



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 28 OF 2009

AMOS KIBET MASAI APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

*(APPEAL ARISING FROM THE DECISION OF HON. P. N. GICHOHI, PM IN KITALE CHIEF
MAGISTRATE'S COURT IN CRIMINAL CASE NO. 3318 OF 2006 DELIVERED ON 16TH APRIL,
2009)*

J U D G M E N T

The appellant, **Amos Kibet Masai**, appeared before the Principal Magistrate at Kitale charged with three (3) counts of robbery with violence contrary to Section 296 (2) of the Penal Code.

It was alleged in count one that on the 17th September 2006 at [particulars withheld] Trans-Nzoia District, jointly with others and while armed with dangerous weapons namely pistol and pangas robbed J N O of a community phone, mobile phone make Nokia 3310, electric iron box, a torch, a knife, a title deed, a pair of rubber shoes and assorted clothes all valued at Kshs. 54,000 and immediately before such robbery used actual violence upon the said J N O.

In count two, it was alleged that on the 29th September at Kibomet area Kitale Trans-Nzoia District, jointly with others and while armed with dangerous weapons namely pangas and knives, the appellant robbed Joseph Thuo Maina of a leather jacket, a mobile phone make Nokia 1600, electors card, a cap, ATM card, a pair of shoes and cash Kshs. 290 all valued at Kshs. 6,600 and at or immediately before the time of such robbery used actual violence upon the said Joseph Thuo Maina.

In count three, it was alleged that on the 1st October 2006 at Lessos area Kitale Trans-Nzoia District, jointly with others and while armed with dangerous weapons namely pangas and steel bars, robbed Josephat Muraya of a mobile phone make Samsung SGH 810, driving licence, a jacket, a pair of shoes and cash Kshs. 8,000 and immediately before the time of such robbery used actual violence upon the said Josephat Muraya.

The appellant denied all the three counts. He was tried and convicted on counts one and two but not count three on which he was acquitted.

The Learned Trial Magistrate imposed the death sentence on the appellant without indicating or specifying for which count the sentence was to apply.

Ideally, the Learned Trial Magistrate ought to have imposed the death sentence on each of the two counts with an order that the sentence on count two be held in abeyance since a person cannot suffer death twice or thrice (see, **Abdul Debanoye & Another Vs Republic Criminal Appeal No. 19 of 2001 (C/A)**).

Be that as it may, the appellant was dissatisfied with conviction and sentence on counts one and two and preferred the present appeal on the basis of the grounds contained in his petition of appeal filed herein on 27th April, 2009 in which he complains about his conviction by the Learned Trial Magistrate on the basis of evidence by the prosecution which was contradictory and uncorroborated. He also complains that there was insufficient evidence to convict him and that the Learned Trial Magistrate disregarded his defence.

At the hearing of the appeal, the appellant represented himself and relied on his written submissions in support of his case.

The Learned Prosecution Counsel, **Mr. Chelashaw**, appeared for the State/Respondent and opposed the appeal by submitting that there was proper identification of the appellant by Pw 1 who was a taxi driver hired by the appellant and others on the material date. That, the appellant was seated in the front of the vehicle and was clearly visible to Pw 1 when the vehicle was driven for fueling into a petrol station where there was sufficient light. That, Pw 1 noted with the help of his vehicle's headlamp that the appellant had a panga (machete). This was at a place called Kibomet where Pw 1 was kidnapped and taken to a place called Kesogon where he was robbed of his property.

The Learned Prosecution Counsel further submitted that Pw 1 further identified the appellant when he was arrested and found in possession of some of his (Pw 1's) stolen property as well as the property belonging to Pw 2. That the appellant was also identified by Pw 3 whom he had previously robbed of her property and who had previously known him.

The Learned Prosecution Counsel contended that although the identification of the appellant was by a single witness in both counts one and two, the circumstances were conducive for the identification of the offenders and that the trial Court properly warned itself before convicting.

The Learned Prosecution Counsel urged this Court to dismiss the appeal while contending that the failure to call the Arresting Officer as a witness was not fatal as the appellant was arrested by members of the public and the recovered items were tendered in evidence by the Investigating Officer.

In his re-joinder to the submissions by the State/Respondent, the appellant contended that there was no Arresting Officer who re-arrested him from members of the public.

Having considered the submissions by both the appellant and the Respondent, our duty is to re-visit the evidence availed before the trial Court and arrive at our own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses (see, **Okeno Vs. Republic [1972] EA 32** and **Achira Vs. Republic (2003) KLR 707**).

In summary, the prosecution case was that on the 17th September 2006, the first complainant **J N O (Pw 3)**, was at her house at about 8.30 pm when a group of three young men arrived there and indicated they wanted to buy milk. They were her customers. They told her that they had been paid Kshs. 20,000 to kill her but that they had no intention of doing so. They nonetheless turned against her. They tied her with sisal ropes and forced her to lie down. They ransacked her house and nearby shop and took away her property after having been in her house for about two (2) hours during which she was threatened with rape but saved herself by saying that she was a victim of the disease AIDS. She indicated that she was able to identify the appellant as one of the three people and that she further identified him after his arrest. She said that he had a pistol when she was robbed but that none of her stolen property was recovered.

The second complainant, **Joseph Thuo Maina (Pw 1)**, was a taxi driver at the material time and on the material 29th September, 2006 at about 9.30 pm he was at a bus stage looking for customers when he was approached by the appellant and another to transport them to Kibomet. He charged them a fare of Kshs.

150 and on the way they passed through a petrol station to fuel the vehicle. Thereafter, they proceeded to Kibomet and stopped near a house gate. At that point he (Pw 1) turned on the vehicle's cabin lights and immediately thereafter the appellant and his colleague alighted from the vehicle. The second complainant (Pw 1) also alighted and was suddenly ordered to put off the vehicle's lights. He was also ordered to surrender all that he had before being manhandled and thrown into the boot of the vehicle which was then driven off upto a forest where it was stopped and he was removed from inside the boot and left behind under the guard of three new people as the vehicle was driven off. The vehicle returned later to the forest and he was again thrown into the boot upto a place where the vehicle stopped after running out of fuel. He remained in the boot of the vehicle after the captors disappeared and was rescued on the following morning by villagers at Kesogon Market where the vehicle had stalled.

The incident was reported to the Police and after a few days, the second complainant (Pw 1) learnt that a person had been found with a suspect driving licence belonging to a taxi operator. He enquired and found that the person was the appellant. He knocked him (appellant) down and shouted that he had robbed him (complainant two). The appellant was surrounded by members of the public and asked to return what he had taken. He produced the second complainant's ATM card issued by Equity Bank, a driving licence belonging to **Samuel Kamau (Pw 2)**, the second complainant's employer and other suspected stolen documents. The appellant was then handed over to the Police and later charged in Court with the present offences.

The recovered items were produced in Court by **P. C. Luke Malwa (Pw 4)**, who took over the investigation of this case from his colleague Cpl. Paul Ambuto who was transferred from the C. I. D. Kitale.

In his defence, the appellant denied the charges and stated that on the 5th October, 2006 at about 10.30 pm he was at Villa Club in Kitale town in the company of a lady called Elizabeth when three Police Officers including a P. C. Kamau and another nicknamed "bad boy" asked him about the lady. Thereafter, he was handcuffed by the said Police Officers and taken to Kitale Police station where he was locked in the cells. Later on the following morning, he was questioned more about the lady Elizabeth. He said that the lady was his girlfriend with whom they lived at a place called Laini Moja. The lady was arrested and released while he appeared in an identification parade before being arraigned in Court for the present offences. He indicated that the Police Officers who arrested him did not testify in Court.

The Learned Trial Magistrate considered all the foregoing evidence by the prosecution and the defence and concluded that the first and second counts had been proved beyond reasonable doubt against the appellant. He was acquitted on count three due to lack of evidence prompted by the failure of the third complainant to testify in Court.

On our part, we find that there was really no dispute that separate acts of robbery with violence were indeed committed against the first and second complainants (Pw 3 and Pw 1) on the 17th September, 2006 and 29th September, 2006 respectively. There was ample credible evidence from the said two complainants confirming the fact.

Apparently, what was in dispute and which fell for determination by the trial Court was the alleged identification of the appellant as one of those who committed the material offences.

The defence raised was a denial and a suggestion that the appellant was arrested and implicated simply because of a woman called Elizabeth. The said woman was never called to testify as a witness for the appellant nor the prosecution. She therefore remained a mysterious lady.

Basically, the prosecution evidence of identification against the appellant in both counts came from the first and second complainants.

With regard to the first complainant (Pw 3) in relation to the first count, the Learned Trial Magistrate observed as follows:-

“On count 1, the complainant (Pw 3) told the Court that accused had gone to her shop twice about 4 days before and had engaged her in a conversation. She knew him before. When he came with two others on the material night, there was electricity light and they did not cover their faces. He was armed with a pistol. She was able to identify him well. They took about two hours in the house on the night of robbery. I am satisfied that this identification is proper. The circumstances were conducive for proper identification and I do not see any possibility of a mistaken identity in that evidence.”

We confirm that the foregoing observation by the Learned Trial Magistrate was in effect a reflection of what was stated by the first complainant. We therefore agree with the Learned Trial Magistrate and hold that the appellant was positively identified as one of those who committed an act of robbery against the first complainant. There were favourable conditions and adequate opportunity for his identification or recognition by the first complainant. With regard to the second complainant (Pw 1) in relation to the second count, the Learned Trial Magistrate observed as follows:-

“Pw 1 told the Court that it is accused who had approached him while in company of another and had asked him to take them to Kibomet. There was light at the time and he was able to see him well. The accused sat at co-driver's seat when they went to Kiboswa petrol station to fuel the car on their way to Kibomet. He was able to see the accused well. The accused person had been talking to Pw 1 and therefore Pw 1 marked his appearance and voice. When they reached a turning and he was ordered to stop the vehicle.

Pw 1 switched on the lights inside the vehicle and the vehicle lights (outside) were on.

He was able to see the accused well and the accused again talked to him demanding he hand over everything and switch off the lights and the engine before tying him and putting him in the boot. He was able to see him and note that he had a panga.

When he was alerted by members of the public that a suspect had been arrested with a taxi operator's driving licence, he rushed to the scene immediately knocked him down. He had recognized him as the person who had robbed him on the material night. His employer's driving licence and insurance certificate were recovered from the accused and so was Pw 1's ATM card among other things.”

This observation, we again confirm, was in effect a reflection of what was stated by the second complainant. We agree with it and affirm that the appellant was again positively identified as one of those who committed the material act of robbery against the second complainant.

There were favourable conditions and adequate opportunity for his identification by the second complainant and this was fortified by the recovery of some of the items stolen from the second complainant. The items were found in the possession of the appellant thereby producing further credible circumstantial evidence on his identification based on the doctrine of recent possession as he was unable to at all or satisfactorily account for his possession of the said items.

The evidence of identification against the appellant in relation to the second count was thus both direct and circumstantial as to leave no doubt that he participated in the robbery against the second complainant.

We see no good reason to interfere with the conviction of the appellant by the Learned Trial Magistrate on both counts one and two. We may however, point out that given the fact that in both counts, the identification of the appellant was by a single witness in hours of darkness, it would have been proper if the Learned Trial Magistrate had warned himself before convicting on the basis of identification by a single witness (see, **Roria Vs. Republic [1967] EA 583**).

Nonetheless, the Learned Trial Magistrate found that both the first and second complainants were honest and credible witnesses. He was better suited than ourselves to make findings on credibility as he saw and heard the witnesses as they testified in Court.

We are aware of the danger of convicting a suspect on the basis of evidence of identification by a single witness but in the present circumstances we are satisfied that it was safe for the Learned Trial Magistrate to convict the appellant on both counts. We accordingly uphold the convictions.

The sentence meted out against the appellant was lawful but the Learned Trial Magistrate should have prescribed the same for each count rather than prescribing a blanket sentence for both counts.

Accordingly, we order that in count 1, the appellant shall suffer death as prescribed by law and in count 2, he shall suffer death as prescribed by law. However, the sentence in count 2 shall be held in abeyance.

In the end result, this appeal is dismissed in its entirety.

(Delivered & signed this 5th day of November 2013).

J. R. KARANJA

JUDGE

E. OBAGA

JUDGE

In the presence of:

Appellant:

Respondent: