REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 570 of 2006

(From original conviction and sentence in Criminal Case No. 19164 of 2004 of the Chief Magistrate's Court at Makadara)

KIMAKESA NYAWADE ARINGO…….....…….APPELLANT

VERSUS

REPUBLIC …….....…….RESPONDENT

JUDGMENT

The Appellant, **KIMAKESA NYAWADE ARINGO,** was convicted in Chief Magistrate's Court at Makadara on a charge of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** and thereupon sentenced to death. He appealed to this court against conviction and sentence.

The charge against the Appellant read as follows-

"KIMAKESA NYAWADE ARINGO: On the 4th day of July 2004 at Jogoo Road near Kaloleni Estate in Nairobi within Nairobi Area jointly with others not before court while armed with dangerous weapons namely bars robbed MICHAEL NJIHIA JEREMANO off his spectacles valued at Kshs. 4,500/=, cash Kshs. 750/= all valued at Kshs. 5,250/= and at or immediately before or immediately after the time of such a robbery used actual violence to the said MICHAEL NJIHIA JEREMANO."

The evidence of the complainant, Michael Njihia Jeremano (PW1), was that on the night of 4th July, 2004 at about 8.30pm, he was walking alone from Burma market bus stage towards Kaloleni where he lived. He saw a young man in front of him and followed behind him. When they crossed a trench which was by the side of the road, another man whom the witness did not know approached the Appellant and the latter slowed down. The complainant then turned and saw about three other people behind him. It was then that he was attacked and robbed of Kshs 200 and his spectacles.

PW2 and PW4 were police officers who arrested the Appellant on 22nd September, 2004 after the latter was pointed out by the complainant. This was more than two months after the date of the alleged incident. Dr. Zephania Kamau, a police doctor, testified as PW3. His testimony was that he examined the complainant on 2nd August, 2004, which was a month after the event. According to the witness, the complainant had a healing scar at the back of the head and, in his opinion; the object of attack was blunt. He assessed the degree of injury as ***"harm"*** and produced a completed P3 Form as an exhibit.

On the basis of the above evidence, the trial court found that the Appellant had a case to answer and accordingly put him on his defence. In his sworn testimony, the Appellant denied having committed the offence with which he was charged. He called one witness whose evidence was that the Appellant played football for Black Mamba. He did not seem to be conversant with the events leading to the arrest and prosecution of the Appellant and spoke mostly of football.

Against that background, the Appellant was found guilty as charged and sentenced to death. In his appeal to this court, the most salient grounds of appeal were that the learned trial magistrate erred in law and fact in failing to find that the circumstances for identification were not conducive. Secondly, it was his contention that the court erred by acting upon evidence of recognition without considering the credibility of prosecution witnesses, and that the court failed to consider the Appellant's sworn evidence.

In her judgment, the learned trial magistrate found, *inter alia,* that the Appellant was well known to the complainant. Whereas that may be so, it may not have had much weight unless and until the identification or recognition of the Appellant was well established. In a bid to demonstrate that the Appellant was properly identified, the learned magistrate stated, among other things, that-

"…The complainant also testified that there were street lights at the Burma stage where he alighted. He saw accused infront of him 10 metres ahead. He even testified that after seeing accused he felt safe. Given all the circumstances, I find that the complainant could easily recognize the accused person. I find the circumstances favoured identification. It was also the complainants evidence that accused is the person who stepped on his stomach during the attack. He had enough time to recognize him. It was also the complainant's evidence that after he held onto one of his attacker's shirt, the person screamed out the accused nickname "Kase" which nickname he testified he knew too well…"

Out of these remarks, we note that the observations of the learned trial magistrate do not tally with the words used by the complainant. Conversely, we hasten to observe that the actual words used by the complainant in his evidence–in –chief do not support the findings of the trial court. For instance, the complainant does not state anywhere that he was 10 metres behind the Appellant as stated by the learned trial magistrate. He could have been more than 10 metres behind. Even if he was only 10 metres behind the Appellant, at the risk of repeating ourselves, there is no evidence as to how bright the lights were. Moreover, when a person walks behind another all he can see is the latter's back, and not the face. Normally people are better and more accurately identified from the front i.e. by the face, rather than from behind. For this reason, we find that there is no evidence to demonstrate conclusively that the prevailing conditions were conducive to a positive and fool proof identification. In the case of **MAITANYI v. REPUBLIC [1986] KLR 186**, the Court of Appeal remarked at page 201, with regard to identification at night, that-

" It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident…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… 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 the greatest care. It is not a careful test if none of these matters were inquired into…"

In this case, the above conditions for a positive identification were not satisfied. The nature of the light available, the sort of light, its size, and its position relative to a suspect were all important matters for helping to test the evidence on identification with the greatest care, but none of them was inquired into.

The evidence of the complainant in this case was that he knew the Appellant very well. This would suggest that the complainant recognized the Appellant. The first problem with such recognition was that the conditions were not appropriate. Secondly, even if they were appropriate, we have to be cautious about recognition because cases of mistaken identity can occur. Suffice it to refer to the English case of **R. v. TURNBULL [1976] 3, All ER 549,** in which Lord Widgery, CJ said at page 552-

"…recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

Bearing these words mind, a mere statement by a witness that he recognized someone in conditions which are suspect should not be taken at its face value.

As small but significant parting point relates to the amount of money stolen from the complainant. Whereas the charge sheet puts it at Kshs. 750/=,the learned trial magistrate said in her judgment that the stolen items were Kshs. 700/= and the complainant's spectacles. Against this statement, the complainant's evidence was that-

"I had spects (sic) with me. I fell down. The person I was holding his shirt (sic) took my money about Kshs. 200/=. They also took my spects. The rest ran away. I remained with one of them. We struggled. He started calling Kare, the nickname of the accused in the dock. He ran off. I remained with the shirt which I took to the police station..."

From this statement, if the complainant states on oath that the amount stolen was Kshs. 200/=, from where did the investigating officer obtain the figure of Kshs. 750/= as the amount of money stolen? Secondly, the complainant himself says that the person whose shirt he was holding took the complainant's Kshs. 200/= and, as they struggled, that person ***"started calling Kare, the nickname of the accused in the dock".*** If the person who stole the money started calling the Appellant's name, it stands to reason that the Appellant was not the person who stole the money. From these two observations, it may well be that the charge against the Appellant is an exaggerated version of the events of that evening, and if a person walks one step in the wrong direction, there will be nothing to prevent him from walking a hundred steps in that direction.

On the basis of the foregoing, we find that the conditions were not favourable to fool poof identification or recognition of the Appellant, and that this appeal ought to be allowed. We accordingly quash the Appellant's conviction and set aside the death sentence. He is accordingly set free forthwith unless he is otherwise lawfully held.

Orders accordingly.

L. NJAGI
JUDGE

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M. WARSAME

JUDGE

DATED and **DELIVERED** at **NAIROBI** this 13th day of July, 2012

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JUDGE