



IN THE COURT OF APPEAL

AT ELDORET

CRIMINAL APPEAL NO. 670 OF 2010

JORAM SIMIYU WAMALWA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Bungoma (Ombija, & Kariuki, JJ.) dated 21st May, 2008

in

H.C.CR.A NO.59 OF 2005)

JUDGMENT OF THE COURT

On 3rd September, 2004 at M [particulars withheld] Location Bungoma, a businessman by the name J.K.K (PW1) was violently robbed by a gang of three people who were armed with a gun, rungu and knife. The robbery took place at about 7.30 p.m. just after PW1 had closed his shop. He had stepped outside the shop while his wife S.K (PW4) was lying on the sofa set in another room at the back of the shop and P.N.M (PW3) a sister to (PW4) was cooking in another room in the front of the shop.

After PW1 locked his shop, he was confronted by a gang of three people; they ordered him to go back to the shop and lie down. The attackers covered his face with a piece of cloth; and they demanded to know from PW4 whether PW1 was her husband but PW4 pretended that he was just a visitor.

When P.N.M heard the attackers ordering everybody to lie down, she too lay down but she testified that although she was lying down she was able to peep through her elbows and was able to recognize the appellant. According to her the appellant was one of the attackers and he was the one who was armed with a rungu and a Somali Sword. He was wearing a cap and white jeans. The appellant is also the one who demanded to be given money and P.N.M's told him the money was in the shop drawer. The attackers stole Kshs.15,000/=, from the shop drawer, a mobile telephone, Rice and Sugar. They also took P.N.M's school bag which they used to carry the items. The place was lit by a lantern and that is how P.N.M was able to recognize the appellant who was known to her as he used to issue revenue tickets at K[...] Market. PW1 and PW4 were however not able to identify the attackers.

After the robbers left the scene, an alarm was raised; the matter was later reported at Chwele Police Station. P.N.M was treated at Bungoma District Hospital for the injuries she sustained during the robbery. The appellant cut her on the left thigh when she resisted his attempt to rape her.

P.N.M told the police that she recognized one of the attackers, although she did not know him by name but she used to see him collecting revenue at K[...] Market. On 10th October 2004, she led P.C. Festo Wamwayi (PW5) to K[...] Market; identified the appellant and that was how he was arrested and subsequently was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

The appellant opted to give sworn evidence in his defence. He denied the offence, but admitted that he was at the material time an employee of K[...] County Council. He used to collect market revenue and issue receipts. On the 7th October 2004, he had a disagreement with P.M.N over the market fees, and that is why she framed him up with the charges. He said he was arrested on the 10th October 2004, after the disagreement.

After trial by the Senior Principal Magistrate, he was convicted and sentenced to suffer death. After analyzing the evidence by the five prosecution witnesses and the defence, the learned trial magistrate was satisfied that P.M.Ns' evidence of identification of the appellant by recognition was sufficient and that was positive identification of the appellant.

The learned Magistrate observed this in part of his judgment:

“...P.N.M (PW3) on her part gave detailed and concise account of what transpired and how she was able to identify the accused. Her face was not covered and there was sufficient light in the room and further that she was able to clearly see the accused who attempted to rape her. The two also exchanged words before the accused stabbed her on the thigh when she resisted being raped. Her evidence was very consistent, forthright and bore all the hallmarks of the truth. I believe her when she says she positively identified the accused as one of the robbers...”

The learned Judges of the High Court arrived at concurrent findings with the learned trial Magistrate as they stated in part of their judgment as follows:

“...Having carefully re-evaluated the evidence. We are prepared to hold that though PW3 was a single witness, her testimony was consistent. She informed PW1 and PW4 immediately after the robbers left that she knew one of them as a tax collector at K[...] Market. She reiterated the same at the police station contemporaneous with the reporting. There was a lantern lamp on at all material times. The appellant talked to her. She volunteered information that led to the robbers getting the day's collection. The appellant wanted to rape her. Her refusal earned her a stab wound on her thigh. In effect, she was with the appellant and talked to him most of the time. She had the opportunity and the means to identify the appellant.. In the premises, we hold the view that the evidence against the appellant was overwhelming, as PW3 mentioned his name contemporaneous with the incident and subsequently to PW1, PW4 and PW5 and reiterated the same in Court...”

The appellant has now filed this second appeal, which by dint of the provisions of Section 361 of the Criminal Procedure Code turns only on points of law. In his homemade grounds of appeal which were adopted by M/S Konuche learned counsel representing the appellant, there are eight grounds of appeal. However, in her arguments learned counsel argued grounds 5, 7 and 8 together which touched on the issue of the evidence of identification by a single witness. The robbery occurred in a place where there were two rooms. P.N.M the only witness who identified the appellant said the lantern was on, however, the evidence of where the lantern was placed and the intensity of the light it was emitting were not adduced and the learned judges failed to reconsider that aspect.

Moreover, P.N.M testified that she was cut on the left thigh which is inconsistent with her evidence that she was lying down and looking through her elbows to see what was happening. Had the learned Judges re-evaluated the evidence of P.N.M they could not have arrived at the erroneous conclusion that she contemporaneously gave the name of the appellant to the other witnesses and to the police. Indeed P.N.M told the police she did not know the name of the attacker but could identify him by recognition. The robbery was reported to the police on the 4th October, 2004 while the appellant was arrested on 10th

October, 2004 despite the fact that his identity was revealed on 4th October, 2004 when the first report was made. If the defence by the appellant was given due consideration that he had disagreed with P.N.M on 7th October, 2004 over market fees, both Courts would have seen there was a possibility that the appellant was implicated after the disagreement and the matter was reported on 7th October, 2004.

On the part of the state Mr. Chirchir, learned Senior Prosecution Counsel opposed the appeal on the grounds that the appellant was identified through recognition. There was light from a lantern and the report was made instantaneously to the investigating officer. Counsel urged us to dismiss the appeal.

The Principles that guide the Court regarding evidence of a single identifying witness have been settled in a long line of authorities by this Court. In the case of **Maitanyi v Republic [1986] KLR page 200** this Court repeated the oft' cited words in well known authorities *Abdulla Bin Wendo & Another V Reg (1953) 20 EACA 166* followed in *Roria Vs Rep (1967) EA 583*. To wit;-

“Subject to 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 greatest care the evidence of single witness respecting identification, especially when it is known that 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.”

Also the principles on evidence of identification through recognition have been established and restated. See the case of; **Wamunga vs R [1989] KLR 424** this court stated:

“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”

The offence was committed at the night and although it is not disputed that there was a lantern lamp, this evidence needed to be evaluated with the greatest care because there were two rooms where the robbery took place. P.N.M was lying down and was peeping through her elbows and in that position was looking through the connecting door as the robbery took place. It is not clear whether there was a lantern in the other room, nor the proximity of the place where the lantern was, including the light that it was emitting therefrom. In this case, both courts should also have cautioned themselves of a possibility of an error due to the prevailing circumstances and looked for other supporting evidence.

P.N.M was categorical that she recognized the appellant; however, the learned Judges of the High Court erred in appreciating this evidence especially by stating that she contemporaneously named the appellant to the witnesses and to the police. The evidence of the investigating officer is clear that P.N.M did not know the name of the appellant; but only said she recognized him as a person who collects revenue at K[...] Market. The incident was reported on 4th October, 2004 and there was no explanation in the evidence why the appellant was not arrested immediately. We agree with M/s Konuche that lack of explanation here could have given some credence to the appellant's defence that he was arrested on 10th October, 2004 after he had a disagreement with P.M.N over market fees on 7th October, 2004.

Taking into consideration that both Courts did not properly caution themselves regarding the evidence of a single witness and the circumstances that obtained then, and analyzed the circumstances under which the robbery took place, we find merit in this appeal. We find the circumstances for a positive identification were difficult and needed to be considered with other supporting evidence. Since there was no other evidence pointing to the appellant, we entertain doubts that the evidence on record proved the appellant and no other person committed the offence.

Accordingly, we allow the appeal, set aside the conviction and quash the death sentence. Unless the

appellant is otherwise lawfully held, he should be set at liberty.

Dated at Eldoret this 31st day of January, 2013

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR