



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, ONYANGO OTIENO & NYAMU, JJ.A.)
CRIMINAL APPEAL NO. 52 OF 2004

BETWEEN

KERISH OLE MASAKUAPPELLANT
AND
REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Mbaluto & Onyancha, JJ.) dated 30th May, 2003

in

H.C.C.R.A. NO. 1122 OF 2001)

JUDGMENT OF THE COURT

Joyce Wanjiru Kirongo, (PW1) and her husband were staying at her sister’s house at Ongata Rongai. Her sister Ruth Wanjiru Njuguna (PW2) and her family were also in that house. In the night of 31st March 2001, all the three of them together with Njuguna’s family were a sleep. Njuguna heard a loud bang and asked what it was whereas Kirongo felt the presence of somebody in the bedroom where she was with her husband. Kirongo saw two people enter the house. She asked who they were. At that time there was no light in the house as there had been a power black- out in the area. However, the intruders had torches which were shone towards Kirongo, Njuguna and those in that room. They were armed with whips and swords. They ordered them to shut up, and before they could shout for help they were hit and Kirongo’s husband went under the bed. During that confusion, light came back but one of the thieves quickly ran to the switch and put it off. Within that short span when light was back, Kirongo alleged she saw two people one of whom wore monkey cap and who she could not identify and one she identified as the appellant before us, Kerish ole Masaku. It would appear from the evidence that the attackers were more than the two as Kirongo said in evidence that there were other thieves who, as she, and Njuguna were being beaten, were busy removing things from the house. The attackers stole things from wardrobe and several other things. They also stole a TV set, gas cooker, cylinder, clothes and documents including Identity Card. Thereafter they went away. Kirongo and Njuguna reported the incident to PC Joseph Munguti (PW3) who was on duty at Ongata Rongai Police Station. Njuguna told PC Joseph that “*she had a suspect.*” Thereafter, as Kirongo was expecting and had sustained injuries from the beating by the thugs, she went to Kenyatta National Hospital where she was admitted for some days and later discharged, but after a miscarriage. After three days, Njuguna found her Identity Card on the road near Kisumu Dogo. She reported that to the police. After about one week, Njuguna alleged she met the appellant, but despite her following him, the appellant disappeared. She went back home and later went to look for him

and saw him again. She identified a room in Khauri Bar which she claimed was rented by the appellant. She reported that to the police and took PC Joseph to that room. At that time Njuguna was with another woman. The appellant was arrested and was, on 25th April 2001, charged in court with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars were that:-

“On the 31st day of March, 2001 at Ongata Rongai township in Kajiado District within Rift Valley Province, jointly with others not before court robbed Joyce Wanjiru Kirongo of one J. V. C. 1 inch TV set, gas cylinder, assorted clothing and personal documents all valued at Kshs.30,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Joyce Wanjiru Kirongo.”

He pleaded not guilty to the charge. The four witnesses mentioned above were called by the prosecution. After the close of the prosecution case, when put to his defence, the appellant stated in his unsworn statement that he was a watchman. He was arrested by police officers from his place of work and was not told the reason for his arrest. He knew of the charges facing him on 25th April 2001 when he was taken to court. He had not known why he was arrested till then.

After full hearing, the learned Senior Principal Magistrate Mrs. Karanja, found him guilty as charged, convicted him and sentenced him to death. He felt dissatisfied with that conviction and sentence. He appealed to the High Court vide Criminal Appeal No. 1122 of 2001. In a short judgment dated and delivered on 30th May 2003, the learned superior court Judges, Mbaluto and Onyancha JJ.) dismissed the appeal. After a summary of facts, the learned Judges stated in what was the main part of the judgment as follows:-

“On our own assessment of the evidence we have reached the same conclusion as the learned trial Magistrate. Although the robbery took place at night, there was electricity light at one stage of the robbery, the light having come back after a black out. The two prosecution witnesses PW1 and PW2 were therefore, able to see the robbers including the appellant very well. There was no possibility of a mistaken identity. We are satisfied that the appellant was one of the robbers and that during the robbery violence was used against the complainant and others as a result of which the complainant suffered a miscarriage.

