REPUBLIC OF KENYA

Court of Appeal at Nyeri

Criminal Appeal 308 of 2006

BETWEEN

JOHN GICHUNGE MUTIE ..... APPELLANT

AND

REPUBLIC ……...…….....…… RESPONDENT

(Appeal from judgment of the High Court of Kenya at

Meru (Lenaola & Sitati JJ.) dated 29th September 2003

in

H. C. C. A. No. 273 of 2002)
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JUDGMENT OF THE COURT

1. The appellant, ***John Gichunge Mutie***, was after trial convicted for the offence of attempted robbery with violence contrary to ***Section 297 (2)*** of the Penal Code and was sentenced to death. He appealed to the High Court which upheld the conviction and sentence. This being a second appeal, we point out that by dint of Section 361 of the Criminal Procedure Code, only matters of law fall for consideration. This court will not normally interfere with concurrent findings of fact by two lower courts unless such findings are based on no evidence at all or are based on misapprehension of evidence **(See Chemangong - v- R 1984 KLR 6)**.

2. We have analyzed the record and have no reason to interfere with the facts as established by the two courts below.

3. The prosecution presented the following facts before the High Court. On the evening of 2nd March 2002, at about 8.30 pm, PW 1, Susan Ikolomi was in her house together with her minor children when two people entered the house and attacked her. One of the two men had a simi and cut her on the forehead. Another hit her on the back with a gun butt and she screamed. Her brother, Mr. Kaume, came to her rescue and the two men ran away. The attack took less than ten (10) minutes and nothing was stolen during the attempted robbery. It was her evidence that she did not recognize her attackers but later in evidence she said the “accused person…cut her” on the forehead. She stated she did not know the appellant before.

4. PW 2, Joshua Kabutha, testified that on the material night he was at home when he heard PW 1 scream and as he ran to her rescue, he saw three men running towards his farm. He said there was moonlight and when he followed them, he found the appellant hiding in napier grass and he with others arrested the said appellant.

5. PW 3 Kenneth Mwiti son of PW 1 was in a different house and when he heard her screams he rushed out and shouted at her but he met a man who slashed him on the cheek. He did not know who that person was.

6. PW 4 Willian Kaume testified that he was at his home on the material night when he heard PW 1 screaming. He rushed to her aid and found she had injuries on the forehead. He did not know who had cut her. Together with neighbours they searched the area and found the appellant hiding in napier grass. The trial magistrate convicted the appellant and on the first appeal to the High Court, the conviction for attempted robbery with violence was upheld and the death sentence confirmed.

7. The appellant has moved this court on a second appeal. Three grounds of appeal were proffered as per the supplementary grounds of appeal. The grounds are:

(i) the learned appellate judges of the superior court erred in law and in fact in shifting the burden of proof to the appellant.

(ii) the appellate court erred in misdirecting itself on issues for trial thereby arriving at the wrong conclusion and

(iii) the appellate court negated its duty of properly directing itself to the role of re-evaluating all the evidence of the trial court and arriving at their own conclusion.

8. At the hearing of the appeal, the state was represented by learned counsel Mr. J. KAIGAI, (Assistant Deputy Director of Prosecution) while learned counsel Mr. J. NDERI was for the appellant. Counsel for the appellant urged this court to allow the appeal arguing that the two courts below failed to correctly address the issue of identification and burden of proof in convicting the appellant. That the courts below did not analyze the issue of *mens rea* that is an essential ingredient for the offenc; whereas the appellant was found in the napier grass, there was no link in terms of *mens rea* between the offence committed and the person fished from the napier grass. In addition, the testimony of PW 1 and PW 2 were contradictory to the extent that the courts below did not consider the evidence of whether there were two or three persons who attempted the robbery. It was submitted that PW 1 testified there were two persons while PW 2 testified that there were three persons. Counsel for the appellant submitted that the court misdirected itself when it shifted the burden of proof and required the appellant to explain what he was doing at the vicinity of crime and why he was in the napier grass.

9. Mr. Kaigai, for the state, concede the appeal stating that the mode of identification of the appellant as the perpetrator of the offence was not to the required standard. He submitted that although there was suspicion that the appellant could have been part of the robbers who attempted to rob the complainants, mere suspicion is not adequate to secure conviction. He also submitted that PW 1 in her testimony did not mention the appellant. The appellant's name only featured from the report by the police. It was submitted that the High Court also found that the testimony of the witnesses were contradictory and as such the state concedes the appeal.

10. Having listened to the submissions by both counsel for the appellant and the state, we find that the issue for consideration in this appeal is whether there was evidence on record to identify the appellant as the perpetrator of the offence and whether indeed the burden of proof was shifted to the appellant.

11. The High Court in considering the issue of identity of the appellant as the perpetrator of the crime stated that:

"The appellant was near the scene of attempted robbery without explanation. That when PW 1

raised an alarm, the robbers took to their heels and headed to the direction of PW 2's land. The appellant was arrested hiding in napier grass within that land. This was five (5) minutes or so after the attempted robbery. He goes on to admit the circumstances of his arrest and offers no reasonable explanation for it. In those circumstances, what would any court confronted with that evidence decide other than that the appellant with or without the evidence of identification was one of the robbers?"

12. From the above observations, the learned judges of High Court proceeded to conclude that from these circumstances, the appellant was one of the robbers. Conviction was upheld and death sentence confirmed. The gist of the appeal is from the above quoted paragraph where it was submitted that the burden of proof was shifted to the appellant to offer an explanation as to what he was doing in the napier grass and why he was on that land. Counsel for the appellant submitted that none of the witnesses identified the appellant as the perpetrator of the crime and the fact that the appellant was found in napier grass should not have been used as evidence of identification of perpetrator.

13. In the case of ***Anjononi & Others - v- R, (1980) KLR 59*** this Court stated that the proper identification of robbers is important in capital robbery emphatically so, in a case like the present one when no stolen property is found in possession of the accused. 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, especially when it is known that the conditions favouring a correct identification were difficult."

14. In the present case, there was no single witness who identified the appellant as the perpetrator of the offence. The prosecution's case at the trial was wholly based on circumstantial evidence which was that the appellant was arrested in the napier grass and he offered no explanation. The learned judges appreciated this and cited case of ***Margaret Wamuyu Wairioko –v – R, Cr. Appeal No. 35/2005*** where it was stated that circumstantial evidence is very often the best evidence. However, we observe that in the case of ***R v. Kipkering Arap Koske and Another (1949) 16 EACA 135*** on circumstantial evidence it was stated:

"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

15. Having analyzed the statement and conclusions of the learned judges, we find that they erred in shifting the burden of proof to the appellant to explain his presence on the land and further explain what he was doing in the napier grass. It is apparent from the statement and that the learned judges were clear in their mind that the prosecution had not established the identity of the perpetrator of the crime. An accused person is presumed innocent until proven guilty. It was not incumbent upon the appellant to prove his innocence. An essential ingredient for any criminal offence is that the prosecution must prove beyond reasonable doubt that the person in the dock is the perpetrator of the crime. We find that the prosecution had not proved that the appellant was the perpetrator of the crime beyond reasonable doubt.

16. In the present case, the prosecution relied on circumstantial evidence to the effect that the appellant was found in the napier grass and this was proof that he was one of the offenders. There was no direct testimony on identification of the appellant. In a case of circumstantial evidence, the prosecution must pass three tests which are well set out in the case of ABANGA ALIAS ONYANGO V. REP CR. A NO.32 OF 1990(UR) at page 5 the learned Judges of this Court stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy

three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

17. Having analyzed the judgment, we are satisfied that the learned judges of the High Court did not address their mind to the three tests while evaluating the circumstantial evidence on record. Failure to apply the test made the learned judges err by arriving at a wrong conclusion that identity of the appellant as one of the robbers had been conclusively proved. Based on the foregoing reasons, we allow the appeal. The conviction entered against the appellant is quashed and the sentence of death imposed on him is set aside. The appellant shall be entitled to his liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 9th day of May, 2013.

ALNASHIR VISRAM
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JUDGE OF APPEAL

MARTHA KOOME
…….....…….
JUDGE OF APPEAL

OTIENO-ODEK
…….....……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR