



IN THE COURT OF APPEAL

AT NYERI

SITTING AT MERU

CRIMINAL APPEAL NO. 139 OF 2014

BETWEEN

NAFTALI MWAMBIA JACKSON.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru (Lesiit, Gikonyo, JJ) dated 28th November 2013

0in

H.C.CR.A. No. 61 of 2012)

JUDGMENT OF THE COURT

This is a second appeal by Naftali Mwamba Jackson (the appellant) who was tried and convicted by the Chief Magistrate's Court at Maua on a charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The trial Magistrate sentenced him to life imprisonment.

His first appeal against both conviction and sentence was not only dismissed, but the learned Judges (Lesiit and Gikonyo JJ) substituted the sentence of life imprisonment with one of death being the mandatory sentence under the law.

Aggrieved by that decision of the High Court, the appellant preferred this appeal in which he complains that the learned Judges erred by;

- **upholding a conviction based on identification and recognition that was not free from error.**
- **Failing to observe that there did exist a grudge between the complainant and him.**
- **Failing to give his defence due consideration.**

The prosecution case as charged and presented through five witnesses was that the complainant Meshack Matheke Kaberia (Meshack) a *miraa* trader who hails from Muringene Location but plies his trade in

Mombasa was on 30th October 2009 accosted by three men along the road to Kianjai. They included the appellant who was well-known to Meshack. On seeing the trio who were armed with a metal bar and pangas, he fell down in shock, whereupon they attacked him with blows, while restraining him at the neck. They then ransacked his pockets and took away some Ksh.40,000 he had withdrawn from the bank the previous day for his *miraa* business, and a mobile phone, before fleeing. The incident occurred at 1p.m.

That evidence was meant to be backed by that of Sammy Muthee Kanyange (PW2), who stated that on 30th October 2009 he was walking from Thura to Maili Tatu at about 3.20 p.m. when he heard screams. On approaching the source of the screams “he found people fighting” but three of them fled including the appellant whom he knew from childhood. Two remained namely Meshack and Mutuma (PW3). Meshack told PW2 that he had been assaulted with an iron rod and robbed of Ksh.40,000.

The evidence of Stanley Mutuma Kanake (PW3) was that he was walking from Maua to Limbine when at Thuru he heard someone screaming. He approached and found Meshack being assaulted by some three people including the appellant who was armed with a panga. Mutuma screamed from some 30 steps away and the three fled. Mutuma did not know the appellant before and did not describe him to the police.

The medical evidence in proof of the injuries sustained by Meshack came from a clinical officer who gave his name as merely Ntongai (PW4). He stated that he examined Meshack on 2nd November 2009 and he had soft tissue injuries to the chest, lumber region and hands. He filled a P3 Form classifying the injuries as ‘*harm*’.

The investigating officer PC Albert Ombelo (PW5) of Maua Police Station testified that Meshack was attacked as he walked home after withdrawing some Ksh.41,000 at the Co-operative Bank, Mau Branch. He at first charged the appellant with assault.

When placed on his defence, the appellant testified on oath and stated that the entire case was a frame up by Meshack over a grudge going back to the year 2005 when the latter had also accused him of assault which led to his being convicted and jailed for 3 months. He said that that case, too, was a frame up because of their rivalry in the *miraa* business.

We have gone into some detail about the facts of the case notwithstanding that on a second appeal we are enjoined to consider only matters of law by dint of **Section 361 of the Criminal Procedure Code**. This is because we think that the first appellate court did not properly, freshly and exhaustively reevaluate the evidence that was before the trial court. This is a duty imposed on a first appellate court and a legitimate expectation on the part of an appellant which must be satisfied subject to the allowance that the first appellate court does not have the advantage of hearing and observing the live witnesses. See **GABRIEL NJOROGE –VS- REPUBLIC** [1982-88] 1 KAR 1134; **PANDYA –VS- REPUBLIC** [1957] EA 336.

As was held in the case of **NGUI –VS- REPUBLIC** [1984] KLR 729, where the first appellate court fails to properly discharge that duty of reevaluation and re-analysis, this Court on a second appeal treats the omission as a point of law that entitles it to conduct its own evaluation, so as to satisfy itself that the defects of the first appellate court have not occasioned a failure of justice . See also **MUTHOKO & ANOTHER –VS- REPUBLIC** [2008] KLR 297.

