



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Nyarangi, Platt & Gachuhi JJA)

CRIMINAL APPEAL NO. 6 OF 1986

BETWEEN

MAITANYI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Nairobi, Mbaya J)

JUDGMENT

The appellant appeals against his conviction of robbery with violence contrary to section 296(2) of the Penal Code (cap 63) and sentence of death. It is once again a case of identification in difficult circumstances by a single witness.

The complainant was attacked at her place of business during the night. She was seriously assaulted by six men, and she will remain maimed. As these men were aiming to cut her head, she tried to shield her head with her left hand, with the result that three finger tips were amputated. She had scars on the head, wrist and hand. As she was being molested one man sat down on the floor next to her, and demanded money with the threat of death, if she did not produce any. She pleaded with the robbers to take what they could find but leave her alone. She tried to bend down but she was forced to sit up straight. By doing so, she claims that she saw the man next to her clearly in the light in the room. At length the robbers took her handbag and escaped. This occurred on March 30, 1984.

On May 6, 1984, she was shopping at quarry village and thought she saw her assailant talking to another woman. She was about 50 yards away but their "eyes" met, as she relates the incident. The man turned and walked away. The face looked familiar. She followed the man, but as he was walking fast, she called a person named Eliud Wakaba to bring the man. The man turned into a shop to buy cigarettes. Eliud told the man that he was wanted and they returned together to the complainant. The latter spoke to the man and as a result she identified the man as the robber who had sat near her. This is how the appellant was arrested.

It is plain that the complainant was in great distress during the time of the robbery, no doubt from the shock of the attack and because of the continual assault upon her. But she had her lamp alight. It had been turned down low; as the assault started she turned it up till she says it shone brightly. The trial court called it "safari" lamp. It is not clear upon what evidence that description was based, as no witness described it as such. But at least it was some sort of lamp that could be regulated to a high or low flame. The witness who came to help the complainant, also saw the lamp alight. The courts below were entitled to hold that

there was light in the room.

But the complainant had not known the appellant before. She heard him speak Kiswahili. She thought that the raid took about five minutes. After the robbers left she lost consciousness for sometime.

The trial court grasped the difficulty clearly, that this was a case of a single identifying witness whose opportunity for identifying the appellant was difficult. The complainant was found to be a very impressive, cogent and reliable witness, whose evidence was corroborated by the conduct of the appellant at the time of his arrest. That was his conduct after talking to another lady. The magistrate warned himself of the danger of relying upon a single witness especially in the case of such a serious capital charge. Nevertheless the identification of the appellant was accepted.

The High Court accepted these findings. Two factors were thought to corroborate the identification. The way the appellant walked away fast as if he was going to disappear, was “certainly” not considered to be the conduct of an innocent person. The second factor was that the complainant identified the appellant’s voice – the judges used the word “talk”, and then added that the “impression” they got was that the appellant was identified by his voice.

Neither of these factors are of any value. The learned state counsel does not support the idea that to walk away fast necessarily indicated any guilt on this charge. That action could have occurred for more than one reason. This is not clear evidence of corroboration, and the appellant’s subsequent actions do not suggested guilt.

The second factor is unsound because the complainant did not say that she recognised the appellant’s “talk” or his voice. She did not point to any peculiarity in his manner of speech or voice, nor that generally these were similar.

The situation is then, that there is only the complainant’s impression from those awful moments that this appellant was the robber who sat down near her. How does a court set out to deal with that evidence? That is the burden of this appeal.

Although the lower courts did not refer to the well known authorities *Abdulla Bin Wendo & Another vs Reg* (1953) 20 EACA 166 followed in *Roria vs Rep* (1967) EA 583, it may be that the trial court at least did have them in mind. It is important to reflect upon the words so often repeated and yet bear repetition:-

“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 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.”

In this case there is no other evidence, circumstantial or direct. The decision must turn on the need for testing with the greatest care the evidence of this single witness. Is that what the courts below really did?

It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, 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. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. 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 are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of

capital robbery to make these enquiries themselves. Otherwise who will be able to test with the “greatest care” the evidence of a single witness?

There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant’s aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters.

There was no real testing in this case. There were continual small lapses and hasty findings of truth before the necessary warnings were considered. The complainant was “not all the time raising her head so that she could face him and hear what he had to tell her...” She was required to sit up once. The appellant was actually alleged to have punched and bullied the complainant, as well as sitting and demanding the money. Nevertheless the learned magistrate had no doubt in his mind as to the correctness of the identification. He then went on to warn himself of the danger of relying on the witness. There is no point in making the decision and then warning oneself afterwards. The warning must be made when the evidence is being considered and before the decision is made. It is clear that the requirements set out in *Abdullah bin Wendo* were not adequately adhered to. There was no careful testing of the evidence which is an error of law. There was no supporting evidence. Had the evidence been thoroughly tested and analysed we cannot be sure that the lower courts would still have come to the same conclusion. Therefore we find that the conviction cannot safely be supported, and therefore the appeal is allowed.

The conviction of the appellant is quashed, sentence set aside, and the appellant is ordered to be set at liberty forthwith, unless held for any other lawful cause.

Dated and Delivered in Nairobi this 19th day of September 1986.

J.O.NYARANGI

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JUDGE OF APPEAL

H.G .PLATT

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JUDGE OF APPEAL

J.M.GACHUHI

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JUDGE OF APPEAL

i certify that this is a

true copy of the original

DEPUTY REGISTRAR