REPUBLIC OF KENYA

Court of Appeal at Nyeri

Criminal Appeal 462 of 2010

MARTIN KIMATHI MUKARIA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court of Kenya at Meru (Lesiit & Kasango, JJ.) dated 29th October, 2010

in

H.C.CR.A. NO.122 OF 2009)

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JUDGMENT OF THE COURT

On 6th August, 2004 at about 11.00 a.m. Christine Kaguri Kiogora (PW1) an employee of Millennium Dealers was walking to the Bank carrying a sum of Kshs.200,600/= in a paper bag which she was going to deposit at Equity Bank. After walking for about 50 metres from the offices, she was accosted by three men. They slapped her, threatened her with a sword and was forced to let the paper bag go. The three men ran away with the money and her mobile phone a Motorola L6, a bunch of keys for the office and a bank book. PW1 tried to run after the robbers while screaming but they disappeared between the buildings and she lost sight of them.

PW1 returned to the office to report what had happened, but on reaching the neighbors shop, she fainted and lost consciousness. Michael Mutuma (PW2) was at the material time operating a battery charging shop next to Millennium Dealers. He was sitting on a window grill and he saw PW1 struggling with two young men, snatch a paper bag from PW1 and escape between a building that was under construction and Tabibu Cures. PW2 went to see what was happening and found PW1 crying, she told him that she had been robbed of the money.

PW2 had not locked his premises, so he decided to secure his premises first. Meanwhile PW1's other colleague at work joined her and they decided to pursue the robbers. After sometime, PW1 returned and sought advice from PW2 on what to do, but she collapsed and fainted. PW2 looked for a vehicle that took PW1 to Maua Methodist Hospital. She was treated and discharged after about 3 hours. The matter was reported at Maua Police Station.

On 20th August, 2007 PW1 learnt from the police that one of the robbers had been arrested. At an identification parade conducted by Jeremiah Mwangi Wakaba (PW4) on the 22nd August 2007, both PW1 and PW2 were also able to identify the appellant. The appellant was arrested by PC James Maina on 20th

August, 2007 following information received from an informer. The appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

The prosecution's case was supported by the evidence of those four witnesses. The appellant was found to have a case to answer, he was placed on his defence, and he elected to give sworn evidence. He denied the offence and gave a chronology of the events that occurred on the day he was arrested. He contended that he was arrested while going about his business at Maua Town, and on 22nd August 2006, PW2 who was well known to him purported to identify him at an identification parade. He claimed that even PW1 had seen him earlier on the day he was arrested.

After analyzing the above evidence, the learned trial magistrate was satisfied the prosecutions' case was proved and in particular the appellant was properly identified at an identification parade, convicted the appellant and sentenced to death. This is what the learned trial magistrate observed in part of his judgment:

"From the evidence adduced before the Court I have no doubt that the complainant clearly saw the accused during the robbery. She had seen him seated at the grills of 711 bar when she left her office. She saw him in front of her when he robbed her. The identification parade was properly conducted. The accused did not at the time complain that the complainant had seen her on 22nd August. He instead complained that the complainant had seen him on the day he was arrested. The accused was arrested on the 20th August. I do not believe that the complainant had seen the accused on 22nd August.

Mutuma said that he had known the accused for about three years. That there was a time that he was working with Kiringo Beer Distributors and that he used to deliver beer at 711 Bar. That on such occasions he used to go to his workshop and greet Mutwiri who was working with him. Further, that a day before the complainant was robbed he saw the accused and Mutwiri talking at the grills of 711 bar. This evidence that the accused was at the grills of the said bar corroborates the evidence of the complainant that she saw the accused at the said grills when she left the depot. There is overwhelming evidence that the accused was within the vicinity before the complainant was robbed. I have no doubt that he is one of the people who robbed the complainant."

The appellant's appeal in the High Court was dismissed thereby provoking the present appeal. In a short Judgment, Lesiit and Kasango, JJ, concurred with the trial magistrate and indeed reiterated his findings. By dint of the provisions of Section 361 of the Criminal Procedure Code, this appeal will only be determined on points of law. See the case of; ***Njoroge v Republic [1982] KLR 388***, this Court held:

"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."

The appellant filed some eight (8) homegrown grounds of appeal which were adopted by Mrs. Ntaragwi his learned counsel. She combined all the arguments together with the supplementary grounds of appeal which basically faulted the learned Judges for failure to re-evaluate all the evidence especially on identification; the circumstances for a positive identification can be said to have been difficult; PW1 said she was, which was accepted by both courts below, able to identify the appellant because she left him sitting on the grills; at the same time PW1 said she had not taken any interest in the appellant; what was more telling is the fact that the appellant was attacked from the back; the attack took a short time as the attackers slapped PW1, snatched her bag and took off.; PW1 gave the description of the clothes the assailant was wearing which was of no use as the appellant was arrested on 20th August, 2007 following information from an informer not from PW1; the appellant disputed the identification parade by the witnesses as he claimed they had seen him on 20th August, 2007 when he was arrested; Moreover, the statements were recorded on 22nd August, 2007 which gives credence to the appellant's defence that he had seen the witnesses the day he was arrested.

Mr. Kaigai, learned Acting Assistant Director of Prosecution opposed the appeal, he submitted that the

evidence against the appellant was overwhelming; the offence occurred at 11.00 a.m. and PW1 aptly described the appellant by the clothes he was wearing; any doubts that may have existed were cleared by the identification parade. It was not necessary for PW2 to attend the identification parade although it was properly conducted for PW1; thus a conviction could have been obtained even based on evidence of a sole witness as long as the court cautioned itself; in view of the concurrent findings, Mr. Kaigai urged us to dismiss the appeal.

We have considered this appeal, as well as the submissions, first of all Mr. Kaigai readily admitted that PW2 knew the appellant. That is also demonstrated by his evidence in chief where he testified as follows: -

"I recorded my statement to the police before the accused was arrested. I had been called by the complainant to record the statement. I recorded it on 22nd August, 2007. When I recorded the statement I told the police that I had identified the person as Matoo. The accused was also wearing a yellow T. Shirt. I knew the accused by the name Matoo. I did not identify the other person. I have known the accused for about three years. There was a time he was working for Kiringo Beer Distributors. He used to come to 711 Bar to sell beer. He would come and greet Mutwiri who was working with me."

During the identification parade conducted by PW4, where PW2 identified the appellant, the appellant remarked that he used to charge batteries at a place where PW2 was the proprietor. For that reason the two courts below should not have accepted or acted upon PW2's evidence on identification parade. It was not necessary for PW2 to participate in a parade.

The evidence by PW2 was further discredited when the learned trial magistrate in the course of his judgment stated:

"I do not believe Mutuma's evidence that he saw the accused and another robbing the complainant. If he had seen it he would have told the police so when he recorded his statement instead of saying that he saw the accused running away. If he only saw the accused running away he did not explain how he managed to rectify him his flight."

From the foregoing, it is clear the appellant's conviction can only be based on the evidence of PW1, and that is evidence of identification. The attack and robbery took place during the day; PW1 was attacked by three assailants who approached her from the back. After a very short struggle, they managed to snatch the paper bag that contained money and they disappeared. PW1 said she was able to identify the appellant by the clothes he was wearing. However, this is of no use because the appellant was arrested almost two weeks later and there is no evidence that he was wearing the same clothes. Further when PW1 reported the matter, she told PC Maina PW3 that she had identified one person by physical appearance. However, the physical features of the suspect were not recorded and during cross-examination by the appellant, PW3 readily accepted that PW1 did not give the physical description of the suspect.

According to PW3, the appellant was arrested on 20th August, 2007 following information received from an informer. It is not clear whether the appellant was initially arrested for this offence because when PW1 reported the matter, she did not give the physical description of the assailant and PW2 who was explicit on the description of the appellant said he recorded his statement on 22nd August, 2007 when the arrest was effected on 20th August, 2007. The question that was not answered was whether PW2 was the informer.

It is evident from the record that PW1 saw the appellant on 20th August, 2007 after his arrest. Considering that PW1 also recorded her statement on 22nd August, 2007, this lends credence to the submissions by counsel for the appellant that the police pieced up together the evidence against the appellant after his arrest.

The appellant was also convicted based on the evidence of PW1 which needed to be tested carefully in view of the inconsistencies that the learned trial magistrate noted in the evidence of PW2 and what we

have noted here as irregular participation in an identification parade. See the case of ***Maitanyi v Republic [1986] KLR*** **page 200** where 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***

"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."

Accordingly, we find merit in this appeal, the identification of the appellant when he was arrested and while at the police station leave doubts in our minds that he was proved beyond reasonable doubt as one of the assailants that robbed PW1. It is our view that had the High Court duly performed its lawful duty, it would have found as we have endeavored to show above, that the evidence against the appellant was scanty and to some extend discredited to sustain a safe conviction.

In the upshot, we allow the appeal, set aside the conviction and quash the death sentence imposed on the appellant. Unless the appellant is otherwise lawfully held he should be set at liberty forthwith.

Dated and delivered at Nyeri this 6th day of February, 2013.

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

….....

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