the conviction wholly unsafe. Furthermore the prosecution evidence having been below the required standard the Appellant's defence that he was apprehended as he innocently went home remains uncontroverted.
21. We will make a comment in regard to the charge and the manner in which it is framed. We have included the particulars of the charge at the beginning of this judgment. Section 295 of the Penal Code defines robbery as follows:

"295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to

any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery”

22.The prosecution framed the charge against the Appellant in thefollowing terms:

“...with others not before court, while armed with a piece of wooden frame, jointly robbed Patrick Mutegi of cash Ksh.10,000/- and immediately before or after the robbery wounded the said Patrick Mutegi.”

23.The particulars of the charge meet the ingredients of the offence of robbery under section 296(1) of the Penal Code, as can be deciphered from the particulars of the charge. We say no more.

24.We have come to the conclusion that the evidence adduced by the prosecution in this case was insufficient to sustain a conviction. The evidence of identification was unsafe, unreliable and consequently the conviction unsafe. We find merit in this appeal, allow the appeal, quash the conviction and set aside the sentence. The Appellant should be set free forth with unless he is otherwise lawfully held.

DATED SIGNED AND DELIVERED AT MERU THIS 3RD DAY OF JULY, 2014

LESIIT,J.

J. A. MAKAU,

JUDGE

JUDGE