



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, G.B.M. KARIUKI & KIAGE, JJ.A.)

CRIMINAL APPEAL NO. 176 OF 2013

BETWEEN

MUGAMI MUNGATHI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence of the High Court of

Kenya at Nairobi (Makhandia & Dulu JJ.) delivered 20th April, 2013

in

MACHAKOS H.C.C.R.A NO.33 OF 2012)

JUDGMENT OF THE COURT

1. Mr. Mugami Mungathi, the appellant in this appeal, was on 27th February 2012 convicted by the Principal Magistrate Court at Makueni of the offence of robbery with violence contrary to Section 296(2) of the Penal Code and on 23rd February 2012 was sentenced to death. Section 296(2) of the Penal Code under which he was charged, convicted and sentenced provides that:-

“296. (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

2. The charge against the appellant was framed as follows:

“On 11th day of October 2010 at around 10.00 p.m. at Miangeni Market, Miangeni sub-location in Mbooni East District within Eastern Province being armed with dangerous weapon namely metal bar robbed FELIX KINYAE MUTULA of two mobile phones make Nokia 1208 valued 3,000/=, Samsung C140 valued Ksh.3,000/= and cash 600/= all totaling to

Ksh.6,600/= and at the time of such robbery wounded the said FELIX KINYAE MUTULA.

3. In the trial that ensued, evidence of identification of the appellant was given by the complainant, Felix Kinae Mutua, (PWI), who described himself as a businessman and testified that he bumped into the appellant by happen-stance on 11.10.2010 at 9.30 p.m. as he went looking for a friend at a newly opened club at Miangeni Market in Miangeni sub-location in Mbooni East District of Eastern Province. Both walked to the club from the bus stage after the complainant had unloaded building materials he was carrying on his vehicle and put them in the premises of a neighbour.

4. The complainant stated in his evidence that he knew the appellant to see and that he had known him for three months before. The appellant, he said, was carrying a metal club and when they got to the bar, the appellant requested the complainant to buy him a drink. The latter obliged. The duo stayed in the bar for 45 minutes during which period the appellant had a cup of senator keg while the complainant who paid the bill took two of the same drink. The bill was paid by the appellant. The duo left the club at about 10.00 p.m. They talked as they walked. It was the testimony of the complainant that the appellant enquired where the complainant worked because he had seen him carrying building materials.

5. Immediately after passing Miangeni Secondary School, the appellant attacked the complainant and using violence robbed him of his identity card, Shs.600/= and a Nokia mobile phone No.1208, a belt and letters relating to his business. It was the complainant's evidence that the appellant suddenly grabbed him by the shoulders and ordered him to remove everything from his pockets lest he killed him. The appellant strangled him and bit his right ring finger when he tried to shake him off. It was the complainant's further evidence that the appellant beat and injured him with the metal rod he was carrying and threw him to the ground. Defeated, the complainant surrendered. After robbing and injuring the complainant, the appellant left him for dead.

6. The complainant's home was not far from the scene of the crime and when he managed, two hours later, to pick himself up, he made his way home where he found only his children as his wife was away in Nairobi at the time. In the morning, he reported the incident to the area Assistant Chief, Robert Sito Ndumi, who testified as PW4 and confirmed that the complainant had made the report to him. In the report, the complainant told the area Assistant Chief that he knew his assailant was called Mulili Mutunga and that he was working for one Wilson. Pw4 was to later discover that the appellant had a different name.

7. PW4, the area Assistant Chief of Miangeni sub-location, confirmed in his testimony that he was on duty on 12.10.2010 when the complainant's father, Mutula Kianga, in company of Mulwa Mumo, the village elder, reported to him that the former's son (the complainant) had been injured and wanted a letter to seek medical assistance. The identity of the assailant was given as the person who was drinking with the complainant on 11.10.2010 and who was working at the home of one Muthusi. The Assistant Chief and his two guests visited the scene of the crime and observed shoe prints that led to the home of Muthusi where they found the appellant. Apart from bhang, shoes, guitar and a metal rod, nothing else was found. They arrested him. It was not clarified whether Wilson and Muthusi was one and the same person. But nothing would turn on this as the appellant testified that he knew the appellant and whether he worked for Muthusi or Wilson did not bear on the evidence of recognition.

8. As is apparent from the evidence, the prosecution's case against the appellant turned on the evidence of the single identifying witness, namely Felix Kinae Mutula, the complainant.

