



IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 70 of 2008

JOSEPH NJOGU KIMOTHOAPPELLANT

AND

REPUBLICRESPONDENT

*(An appeal from a judgment of the High Court of Kenya at Nyeri (Kasango & Makhandia, JJ.) dated
7th May, 2008*

in

H.C.CR.APP. NO. 57 OF 2005)

JUDGMENT OF THE COURT

On the evening of 18th September, 2003 at about 8 p.m. **Lawrence Wamae Gateru** (PW1) (Gateru) was at the Maxoil petrol station waiting to board a bus to Naromoru. He was with his friend **Joseph Mwarari Muriuki** (PW3) (Muriuki). As they waited, Gateru says, the appellant joined them, and began a conversation. Gateru had known the appellant for about 10 years, from his days in Karatina. The appellant reminded Gateru that he even knew his (Gateru's) brother who was an accountant in Karatina. As they continued the conversation, and smoked cigarettes, the appellant told Gateru that he, too, was headed to Naromoru, and suggested that they travel together. At this time Muriuki left them and proceeded to Aguthi bar. After waiting in vain for about 20 minutes for a bus to Naromoru the appellant suggested that they take a taxi and share the cost. He said he had a friend who had a taxi, and which is parked at GK prison bar, who could take them to Naromoru at a cost of Shs.200/= each. Gateru agreed, and they proceeded to the prison bar, passing first by Aguthi bar. At the prison bar, the appellant engaged several people into conversations while Gateru waited a short distance away. Eventually, he returned, only to say that his friend the taxi owner was not around, and invited Gateru to join him and spend the night at his house. Gateru agreed, and proceeded to walk toward what he thought was the way to the appellant's house. In some dark area, the appellant suddenly pulled out a pistol, pointed at Gateru, asked him to lie down, and removed Shs.440/= in cash and other items from his pocket, including his Nokia mobile phone. The appellant then disappeared in the dark, while Gateru rushed to Aguthi bar looking for his friend Muriuki. He found Muriuki and related the story of what had happened. They went looking for the appellant but could not find him. The following morning they reported the matter to the police station.

On 19th March, 2004, **Pc. John Mukoma** (PW4) received information from an informer that the appellant, who was then a robbery suspect, had been seen at the KFA bus stop. He was promptly arrested and handed over to **Corporal Kitiinya** of Nanyuki Police Station for further investigation.

He was eventually charged before the Senior Resident Magistrate's Court at Nanyuki (P.C. Tororey) on one count of robbery with violence contrary to **section 296 (2)** of the Penal Code. After the trial, in which 5 witnesses testified, the appellant was convicted and was sentenced to death. His appeal to the superior court (Kasango & Makhandia, JJ.) was dismissed, hence this second and last appeal before us.

The appeal, as the law requires, may only raise issues of law - see **section 361**, Criminal Procedure Code. The appellant, in person, drew up his home-made grounds of appeal and filed the same on 23rd May, 2008. His learned counsel, Mr. P.W. Mwangi, filed supplementary grounds of appeal raising seven issues. However, at the hearing before us, Mr. Mwangi abandoned five grounds, and argued only the following two grounds.

“1. The learned judges erred in law when they found out that the lighting its (sic) intensity and source was not enquired into as required in law but proceeded to hold that the lighting was enough to help identify the accused.

2.

3. The learned magistrate erred in law in her failure to state the language used when the charge was read and explained to him and her failure to state whether language used was the language the accused understood.”

The first ground is based on identification of the appellant. That is indeed a point of law. In urging this ground, Mr. Mwangi argued that the incident having taken place at 8 p.m., there was no evidence of the intensity of the light, and the distance between the source of the light and where the appellant and the witnesses were located, to determine conclusively the identity of the assailant. Relying on the cases of **Kiarie v. R (1984) KLR 739** and **Maitanyi v. R (1986) KLR 198**, Mr. Mwangi argued that the witnesses who purported to have identified the appellant by recognition were possibly mistaken.

Mr. C. Orinda, learned Senior Principal State Counsel, for the respondent, submitted that the evidence regarding identification was water-tight. Gateru knew the appellant for some 10 years, and both he and Muriuki had spent a lot of time together in conversation with the appellant. There was, therefore, no doubt about their recognition of the appellant.

Both the courts below were alive to the fact that the prosecution case stood or fell on the evidence relating to identification of the appellant. In this case it was not that of a stranger, but of a person previously known and therefore it was identification by recognition. As this Court stated before in **Anjononi v Republic [1980] KLR 59** at page 60:

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya vs. Republic (unreported).”

In considering that issue of identification, the learned magistrate stated as follows:

“Under cross examination the complainant stated he had known the accused for about 10 years. He gave his home as Kiaraine next to the home of Muchina. The accused never challenged this evidence. The complainant told the court he used to work in Karatina and saw the accused about frequently.

On the question of visibility the complainant told the court there was adequate light at the Maxoil Petrol Station from electricity, there was light at Aguthi bar where they passed as they were

looking for the taxi driver and light at the prisons bar where they learnt the taxi driver had gone home. I do find that visibility was adequate coupled with the fact that the complainant knew the accused before as someone he used to see in Karatina.”

In the end, the magistrate came to this conclusion:

“This (sic) I find that identification which is paramount in such a case has been proved beyond all reasonable doubt and I do find the accused guilty as charged.”

The superior court went through similar analysis of evidence before stating in the end as follows:

“There is no doubt at all that the appellant was well known to PW1. Indeed PW1 testified that he had known the appellant for about 10 years. He even knew appellant’s home at Kiathaini. PW3 as well knew the appellant. Under cross-examination by the appellant PW3 stated

“.....I knew you before. I used to see you around”

Clearly then this was a case of recognition. Is it possible that the appellant could have been recognized by mistake? We do not think so. PW1 spent a lot of time with the appellant. He testified thus on the issue:

“..... I knew him because I had spent quite sometime with him at the petrol station and also when we ostensibly went in search of the taxi driver. There was light at Maxoil. There was also light at Aguthi where I went to the toilet. There was also light at the Prison bar and I saw him clearly”

From this evidence it is apparent to us just as it was with the learned magistrate that PW1 spent a lot of time with the appellant moving from one area to another and there was light whenever they went. There was light at Maxoil. There was light at Aguthi bar. There was also light at Prison bar. Much as no inquiries were made by the learned magistrate regarding the source and intensity of light as required, (see Maitanyi vs. Republic 1986 KLR 198), we are nonetheless convinced that PW1 was in a position to positively recognize the appellant given the fact that he was a person well known to him and they had spent a lot of time together conversing. We think that the light in all these various places that the appellant and PW1 went was sufficient to enable PW1 recognise the appellant.”

There are therefore concurrent findings made by the two courts below that the appellant was properly identified as the robber. We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Gateru was familiar with the appellant; had known him by appearance for ten years; and was with him for almost an hour before the incident, in conversation, and walking around from place to place where the lighting conditions were favourable to recognize the appellant. We are also satisfied that Muriuki had spent some 20 minutes with the appellant in conversation at the Maxoil petrol station, where also there was sufficient light to recognize the appellant. Accordingly, we have no reason to disturb that finding and we dismiss that ground of appeal.

The second ground of appeal relates to the record of the language of the court in the proceedings. More specifically, learned counsel for the appellant submitted that when the plea was taken on 5th April, 2004, the trial court did not record the language in which the plea was taken, thus violating the appellant’s rights under **section 72 (2)** of the Constitution which requires that a person who is arrested or detained shall be informed, as soon as practicable in a language that he understands, of the reasons of his arrest or detention.

We have examined the record and find no merit in this complaint. Although the language of the court is not recorded when the plea was taken, we are satisfied that the appellant knew and understood the charge, and actually pleaded **not guilty** to the charge. All subsequent proceedings were conducted in Kiswahili, and the appellant also cross-examined the witnesses at length in that language. We, therefore,

reject that ground of appeal.

In sum, we agree with the learned Senior Principal State Counsel, Mr. Orinda, that the offence charged was proved beyond reasonable doubt, and the conviction of the appellant was safe in all the circumstances. The appeal has no merits and we order that it be and is hereby dismissed.

Dated and delivered at Nyeri this 30th day of October, 2009.

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR