



IN THE COURT OF APPEAL

AT NYERI

(CORAM; VISRAM, KOOME, & ODEK, JJ.A)

CRIMINAL APPEAL NO 104 OF 2013

BETWEEN

DANIEL KIMANYI KAMAU.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nyeri, (Wakiaga & Ombwayo, JJ.) dated 13th November, 2013

in

H.C.CRA. No. 130 of 2009)

JUDGMENT OF THE COURT

On 25th December 2007, Charles Ngirigacha (PW1) woke up at dawn and set out for Nyeri to see his wife who had been hospitalized at the Provincial General Hospital. When he reached the stage at Kiangai, he saw no people, so he decided to sit by the road side terrace. Suddenly, somebody shone a torch on him, and hit him on the chin with the same torch. The attacker cut PW1 with a panga on the head, back and right hand. He then undressed PW1 off his coat and took away Kshs. 12,100/= from the inner pocket. This was the money PW1 was going to use to settle his wife’s hospital bill; his identity card, election card and other personal documents were also stolen. None of the items that were stolen were ever recovered.

After the attack, PW1 screamed a lot but only Musili Mwanzia Kituo (PW3) heard the screams; however, as he tried to find out what was happening, a watchman told PW3, not to bother as it was drunk people who were screaming. However, an aspect that was taken by the trial court and weighed on the appellant’s case was the fact that about 5 minutes earlier PW3 had seen the appellant pass by the same place; the appellant asked PW3 whether he had seen his wife by the name Wanjiku. PW3 said he had not seen her and it was soon thereafter that PW3 heard somebody screaming; later, he learnt PW1 was attacked. He met the appellant a few days later and asked him whether he was the one who attacked PW1, as he had been seen at the Centre, but the appellant said there was also another person by the name Nyaga who was at the Centre at the material time.

After the attack which took about 3 minutes, PW1 reported the matter at Kiangai Police Post, he was

issued with a P3 form that was completed by Maina Ndiragu (PW2) a registered clinical nurse working at the time at Karatina District Hospital. PW1 sustained a deep cut wound on the back of the head, multiple cut wounds on both hands around the wrist joint and a fracture of the left arm. PW1 was hospitalized for two weeks and continued with treatment for some time even as the trial progressed.

PW1 stated in his evidence that he had not identified the attacker, when the torch was shone on his eyes. It is not clear from his evidence at what stage of the attack he was able to recognize the attacker but he indicated that he gave the police the name of the assailant. The report of the attack was received by APC Raphael Kioko (PW4) of Kiangai AP post in Ndia on the 25th December, 2007 at about 5.30am. He organized for PW1 to be taken to the hospital and on the 8th January 2008, with the help of police officers from Karatina, he arrested the appellant following information from an informer.

The other evidence that was relied upon by the prosecution was by P.C. Joseph Kariuki (PW5) based at the Karatina Flying Squad. PW1 reported about the attack and the robbery on him on the 25th December 2007 at about 9.30 a.m. After PW1 was discharged from hospital, PC Kariuki recorded his statement. According to Kariuki, although PW1 said he knew his attacker, he did not mention the name of the attacker when he recorded the statement.

The above is the summary of the evidence against which the appellant was charged and arraigned before the Principal Magistrate's Court at Karatina with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars stated that on the 25th December, 2007 at Kiagai village in Nyeri District within Central Province while armed with a panga, robbed Charles Ndirigacha Ndei of Kshs. 12,100/= and or immediately before or immediately after the time of such robbery wounded the said Charles Ndirigacha Ndei.

The appellant pleaded not guilty and after the prosecution's case the appellant was found to have a case to answer. He gave a sworn statement of defence denying the offence and basically gave a chronology of the events that happened on the 8th January 2008 when he was arrested and subsequently charged with the instant offence. Upon trial, the appellant was convicted a lesser offence of simple robbery under the provisions of **Section 296(1)** of the **Penal Code**. He was sentenced to 20 years imprisonment.

Being aggrieved of the conviction and sentence, the appellant appealed before the High Court. Wakiaga & Ombwayo, JJ. dismissed the appellant's appeal and substituted the trial courts conviction of simple robbery to that of robbery with violence and enhanced the sentence of 20 years to death. This is the judgment that has provoked this appeal which is predicated on 5 grounds of appeal. For avoidance of repetitions and proliferation of common mistakes, those grounds may be summarized as follows:-

That the first appellate court erred by;

- a. ***Failing to acknowledge the charge sheet was defective;***
- b. ***By relying on the evidence of PW1 whose quality was wanting and was not corroborated;***
- c. ***By relying on the evidence of PW3 which did not have a bearing to the offence but was merely made to give credence to the prosecution;***
- d. ***By declining to evaluate the defence case;***
- e. ***Failing to thoroughly re- evaluate the evidence on record thus arriving at an erroneous finding.***

The above grounds were elaborated in greater detail during the hearing of this appeal by Mr. Kimunya, learned counsel for the appellant. He faulted the High Court Judges for failing to re- evaluate the evidence as it is the duty of the first appellate court. Commenting on the judgment, counsel submitted that the Judges merely summarized the evidence before the trial court and failed to subject it to its own analysis; had the Judges done that, they would have arrived at a conclusion that the evidence before the court could

not lead to a conviction. Counsel particularly identified the following conclusion which was arrived at without any analysis of the evidence;-

“From the evidence herein, we are of the considered opinion that the appellant was placed at the scene of the robbery by PW1, PW2 and PW3 and the clothes he was wearing on that date of the attack were positively identified by the said witnesses and thereafter his conviction was proper. We therefore find no fault with the trial courts conviction of the appellant”

Poking further holes on the conclusions drawn by the two courts below, that the appellant was convicted based on the evidence of recognition, counsel for the appellant argued that there was no evidence adduced by PW1 to show any familiarity with the appellant. It was necessary for the witness to state how he was able to recognize the appellant. The robbery took only 3 minutes, it was about 5:00 a.m. in the morning, thus the circumstances for positive identification can be said to have been difficult. Counsel cited the cases *Nzau Muli & Another –vs- Republic- Criminal Appeal 245 of 2009* and *Stephen Mbondola & 2 Others v Republic - Criminal Appeal No 162 of 2000 (unreported)*. In both cases this Court was dealing with the issue of reliability of visual identification of suspects and restated what was held in *Patrick Nabiswa –vs- Republic- Criminal Appeal No. 80 of 1997* and stated;

“This case reveals the problems posed by visual identification of suspects. This mode of identification is unreliable for the following reasons which are discussed in BLACKSTONE’S CRIMINAL PRACTICE, 1997, Section F 18

- a. ***Some person may have difficulty in distinguishing between different persons of only moderately similar appearance, and many witnesses to crimes are able to see the perpetrators only fleetingly, often in very stressful circumstances;***
- b. ***Visual memory may fade with the passage of time;***
- c. ***As is the process of unconscious transference, a witness may confuse a face he recognized from the scene of the crime (it may be of an innocent person) with that of the offender.”***

PW1 did not state at what point he was able to recognize the attacker. Although, he told the trial court that he gave the name of the assailant to the police, the two police officers who testified as PW4 and PW5 said that PW1 did not give them the name of the assailant. Indeed according to PW4, he arrested the appellant following information from an informer and PW5 was categorical he was not given the name of the appellant.

On the other hand this appeal was opposed by the State, Mr. Kaigai learned Assistant Director of Public Prosecution supported the conviction and sentence. He submitted that the case against the appellant was proved to the required standard. The two Courts were concurrent on their findings of fact, regarding how the complainant was attacked. His evidence was corroborated by PW2 and PW3. Although PW3 did not witness the robbery, the fact that he saw the appellant pass near the scene and 5 minutes later he heard the complainant screaming, corroborated the complainant’s evidence. Mr. Kaigai urged us to dismiss the appeal both on conviction and sentence as the evidence proved the offence of robbery with violence and the prescribed sentence is death.

This is a second appeal, by dint of the provisions of **Section 361 (1) (a)** of the **Criminal Procedure Code**, only matters of law fall for our determination unless it is demonstrated that the two courts below failed to consider matters they should have considered or looking at the entire case, their decisions on such matters of fact were plainly wrong in which case this Court will consider such omission or action as matters of law. See *Kavingo – v – Republic (1982) KLR 214*, wherein it was held that 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- Republic [2011] eKLR* 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)

With the above principles in mind, and from the summary of the background information, we have distilled the following issues for determination.

1. ***Whether the appellant was positively identified.***
2. ***Whether the High Court Judges re- evaluated the evidence as required of them.***

The conviction of the appellant was based on the evidence of PW1, the victim of a very vicious attack and robbery which happened on the 25th December, 2007 at dawn. No one witnessed the robbery. PW1 testified that he identified the appellant and gave his name to the police. However this information is not borne out of his evidence which we reproduce a pertinent portion here below;

“Then I spotted someone who came and he is accused on the dock. He is called Kamanyi Kamau. He shone a torch on me and hit me with the torch on my chin and told me “bring money you thief”. I had not known who it was that time, he then cut me with a panga on my back and on of head and on my right hand (court observes a large scar on right arm that is deformed). He also cut me on left arm... The assailant then undressed me of my coat and he took Kshs. 12,700/= from inner coat pocket and also my identity card, election card and my personal documents, I was to use that money to pay for my wife’s hospital bill. I screamed a lot, and then went to AP’S at Kiangai. Police started searching for the assailant. I was then picked and brought to Karatina hospital. I was admitted there for two weeks. I was then discharged later. Accused was arrested later. Police had checked on me at hospital. I wrote a statement. When I left the hospital, accused was arrested by police at Kiangai and knew him. I had given police the name of my assailant. Accused had been with me for about 3 minutes...”

The two police officers were categorical that PW1 did not give the name of the assailant. This is what PW4 stated in cross examination;-

“I was told by my informant that you were the assailant. Complainant had come to report to me. I only know you as master which is a nickname. On 25th, I was not told anything. I did not go to scene... my informant told me the assailant is alias Kinyua alias Master... my informant did not tell me where you home is...”

The other police officer was also categorical in his evidence that the complainant did not give the name of his attacker when he made the report. Thus the appellant was convicted based on the evidence of visual identification by the complainant alone when the circumstances for positive identification were not properly evaluated by the two courts below. This is what the learned trial Magistrate concluded regarding the evidence of identification of the appellant;-

“I find that though the incident occurred at dawn, PW1 avers that he had been able to identify the assailant during the robbery although when accused approached him (PW1) he had not known whom he was. PW1 avers that accused is a son of PW1’s age mate and they are from the same village, their homes being about 400 metres apart. Accused never rebutted PW1’s evidence that he (accused) hails from Thunguri and that he was known by PW1 from a very long time. PW1 averred that there was electricity lights about 8-10 metres away at the centre, so he had seen accused. It then follows that the evidence of PW1 regarding (sic) identifying accused is that of recognition. It has been held that familiarity for many years exclude error of identity as was held in the case of Njeri –v- Republic 1981 KLR 156.”

The Judges of the High Court were required to subject the aforesaid judgment of the trial magistrate and the entire evidence to fresh analysis while bearing in mind the laid down principles of the evidence of

visual identification and recognition. Although evidence of recognition is more reliable than identification by a stranger, caution must always be taken as there is always a possibility of mistaken identity. See the case of;- **Wamunga –v- Republic (1989) KLR 424** in which it held inter alia as follows:-

“Where the only evidence against a defendant is evidence of identification, or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.”

We find the evidence by PW1 alone was not safe to sustain a conviction. This evidence was not subjected to any test so as to rule a possibility of mistaken identity. For example at what point of the encounter was the complainant able to identify the appellant? How was he able to identify him?; if these questions were answered in the affirmative, the court could have looked for other corroborative evidence but what is on record was of no assistance to the case. Firstly, although PW1 said he recognized the appellant as the assailant, it is not clear from his evidence at what stage that happened. Secondly PW1 testified that he gave the names or description of the assailant to the police. However the two police officers denied this. The police officer who arrested the appellant said he was given the information by an informer. The investigating officer also confirmed that the complainant did not give the names of the assailant. The other evidence by PW3 who said that he saw the appellant at the Centre on the material day and soon after he heard somebody screaming, was merely speculative at best, this witness said he suspected the appellant and when he learnt the complainant was the one who was attacked he confronted the appellant but the appellant denied he was the attacker. Suspicion no matter how strong, cannot form the basis of a conviction of an accused person.

Both courts below failed to examine carefully the evidence of identification or recognition and as we have endeavored to demonstrate, the evidence on record left doubt as to whether the complainant positively identified the appellant as the assailant who violently robbed him or he was merely suspected. This is a doubt which should have but was not identified and applied in favour of the appellant. In the result, this appeal has merit, it is allowed with the result that the conviction against the appellant is quashed and the death sentence imposed on him is set aside. We order the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 19th day of November, 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