



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 21 of 2007

SAMUEL MUGO MUCHOKI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the judgment of T.W. Murigi,

Senior Resident Magistrate in Principal Magistrate's

Criminal Case No. 1788 of 2005 at Murang'a)

JUDGMENT

The appellant in the lower court was charged with robbery with violence contrary to section 296(2) of the penal code. After trial he was convicted as charged and sentenced to death as provided by the law. He was aggrieved by the conviction and sentence and has preferred this appeal. This is the first appeal. In deciding this appeal we are guided by the principles enunciated by the Court of Appeal Case of *Gabriel Njoroge vs Republic (1982 – 88) 1 KAR 1134 at page 1136* where it was stated:

*“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see *Pandya v R (1957) EA 336, Ruwala vs R (1957) EA 570*.)”*

The evidence against the appellant that was adduced at the lower court was one of recognition by the complainant. The complainant stated that on 23rd April 2005 at about 2a.m. he was going from his house to the roadside to buy milk. At a distance he saw four people. He was in possession of a torch. He noted that all except the appellant were hiding their faces. He then stated;

“When I heard him the one who was not hiding his face hit me. I recognized him as Samuel Mugo. I knew him before. He was in front of me when I was hit I fell down and my jerricans also fell.”

The complainant stated that he was robbed whilst on the ground of Kshs.5600/-. That money was in his pocket. He was later taken to hospital at Kigumo. From there he was transferred to Maragua hospital and because he lost consciousness he was transferred to Kenyatta Hospital where he was admitted for five days. He was cross examined by the appellant. In response he stated;

“I know you. I know you for a long time. I was able to identify you since I had a torch. You were one of the robbers who beat me. I saw you before you beat me. I told the police that Mugo Muchoki was amongst the robbers.”

When he was further cross examined and more particularly with regard to his report to the police on the identity of the robber he identified at the scene he stated that he recorded the name of Gikuyu at the police station. It should be noted that this is the first time he indicated that he reported to the police the name of the robber to be Gikuyu which was the name that the appellant was said to be known by in the village. The rest of the prosecution evidence is simply a repeat of what the complainant informed his wife and another person who responded to the scream of his wife. PW 3 did state in cross examination as follows;

“He did not say the person who assaulted him was Gikuyu”

There was evidence from the Clinical Officer who gave evidence of the serious injuries suffered by the complainant which he assessed to be grievous harm. In his evidence he stated that the complainant had to undergo an operation on the head due to a blood clot that is suffered. The appellant in his defence whilst giving an unsworn statement denied the charge before him. He instead gave details of his activities on the day of his arrest. On being arrested he was informed that he was arrested for breaking in, stealing and handling stolen goods. The learned magistrate in the considered judgment had this to say;

“I find that the complainant positively identified the accused person as the person who attacked him. Since he could see clearly as he had a torch. Furthermore, it was not disputed that both the accused and the complainant came from the same village and he was a person whom he knew for a long time. The complainant had no reason to implicate the accused since there was no existing grudge between him. (sic).”

As can be seen from the evidence of the prosecution the case against the appellant was one of identification under difficult circumstances. It was 2a.m. when the incident occurred. The complainant had a torch. The prosecution did not adduce evidence on whether the complainant used the torch to identify the appellant. As can be seen from the above evidence the complainant stated that it was when he heard the appellant that he recognized him. From that evidence it is not clear whether the identification of the appellant was one of voice recognition or one of physical recognition. In the case of *Anjononi & others v/s Republic (1980) KLR 59*, the court of appeal stated:-

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form of other”

The evidence against the appellants is one of the identification by single witness. In the case where the evidence is of visual identification where the appellant denies having participated in the offence there is a case in point namely *Cleophas Otieno Wamunga vs Republic (1989) KLR 424*, this court stated:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The

way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well known case of R vs Turnbull (1976) 3 ALL ER 549 at page 552 where he said:

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in

recognition of close relatives and friends are sometimes made.”

In the case of *Kamau v Republic (1975) EA 139* the East African Court of Appeal had the following to say;-

“The most honest of witnesses can be mistaken when it comes of identification.”

In our re-examination of the evidence of the lower court we find that the said recognition of the appellant by the complainant was not reliable sufficiently for a conviction of robbery with violence to follow. We find that the prosecution did a poor job in prosecuting this case in failing to adduce evidence of exactly how the appellant was recognized by the complainant. Bearing that evidence in mind we entertain doubt whether there was proper recognition in those very difficult circumstances. For that reason we are of the view that the appellant’s appeal against conviction and sentence does succeed. We hereby quash the conviction of the appellant and set aside his sentence. We order for the appellant to be set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 1st day of October 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE