REPUBLIC OF KENYA

Karani v Republic

Court of Appeal, at Kisumu June 18, 1985

Nyarangi JA, Platt & Gachuhi Ag JJA

Criminal Appeal No 181 of 1984

June 18, 1985, Nyarangi JA, Platt & Gachuhi Ag JJA delivered the following Judgment

This is a second appeal and so only matters of law can be raised.

The appellant was convicted by the senior magistrate Kisii of the charge of robbery contrary to section 296(1) of the Penal Code. His appeal against conviction and sentence to the High Court (Schofield J) was dismissed. His grounds of appeal to this court may be summarized as follows: there were no eye witnesses to support the testimony of the other prosecution witnesses having stated that they arrived at the scene after the assailants had left. Abongo and Pamela Odhiambo from whose houses some exhibits were taken failed immediately to report the alleged robbery to the nearest police station,, that the empty cartridges were picked up at the scene after the event and that he, the appellant, was not found in possession of any of the exhibits and was not identified by the prosecution witness.

Addressing the court on his grounds of appeal, the appellant asked why Sergeant Onyango PW 2 did not take the gun from the appellant if PW2's claim that the appellant took them where he had kept the overcoat and the hat is true. And how was it, asked the appellant, that he did not show PW 2 and the others where the stolen property was? PW 2 failed to produce a work ticket in support of his evidence that the appellant led him to the home of Odongo, PW 5. Moreover he was charged before the district magistrate Migori with an offence related to the overcoat and the hat, the very two items which it was alleged he had taken to the house of Odongo I P Mary (who did not give evidence) and Sergeant Onyango gave contradictory evidence and so it is difficult to know who was telling the truth. The appellant told the court that there was no evidence that he was an employee of the complainant, no evidence that Corporal Muya PW3 had been looking for him two months, no OB entry produced to show that Ouko PW 4 reported the incident to the police after taking the complainant to the hospital, that Odongo did nothing about the over coat and the hat which he found in his house and finally that the evidence of Odongo PW 9, a daughter of PW 5, that the appellant left an overcoat and a hat in their house was not corroborated. On all that the appellant urged that the appeal should be allowed.

Learned senior state counsel supported the conviction and contended that the appellant was recognized through the torch light, that the complainant had known the appellant was the night of the robbery, that the appellant asked the complainant and his wife to open the door for him, the complainant gave a description of how the appellant was dressed and that the trial and the first appellate court had considered and accepted the evidence on identification of the appellant and rejected the appellant's defence.

The basic issue, as the trial and the first appellate court recognized, was identification.

There was a concurrent finding of fact that the appellant had been sufficiently identified by torch light and also because of the complainant's evidence that he appellant was wearing the overcoat and the hat. There was credible evidence that he appellant was in possession of the overcoat and the hat a few days after the robbery. Only the complainant gave firm and consistent evidence that he heard the voice of the appellant and that he saw him when he flashed a torch. In the case of Roria v Republic [1967] EA 583, at page 584 letter G the predecessor of this court had this to say on identification by a single witness, "Subject to certain 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."

See also Mwangi & Another Vs Republic Criminal Appeal No 100 of 1984, Court of Appeal, Nairobi and Republic v Turnbull [1976] 63 CAR 132. The complainant knew the appellant having employed him for about two months before the robbery. The complainant talked to the appellant and asked him where he was coming from. That was after the complainant had flashed his torch and seen the appellant. The complainant had not been shot yet.

There is a circumstance from which the trial and first appellate court could have concluded that the evidence of the visual identification was safe.

There was the identification by voice. The complainant told the trial court that after there was a knock at the door, after the complainant had asked who are you? The appellant said,

> "I am Ario, open for me"

There-after the complainant opened the door. The complainant could not have opened the door unless he was pretty certain that it was Ario he was opening his door for.

The complainant recognized the voice of the appellant and then "went round to open the door to the compound"

Identification by voice nearly always amounts to identification by recognition. Yet here as is any other case care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification. In Mbelle v Republic, Criminal Appeal No 45 of 1984, Court of Appeal, Mombasa, the appellant said "Ni mimi' in response to the caller. This court held that the reception of the evidence of identification by voice was safe. Here, the appellant had worked for the complainant for about two months and during the material night the appellant is stated to have said in response to the complainant's question "who are you?

"I am Ario, open for me", a total of six words forming a complete sentence. We are satisfied that, in all the circumstances of the matter, the complainant did identify the voice as that of appellant. It follows that there were no misdirection's amounting to an error or law regarding the concurrent finding that the appellant was sufficiently identified.

We dismiss the appeal. That is the order of the court.