



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 201 of 2011

HEZRON CHRISANTUS MOMANYI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence of Hon. Wanjala SPM,

at Nyamira in criminal case No.107 of 2011 dated 14th September 2011)

JUDGMENT

Introduction

1. The appeal herein arises from the judgment, conviction and sentence of the appellant herein Hezron Chrisantus Momanyi on account of a robbery with violence charge contrary to **section 296 (2)** of the **Penal Code** by the Senior Principal Magistrate's court at Nyamira in Criminal case No.107 of 2011. He had been jointly charged with Douglas Ongaga Aunda who was acquitted under **section 210** of the **Criminal Procedure Code**.

2. The particulars of the offence are that on the night of 9th February 2011 at Nyaramba sub location, Kiabonyoru location in Nyamira District in Nyanza Province jointly with others not before court while armed with dangerous weapons namely a panga and a Somali sword robbed GRACE NYANCHOKA CHARLES of Kshs.7,000/= the property of the said Grace Nyanchoka Charles and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said Grace Nyanchoka Charles.

3. The appellant and his co-accused pleaded not guilty to the charge and the case therefore went to trial during which the prosecution called 5 witnesses.

Facts and evidence of the case

4. The complainant in this case, Grace Nyanchoka Charles who testified as PW1 stated that she was in her kiosk at Kiabonyoru location Omonono sub location in Ekerenyo Division on the 9th February 2011 when at around 8.00 p.m. she was attacked by two persons who pretended to be her customers. The attackers had a Somali sword and a panga and took away Kshs.7000/= from her. She described one of the attackers as short and brown while the other was tall and black. She stated that there was electricity lighting in the kiosk and therefore she was able to see clearly. After the attackers had taken the money

and left, she ran out through the rear door of the kiosk and screamed and members of the public started chasing the attackers but none was arrested.

5. The following morning she reported the incident to village elders and described the appearance of the people who had robbed her and from that description the appellant was arrested. She was able to identify him later at the Nyaramba AP Camp.

6. PW2, Joshua Kimoni Omoro testified that on the night of 8th February 2011 at about 8.30 p.m. he heard noise coming from the complainant's shop. He ran out of his home towards the direction of the noise and just before he got to the complainant's shop, he saw six people running along the road as they were being chased. He joined in the chase but those people who were being chased disappeared into the night towards Kitengere area.

7. On the following day, which was 9th February 2011, PW2 received information that the suspects who were being pursued the previous night had been apprehended but had again disappeared. PW2 told the court that on the evening of 8th February 2011 the villagers were of the view that one Orina Origo who had been released from prison on 4th February 2011 was one of the suspects. On that same day, one Mongare, who is father of the appellant also told PW2 and others that he (Mongare) was suspecting his son who had also been released from prison recently. The appellant was arrested from his house with the help of his father.

8. Upon arrest, the appellant herein was taken to the complainant (Grace) and she identified him as one of the two people who had attacked her and taken away her Kshs.7000/=. That Grace was able to notice the appellant's shaven head, his plump stature and his light complexion.

9. PW3 was Jared Mwanyiko Okongo. He testified that at about 7.30 p.m. on 8th February 2011, he was riding his motor cycle from Nyaramba to Ideresi village where he was taking a client. On the way, he met 10 youths on the road, all of whom were armed with pangas. They tried to intercept him, but PW3 went past them. However, on coming back from Ideresi, he met the same youths again and this time they managed to stop him. The appellant, who was said to be among the youths, and whom PW3 (Jared) was able to identify using light from the headlamps of the motorcycle, took away Jared's mobile phone, Motorola C168 from the shirt pocket.

10. On the 9th February 2011, Jared met members of community policing who told him that the appellant had been arrested.

11. PW5 was Elijah Nyambane Ondieki, Assistant Chief of Boisanga II sub location. He testified that on 9th February 2011, he received a report concerning the arrest of Douglas Ongaga who was being held at the Nyaramba AP Camp.

12. After the appellant was arrested, he was temporarily detained at Nyaramba AP Camp until information was passed on to Number 92522 Acting Inspector Timothy Momanyi Kengu, the Deputy DCIO Nyamira. He received the report at about 2.00 p.m. on 9th February 2011 and immediately went to Nyaramba AP Post accompanied by PC Lameck of Nyaramba AP Post. On arrival at the AP Post, Ag. Inspector Momanyi who testified as PW4 found the appellant together with other suspects. The suspects had been arrested by members of community policing.