9. The appellant was aggrieved by the decision of the trial court and consequently, filed in the High Court at Machakos an appeal against his conviction and sentence in which he challenged the evidence of identification by the single identifying witness and also contended that while the weapon used to injure the complainant was not found in his possession, the defence he adduced in the trial court was rejected "for no good reason." The High Court did not find merit in his appeal. The High Court observed in its judgment thus -

“...we do not think that evidence of identification of the appellant can be faulted. The complainant had known the appellant long before the incident as he used to work for a neighbor as a herdsman. On the material day, the complainant met with the appellant at a bus stage. Together they went to a club and the complainant bought him a drink. There was light in the club. After having a drink for about 45 minutes, they left together. It was while on the way home that the appellant turned on complainant and robbed him. In the cause of the robbery the appellant who was armed with a metal rod repeatedly struck the complainant leaving him for death as he took off with the complainant’s items listed in the charge sheet. In our view, the appellant had been in the company of the complainant for a long time, they were in close proximity also for a long time, and being a person the complainant knew, he could not have mistaken the appellant for another person....”

“...it is also instructive that he mentioned the appellant as the person who perpetrated the attack on him to the first person he came in contact with, his father and thereafter to the local administration. Armed with the information, members of the public proceeded to the house of the appellant whom they and upon searching (sic) the house, they came across a metal rod, same as that used during the robbery. This cannot merely be coincidence.”

10. The High Court also faulted the trial Court, correctly in our view, for failing to warn itself of the danger of relying on evidence of a single identifying witness but it also observed, correctly in our view, that the circumstances under which the complainant identified the appellant left no doubt that the appellant could not but be the assailant who robbed the complainant. The High Court observed in its judgment:

“...As already stated, the complainant knew the appellant very well, they moved from the bus stage to the club as they talked, there was light in the club, they stayed in the club for over 45 minutes as they partook alcohol. This being the circumstances, can it really be said that the complainant could not have identified the appellant? We do not think so...”

11. When the appeal came up for hearing before us on 17th July 2014, the learned counsel **Mr. Ibrahim Onyata** appeared for the appellant while Mr. Kivihya, the learned Assistant Director of Public Prosecutions appeared for the State. Mr. Onyata collapsed the 8 grounds of appeal into three and argued grounds 1 & 2 as the 1st ground and grounds 3 & 4 as the 2nd ground and grounds 5, 6, 7 & 8 as the third ground.

12. On the first ground, the learned counsel submitted that the evidence of identification by the complainant lacked corroboration. The learned counsel did not furnish authority for that proposition even at the behest of the Court. He was however not wrong in expressing the need for great circumspection by the Court before relying on the evidence of a single identifying witness. In counsel’s view, the complainant had had alcohol which could have impaired his ability to identify the assailant. He pointed out the contradictions in the prosecution evidence with regard to the place where the weapon used in the robbery was found and contended that while the village elder (PW2) alleged that it was found at the scene of the crime, the Assistant Chief (PW4) stated that it was found in the house of Muthusi where the appellant was found. He urged us to consider why the witnesses followed footprints to the house where the appellant was found and contended that it would have been superfluous if the identity of the appellant had been known. But this does not take away from the fact that the complainant, regardless of the footprints which he was ostensibly unaware of, had described the assailant as the person he had been with at the said club and whom he knew. The footprints led the trio to the house where the appellant worked. He was found there. The arrest of the appellant was not merely because the foot-prints led to where he was found. He had been described by the complainant as aforestated.

13. The learned counsel also challenged the decision of the High Court on the ground that the High Court did not properly evaluate the evidence and consequently came to the wrong conclusion. That too was a point of law. Counsel wondered why the Court did not interrogate the question as

regards the name of the assailant the complainant had in mind. While the charge against the appellant referred to Mungani Mungaathi as the suspect, the complainant testified that the person in his company at the club who subsequently robbed him was called Mulili Mutunga. So what is the appellant doing here in court, asked counsel, and yet he is not Mulili Mutunga.

14. First, the evidence shows that the complainant stated that the suspect called himself Mulili Mutunga. He himself did not know the assailant's name but he had known him to see for about 3 months. That evidence is at variance with the statement made by counsel. The record does not show that the complainant knew the suspect by name. He knew him to see and could recognize him, which he did.

15. On the third ground, the learned Counsel contended that the High Court never evaluated the evidence and did not ask itself what the direction of the complainant's home vis-à-vis the scene of crime was nor did it appear alive to the fact that it may well be that when the complainant and the person he was with left the bar, they went to different directions and that the complainant might have been attacked by somebody else on his way home. These arguments proceed from surmises, suppositions and speculation and are not borne out by evidence. The evidence adduced in the trial court shows that the duo walked together and talked as they did so before the appellant attacked the complainant.

16. As this is a second appeal, we are constrained by the provisions of Section 361 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya to entertain only issues of law. In successive decisions of this Court, this statutory requirement has been emphasized again and again and in the case of **Njoroge v. Republic** [1982] KLR 388 this Court emphasized that

“on a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the Court was bound by the concurrent findings of fact made by the lower Courts, unless those findings were shown not to be based on evidence.”

17. In this appeal, the evidence of identification of the appellant was by one witness, namely the complainant, PWI, who testified that the appellant was not a stranger to him. He had known him for 3 months. On the day the crime was committed, the complainant spent time with the appellant as they walked together to the bar where they sat for 45 minutes during which the complainant had two beers and the appellant one. They then walked together out of the bar and were on their way home when the appellant turned on the complainant. The trial Court watched the demeanour of the complainant and that of the other prosecution witnesses as well as that of the appellant as they testified. It believed the evidence of the complainant and rejected the denial by the appellant that he committed the offence. The High Court re-evaluated the evidence in its judgment. Both Courts arrived at concurrent findings which were based on the evidence adduced at the trial. We are statutorily enjoined to accept these concurrent findings. They are not plucked out of thin air. They have their foundation in the evidence. If the findings were not supported by the evidence adduced at the trial, we would be justified in rejecting them for the simple reason that it would be an error of law for a Court to make a finding of fact that has no evidential support. As the second appellate Court, we are justified in interrogating the matter with a view to find out whether the findings of fact made by the lower courts are backed by evidence. Where they do not, that constitutes an error of law on the basis of which we would be entitled to interfere. An appellant would be perfectly entitled to address this Court on a second appeal on the question whether the concurrent findings were based on evidence or not because that is a question of law. But unless the concurrent findings were not based on the evidence on record, they are binding and will be had regard to in determining the merits or otherwise of the appeal.

18. In the instant appeal, there is ample evidence that the trial and the first appellate Courts after evaluating the evidence found that the person who attacked and robbed the complainant was the appellant who had spent time in the company of the complainant and who the latter knew. There is no basis on which those concurrent findings can be interfered with. The period during which the complainant and the appellant spent together, the conditions of light in the bar, and the fact that

the complainant already knew the appellant put the evidence of recognition of the appellant by the complainant beyond any doubt.

19. Learned counsel for the appellant, Mr. Ibrahim Onyata tried to poke holes in the findings by posing conjectures about the directions of the homes of the complainant and the appellant and the surprising fact that the complainant could be robbed so near his home and then take such a long time to get home after the ordeal. The conjectures by the learned counsel did not displace the concurrent findings which had evidential backing.

20. The first appellate Court was enjoined to carefully undertake an inquiry to test the evidence of the complainant who was the single identifying witness. Failure to do so would have constituted an error of law. In the case of **MAITANYI V. REPUBLIC** [1986] KLR 198 this Court held:

1. **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.**

2. **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.**

3. **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 decision, it must do so when the evidence is being considered and before the decision is made.**

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

21. In a recent decision of this Court in **Michael Kimani Kungu v. Republic** (Criminal Appeal No.686 of 2010 (R)) relating to an appeal for robbery with violence this Court stated:

“This court has time and again pointed out that evidence of a single identifying witness needs to be tested with the greatest care before a conviction is based on it so as to eliminate the possibility of an error or mistake (see **ABDALLA BIN WENDO & ANOTHER versus REGINAM (1953) 20 E.A.C.A.155**. It is accepted that even the most honest of witnesses can be mistaken when it comes to identification (see **KAMAU versus REPUBLIC (1975) EA 139**). In the light of this, conviction should only ensue when it is beyond per adventure that a suspect was properly identified. In the case of **CLEOPHAS OTIENO WAMUNGA VERSUS REPUBLIC (1989) KLR 424** this court correctly stated in this regard:-

“**Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.** Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. **The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well-known case of R. VS. TURNBULL (1976) 3**

ALL ER 549 at page 552 where he said:-

“**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.**”

“Although 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 such single witness respecting identification.” This is particularly so where the conditions are not conducive to proper identification or where conditions favouring a correct identification are difficult.”

22. In this appeal, the evidence shows quite clearly that the appellant was known to the complainant and that the complainant and the appellant spent time together in a bar which had electric light. The conditions were conducive to positive recognition. Thereafter they walked away together. The complainant described the attacker as the person he was drinking with. He stated immediately he was able to talk that the appellant who was drinking with him and whom he knew was the assailant.

23. At no time did the two part company after leaving the Bar before the complainant was attacked. The weapon used by the assailant was similar to the one found in the house where the appellant was found. But even if the weapon and other items stolen from the complainant were not found in possession of the appellant, the evidence of recognition was so cogent that it left no room for doubt that the appellant was the robber.

24. The evidence shows that the appellant was armed with a metal rod and that he unleashed violence on the appellant and robbed him of the items stated in the charge in respect of which evidence was adduced. The evidence of the complainant as the single identifying witness has been carefully tested. It leaves no doubt whatsoever that the appellant committed the offence with which he was charged, tried and convicted. We find no merit in the appeal.

25. For the foregoing reasons, we dismiss the appeal.

Dated and delivered at Nairobi this 10th day of October 2014.

J. W. MWERA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR