



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
CRIMINAL APPEAL 180 OF 2007
MARTIN LAWRENCE OCHIENG.....APPELLANT
AND
REPUBLIC.....RESPONDENT
(An Appeal from a judgment of the High Court of Kenya at Nairobi

(Lesiit & Makhandia, JJ.) dated 11th November, 2005

in

H.C.C.R.A. NO. 258 OF 2002)

JUDGMENT OF THE COURT

Principal State Counsel, Mr. Kaigai concedes this appeal on the main ground that the evidence on identification of the appellant was not beyond reasonable doubt, and we think he was right to do so.

The appellant was convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code and was sentenced to death as by law provided. It had been alleged in the charge sheet laid before the trial Magistrate, Ndambuki SRM, that on the 17th day of October, 2001 at Wanjeri bar in Gikomba Market within Nairobi area, jointly with others not before the court, while armed with a dangerous weapon, namely a rifle, he robbed Beth Wangu cash Kenya shillings 12,000 and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Beth Wangu. His appeal to the superior court, Lesiit and Makhandia JJ, was dismissed, hence this second and final appeal.

The conviction of the appellant was solely based on the evidence of identification by two witnesses who testified that they not only visually identified the appellant, but also identified him through his voice. The facts were fairly straight forward:

Charity Wanjeri Mwangi (Charity) (PW3) owns a bar known as “Wanjeri Bar” at Gikomba area in Nairobi. On two occasions: 17th and 31st October, 2001 armed thugs raided the bar and stole cash and other items from the bar and the patrons inside the bar. Charity never witnessed any of the two robberies but was told by her employees, Beth Wangu (Beth) (PW1) who was a bar maid/cashier and Joseph Ole

Lasheli (Joseph) (PW2), the watchman. The subject matter of the charge before the trial court was the first robbery committed on 17th October, 2001 and not the second.

At about 10 p.m. on 17th October, 2001, Joseph was inside the main gate of the bar when someone knocked. On opening the gate he saw some five people and was immediately grabbed by one of them. His evidence on what immediately followed is material to identification and is best reproduced verbatim:

“He grabbed the overall which I was wearing while I was on duty and he pulled me into the bar where he ordered me to lie down. I got under a table and I continued lying on the ground as one man not before court who was armed with a big gun went towards the counter. He is the one who had pulled me inside the bar, and he had ordered me to lie under the table with customers. His colleagues were standing in the bar ordering every one to lie down but he is the one who went to the counter and demanded for money. He took money from the counter and they left with the lady who was collecting money at the counter. She has testified. She is in court (P.W.1.) they also took away a radio cassette player which was in the bar. When I was lying under the table I was lying in such a way that I was able to see that person as he went towards the counter. He was holding a rifle. They took me to the room where I normally stay when it is raining and they locked me there. They locked it from outside.” (emphasis added).

It is evident at once that it was not the appellant who was seen by Joseph holding a gun and going towards the counter that evening. The man he saw was not before the court. Joseph continued:

“When the thugs came on 17/10/2001, I saw them clearly. At the bar, there are bright lights inside the bar. They were on. They are placed high up and they are very bright. I can be able to identify the person who came to me first because he is the one who approached me first. He is the one who talked to me and he is the one who grabbed me by the overall and pulled me into the bar and he ordered me to lie down. I can also recognize him by his voice. He was talking with an authoritative or commanding tone. I saw him when he was asking me to open the gate. At first I had not known that they were bad people. I could see him from where I was lying under the table as he went to the counter.” (emphasis added).

Again, the armed person who went to the counter and was seen by Joseph as he lay under the table was not the appellant.

The armed robber confronted Beth with demands for money when he reached the counter. He slapped Beth on the cheek when she hesitated and used his gun to break into the cash box from where he took the day’s collection. His accomplices were in the meantime busy stealing from the bar patrons and thereafter the gunman grabbed Beth and he walked out of the bar with her together with the rest of the gang. It was all dark outside since the gate lights had been broken. Beth was later abandoned at Kariokor Cemetery tied to a tree and was not rescued until 6 a.m. The matter was thereafter reported to Charity and to Kamukunji police station.

There was no evidence from Kamukunji police station on the nature of the report made there. Two weeks later on 31st October, 2001 at about 9 p.m., a gang of four men struck at the bar again. According to Joseph, they were the same people who had robbed the bar earlier and he

“identified the person who had balaclava as the same person who had come the other time. This time he was holding a pistol.”

The armed gangster cocked the pistol and ordered every one in the bar to lie down whereupon they were all robbed of various items. The armed gangster went towards Beth at the counter, and according to Beth:

“.....they looked like the same people who robbed us before. When the one who had the gun came towards me, I was sure he was the same person who had come to the counter during the previous incident and this time, he was holding a small gun. I positively identified him as the same person.”

We may stop there for a moment. Both Joseph and Beth were talking about the same person who was

holding a pistol. According to Joseph, the person had a balaclava although Beth did not say he had one. According to the Concise Oxford Dictionary, “balaclava” is a “...tight woolen garment covering the whole head and neck except for parts of the face” Facial identification was therefore not possible. If both witnesses were talking about the same person whom they had seen earlier on 17th October, 2001, then again that person was not before the court. Joseph so testified and Beth also testified as follows:

“another one who came inside the counter the first time is not in court. He is the same person who came to the counter where I was and he took the money on the second occasion. I can be able to identify him. He came very close to me when he was asking for money. He was very close to me when he slapped me on the cheek. I saw him very clearly. I can identify him. I can also recognize his voice. He was peaking with a voice with commanding tone.” (emphasis added).

The second robbery took a short while and the gang disappeared into darkness. It was again reported at Kamukunji police station.

None of the two key witnesses, Beth and Joseph, were involved in the arrest of the appellant. The arrest was made on 10th November, 2001 by Pc. Matagaro (PW4) of Shauri Moyo police station who was on routine patrol in Majengo area. The basis for the arrest was information received from an informer who was not called as a witness. The appellant was handed over to the Flying Unit Squad at Pangani and Pc. Dennis Omondi (PW6) commenced investigations. He called Beth to the police station and showed the appellant to her. In court Beth testified in cross-examination:

“...I was shown you at Pangani police station. I had never seen you before. I never saw you on the two occasions when robbers came to the bar. I have seen you in court.”

All she was saying is that the appellant is the person she was shown by the police at Pangani police station.

An identification parade was arranged by Inspector John Ndungu (PW5) with the intention of testing the information by Joseph that he could identify the appellant. If that was the intention, however, then there was no exhibit produced by IP. Ndungu to confirm that the conduct of the parade was proper. Instead, IP. Ndungu produced Exhibit 1, which shows that the identifying witness was Charity Njeri (PW3). There was no evidence on record that Charity could identify any of the robbers and it is surprising that her name appears as the identifying witness. Furthermore, the members of the parade as shown on the form were three. That number is at variance with the number stated by IP. Ndungu as having participated in the parade as 8 and that the appellant stood between the 3rd and 4th members of the parade. According to IP. Ndirangu, there was only one identification parade held. On the facts on record, the identification parade was simply of no probative value.

The appellant who was a matatu tout, insisted in his defence, that he was walking home after work on the evening of his arrest when he met policemen on patrol and they sought his identification. They did not seem to be satisfied and wanted to know why he was walking around at night. They made a search on his person, handcuffed him, and took him to Shauri Moyo police station. He was later taken to Pangani police station where he was asked about some robbery which he denied. An identification parade, which he protested about, was then held and one person purported to identify him before he was charged with the offence of robbery with violence.

How did the lower courts assess the evidence on identification? The trial court stated:

“The court is satisfied that the accused has been properly identified by P.W.1 and P.W.2 as shown by the circumstances there was sufficient lighting and enough time for them to see him clearly during the robbery. P.W.2 identified him in the identification parade. Even though there might have been an irregularity in the manner in which the parade was conducted since the accused alleged that the witness had earlier seen him at the offices of the Flying Squad Unit, this does not cause prejudice as there is overwhelming evidence from both P.W.1 and P.W.2 to show that the circumstances during the robbery did not make it difficult for them to identify him and this court is satisfied that the accused has been

identified by the said witnesses. The court notes that there is evidence from the said witnesses that they also identified the accused as amongst a gang which went to the same bar on 31/1/2001 armed with small gun and they took Kshs.4,000/= though they have not been charged in respect of that incident in this case.”

The superior court for its part re-evaluated the evidence and found:

“The evidence against the appellant does not rest only on the identification evidence of PW1. There was other direct evidence of PW2.

We have carefully examined this evidence and find that both PW1 and PW2 had opportunity to see the appellant closely. PW1 saw him at the gate where electric lights were on. PW2 was grabbed and pulled into the bar where there were brighter and stronger electric lights, as described by both PW1 and PW2. PW1 saw the appellant when he walked up to her and asked for money. When she refused to give out the money, the appellant went to the counter where PW1 was and took the money for himself. PW1 was thereafter taken out of the counter by the appellant, walked up to where PW2 was and after PW2 was locked up, she was walked in the night before being abandoned. Having considered this evidence, we are in agreement with Miss Nyamosi’s submission and the learned trial magistrate’s finding that the evidence against the appellant was safe. PW2’s evidence of identification was fortified by an identification parade where PW2 was able to pick out the appellant from a group of 8 others.”

With respect to both courts below, there was no factual basis upon which such findings could be made. As is evident from the summary of the evidence on identification above, the two witnesses were clearly talking about a person who was not before the court and not the appellant. The appellant was a stranger to Beth as she freely admitted, and the identification parade cannot be said to have fortified any identification evidence by Joseph.

This Court has had the occasion to revisit the purpose of an identification parade and it is worth reiterating it. It was in the case of David Mwita Wanja & 2 others v. Republic Cr. App. No. 117 of 2005 (UR):

“The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwangi s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -

“It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under *section 5* of the Police Act *Cap 5* Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, *Standing Order 6(iv) (d)* and *(n)* state as follows:

“6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the

following procedure must be followed in detail: -

.....

(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

.....

(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"

In this case, there was no clear evidence apart from the parade and there was no identification parade organized in accordance with the Force Standing Orders. The complaint raised by learned counsel for the appellant, Mrs. Chesang, in respect of identification, which was the sole basis for conviction of the appellant, is well founded and we uphold it.

The appeal is allowed and we order that the conviction of the appellant be and is hereby quashed and the sentence set aside. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 13th day of November, 2009.

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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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