REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISII
Criminal Appeal 95 & 96 of 2008

1. BENARD KEBINI OGARO)

2. RAPHAEL NYANCHOGU OGARO)
…………....……… APPELLANTS

VERSUS

REPUBLIC …………………………………………………. ……… RESPONDENT

JUDGMENT

The appellants were jointly convicted of robbery with violence contrary to section 296(2) of the Penal Code by the Senior Resident Magistrate, Kisii, who sentenced them to death. The particulars of the offence were that on 20/1/08 at Nyamerandi village in Igemo sub location of Kisii Central District within Nyanza Province, they jointly robbed Veronicah Boyani Hassan (PW1) of cash Kshs.2000/= and a Nokia Mobile Phone with Kshs.2700/= and immediately before the time of such robbery wounded the said Veronicah Boyani Hassan (PW1). The appellants were dissatisfied with the conviction and sentence and preferred this appeal which was prosecuted on their behalf by Mr. Ochwangi. Mr. Mutai for the Republic opposed the entire appeal.

This is a first appeal. It is the duty of this court to reevaluate and consider the entire evidence and to reach its own independent conclusion as to whether the appellants were properly convicted. In so doing, the court has to bear in mind that the trial court had the distinct advantage of seeing and hearing the witnesses. (See Okeno v. Republic [1972] EA 32).

The conviction in this case was based solely on the evidence of identification by recognition by a single witness, the complainant. Her evidence was that on 20/1/08 at about 7.30 p.m. she was going home from her kiosk when two men who were hiding in her tea bush along the road ambushed her, grabbed her and took her into the bush where she was beaten before being robbed of her mobile phone and purse which had Kshs.2000/=. She was abandoned there and rescued by villagers at about 8 p.m. They took her to hospital. She was found unconscious. Medical evidence contained in P3 form (Exhibit 1) produced by Clinical Officer Jackson Murauni (PW3) of Kisii Level 5 Hospital revealed she had reddish left eye, left upper jaw was bruised, left eyelid was swollen and tender, left lower mandible was

swollen and tender, neck had bruises on both the left and lateral aspects and had stitched cut wound on the left side of the chin. The injuries were caused by both blunt and sharp objects, and she had suffered harm. Her evidence was that she recognized her two attackers to be the appellants who were sons of her cousin and also her neighours. Of the two, she said, it was only the 1st appellant who beat her and stabbed her on the cheek. The 2nd appellant did not beat her and she did not see well if he was armed. She told the trial court she saw and recognized the appellants because, although it was 7.30 p.m. it was not dark.

When the complainant's children noted that their mother had uncharacteristically not returned home, they went to he homes of PW2, Joseph Atura Mayaka, and PW4, Richard Akunga Nyamete, at 8. p.m. The two, along with other villagers, begun to look for the complainant whom they found injured and bleeding in the tea bush. She could not talk. They helped her to Marani Hospital, but she was referred to Kisii District Hospital. She was admitted. On the following day she was able to talk. PW2 said she revealed her attackers as the two appellants. According to PW4 she said she was beaten by two people but that she was able to identify only one of them, the 1st appellant.

In defence, each appellant denied he was in the attack and said he was at home on the material night. The two are brothers and called their mother Isabella Buyake Ogari (DW1) and sister Lynette Kemuma DW2) to say the two were at home at the time the complainant alleges they attacked her.

The trial magistrate cautioned himself of the danger of convicting on the evidence of a single identifying witness in the following terms:

> "PW1 was the only identifying witness. I warn myself
>
> of the dangers of convicting upon the sole testimony
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> of identification more so given that the incident occurred
>
> at night."

He went on to observe PW1's evidence was clear and consistent. The court noted that:

> "She further testified that although it was 7.30 p.m., there
>
> was still light enough for her to be able to identify the two
>
> people whom she knew. Indeed given that they had to
>
> waylay her and that she was comfortably walking home
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> without the aid of any external lighting devise, there must
>
> have been sufficient light to enable her see and recognize
>
> the accused."

The appellants' counsel complained that the judgment lacked circumspection, given the time and circumstances under which the offence was committed; and was full of speculation, supposition and hypothesis, devoid of any legal or evidential foundation. Mr. Mutai's response was that the circumstances for positive identification obtained and that the trial court analysed the evidence well and came to the correct conclusion that the two appellants were in the attack.

The mode of warning when dealing with the evidence of a single identifying witness was laid down in the often -repeated case of Abdulla Bin Wendo & Another V. Reg [1953] 20 EACA 166. Many subsequent decisions have adopted the warning. They include the case of Roria v. Republic [1967] E.A.

583 and even Maitanyi v. Republic [1986] KLR 198. It is important to reflect upon the words contained in the warning which are as follows:

"Subject to 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 favouring 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."

In the case Roria v. Republic (above) at page 584, Sir Clement De Lestang V. P. said *inter alia* as follows:

"A conviction resting entirely on identity invariably causes

a degree of uneasiness, and as Lord Gardner, L. C.

said recently in the House of Lords, in the course of a

debate on s.4 of the Criminal Appeal Act 1966 of the

United Kingdom which is designed to widen the power

of the court to interfere with verdicts:

"There may be a case in which identity is in question and if any innocent people are convicted today I should think that in nine out of ten – if there are as many as ten – it is in a question of identity."

It should also be borne in mind that even the most honest of witnesses can be mistaken when it comes to identification. (See Kamau v. Republic [1975] EA 139). Recognition may be more reliable than identification of a stranger, but the trial court has to caution itself that mistakes in recognition of close relatives and friend are sometimes made. (See David Kieti Mulei v. Republic, Criminal Appeal No.108 of 2005 at Nairobi).

It is certain that the trial court did not bear in mind that, although PW1 was

" clear and consistent"

as a witness, she may have been mistaken as to the identity of her attackers. The possibility of mistaken

identity did not see the light of day before the learned magistrate, and that was an error. Secondly, the court did not adequately adhere to the caution above, as it did not address itself to the need of other supporting evidence pointing to the guilt of the appellants.

Further, although PW1 was found to be a “consistent” witness it was not noted that she told PW2 the attackers were the two appellants, but told PW4 that she was attacked by two people and only recognized one (1st appellant) of them. This piece of her evidence should have warned the court that her evidence on identification was suspect. 7.30 p.m. was at night. There was no evidence of any light and the court fell into error when it observed that

“there was still light enough for her to be able to identify

the two men whom she knew.”

The children of the complainant went to seek the assistance of PW2 and PW4 because it was unlike her to be away this late. There was therefore no basis for the trial court to observe that PW1 was

“comfortably walking home without the aid of any external

lighting device, there must have been sufficient light to

enable her see and recognize the accused.”

Lastly, the appellants stated they were at home at the time PW1 said they attacked her. That was alibi defence. They called DW1 and DW2 to support that alibi. The 1st appellant made his defence on oath. The judgment of the trial court does not show that the learned magistrate was alive to the fact that an accused who raises an alibi as a defence does not in law thereby assume any burden of proving it, and that it is sufficient if the alibi introduces into the mind of the court a doubt that is not unreasonable. (See Kiarie v. Republic [1984] KLR 739). The burden is always on the prosecution to prove beyond all reasonable doubt that the accused was at the scene at the material time and committed the offence alleged. No reasons were given why the alibi defence was rejected. The judgment did not even make reference to the fact that the accused had called two witnesses, both of whom supported the alibi defence. The complaint by Mr. Ochwangi that the court had not considered the defence evidence before arriving at its conclusion is therefore merited.

We have come to the conclusion that the finding by the court that the complainant had positively identified the appellants was without sufficient evidential basis and the conviction was therefore unmerited. We allow the appeal, quash the conviction and set aside the sentence. The appellants are hereby set free unless they are otherwise being lawfully detained.

Dated, signed and delivered at Kisii this 2nd day of November, 2009

D. K. MUSINGA **A. O. MUCHELULE**

JUDGE **JUDGE**

2/11/2009

Before D. Musinga-Judge

Nyangaga court clerk

Mr. Oguttu for the appellants

Mr. Kemo for the state

Appellants-present

COURT: Judgment delivered in open court.

D. MUSINGA

JUDGE

2/11/2009