13. The appellant and 2 other suspects were re-arrested by PW4 and taken to Nyamira police station for interrogation. PW4 also took statements from Grace, and the other witnesses after which he charged the appellant with the offence of robbery with violence. PW4 stated that Grace gave him the description of the appellant as a brown, short and medium sized person. PW4 also stated that Jared gave a similar description of the person who stole his mobile phone slightly less than an hour before Grace was attacked and robbed.

14. During the investigations that ensued, PW4 established that the appellant had just recently been

released from prison after he was acquitted of a robbery with violence case. After PW4 established how the appellant and other suspects had been arrested by members of community policing, the appellant and his co-accused were charged with the offence of which he was convicted and sentenced to life imprisonment.

The Appellant's Defence

15. At the close of the prosecution's case, the appellant's co-accused was acquitted under **section 210** of the **Criminal Procedure Code** for lack of evidence while the appellant was put on his defence. The appellant gave sworn evidence and told the trial court that he was arrested from his house without any reason whatsoever. He denied that he committed the alleged offence. He also told the court that he did not know how the alleged crime happened. During cross examination, the appellant testified that he did not know Grace before and that she had no grudge with him. He also confirmed that his father informed members of the community policing that he (appellant) had been released from prison, but added that the person who was being sought was the one who had been released from prison at the same time with the appellant. He denied that he was ever at Grace's Kiosk where the alleged robbery took place, adding that Grace knew him because after his arrest, he was taken to her home where he was kept for about 2 hours.

Judgment of the Trial Court

16. After hearing both the prosecution and the defence, the trial court reached the conclusion that the appellant took part in the robbery during which Grace lost Kshs.7000/= as the appellant and another stood over her with a panga and a sword hence the conviction and sentence to death.

The Appeal

17. The appellant was aggrieved by the conviction and has come before us seeking to have the judgment of the trial court overturned and a return of a verdict of not guilty. The appellant appeals on the basis of the following grounds:-

- 1) *That the learned trial magistrate erred in both law and fact by basing the appellant's conviction on evidence of identification without the evidence of an identification parade;*
- 2) *That the learned trial magistrate erred in law and fact by failing to appreciate that the complainant did not give a description of the appellant with her first report.*
- 3) *That the learned trial magistrate erred in law and in fact by failing to consider that the evidence adduced by the prosecution was so contradictory that it raised reasonable doubt as to the guilt of the appellant.*
- 4) *That the learned trial magistrate erred in law and fact when she denied the appellant an opportunity to defend himself after taking the oath.*
- 5) *That the sentence of life imprisonment was overly harsh, excessive and illegal in the circumstances.*

18. The appellant therefore prays that the conviction be quashed and sentence of life imprisonment set aside.

The Duty of this Court

19. This appeal is before us as a first appeal, and in this regard we are under a duty to rehear the appellant's case and to make our own findings and reach our own conclusions in the matter, but bearing in mind the fact that we do not have the privilege of seeing and hearing the 5 witnesses who gave evidence before the Senior Principal Magistrate at Nyamira. We must therefore exercise caution as we rehear the case, so that unless it is abundantly clear that there is no evidence whatsoever to support the charge or that the learned trial magistrate acted on wrong principles of law, we shall not be in a hurry to

interfere with the trial court's findings. See Pandya –vs- R[1957] EA 336 and Okeno –vs- Republic [1972] EA 32.

Findings and Conclusions

20. We have now carefully reconsidered and evaluated the evidence afresh with a view to reaching our own conclusions in the matter. We have also considered and weighed the judgment of the trial court. In our considered view, three issues arise for determination:- **(a)** whether Grace positively identified the appellant at about 8.00 p.m. on 8th February 2011 when she was accosted at her kiosk and Kshs.7000/= stolen from her by the attackers; **(b)** whether the evidence by Grace, as a single identifying witness was sufficient to place the appellant at the scene of crime and **(c)** whether the sentence of life imprisonment is overly harsh, excessive and illegal in the circumstances.

21. While we appreciate that the alleged crime took place at 8.00 p.m. on 8th February 2011, we are nonetheless satisfied that the appellant was positively and properly identified by Grace. In our view, the circumstances under which the appellant was identified were free from error. We are mindful of the dangers that accompany such identification and the evidence of a single identifying witness. We have in mind the words of the Court of Appeal in Wamunga –vs- Republic [1989] KLR 424 and Paul Etole & another –vs- Republic – Criminal Appeal No.24 of 2008. In the Etole case, the Court of Appeal expressed itself in part of its judgment, thus on the issue:-

“.....to evidence of visual identification, such evidence can bring about miscarriage of justice. But such miscarriage 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 weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when a 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.”

All these matters go to the quality of the identification evidence. When the quality is good, and remains good at the close of the accused's case, the danger of mistaken

identification is lessened, but the poorer the quality the

greater the danger.”

22. We note that in the instant case, Grace did not know the appellant before though she stated that she had been seeing him passing on the road near her kiosk without knowing his name.

23. In Roria –vs- Republic [1967] EA 583, the appellant was convicted on the evidence of a single identifying witness. In accepting that evidence as sufficient, the court applied the principles as set out in the case of Abdala Bin Wendo & another –vs- R [1953] 20 EACA 166 at p.168 in the following words:-

“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 respecting identification, especially when it is known that the conditions following a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be 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 the possibility of error.”

24. In the instant case, Grace stated that just as she was about to close the door of her kiosk after closing the main gate, somebody called out to her, **“Grace you have closed.”** When she responded by saying that she was closing, the person who had called out to her told her he wanted to buy some cooking fat. Convinced that it was a genuine customer, Grace asked her child for 500 gram fat and started walking towards the gate. When she turned to leave the door of the gate, she saw 2 people at the door of the kiosk. At the time, the electric lights at her kiosk were on. The 2 people held her and told her to go with them into the kiosk so she could give them money. They then pushed her into the kiosk and asked for the money. Neither of the 2 people mentioned the cooking fat again. One of the 2 people was armed with a panga while the other one was armed with a Somali sword. Inside the kiosk, Grace said she saw the faces of the 2 people well as they demanded that they be given money quickly. Grace then took a pouch which had Kshs.7000/= in it. The appellant whom she described as **“the short brown man who was armed with a Somali sword”** took the pouch, opened it and took out the money and put it into his pocket before the 2 men left.

25. Although Grace did not say how long the incident took, we are convinced that she had enough time to see and internalize the appearance of the appellant as he asked for money, took the purse from her hand, opened it and took the money which he then put into his pocket. During cross examination, Grace told the court that though she did not know the appellant by name, he knew him by appearance as she used to see him passing by on the road. She also said that after she closed the gate, the voice that called was that of a man and that it was the same voice that she heard asking for money during the attack.

26. In our considered view, the appellant was properly and clearly identified by Grace. There is no indication from the record that Grace was unduly frightened during the attack. She obliged to the request by the appellant and his accomplice to give out whatever money she had and after she handed over the money, she had time, under the glare of the electric light to see the appellant as he opened the purse and transferred the money therefrom into his own pocket.

27. There is also in our view other circumstantial evidence to suggest that just before the appellant and his accomplice attacked Grace, he was seen in the neighbourhood of Grace’s kiosk namely around Kiabonyoru at about 7.30 p.m. in the company of 9 other young men all of whom were armed with pangas. According to Jared, he was stopped by this group of young men as he rode home from Ideresi after dropping a client. Jared stated that the young men stopped him and surrounded him and one of them whom he identified the following day as the appellant herein, took his phone. Piecing all this evidence together, we have no doubts in our minds that the appellant was one of those persons who invaded Grace’s shop armed with a sword and a panga and extracted money from her while they were so armed. One can only begin to imagine what the situation would have been like if Grace had resisted the appellant’s demands to give out the money.

28. So in effect what we are saying here is that there was no mistaken identity of the appellant. We are also saying that Grace's evidence, though of a single identifying witness, has led us to the conclusion that the same can be accepted as being free from the possibility of error.

29. The final point for determination by us is whether there is any justification to interfere with the sentence imposed by the learned trial magistrate. In our considered view, there is no such justification. A conviction on a charge of robbery with violence under **section 296 (2)** of the **Penal Code** automatically leads to a sentence of death. However, in this case, the trial court used its discretion to sentence the appellant to life imprisonment. In the circumstances, it cannot be said that the sentence was either harsh or excessive, nor is there evidence to show that the learned trial magistrate applied wrong sentencing principles in meting out the life sentence.

30. In the premises, we find and hold that this appeal on both conviction and sentence lacks merit. The same is accordingly dismissed in its entirety. The appellant has a right of appeal to the Court of Appeal within 14 days from the date of this judgment.

31. It is so ordered.

Dated and delivered at Kisii this 09th day of May, 2013

RUTH NEKOYE SITATI
JUDGE.

EDWARD M. MURIITHI
JUDGE.

In the presence of:

Hezron Chrisantus Momanyi P.I.P. for Appellant

Mr. Majale (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.

EDWARD M. MURIITHI
JUDGE.