For these reasons, we do not think that the appellant’s appeal has any merit. We dismiss it.”

In our view, that judgment, did not, with respect, meet the standard required of a judgment, of a first appellate court. We shall revert to it later in this judgment. It is however not surprising that the appellant still felt dissatisfied with that judgment which confirmed his conviction and sentence imposed upon him by the Senior Principal Magistrate. He moved to this Court vide a memorandum of appeal filed on 9th June 2003 in which he cited seven grounds of appeal six of which were challenging his identification and the seventh stated that:-

“That the learned Judges erred in law by failing to carry their task as they were duty bound.”

Later on unknown date, the appellant filed another memorandum of appeal, which we treat as supplementary memorandum of appeal. In the supplementary grounds of appeal, the appellant on the main complained that the learned judges of the superior court failed to evaluate the evidence that was on record as was required of them and thus failed to consider contradictions in the evidence on record and to decide on the same.

In her submissions before us, Mrs. Rashid, the learned counsel for the appellant relied on the grounds of appeal filed by the appellant in person and argued only the issue of whether or not the appellant was properly identified so as to make the court reach an inevitable conclusion that he was one of the robbers. In her view, the conditions obtaining at the time of robbery were not conducive to proper identification of the appellant. She submitted that there was not enough light as the robbers attacked

Kirongo, Njuguna and Kirongo's husband at the time when it was still dark as there was at that time black out. When light came back, Kirongo and Njuguna were already being beaten and so could not properly identify the attackers, and in any case, the attackers quickly put it off so that there was no time to identify the attackers. Further Mrs. Rashid emphasized that if indeed Njuguna had seen the appellant well, then there would have been no need for her to ask the appellant to talk so as to lend assurance to her that appellant was one of their attackers. In conclusion, Mrs. Rashid also submitted that as no identification parade was arranged by police for Kirongo to identify the appellant, her evidence on identification was dock identification which is worthless and evidence of Njuguna, being that of a single witness needed to be considered with greatest care and had that been done, it would have been found that it could not be relied upon for conviction once the conditions prevailing at the time of the incident were considered. Mr. O'Mirera, Senior Principal State Counsel, conceded the appeal stating that the evidence of Njuguna could not be relied on as she was the star witness but she had not given PC Joseph, the description of the appellant merely saying she had a suspect. Her evidence was not tested and the superior court did not analyse and evaluate the evidence on record afresh as is required by law. He was of the view that the evidence on record could not sustain a conviction.