Mr. Wamache, learned counsel holding brief for Ms Nelima for the appellant submitted that the evidence of identification was not sufficient to found a safe conviction of the appellant as one of the alleged robbers. As we have indicated, Meshack’s evidence was in the nature of recognition, and the incident having occurred in broad daylight, at 1 P.M. according to him, it has a measure of assurance to it. (See **ANJONONI –VS- RELPUBLIC** [1980] KLR 59). The evidence of Sammy Kanyange, (PW2) though also alleging to have recognized the appellant, is of a more doubtful character. This is what he stated;

“On 30.10 2009 at around 3.20 pm, I was walking from Thura to Maili Tatu when I heard screams. I walked fast towards the source ahead of me. I found people fighting. As I approached I saw about 3 people fleeing the scene. 2 remained. One on the ground. I recognized one of the fleeing men. The one I recognized was Naftali the accused. I saw him clearly. I saw his face. I knew him. He was from my village Thuru. I have known him from childhood...”

It is clear that as this witness arrived at the scene of the alleged robbery, three of the people he said were fighting, fled. This weakens the strength of the assertions that he saw the appellant's face. Ordinarily people flee a scene with their faces facing the direction of flight so that if at all PW2 saw one of the fleeing men, it could only have been a fleeting, transient rear view quite insufficient to lend assurance to his alleged recognition of the appellant. It does not help that he was not led in evidence on a description of how the appellant was dressed and whether he was wielding any weapon. There is no indication that the witness gave the name of the appellant to the police.

On his part, Mutuma's evidence PW3 was as follows;

“On 30.10. 2009 at 3.00 pm. I was walking from Maua to Limbune. On getting to Thuru I heard a person screaming. I rushed there and found Meshack Kaberia under attack by 3 people... He was being assaulted. 2 had pangas and one had an iron bar. One of the 3 is accused. He was armed with a panga. I screamed to raise alarm when I was about 30 steps from them as I was fearing. The men fled the scene together.”

On cross-examination, the witness stated;

“I did not know you before. ... I did not describe you to the police but I told them I could identify them. ...Your name is not in my statement.”

Not having given a description of the appellant to the police, and not having attended any identification parade prior to his testimony, PW3's identification of the appellant in court was a dock identification which, as has been held by this court on many occasions, is worthless and of no probative value. See **GABRIEL KAMAU NJOROGE –VS- REPUBLIC** [1982-88] I KAR 1134.

Had the learned Judges considered the identification evidence of PW2 and PW3 and the inherent weaknesses of it, they would have come to the conclusion that the only firm and reliable evidence of identification available was that of Meshack alone. They would then have been required to warn themselves of the dangers of basing a conviction on the evidence of a single identifying witness before convicting if satisfied it was truthful and free from error. This did not occur and doubts abound as to whether the conviction of the appellant was watertight or foolproof and free from the possibility of error.

Identification aside, there do also exist troubling contradictions and inconsistencies in the prosecution case which do not appear to have been addressed and resolved by the two courts below.

From the excerpts of the evidence that we have set out above, there is the slight inconsistency as to the time of the incident as between PW2 and PW3. The one says it occurred at 3.00 pm while the other says 3.20 pm. We would have overlooked the 20 minute variance as minor except that these two witnesses' recount is materially different from that of Meshack who said that he was attacked at 1 PM! We find it quite remarkable that the learned Judges failed to notice and deal with a contradiction in the prosecution case that was so glaring. It is most improbable that Meshack would have been under the attack of supposed armed robbers for more than two hours on a public road without help coming sooner yet lived to tell the tale. That contradiction ought to have been resolved in favour of the appellant and the present case found not to have been proved beyond reasonable doubt.

Apart from the time discrepancy, we observe also the contradiction between the witnesses as to what weapon the appellant wielded, if any. In his first account on 20th April 2010 before L.N. Sarapai

DM II, Meshack stated that he was accosted by three people. The appellant had a metal rod while the other two had pangas. When he testified before J.G. Kingori SPM following a substitution of the

original assault charge with one of robbery with violence at the first Magistrate's instance, he stated; ***"Naftali had an iron rod. The other men had knives."***

The evidence of PW2 is wholly silent on any weapons being carried by the alleged assailants. In fact, he stated that he saw people fighting. His evidence of what Meshack told him is a total contradiction for, whereas the latter stated in court that the appellant did not hit him with the rod, he told PW2 that he was hit with it, which is the very opposite.

As for PW3, his evidence was that the appellant was armed, not with an iron bar as Meshack claimed, but with a panga. We are unable to accept that evidence that is so jumbled up can properly be a basis for conviction on a capital charge no matter how many courts return concurrent findings. The findings are not based on evidence and there is a clear deficit of reevaluation on the part of the first appellate court.

We have already pointed out the fact that the original charge the appellant faced was one of assault. The substitution of the charge with one of robbery with violence appears to have been influenced by Sarapai DM II's indication that Meshack's evidence seemed to point to the offence of robbery with violence which she had no jurisdiction to try. It would seem though, that the prosecution initially doubted the existence of the ingredient of theft hence the charge of assault. Indeed, whether Meshack had with him some Ksh.40,000 on the material date appears on the record to be highly doubtful. His testimony is that he withdraw Ksh.41,000 from the bank in Maua on 29th October 2009 at about 1 pm. He walked home with the money. He then walked back on the same road 24 hours later with the same money in his pocket less Ksh.1,000 which he had spent and then he was robbed.

This account was not in consonance with the report he made to the police which was that he was robbed on 29th October 2009. When confronted with that statement in cross-examination by the appellant he swore that he never told the police he was robbed on 29th and went as far as to suggest in re-examination that the statement had been altered;

"I was robbed on 30th October 2009, I do not know who altered the date to 29th on my statement."

This assertion was contradicted by PW5 the investigating officer whose evidence was that;

"I had confirmed that indeed the complainant Meshack had withdrawn money on 29.10. 2009. He was heading home when he met 3 people among them the accused whom he identified. The accused was armed with a panga. The accused had punched him and then ransacked his pockets and removed Ksh.40,000."

The contradictions between the evidence of the Investigating Officer and of Meshack are plain to see. They relate to the date of the alleged robbery; whether Meshack was walking to or from home; whether the appellant had a metal rod or a panga; whether or not Meshack had a phone stolen from him. What emerges from those contradictions is that Meshack leaves an impression that he had a negotiable relationship and was often economical with the truth changing his version of it at will. Such is the kind of witness this Court had in mind in the case of; **NDUNGU KIMANYI –VS- REPUBLIC** [1976-80] I KLR 442 as one who, for creating an impression in the mind of the court that he is not a straight forward person or is untrustworthy, should not be relied upon to found a conviction.

We need not go into the troubling aspect of the case which is that Meshack seems to have taken some kind of unhealthy control of the process leading to the arrest and prosecution of the appellant. His own testimony on this was that;

“On the following day I recorded a statement. The police hid that statement when the accused was arrested. I was tipped that the accused was spotted in Maua town. I came to Maua town and took a police officer who arrested him. We took him to Maua Police Station. I was issued with a P3 form which was duly filled. This is the P3 for (MFI 1). This was my treatment card (MFI 2). I later heard the accused had been released. I came to complain to the OCS. The accused went underground and I left for Mombasa. I returned from Mombasa and organized for the accused’s arrest. I recorded another statement and so my witnesses.”

Suffice it to say that such control of the investigation process by a complainant who already has a less than friendly history with the appellant goes to lend credence to the appellant’s complaint that the case against him was concocted by Meshack. His defense was that the whole case was trumped up by Meshack who had an axe to grind with him. We are not satisfied that this complaint was given the full consideration it merited in the circumstances of this case.

For all the reasons we have set out, we find that the case against the appellant was so fraught with contradictions and inconsistencies as to have left much doubt on the appellant’s guilt. The resultant conviction was unsafe and we accordingly quash it and set aside the sentence.

The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Meru this 23rd day of July, 2015

P. N. WAKI

.....

JUDGE OF APPEAL

R. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR