



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO.38 OF 2013
AS CONSOLIDATED WITH
CRIMINAL APPEAL No. 39 OT 2013

LESIIT, MAKAU JJ

STANLEY MUTWIRI MUTHOMI.....1ST APPELLANT

JACKSON KAILIKIA THARIBA.....2ND APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in Criminal Case No. 736 of 2011 of PMs Court at Tigania.)

JUDGEMENT

1. The two Appellants, Stanley Mutwiri, hereinafter the 1st Appellant, and Jackson Kailikia, the 2nd Appellant were the 2nd and 3rd accused respectively in the trial before the lower court. They were charged with two counts of robbery with violence contrary to section 296(2) of the Penal Code. After a full trial the Appellants were found guilty of both counts, convicted and sentenced to death.
2. Both Appellants were aggrieved by the conviction and sentence. They filed these appeals which we have consolidated as they arise from the same trial in the lower court.
3. In the 1st Appellant's grounds of appeal he raises several grounds which we summarize as follows:

The learned trial magistrate erred in both law and fact

- i. **By failing to note PW1 could not have identified anyone because he put off his lamp the moment he heard the attackers.**
- ii. **By failing to note that PW3 could not have been able to identify anyone since in his evidence the thugs stormed into the house knocked down the lamp and broke it.**
- iii. **By failing to note that the prosecution gave contradictory evidence.**

iv. **By failing to note material witnesses were not called to testify.**

v. **By failing to give due consideration to appellant's defence.**

4. In the 2nd Appellant's grounds of appeal he raises several grounds which we have summarized as follows:

That the learned trial magistrates erred in both law and facts;

- i. **By failing to find that the light from the tin lamp was not sufficient for a safe identification.**
- ii. **By failing to consider the fact the Appellant and complainant had a long outstanding grudge.**
- iii. **By failing to find PW3's evidence unreliable having been charged with a criminal offence.**
- iv. **By failing to note that PW1 contradicted his own evidence upon cross examination.**

5. The state was represented by Mr. Jalson Makori, learned Prosecution Counsel. Mr. Makori conceded this appeal on the grounds the condition of, identification were not favourable to enable witnesses positively identify the assailants. Mr. Makori urged further that there was contradiction between the evidence of PW1 and PW2.

6. We have carefully considered the Appellants appeals. We have considered the written submissions by both Appellants and the oral submissions by the Prosecution Counsel.

7. We are a first appellate court and as such we have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that we had no opportunity to see and hear the witnesses and so cannot comment on their demeanour. We have drawn our conclusions after given due allowance. We are guided by the Court of Appeal case of **Okeno Vrs. Republic** 1972 EA 32 where the court set out the duties of a first appellate court thus:

“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. (Shantilal M. 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 facts of the prosecution case are that PW1 the mother and PW3 her son were seated in the sitting room when four men stormed in armed with rungun and a panga. They knocked down the lamp then assaulted both complainants before robbing them. Both complainants testified that they were able to see and recognize the some of the attackers.

9. Both appellants denied the charge and put forward an alibi as their defence each of them narrated the circumstances leading to their arrest. The most important issue in this case is that of identification whether it was positive and correct. There is no doubt that the incident took place at 9.30 pm. The attackers who were 4 stormed into the house of the two complainants, a mother and her son and according to the complainants the lantern lamp which they were using was knocked down. They were then beaten. PW3 said that 3,000/- was stolen from the bed which belonged to both complainants. They also took a Nokia 1616 phone belonging to PW1. They escaped with PW3's bicycle. The bicycle was later recovered in the neighbours shamba.

10. Regarding identification we are guided by **Paul Etole and Another vs Republic CA 24 of 2000(UR)** pg 2 & 3.

“The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring

about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made”.

11. We have carefully examined the evidence of identification adduced by both complainants. According to PW1 she was able to identify one of the attackers as one Jack. She says she was able to see him just before they put off the lamp that was lighting the room where they were seated. She identified Jack as the 2nd Appellant in this case. PW3 also claimed to have been able to see and identify 3 of the attackers and he identified them in court as Kendia who was the 1st accused in the case Mutwiri who was the 2nd accused and the 1st Appellant and one Jackie who was the 3rd accused in the case and the 2nd Appellant.
12. PW4 the Assistant Chief who received the report of the robbery testified that the complainants gave him the names of two thugs that is Jackie and Mutwiri. He said that the following morning he was able to arrest Jackie the 2nd appellant and Mutwiri the 1st appellant at Kianjai Market. PW4 testified that the two Appellants implicated a 3rd suspect by the name Mwika who was also arrested and identified as the 1st accused.
13. The evidence of PW4 brings to the fore the issue of the first report and the importance of that report when it comes to considering the ability of complainants to identify the people who robbed them or committed an offence. In the court of Appeal for Eastern Africa case of **Republic vs Shabani Bin Donaldi Criminal Appeal No. 76 of 1940 VII EACA page 60.**-it was held:

“That it is desirable in almost every case in which an immediate report has been made to the police by someone who is subsequently called as a witness that being hearsay or the like should always be given at the trial”

14. PW4 was the one who received the first report from the complainant in this case. He said he was given 2 names of the suspects as one Mutwiri and one Jackie. He said that no descriptions of those people were given. He said that they were people he knew and he therefore organized with the Administration Police Officers. He identified the Appellants as the people he arrested the following morning after the incident.

15. PW1 in her evidence said that she was only able to identify one person during the incident and said that she gave his name to the police as one Jackie. In court she identified the Appellant's co accused as the person he recognized during the incident as one Jackie. PW1 was not very consistent in her evidence because during the examination in chief she identified the 1st Appellant as the only accused person that she knew physically.

16 PW3 identified the 2nd appellant in this case as the one called Jackie and who was in company with Mutwiri identified as the 1st Appellant during the robbery. PW4 also identified the 1st accused in the case as one Kiendia whom he said he also saw at the scene of the incident and whose name he claims he gave to PW4.

17. There is a very glaring contradiction between the evidence of PW1 and 3. PW1 identified the 1st accused in the lower court as the one called Jackie while PW3 identified the 1st accused as one called Kiendia. In addition PW3 identified the 2nd appellant as the one known as Jackie. The contradiction of the Appellants and their co-accused interchangeably goes to the very root of substance of the case. It creates a doubt as to the identity of the persons who committed this

offence and their ability of the two complainants to identify them. Since the two witnesses clearly messed up the names and identities of the Appellants and co accused their evidence cannot be relied upon. Even though the complainants claims they had ample opportunity to see the assailants just before they broke the only lantern lamp that was lighting up the room it is very clear that they had only a fleeting glance of the assailants. The identification is therefore unreliable and cannot on its own found a conviction.

18. There were other inconsistencies in the prosecution evidence for instance PW1 identified the 2nd Appellant as the one who broke the lantern lamp while PW3 identified the 1st Appellant as the one who broke it. On the other hand while PW3 said that the two Appellants and their co-accused worked as loaders at the local market and that PW1 used to hire them to carry loads for her at the market. Pw1 on her part said that she had never seen the accused persons before except the 1st Appellant. PW1 also denied that she ever hired any of the Appellants and their co accused to work for her at the market.

19. We noted there was no Identification parade conducted for the identification of the suspects in this case. According to PW1 the 3 accused persons at the trial were lined up at the report office and she was asked to point out who among them robbed her. That is not a proper identification parade. That identification of the suspects was of no probative value to the prosecution case.

20. What was required in this case was for other evidence implicating the Appellants with the offence to corroborate the evidence of the two witnesses such evidence was not available and even from the record it is very clear that the prosecution was not able to bring additional independent evidence to implicate the Appellants with the offence. For that reason the evidence of the two complainants was insufficient to sustain the conviction against the Appellants. It is also not clear to us why the 1st accused in the case was acquitted yet PW3 identified him and the two Appellants as the ones who committed this offence. If the learned trial magistrate had a doubt regarding the identification of the 1st accused in the lower court that doubt should have been entertained in regard to the Appellants.

21. We have come to the conclusion that the evidence adduced by the prosecution was insufficient and unsafe to found a conviction against the Appellants. For that reason we find merit in the appeals by the two Appellants and allow them. Accordingly we quash the convictions entered against both Appellants, set aside the sentence of death and order that the Appellants should be set at liberty forthwith unless they are otherwise lawfully withheld.

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

LESIIT, J.

J. A. MAKAU,

JUDGE

JUDGE