IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, KOOME & OKWENGU, JJ.A.

CRIMINAL APPEAL NO. 279 OF 2005

NORMAN AMBICH MIERO

HENRY KISINJA ANJILI .....…… APPELLANTS

AND

REPUBLIC …….....……...……..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ) dated 5th July, 2005

in

H.C.Cr.A. NO. 1129 OF 2002)
****

JUDGMENT OF THE COURT

NORMAN AMBICHI MIERO and ***HENRY KISINJA ANJILI*** were jointly charged before the Chief Magistrate's Court at Makadara with the offence of robbery with violence contrary to ***section 296(2) of the Penal Code***.

The particulars of the charge stated that, on the 18th day of December, 2001 at Mowlem Valley in Nairobi within Nairobi area, jointly while armed with dangerous weapons namely knives robbed ***Priscilla Nduta*** of a handbag, cash KShs.7,775/= a mobile phone make Erickson Number A1018s all valued at KShs.12,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said Priscilla Nduta.

The appellants were tried, convicted and sentenced to suffer death by the learned trial magistrate. The conviction and sentence was confirmed by the High Court. The appellants appeal before this Court is only on points of law.

The evidence that led to the conviction of the appellants was given by three prosecution witnesses. The

prosecution's case was that on 18th December, 2001 at about 12.45p.m., Priscilla Nduta (*the complainant)* before the subordinate court, alighted from a vehicle at a *"matatu"* stage called *Pheloz* stage, Kangundo Road. It was raining so she reached out for an umbrella. Suddenly she heard somebody holding her from behind, the assailant snatched her bag, slapped her, and her spectacles fell. Priscilla called out for help from David Mwangi, a watchman who was guarding a place near the scene of robbery. Meanwhile, the second appellant appeared and drew out a knife and aimed at Priscilla.

Both Priscilla and Mwangi ran after the two assailants, one of them jumped over a wall and the other one disappeared in a different direction. The matter was reported at the Mowlem Police Post. The police advised Priscilla to look out for the assailants and report again if she saw them. On either the 28th or 29th December, 2001, while Priscilla was passing by the scene of robbery, she saw the two assailants cooking food across the wall. She alerted Mwangi to keep an eye on them as she went to seek for police assistance. PC. George Ogola accompanied by other police officers managed to arrest the two appellants. Nothing was recovered from the appellants; the police relied on the evidence by both Priscilla and Mwangi who said they were able to identify the appellants through recognition.

Both witnesses testified that they used to see the two appellants at the scene of robbery. In her judgment, the learned trial magistrate Mrs Juma, relied on the evidence of recognition by both Priscilla and Mwangi and the fact that the incident occurred in broad daylight. The learned trial magistrate opined that even if it was raining when the complainant was attacked, the rain alone could not have confused a person who knows another so as to cause a mistake. The learned trial magistrate made the following observations in her judgment:

"In my view it is not a coincidence that the accused persons could have been arrested on the same day and from the same place the way they would want the court to believe that each of them was going about his own business."

Being dissatisfied with the decision of the subordinate court, the two appellants appealed to the High Court, (*Lesiit & Makhandia, JJ*.), concurred with the judgment of the learned trial magistrate that the conviction was safe because it was based on evidence of recognition by the complainant and Mwangi. The first appeal was dismissed.

The appellants have filed this second appeal. During the hearing, Mr Monda, the learned Principal State Counsel for the respondent declared that he was not supporting the appellants' conviction and sentence by both the High Court and the subordinate court. He conceded to this appeal on the grounds that the High Court failed to scrutinize the record of proceedings as well as the written submissions by the appellants. He submitted that the High Court only evaluated the issue of identification whereas the appellants raised a fundamental discrepancy regarding the date when they were arrested and when the offence took place; that as the issue was not resolved, the prosecution could not have proved the charge against the appellants to the required standard in view of the glaring contradictions, and that those contradictions affected the weight and credibility of the prosecution's evidence.

The appellants were arrested ten (10) days after the offence had been committed which presented a further possibility that the prosecution's witnesses could have mistaken the identity of the appellants.

We restate that this Court is not bound by the views of the State Counsel as we have a duty to reassess the matter and make our own findings on whether or not the evidence presented before the trial court which was confirmed by the High Court support the conviction of the appellants.

In this appeal, the appellants were represented by learned counsel Mr Kenyariri who filed a joint memorandum of appeal in respect of both appellants. The appeal raised the following grounds:

1. The Learned Appellate Judges erred in law by relying on the identification by recognition without considering possibility of mistaken identity.

2. The learned Appellate Judges erred in law by shifting the burden of proof of Alibi to Appellants.

3. The learned Appellate Judges erred in law by upholding the conviction against the weight of evidence.

4. The learned Appellate Judges erred in law by upholding the conviction against the weight of evidence.

There are three issues of law that are discernable in this appeal; firstly, whether the contradictions of the date when the offence was committed and when the appellants were arrested affected the weight and credibility of evidence. Secondly, whether failure to recall the Complainant and PW2 for further cross examination by the appellants denied them a fair trial. Lastly, whether the evidence of identification of the appellants by way of recognition was safe to sustain a conviction.

We agree with Mr Kenyariri**,** learned counsel for the appellants that the charge sheet states that the appellants were arrested on the 28th December, 2001, while the evidence by the prosecution stated that they were arrested on the 29th December, 2001. However in our view this was a minor discrepancy, which was not addressed by the two courts below. We find that this anomaly did not cause the appellants any prejudice.

On the second issue the record of proceedings show that the appellants were given an opportunity to cross examine the prosecution witnesses. The appellants applied to recall two witnesses but when the hearing resumed, they did not seek to renew their application nor did they give reasons why they needed to recall the two prosecution witnesses who had already testified. As far as the court room processes of examination in chief and cross-examination of witnesses is concerned, we are satisfied that the appellants were accorded a fair trial.

On the last issue of identification of the appellants by way of recognition, the principal factors that guide the Court when determining the issue of identification were clearly enunciated by the English Court of Appeal in the case of ***R V TURNBULL & OTHERS [1976] 3 ALL ER 549.*** For instance, a court must consider such factors as the distance between the witness and the suspect when he had him under observation. The length of time the witness saw the suspect, and the lapse of time between the date of the offence and the time the witness identified the suspect to the police.

In this case both the complainant and Mwangi said they used to see the appellants at the scene of crime. We discern from the record of proceedings that the scene of crime is a *matatu* stage, and there is a wall next to it where the appellants *presumably* used to cook their meals. We say so because the evidence does not disclose what the appellants used to do at the wall, whether they used to live there or the nature of their business at the wall.

The two prosecution witnesses also did not give the description of the appellants such as their names or physical features when the first report was made to the police. This was important because the whole case was based on evidence of identification through recognition. The complainant was attacked suddenly, she called out for Mwangi, and when he appeared, the two assailants took off and disappeared in two different directions. Another important factor that was not taken into account by the two courts below is that when the complainant was attacked, it was raining and her eye glasses fell down.

There was no evidence adduced to determine the intensity of the rain, whether the rain would have hampered positive identification of the assailants. The complainant's eye glasses also fell, and no evidence was adduced to determine whether that too could have affected her eyesight.

It is trite that identification by recognition is more reliable because it is based on the witness' familiarity with the assailant. In the case of ***WAMUNYU VS R [1989] KLR 424,*** it was held that:

"1. 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.

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

The complainant was attacked after alighting from a motor vehicle at a "*matatu"* stage which is a public place. The evidence shows the attack happened suddenly in what can be termed as a fleeting moment. Although the two prosecution witnesses said they used to see the appellants at the scene of crime, the reliability on this evidence needed to be tested carefully because the prevailing circumstances which were somewhat difficult, were not analyzed by the two courts below.

The evidence of how the two prosecution's witnesses had developed a familiarity with the appellants was also not evaluated. It is possible that even if the complainant and Mwangi used to see the appellants near the scene of robbery which is a public place, there is a possibility that they could have been mistaken in their identification due to the gaps we have identified in the evidence.

For the aforesaid reasons, we agree with both Mr Kenyariri for the appellants and Mr Monda for the respondents, that it is unsafe to sustain the conviction of the appellants. In the circumstances we quash the conviction, and set aside the death sentence which was imposed upon the appellants for the offence of robbery with violence. The appellants shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 24th day of February, 2012.

E. M. GITHINJI

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

H. M. OKWENGU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR