



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: WAKI, AGANYANYA & NYAMU, JJ.A.)
CRIMINAL APPEAL NO.15 OF 2008

BETWEEN

TETU OLE SEPHA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Ojwang & Dulu, JJ.) dated 26th February, 2008

in

H.C.CR.A.NO.145 OF 2006)

JUDGMENT OF THE COURT

The appellant, **Tetu ole Sepha** was tried and convicted in the Senior Principal Magistrate, Kibera of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. Upon his conviction, he was sentenced to death. Aggrieved by the verdict the appellant appealed to the superior court but the appeal was dismissed both as against conviction and sentence and this is what provoked the appeal before us.

In the trial court the prosecution case was that on 23rd day of January 2004 at Ongata Rongai, Kajiado District within Rift Valley Province jointly with others not before the Court, while armed with dangerous weapons, namely pistols and pangas he robbed **Nickson Kibungi** (deceased) cash Kshs.10,000, and at or immediately before or immediately after the time of such robbery shot the deceased.

Rose Muturi Kibungi, PW1, the widow of the deceased Nickson Kibungi, testified that the deceased was a businessman and that he used to supply building materials to contractors. On 23rd January 2004 at 10.30 a.m. the deceased left home for Karen Estate where he expected to receive payment from one of his customers. He came back home in his saloon car on the same day at around 7.30 p.m. The deceased's son **Moses Watheru** (PW3) opened the gate for the deceased who drove and packed his car and immediately thereafter joined PW1 in the house and as the deceased engaged his wife in a conversation, they heard

strangers, at the door and to their horror, as the house was lit with candles, they saw two strangers who were holding PW3. They ushered him in and confined all the three to the living room. PW1 was immediately ordered to take another seat while the deceased was ordered to occupy PW1's seat. PW1 immediately noticed that the appellant was armed with a pistol but his companion had nothing. The attackers demanded money from the deceased and upon responding that he had no money, the unarmed man entered the couple's bedroom and after a brief search, he came out with a machete and a whip which the couple used to keep in the bedroom and started whipping the deceased and at the same time frisked the deceased pockets in search of money. In the process the deceased stood up whereupon he was shot at by the armed assailant and fell down. A second shot aimed at PW1 and PW3 missed the target. In response to what had happened PW1 screamed, and the screams attracted the attention of neighbours and the attackers escaped. Unfortunately the deceased died on the way to hospital.

The appellant's defence was that he worked in a butchery and at the time he was arrested at Ongata Rongai by some Administration Police he had taken a day off in order to rest. He claimed to have been arrested from a miraa shop and thereafter charged with an offence he did not commit and knew nothing about.

This is a second and final appeal. In a home-made memorandum of appeal the appellant raised seven grounds of appeal but *Mrs Rashid*, learned counsel for the appellant relied only on grounds 4 and 7 which are:-

“4. That the superior court judge erred in law to affirm a conviction without the need to reevaluate the evidence on record and to analyse the same.

7. That the superior court judges erred in law by failing to observe that the gangster purported (sic) to be the appellant was not satisfactorily identified at the scene of the attacks and further essential witnesses were never summoned to testify.”

In her submissions Mrs Rashid stated that although in her view the superior court had quite correctly identified the main issue in the case namely whether the appellant had been properly identified, all the same the court had failed to analyse the available evidence on the point. For example, Mrs Rashid, submitted that the fact that PW1 had admitted that on the fateful night she had discussed her eye ailment with her late husband yet this fact was never considered as having a direct bearing on the appellant's identification; the bedroom where the robbery took place was large and the court did not inquire concerning the intensity of light, the size and number of the candles used since at the material time there was a power failure and in the circumstances the appellant was not identified at the scene of crime because the conditions were not conducive and consequently the alleged finding of identification by the two courts below was a misdirection in law. For this reason she urged the Court to relook afresh at the evidence of identification taking into account, that there was no sufficient lighting; that the appellant was mistakenly identified; that the appellant's presence in Ongata Rongai was not consistent with his guilt because although he had been described by PW1 as being a Tanzanian Masai he had the right to be anywhere in Kenya including Ongata Rongai; that the appellant's description as a Tanzanian Masai was given a lot of weight despite the fact that at the lower court's own initiative concerning the appellants origins, the initiative had revealed that the appellant had a Kenyan identity card and was in fact a Kenyan although the witness seemed to suggest that the appellant had a Tanzanian accent; that PW3 identified the appellant in the dock and such identification was in law worthless; and finally that the Administration Police were not called as witnesses. The learned counsel buttressed her submissions by citing several authorities including the case of *Saiyanga Ole Mwaniki* and *Joseph Otieno Ogutu v R C.A. 229 of 2003* (unreported) where she relied on the following holding:-

“A dock identification is generally worthless and courts should not place much reliance on it unless this has been proceeded by a properly conducted identification parade. A witness should be asked to give the description of the suspect and the police should then arrange for a fair identification parade – quotation taken from *Gabriel Kamau v R* (1982-88) KAL 1134.”

Mrs Rashid submitted that PW3's identification of the appellant fell in the category described in the *Ole*

Mwaniki case above and ought to have been ignored. On the failure to call the administration police, Mrs Rashid contended that the failure was caught by the holdings in *Bukenya & others v Uganda (1972)EA 549* where it was held:-

i. The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.

ii. The court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.

iii. Where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution Benson Limantees Lesimir & another v R Cr.A 102 & 103 of 2002 (unreported)

Regarding the appellant's presence in Ongata Rongai and his defence Mrs Rashid relied on the holding in the case of *R v Kipkering arap Koske & Another 16 EACA 135*:-

“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.”

On her part, *Ms Nyamosi*, learned Senior State Counsel, in supporting the conviction and sentence submitted that the conditions prevailing at the *locus in quo* were conducive to a safe identification as the attackers were not masked, the attack took 15 minutes and therefore both PW1 and PW3 had ample time to observe the appearances of the attackers, and in addition the attackers did engage the witnesses in a conversation, and furthermore there were several lit candles which provided sufficient lighting. Finally on this point, she submitted, PW1 was able to observe that the appellant had a gap in his teeth and at the same time immediately gave this description to the police after the robbery and was also immediately able to assure the police that she could identify the attackers should they be apprehended, a task she fulfilled in the second identification parade. Concerning the Administration Police who did the first arrest and who were not called as witnesses, Ms Nyamosi submitted that although it would have been a useful thing to do, on the whole there was sufficient evidence adduced by the prosecution and therefore the arresting officers' evidence would not have made any difference. On the issue of the Tanzanian connection, the learned Senior State Counsel submitted that PW1's description of the appellant was to the effect that he had the features of a Tanzanian Masai and not that he was as a matter of fact, a Tanzanian Masai. Finally on the issue of the alleged lack of evaluation of the evidence by the first appellate court, it was clear from the judgment of the court that thorough evaluation was done including consideration of the appellant's defence.

We have taken into account the submissions of counsel as set out above. Although we agree with Mrs. Rashid that PW3's evidence was that of dock identification, at the same time we wish to observe that the two lower courts did believe the evidence of identification by PW1 which even to us was clear and consistent, despite being subjected to intense cross examination. It follows, therefore that even if the Court were to disregard the evidence of PW3, that there would be no basis for any intervention since the two lower courts would still be entitled to have believed one witness. **Section 143** of the Evidence Act states:-

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

Again concerning the conditions prevailing as at the time of identification, we agree with the submissions made by Ms Nyamosi that PW1 had ample time to observe and identify the appellant because the robbery took about fifteen minutes and there were several lit candles and the appellant had the peculiarity of having a gap in the teeth and he was not masked. Perhaps we should also add that the attackers were themselves able to move around and to pick a machete and whip which they used against the deceased. Surely they could not have succeeded in doing so, without sufficient lighting in the rooms! Although they

had torches there is no mention that they used them to identify their victims at all. In any event in the circumstances we do not think that PW3's evidence on identification was entirely worthless because it buttressed that of PW1 on identification and which was itself found to be credible by the two courts below. We say this because there was no challenge to the evidence of PW3 that he had knocked down one of the attackers at the door although he finally did succumb to the two assailants combined grip when they finally forced him into the house and he therefore had ample time with the assailants.

In the appeal before us the critical evidence is the direct evidence of PW1. The usefulness of it and the weight to be given to it is a factual and credibility matter in each case and this is what the trial court quite rightly did. It believed PW1 on identification. In answer to the appellant counsel's challenge that the court did not ascertain the intensity of light or the size of the living room we cannot obviously interpret the **demand** to mean that the intensity suggested is one with a scientific exactness! In a rural setting for example, generations of rural folks have depended for their lighting and reading at night on charcoal or wood based fire, and the wick and kerosene lamp and have been able to use them for all situations where light is needed. In those situations they have been able to identify and recognise both relations and strangers. In such situations common sense demands that courts do justice in the context of the prevailing atmosphere. Whether the aid is sunlight, moonlight, candlelight or other source, guarding against mistaken identity is the critical question. In our view, we would not be justified to demand a higher intensity of light for justice to be done. In many situations, the lighting as described above is the only evidence available. There is no rule of thumb for all situations and in our view a proper guide is to look and judge the lighting situations intelligently so as to ascertain that the identification is safe. It is sufficient for the courts to be good listeners and observers of the witnesses as they tell their stories from the standpoint of those situations and first ascertain why they say they were able to identify or recognize people, the confidence they radiate when describing the identification or recognition and the reasons for the confidence. It is on this basis that the court is able to assess credibility of a witness or whether there exists a reasonable doubt. As long as a reasonable and intelligent approach is adopted in assessing the lighting conditions the courts should never shy away from doing justice on the basis of it. In the circumstances, the two courts below rightly concluded that the prevailing conditions were conducive to positive identification and we agree with them.

Turning to the issue of the effect of failure by the prosecution to call the Administration Police, we think that although their evidence would have in some way buttressed the prosecution case, we agree with the Senior Litigation Counsel that even without their evidence there was sufficient evidence which placed the appellant at the scene of crime and for this reason the omission could not be the basis for any adverse inference. Concerning the alleged non-evaluation of the evidence by the first appellate court we must point out that evaluation need not follow a particular pattern and the style of evaluation is as of necessity a writing style, provided the critical evidence is dealt with. In the situation before us it is apparent on the face of the judgment that the learned Judges did properly address the effect of the evidence on record touching on the important issue of identification which as is clear from the record constituted the fulcrum upon which the entire case turned. In the circumstances we think the superior court cannot be faulted.

All in all, we cannot either interfere with the findings of fact based on the credibility of witnesses or with the concurrent findings of fact unless it is shown among other things, that no reasonable tribunal could have made such findings. In the appeal before us the two courts below have passed the test. We find no reason for any intervention on our part. In the result the appeal is dismissed.

It is so ordered.

Dated and delivered at Nairobi this 13th day of April 2011.

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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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