The main complaint in this appeal is on the issue as to whether the appellant was properly identified as one of those who participated in the vicious robbery that was visited upon Kirongo and her sister Njuguna in the night of 31st March 2001 and whether the superior court properly carried out its duty as a first appellate court before confirming the conviction and sentence meted out to the appellant on the basis of the evidence obtaining in the record. It is not in dispute that the complainant and her sister were attacked, beaten and robbed of their properties. Kirongo's husband was also beaten but he escaped more harm when he hid under the bed. The facts as can be deciphered from the evidence on record are fairly straightforward. Robbers attacked Kirongo and Njuguna at night about 2.00 a.m. The victims were asleep but as a result of a bang, Njuguna was alerted and Kirongo felt presence of strangers in her bedroom. At that time, it was dark as there was black out. Immediately they attempted to communicate with the attackers or to scream, they were beaten. Kirongo said before she could shout, she was hit with a sword. Njuguna was ordered to sleep the way they had been sleeping and was also hit with a sword. At that moment the only source of light was a torch which was being shone on the two women by the thugs. After a short time light returned but the robbers put it off almost immediately. In short, the only time when there was sufficient light which could ensure proper identification was the short time when light returned and before it was put off by the attackers. At that time Njuguna was sleeping which we take to mean she was lying down in obedience to the orders of the robbers but obviously she could not have been asleep. In that position, the next question that comes into mind is, could Njuguna, lying down, see the faces of the robbers who were apparently standing? If so, was the short time between the return of light and its being put off enough for her to have seen them properly, noting that she was also being beaten? We have taken into consideration that there was no evidence that the attackers flashed the torch they had on to the appellant's face at any time. Our answer to the above questions is that it would not have been easy for Njuguna to have had a clear view of the appellant under those conditions. It is not therefore surprising that later after over a week she needed to assure herself of the person she saw by asking the appellant to talk to her. We have concentrated on Njuguna's evidence because in law the evidence of Kirongo was neither here nor there as far as identification was concerned as it was clearly dock identification as no identification parade was arranged for her to confirm her identification of the appellant as one of her attackers. This Court has stated on several occasions and it is the law, that dock identification without anything more is not a reliable mode of identification in criminal cases. In some decisions, it is described as worthless. In short, evidence of Kirongo as to identification, being dock identification, could not be relied upon by the court for a conviction. The effect of that upon the entire case is that the conviction could only have been based on the evidence of Njuguna, a single witness on identification under conditions that were not favourable for proper identification as we have shown above. Further, she did not describe to the police the appellant. All she said was that she had a suspect which did not mean much. In the well-known case of *Abdallah Bin Wendoh and another vs. Regina, (1953) 20 EACA 166*, the predecessor to this Court had this to say:-

“Subject to certain 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 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. 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 testimony of a single witness, can safely be accepted as free from possibility of error, “(underlining supplied).

In this case, we have perused the record to see if other evidence exist, direct or circumstantial that would make us reasonably conclude that the evidence of identification as given by Njuguna can be safely accepted as free from possibility of error but with respect we find none. In the case of ***Kariuki Njiru and 7 others vs. Republic, Criminal Appeal No. 6 of 2001, (UR)*** this Court stated:-

“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (See R. vs. Turnbull (1976) 63 Civil Appeal R.132). Among the factors the Court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuy & Another vs. Republic Criminal Appeal No. 22 of 1996 (unreported) held that:-

“If (sic) is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone particularly to the police at the first opportunity. Both the investigation officer and the prosecutor have to ensure that such information is recorded during investigation and elicited in court during evidence. Omissions of evidence of this nature at investigation stage or at the time of prosecution in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence.” (underlining supplied).

As we have indicated briefly above and considering the part of its judgment reproduced above, the first appellate court did not, with respect consider all the above matters we have stated. Indeed it did not occur to it that as there was no identification parade arranged for Kirongo to identify her attacker, her evidence on identification remained dock identification. That court did not consider how long the light was on when it came back and was put off by the attackers. It did not consider the effect of Njuguna lying down and claiming that she nonetheless fully identified one of the attackers by his face. It did not consider why Njuguna, having properly identified the appellant, if she did, should have again sought to talk to him to hear his voice for assurance that he was one of the attackers. It did not consider that before the two witnesses could identify the attackers they were hit with a sword while still in the dark and Njuguna forced to lie down. We would not mention all matters that needed to be considered if fresh analysis and evaluation of the entire evidence was done as is required by law. In the case of ***Okeno vs. Republic, (1972) EA 32***, this Court stated at page 36 as follows:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E.A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424.”

In this case, as we have stated above, the first appellate court did not carry out that duty. We would not be able to know what conclusion it would have reached had it done so. Most likely it would have allowed the appeal. In our view, considering the above we agree with Mrs. Rashid and we feel Mr. O’Mirera rightly conceded the appeal. We find it unsafe to uphold the conviction and sentence. We allow the appeal, quash conviction and set aside the sentence. The appellant is set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 11th day of FEBRUARY, 2011.

R. S. C. OMOLO

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR