



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 274 OF 1982

CHARLES NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Charles Njoroge, was charged jointly with others not before the court before the Senior Resident Magistrate sitting at Nakuru with the capital offence of robbery with Violence contrary to Section 296(2) of the Penal Code (Cap 63) and upon conviction for that offence, he was sentenced to the mandatory sentence of death according to process of law. This is his first appeal against the conviction and sentence.

In his original petition of appeal to this court, the appellant complained that there were contradictions in the prosecution's evidence. Upon being supplied with the record, the appellant submitted supplementary grounds stating that he wished to have his case retried by another court of competent jurisdiction because the trial magistrate had tried and convicted him of another offence; that the charge was not read to him and he did not know what ROC meant; that he did not understand the language used at his trial and therefore he did not know what was going on at his trial; and finally that he was prejudiced at his trial.

The particulars of the offence of which the appellant stands convicted were that on the night of March 1 and 2, 1981, at Kapyement Trading Centre, Eldoret, he, jointly with others not before the court, robbed **G M** of Kshs 800, three wrist watches, one coat, one suit and one red handbag, all valued at Kshs 8,000 and immediately before or after the robbery used personal violence to the said **G M**, whom I shall hereinafter refer to as the complainant.

According to the evidence which was accepted by the learned Senior Resident Magistrate, the complainant, who runs a petrol service station at Eldoret lived about four miles out of Eldoret with his wife (PW 2) and his sister-in-law (PW 3) who helped in the house. A gang of robbers posing as policemen attacked the complainant's home on the night of March 1 and 2, 1981 while the entire family was peacefully asleep. The complainant was awakened by the security guard, Wilson Shikuku, who informed him that policeman wanted to see him. He opened the window and saw a group of people numbering eight with his security guard. They were flashing torch-lights and spoke in Swahili with Turkana and Kikuyu accents. The gang then said they were policemen and demanded that the complainant should open the door, which he did not do because he suspected them. The gang forced their way in the house by banging the door with an object which was later found lying in the compound. Inside the complainant's house, they molested and beat the complainant and his wife (PW 2) and his sister-in-law. The gang forced the complainant to show them where money was. They dragged him and assaulted him with an iron bar causing grievous bodily harm to his person. The gang searched for money everywhere in the house. Amongst the household goods was a radiogram in the sitting room. The gang

also assaulted the complainant's wife by pushing a bottle of soda in her private parts and snatched her red handbag containing Kshs 4,000 to Kshs 5,000. They also stole Kshs 800 from the complainant. The gang also got away with other personal items belonging to the complainant, his wife and the sister-in-law. Not being satisfied with the atrocities they had committed so far, the members of the gang raped, in turns, the complainant's sister-in-law (PW 3) who gave evidence that she was able to identify the three men who raped her as well as the appellant who did not rape her.

After the gang had left, police were called and the complainant, his wife and his sister-in-law were taken to hospital where they were admitted and treated for grievous personal injuries they all suffered during the robbery. Police inspector Moses Kirobia Ndegwa (PW 4) who visited the scene took photographs of the cupboard and the radiogram. Cpl Moses (PW 7) of the Scene of Crime Branch lifted obvious fingerprint impressions from the radiogram which was in the house.

The appellant was arrested in connection with another robbery at Molo and his fingerprints and palm impressions were taken. On examination on enlargements of the left thumb-print impression of the appellant and the thumb impression lifted from the radiogram in the complainant's house, both these enlarged photographs were, upon expert comparison, found to have identical characteristics and the fingerprint expert (PW 3) came to the conclusion that both the thumb impressions found on the radiogram and the appellant's left thumb-print were made by the same person and that person was no other than the appellant. This expert evidence stood unchallenged even by the appellant himself who told this court that his thumb impression found on the radiogram might have got there lawfully as he was a radio repairer at Eldoret. The appellant, when called upon, stated that he did not wish to say anything in his defence or to call any witnesses. His submission to this court, therefore, that his thumb impression might have got on the radiogram lawfully because he was a radio repairer must have been an afterthought.

The complainant's sister-in-law gave evidence that the appellant did not rape her but she was able to identify him and saw three members of the gang who raped her. She testified that:

“During the incident I marked the face of one man of the gang who was speaking Kikuyu. He was the accused in the dock (points out). He did not do anything to me. The accused was searching all the rooms. He searched my room also. I would be able to identify the three men who raped me if I saw them again. They are not in court. Accused is the fourth man I remember well.”

At a properly conducted identification parade at Nakuru on November 5, 1981, the complainant's sister-in-law (PW3) identified the appellant in a parade of nine men. She did talk to the appellant to hear his voice and this made her certain that her identification of the appellant as one of the members of the gang who attacked them at the complainant's house on the night of March 1 and 2, 1981 could not have been mistaken identity.

Her evidence was that there was another person who resembled the appellant but he was taller. We are satisfied from the evidence on the record that the complainant's sister-in-law identified and picked out the appellant in a properly conducted identification parade in accordance with the law. However, we are of the opinion that it would have been most unsafe to base conviction of the appellant on the evidence of (PW 3) being the only single witness of identification at night when circumstances favouring accurate identification have been difficult or unfavourable. The complainant, the wife and sister-in-law were suddenly attacked at night while they had been asleep. They must have been terrified and horrified with what had become of them. Neither the complainant nor his wife were able to identify any of their attackers. PW 3 might have had some difficulty too. At the identification parade, she had some doubt or hesitation in picking out either the appellant or the other member of the parade who resembled the appellant but a little taller. She had to have the appellant speak to confirm her identification of the appellant as one of the persons who attacked them on the night of March 1 and 2, 1981. We are of the opinion that her evidence of identification alone would not do.

There was another independent expert evidence which stood unchallenged and that was the expert evidence of the fingerprint expert. Although the appellant was not supposed to prove his innocence, there was no evidence to suggest that the appellant's left thumb impression could have got on the

complainant's radiogram otherwise than in the course of the robbery on the night of the incident. The appellant was not a regular visitor to the complainant's house.

Upon this evidence, the learned trial Senior Resident Magistrate convicted the appellant. We think he was justified in evidence before him in reaching the conclusion he did. There was the unchallenged expert evidence of fingerprints of the appellant's left thumb impression found on the radiogram made by the appellant and no other. To this evidence was corroboration, if required, by the evidence of identification of the appellant by the complainant's sister-in-law.

Mr Mbai, the learned State Counsel, properly supported the conviction and we are of the same view. The appellant was properly convicted on strong expert evidence of fingerprints and corroborated by evidence of identification by the appellant's sister-in-law. This learned trial resident magistrate having warned himself of the principle of caution to convict on the evidence of a single witness of identification at night as well as on the expert evidence of fingerprints, we are satisfied that he was justified in convicting the appellant.

We have examined and considered all the appellant's grounds of appeal and we are satisfied that the trial was not a nullity to warrant an order for retrial either on the basis that the learned Senior Resident Magistrate acted prejudicially to the appellant or that the appellant did not understand the charge or that he did not follow what went on at his trial. We find no merit in the appellant's grounds of appeal. There was no miscarriage of justice at the appellant's trial. The appeal against the conviction and sentence is accordingly dismissed.

Dated and delivered at Nairobi this 5th day of November , 1982.

M.G. MULI

JUDGE