



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU

crim app 83 of 83

(Coram: Madan & Kneller, J.J.A & Chesoni, Ag. J A) CRIMINAL APPEAL NO 83 OF 1983

BETWEEN

HARRIS MWANGIKURIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Mead J) dated 1st September, 1981) in

Criminal Appeal No 111 of 1981)

JUDGMENT OF THE COURT

The Appellant Harris Mwangi s/o Kuria was jointly charged with two females Margaret Muthoni d/o Kamau and Gathoni d/o Mwangi with robbery with violence contrary to serf/on 296(1) of the Penal Code. The particulars of the offence alleged that on the night of December 9, 1979 at Naivasha Township in the Nakuru District of the Rift Valley Province. The accused jointly with others not before the court robbed Pararayone ole Ngoseri of Kshs. 23,000, two dresses valued at Kshs 75 all valued at Kshs. 23,075 and at or immediately before or immediately after the time of such robbery used actual violence to the said Pararayone ole Ngoseri. When the accused appeared in Court on December 13, 1979 they all pleaded not guilty. On April 23, 1980 the case against Margaret and Gathoni was withdrawn and the two were made prosecution witnesses at the hearing of the case against the appellant, which started on September 22, 1979. The appellant was convicted of the charge and sentenced to 5 years imprisonment with 6 strokes of the cane. He appealed to the High Court on six grounds namely that:

- (1) There were many contradictions in the prosecution evidence of PW 1 (Pararayone), PW 2 (Margaret), PW 3 (Gathoni), PW 5 (PC. Geoffrey Gituamba) and PW 6 Inspector James Wambua.
- (2) The complainant's evidence was that he was drunk so he could not have identified his assailants.
- (3) PW 2 who was with PW 3 at the time of commission of the offence said that she did not see the Appellant rob the complainant yet PW 3 said she saw him commit the offence.
- (4) While the complainant told the court that he was with the appellant at PW 4's house drinking chang'aa PW 4 denied seeing the appellant that day and at her house.
- (5) The stolen property was not found in his house even after a thorough search. (6) PW 5 said he

searched the appellant's house on December 9, 1979 whereas PW 6 who said he was with PW 5 said the search was on December 10, 1979. His first appeal having been dismissed summarily by Mead, J on September 1, 1981, Harris appealed further to this court.

The complainant's account was that on December 6, 1979 he went to Naivasha Market into a house. He then had Kshs 23,000 in a purse. His friends brought him chang'aa and the appellant was there. He took out Kshs 100 out of the Kshs 23,000 and gave it to Jane Njeri. The appellant was then not in the house. Later he gave a woman, and, Mary said in her evidence that she was the woman, Kshs 100 to buy his wife a dress. She went and bought a dress for Kshs 50 and brought him the change. Mary in her evidence said that she bought the dress for Kshs 70. She said that when she came back she found Pararaone with one other dress. At 6 pm, the complainant went to the main Nakuru/ Nairobi road to wait for a vehicle to take him home, but when he did not get one he started walking to Kihot Village. When he had passed the railway crossing, he was attacked by people who robbed him. One of them was in front of the complainant and ordered him to stop. He was the appellant, and he got hold of the complainant's jaw knocked him down, cut the complainant's purse containing the money and ran away with it. The complainant was not injured in the robbery. The people also stole the dresses he had bought for his wife. He then reported the robbery to the police. In cross-examination the complainant said it was only the appellant and two women walking along the road and there were no houses near the scene of robbery.

The first appeal should not have been summarily dismissed as the appellant had raised validly strong grounds for appealing against the resident magistrate's decision. There were material contradictions in the prosecution evidence. For example whereas Pararayone said that the appellant was present in the house when his (Pararayone's) friends brought him chang'aa, Mary Njeri (PW 4 who appears to have been in the house too) denied the presence of the appellant in the house for she said:

"I know the accused. I have known that accused for about ten months. On December 9, 1979 at 1.00 pm the complainant was in my house. I did not see the accused that day." Even in the evidence of the complainant he said some people (i.e. more than one person) got hold of him while Gathoni (PW 3) said the appellant got hold of the complainant and knocked him down. The complainant again said a man who was in front of him ordered him to stop, and he was the appellant who got hold of his jaw, knocked him down and robbed him of his money, but his conflicts with the complainant's own testimony that more than one person held him and the dresses he bought for his wife were stolen by the people who robbed him. Margret (PW 2) said that she was alone along the Naivasha road and she did not see the appellant rob the complainant, but Gathoni (PW 3) said Margret was with her when she, Gathoni, saw the appellant knock down and rob the complainant. Whereas Pararayone did not say that he shouted for help Gathoni said that he screamed and shouted for help. All these discrepancies were relevant as they related to what was alleged to have happened to the complainant at the hand of the appellant on the night the complainant was robbed. The trial magistrate never considered and resolved these discrepancies yet he was in their face able to convict the appellant.

The complainant had been drinking chang'aa from 1.00 pm on the day he was robbed. He spent Kshs 100 on the drinking spree. The charge states that the robbery took place at night. There was no evidence of how the appellant was identified and whether it was dark, and, if it was, whether there was a light by which Pararayone and Gathoni identified Harris. It was highly doubtful whether Pararayone identified his assailants. The alleged identification of Harris by Gathoni having been contradicted by Margaret, who said she was not at the scene with Gathoni as the latter had alleged, was not reliable. It was essential for the prosecution to establish that the appellant was positively identified as the complainant's assailant since the attack took place at night. The necessity for the trial court to proceed with greatest care where identification is material, particularly when the offence occurs at night and the conditions of identification may be expected to be unfavourable, has been stressed over and over again by this court - *Abdullah Bin Wendo v. R.* (1953) 20 EACA 166; *Roria v. Republic* (1967) E.A. 583.

The magistrate did not consider and rule out the possibility of the evidence of Gathoni being evidence of an accomplice, which he said had done. She had originally been charged with Harris of the same offence and the case against her having been withdrawn it is possible she had every reason to implicate the appellant. Gathoni's evidence was of the weakest kind and could not support a conviction. The appellant

put up an alibi in defence when he said that on December 9, 1979 he was at his house and never was at the scene of the crime. The magistrate did not consider this defence. Indeed he was found in his house at Kihot village on December 10, 1979 when the police visited the house. It is unlikely that a man who had robbed Kshs 23,000 would have remained in his house at Kihot village near the scene of crime. There was no evidence on which the appellant could be convicted and the conviction and summary rejection of the appeal in the High Court were both wrong in law. In these circumstances we thought it would be contrary to justice to send the case back to the High Court to hear the first appeal. We therefore heard the appeal and now order that it be allowed, the High Court order set aside and the conviction quashed and sentence set aside. The appellant shall be set at liberty forthwith unless he is otherwise lawfully withheld.

Delivered at Nakuru this 7th day of October, 1983.

C D MADAN

JUDGE OF APPEAL

A A KNELLER

JUDGE OF APPEAL

Z R CHESONI

JUDGE OF APPEAL