



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(SITTING AT MERU)
(CORAM: VISRAM, KOOME & OTIENO-ODEK, J.J.A.)
CRIMINAL APPEAL NO. 317 OF 2008
BETWEEN
DOUGLAS MUTHAURA NTORIBIAPPELLANT
AND
REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court of Kenya at Meru

(Emukule & Ouko, JJ.) delivered on 29th July, 2008

in

H.C.CR. Appeal No. 118 of 2008)

JUDGMENT OF THE COURT

1. The appellant, Douglas Muthaura Ntoribi, was charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal code**. The particulars of the offence are that on the 8th day of June, 2004, at Bombitine village, Kigane Sub-Location in Meru Central District within the then Eastern Province, the appellant jointly with others not before court and armed with dangerous weapons *to wit* panga and rungus robbed Dr. Simon K. Ikiugu Ksh. 500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Dr. Simon K. Ikiugu.
2. The complainant, PW1, Dr. Simon K. Ikiugu, testified that he is a pharmacist and runs a pharmacy shop. That on 8th June, 2004 at 1.00 am together with his wife, Jane Ngure Karimi (PW3) were asleep in his house. He heard his dogs barking and then shortly his watchman, Dominisian Kungania, came and knocked on his bedroom window and said there was danger outside. He put on his clothes and was ready for anything. That the very window the watchman knocked was violently hit and it broke. He flashed his torch and saw the appellant whom he used to see in town. The appellant was about 2 metres away from the window and he had a cap. PW1 testified he threw

- a bottle at the appellant but it missed. The appellant went to another window which he broke and PW1 threw another bottle at him. PW1 stated that he was now near the door with his wife. The appellant and other attackers tried to enter and PW1 together with his wife resisted by holding the door. He threw to the attackers Ksh. 500/= through the window. The thugs broke the wooden door with a huge stone and they entered with a panga. That as the attackers entered he jumped outside the house with a rungu. PW 1 testified he started fighting with the thugs and the appellant ran away.
3. That while outside he saw the appellant again as there was moonlight. When the appellant was running away his cap fell. The police came and collected the stone, cap and the rungu. PW1 further testified that on 10th June, 2004 while at his pharmacy shop at 8.00 am, he saw the appellant and another person standing near his shop. He recognized him and rang the police. The appellant was arrested and charged with the offence. In cross examination, PW1 stated that he had known the appellant for about 4years.
 4. The trial magistrate convicted the appellant for the offence of robbery with violence as charged and sentenced him to death. His appeal to the High Court (Emukule & Ouko, JJ) was dismissed and he has lodged this second appeal.
 5. In the home made memorandum of appeal filed on 19th December, 2008, the appellant raises several grounds *to wit*:
 - *The learned Judges erred in law in failing to fully evaluate and analyse the lower court's evidence and drawing their own independent inferences and conclusions.*
 - *The Judges erred in failing to find that there was no first report made to the police giving the name or description of the appellant and the Judges erred in disregarding the occurrence book.*
 - *The learned Judges erred in law and fact in failing to find that the identification or recognition of the appellant was not free from error.*
 6. At the hearing of the appeal, learned counsel, **Ms J. Nelima** appeared for the appellant while the State was represented by the Senior Prosecution Counsel, **Mr. Jalsion Makori**.
 7. Counsel for the appellant emphasised that the key issue in the appeal relates to identification of the appellant; that both the trial court and the High Court failed to test the evidence on identification and to determine whether the prevailing conditions were conducive to an identification that was free from error. That the appellant was not properly identified. Counsel submitted that, PW1, Dr. Simon Ikiugu testified that he identified the appellant through torchlight. He also testified that there was moonlight. Counsel submitted that PW1 in his statement to the police never indicated that he recognized the appellant. That from the testimony of PW1, the attackers broke the window at 1.00 am. Counsel submitted that this time of the night was not conducive for a positive identification of the appellant. It was submitted that both the trial court and the High Court did not evaluate the intensity of the light from the torch, the strength of the torchlight, whether it had new or old batteries and the number of batteries in the torch and the brightness of the moonlight. That the relative position of the appellant to the source of light was not given. That the trial court did not caution itself on the dangers of relying on a single indentifying witness. Counsel cited the case of *Maitanyi – vs- Republic, (1986) KLR 198* in support of her submissions.
 8. Counsel further submitted that the complainant in his statement to the police never mentioned that the appellant had a gap in his teeth and there was no mention of a cap or a scar. That there are discrepancies in the testimony of the complainant given in court and his statement to the police. Counsel submitted that the learned Judges of the High Court erred and misdirected themselves in finding that failure to indicate there was a gap in the teeth of the appellant was not fatal. Counsel cited the case of *Bosco Lewa & another – v- R, Criminal Appeal No. 83 of 2001* and *Joseph Ngumbao Nzaro – v- R, (1991) 2KAR 212* in support of the submissions.
 9. The State in opposing the appeal, submitted that the identification of the appellant was free from error. That the trial court properly warned itself in relying on the testimony of a single identifying witness. That PW1 testified that he flashed a torch and saw the appellant and there was moonlight. That PW1 clearly stated that he was engaged in a struggle with the appellant and came to close proximity with him. It was submitted that PW1 indicated he had known the appellant for about 4

years and the chances of mistaken identity did not arise. The State emphasized the fact that the appellant was seen by the complainant after two days meant that the memory of the complainant was still fresh and no mistaken identity could ensue.

10. We have considered the submissions by both learned counsel and note that this is a second appeal which must be confined to points of law. As was stated in ***Kavingo – v – R, (1982) KLR 214***, a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. In ***David Njoroge Macharia – v- R, [2011]e KLR*** it was stated that under **Section 361 of the Criminal Procedure Code**:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong vs. Republic (1984) KLR 213)”

11. The appellant contends that the learned Judges erred in failing to re-evaluate the evidence on record. In ***Salim Juma Dimiro –v – R, Criminal Appeal No.114 of 2004***, this court stated re-evaluation of evidence is a matter of law. In the present case, the appellant is faced with a charge of robbery with violence contrary to **Section 296 (2) of the Penal Code**. It is our duty to examine if the two courts below erred in law in dealing with the evidence on identification of the appellant. In the case of ***Charles O. Maitanyi vs. Republic, (1986) KLR 198***, this Court held that:-

“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”

12. In ***Abdala Bin Wendo –vs- R, (1953)20 EA CA 166***, it was stated that where the conditions for identification are difficult, there is need for other evidence, circumstantial or direct pointing at the guilt of the accused to be produced. In ***Gerald Kuria Matahe –vs- R, Criminal Appeal No. 69 of 2008***, the court held that there was need for an inquiry to be made on the proximity and brightness of the source of light. In the Court of Appeal decision in ***Ogeto –vs-Republic, [2004] 2KLR***, this court held that:

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken”.

In ***R. –vs-Turnbull & Others, (1973)3 ALL ER 549***, the court considered what factors the court should take into account when the only evidence turns on identification by a single witness. The court said:-

“...the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?...Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made”.

13. In the present case, the testimony of PW1 is that he was woken up by his watchman at about 1.00 am and he prepared himself for any eventuality. When the window to his bedroom was hit, PW1 flashed his torch and saw the appellant. That he further saw the appellant using the aid of moonlight when he (PW1) got outside his house. The complainant testified he had known the appellant for about 4 years.
14. We have examined the judgment of the High Court and the record of appeal. There are concurrent findings of fact by the two courts below in respect to identification of the appellant. On the issue of recognition, the learned Judges evaluated the evidence on record and emphasized that PW1 testified:

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and conclusively identified or recognized by PW1, the complainant”.

The learned Judges further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error. We find that the learned Judges did not err in their re-evaluation of the evidence on record. The upshot is that we find this appeal has no merit and is dismissed.

Dated and delivered at Meru this 30th day of April, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR