



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, J.J.A.)

CRIMINAL APPEAL NO. 13 OF 2013

BETWEEN

AMANI KITSAO MWENI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa

(Odero & Muya, JJ.) dated 20th December, 2012

in

H. C. Cr. A. No. 305 of 2010)

JUDGMENT OF THE COURT

[1] Amani Kitsao Mueni, who is the appellant before us, was tried and convicted by the Principal Magistrate at Mariakani Court for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to suffer death as provided by law. His appeal before the High Court was dismissed, hence, this second appeal.

[2] The appellant initiated this appeal in person by filing six grounds. Subsequently, Mr. Obaga, learned counsel who appeared for him, filed four supplementary grounds of appeal. In a nutshell, the grounds of appeal fault the judgment of the High Court on three main grounds. That is, the inadequacy of the identification evidence; failure to properly re-analyze and consider the evidence; and failure to consider the appellant's defence.

[3] In arguing the appeal, Mr. Obaga relying on ***Abdalla Bin Wendo v R (1952) EACA 166***, as applied in ***Maitanyi vs Republic (1986) KLR 198***, submitted that although the appellant was convicted on the evidence of a single identifying witness, the proceedings and judgment of the trial court do not reveal the trial magistrate warning himself of the danger of relying on such evidence and the High Court failed to take this fatal error into account; that the circumstances were not favourable for a positive identification as the incident happened at night; that no inquiry was carried out regarding the intensity of the light; that the possibility of the witness having made an honest mistake in his identification was not eliminated; and that the identification was further weakened by the failure of the complainant to give a description of his

assailant at the time he made the first report.

[4] Mr. Monda, Assistant Director of Public Prosecutions, supported the appellant's conviction arguing that the two lower courts properly evaluated the evidence; that they took note of the fact that the identification of the appellant was by a single witness but, nonetheless, found the evidence satisfactory; that the evidence of identification was not the only evidence implicating the appellant; that there was evidence that the appellant was in possession of the stolen motor-cycle shortly after the robbery and this placed the appellant at the scene of the robbery; and that the court did consider but rejected the defence of the appellant.

[5] This being a second appeal, our jurisdiction under Section 361 of the Criminal Procedure Code is limited to considering the appeal on matters of law only. Secondly, as was restated in ***Boniface Kamande & 2 Others vs Republic, [2010] eKLR***, in considering the appeal this Court is obliged to pay homage to the concurrent findings of the two lower courts and should only interfere if the findings of the lower courts were not based on evidence or were not reasonable. We have considered this appeal taking cognizance of the above.

[6] The circumstances leading to the appellant's arrest were as follows:

On the 4th January, 2009, at about 6 p.m., PW 3 Abdalla Kenga Mgalla, (Abdalla), who operates a motor-cycle taxi at Kaloleni Stage near Giriama Traders, took a break and handed over the motor-cycle to PW 2 Gona Masha Kalama (Complainant), to operate. At around 9 p.m., the complainant was at the stage when he was approached by a customer who requested to be taken to Kazungu Wa Wanje area. When he arrived at the customer's destination, the customer whom he was carrying on the motor-cycle as a pillion passenger, suddenly accosted him, held him by the neck and ordered him to get off the motor-cycle leaving the keys on the motor-cycle. The complainant struggled with the passenger who continued to hold and squeeze the complainant's neck. When the motor-cycle fell down another person arrived and switched it off. At that point the complainant lost consciousness. When he came round, his assailants and the motorcycle were gone. The complainant was rescued by Kalama Changawa Christopher, a village elder and other community police who took him to St. Lukes's Hospital where he was admitted. He was discharged the following day and he reported the matter to Kaloleni Police Station. Upon learning of the robbery, Abdalla, reported the theft of the motor cycle to PW 4 Davis Charo Hare, (Davis), who was the owner of the motor-cycle. Davis had been given the motor-cycle by the appellant as security for payment of Kshs.50,000/- which the appellant had taken from the house of Davis when the two were staying together. On the morning of 5th January, 2009, between 7.30 a.m. and 8 a.m. PW 6Teddy Patrick Ngumbao (Teddy), who was aware about the appellant having given the motor-cycle to Davis as security, was in Bamburi, Mombasa, when he was surprised to see the appellant passing riding the motor-cycle. He tried to communicate with Davis on phone but he was only able to get him at 11 a.m. when Davis informed him that the motor-cycle had in fact been stolen. Teddy was sure that the motor-cycle he saw the appellant riding was the same motor-cycle the appellant had given to Davis as security. On 14th January, 2009, the complainant saw the appellant at the stage entering into a matatu. He raised an alarm and the matatu stopped at a police road block at Kaloleni Trading Centre. The complainant then identified the appellant to PW 5 Corporal John Ng'ang'a (Cpl. Ng'ang'a), who was at the road block, and Cpl. Ng'ang'a arrested the appellant and took him to the police station. The appellant was, subsequently, charged with the offence of robbery with violence.

[7] When put to his defence the appellant gave a sworn statement in which he denied having committed any offence. He admitted having been arrested from a matatu but denied having robbed the complainant or having taken any money belonging to Davis, or having given him a motor-cycle as security. He maintained that Davis had a grudge against him because they had fought after Davis impregnated his sister and abandoned her.

[8] It is apparent that the evidence against the appellant turned on the issue of identification. In ***Roria vs Republic, 1967 EA 584***, Sir Clement De Lestang, V.P., delivering the judgment of the predecessor of this Court, stated as follows regarding a conviction resting entirely on identification:

“That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this Court to satisfy itself that in all circumstances it is safe to act on such identification. In Abdala bin Wendo and Another v. R. (1) this Court reversed the finding of the trial Judge on a question of identification and said this (20 E.A.C.A. at p. 169):

‘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’.”

[9] In Maitanyi v R. [1986] KLR 198, this Court revisited the issue of identification by a single witness and held as follows:

(i) Although it is trite law that a fact may be proved by the testimony of a single witness, this 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.

(ii) When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.

(iii) The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decisions, it must do so when the evidence is being considered and before the decision is made.

(iv) Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

[10] It is apparent from the judgment of the High Court that the learned Judges addressed the issue of identification, and in order to appreciate the extent to which the matter was addressed, we reproduce herein the relevant portion of the judgment:

“The next crucial issue is that of identification – has there been a clear and positive identification of the appellant as the perpetrator of the offence? The incident occurred at about 9.00 p.m. No doubt it was dark. However, PW 2 told the court that he met and spoke to the appellant at the stage which was well lit. PW 2 states at page 18 line 22:

‘The passenger found me at Kilifo Stage near Giriama Traders Shop. There are two electric lights and there was moonlight at the time. I saw him well. He is the one in the dock’.

We have no doubt that boda operators would park and wait for passengers in a well-lit area if only for security concerns. They would hardly be conducting business in the darkness. PW 2 saw and spoke to the appellant. No doubt they negotiated a fee. After that PW 2 remained in the company of the appellant as he ferried him to his destination. We are satisfied that PW 2 spent enough time in the company of the appellant and had ample time and opportunity to see and identify him. It was this passenger whom PW 2 carried who later turned on him and attacked and strangled

him. We find no possibility of a mistaken identity. On 14th January, 2009, a mere ten (10) days after the incident, PW 2 spotted the appellant riding in a matatu. We agree with the finding of the learned trial magistrate recorded at page 6 line 10 that:

‘That is not a very long period of time for the person’s identity to have faded out of his memory’.

Although the evidence is from only one identifying witness, we are satisfied that in the prevailing circumstances that identification was clear and reliable. We, thus, find that the appellant was one of the men who robbed the complainant of his motor-bike. No doubt the appellant having given out the motor-cycle to PW 4 to guarantee payment of the missing 50,000/- was determined to get it back by hook or by crook”.

[11] It is evident that both courts were alive to the fact that they were dealing with evidence of a single identifying witness and evaluated the evidence with this in mind. Unlike the Maitanyi case in which the identifying witness saw the appellant under stressful conditions with the aid of a safari lamp, the complainant herein first saw the appellant under a very relaxed and friendly atmosphere with the aid of a street electric light which must have been reasonably bright as the motor-cycle taxis were parked there waiting for prospective passengers. The complainant and the appellant had the opportunity to talk as they negotiated over the distance and the fare. The learned judges reasonably inquired into the nature of the light and the time the complainant took with the appellant.

[12] Although the complainant did not give a clear description of his assailant to the people to whom he initially reported the robbery, he was sure that he could identify his assailant if he saw him. We are satisfied that the complainant saw and talked to the appellant and was able to positively identify him as his assailant. We take note that there was some contradiction regarding the person who identified the appellant at the time of his arrest. This is in light of the evidence of Davis that it was one Matano Charo, who identified the appellant to the person who arrested him. Nonetheless, Davis relied on information from Matano Charo which was hearsay information as Matano Charo was not called to testify. Moreover, the complainant’s evidence that he is the one who spotted and identified the appellant at the time of his arrest is confirmed by Cpl. Ng’ang’a to whom the complainant identified the appellant.

[13] We have further considered the rather unusual relationship between the appellant and Davis, and the fact that the motor-cycle was given to Davis by the appellant as security. We agree with the analysis of the trial magistrate that while the relationship between the appellant and Davis may have given rise to a grudge, the complainant who was clearly assaulted and robbed had absolutely no reason to falsely implicate the appellant in the commission of the offence. We come to the conclusion that the appellant was positively identified and that the learned Judges properly analyzed the evidence, and rightly rejected the appellant’s defence. Accordingly, we uphold the appellant’s conviction. As regards the sentence, nothing turns on this as the sentence of death passed on the appellant is the lawful sentence provided by law for the offence of which he was convicted. Moreover, at this stage, severity of sentence being a matter of fact, is not an issue within our jurisdiction.

The upshot of the above is that we dismiss the appeal in its entirety.

Dated and Delivered at malindi this 3rd day of July, 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

M.S.A. MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR