



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA PEAL AT KISUMU**

CRIMINAL APPEAL NO. 137 OF 2005

JOSEPH KIAGE NYACHWAYA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisii (Tanui & Bauni, JJ) dated 15th March, 2005

in

H.C Cr. Appeal No. 239 of 2003)

JUDGMENT OF THE COURT

Joseph Kiage Nyachwaya, the appellant herein, was arraigned before the Senior Resident Magistrate’s Court at Nyamira on a charge of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the offence were that on the night of 17th May, 2003 at Bomabacho Sub-location in Nyamira District of Nyanza Province, with another not before the court robbed Peter Kebaso Mose of one camera make Yashika valued at Ksh.6,000/=, one pair of gumboots valued at Kshs.750/= and cash Kshs.5,000/= and or immediately before or immediately after the said robbery used actual violence on the said Peter Kebaso Mose.

The trial of the appellant commenced before the learned Senior Resident Magistrate Mr. K. W. Kiarie on 3rd July, 2003. The prosecution called seven witnesses to testify against the appellant and when called upon to defend himself, the appellant made a short unsworn statement in which he merely stated that he had accompanied one Ndoka who tied him up with a rope and took him to Nyamira Police Station.

The facts relied upon by the prosecution are brief and may be stated as follows. The complainant, Peter Kebaso Mose (PW 1) was on his way home on 17th May, 2003 at about 9.00 p.m. when he was attacked by two people who robbed him of his property as set out in the particulars of the charge. According to this complainant, he recognized his assailants as Kennedy Nyaberi and Kiage Maeri. It was Kiage Maeri who grabbed the complainant and placed a knife on his neck. It was the complainant’s evidence that he had known Kiage for a long time and that they both come from the same area. After this incident, the complainant reported the attack to Nyamira Police Station the following day where he named those who had attacked him, as Kennedy Nyaberi and Kiage (the appellant). The evidence of John Ndoka (PW 2) was to the effect that on 18th May, 2003 at about 9.00 a.m. the appellant and his colleague Kennedy Nyaberi found him at home and that the two asked him whether he wanted to buy a camera. He told them

that he had no money to which they answered that he should look for someone who could buy a camera. In his evidence, John Onundu (PW 4) testified that he was present when the appellant and his companion were offering a camera to John Ndoka for sale on 18th May, 2003. PW 4 saw the camera and the appellant and his companion claimed that the camera was theirs. This incident was witnessed by Duncan Kaunda Nyariaro (PW 6) who was in that home of PW 2. The evidence of Patricia Nyakerario Kaunda (PW 5) was that the camera was left to her when she sold some chang'aa to the appellant and his colleague. The appellant was eventually arrested while his colleague Nyaberi disappeared.

The learned trial Magistrate considered the evidence adduced by the prosecution and came to the conclusion that the appellant was guilty as charged, convicted him and sentenced him to death as provided by law.

The appellant's appeal to the superior court was dismissed by the superior court (Tanui and Bauni, JJ) in its judgment delivered on 15th March, 2005. In concluding their judgment the learned Judges said:-

“All in all we are satisfied that the evidence adduced was sufficient and the magistrate reached a proper conclusion. We uphold the conviction and sentence and dismiss the appeal.”

Being dissatisfied by the foregoing, the appellant now comes to this Court by way of second appeal. The appellant, through his counsel, Mr. Oguso, filed a supplementary Memorandum of Appeal setting out the following four grounds:-

- 1. The superior court erred both in law and fact in totally misunderstanding and or failing to appreciate the accused persons (sic) defence thereby coming to a wrong conclusion.**
- 2. The superior court failed to appreciate the background of the matter and likelihood of fabrication of evidence by complainant and their witnesses.**
- 3. The judgment of the superior court goes against the weight of the evidence.**
- 4. The learned High Court Judges erred in law and fact as the circumstantial evidence relied on by the prosecution does not measure to the required standard and hence the Appellant ought to have been acquitted.”**

When this appeal came up for hearing on 28th March, 2006, Mr. Oguso, for the appellant, started his submissions by stating that only issues of law may be raised. We agree that this being a second appeal only issues of law may be raised – see **section 361** of the Criminal Procedure Code.

Mr. Oguso then proceeded with his main ground of appeal which was to the effect that the superior court did not evaluate the evidence since, in his view, it was not clear whether Joseph Kiage Nyachwaya, the appellant herein, was the same Kiage Maeri referred to by the complainant in his evidence. In our view, this was the main ground of appeal in this appeal. Can it be said that the learned Judges of the superior court failed in their duty of re-evaluating the evidence and making their own conclusion? In **Okeno v R.** [1972] E.A. 32 the predecessor of this Court had the following to say as regards the duty of a first appellate court:-

“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.”

It was Mr. Oguso's submission that the superior court as the first appellate court failed in its duty as set out above. In its judgment the superior court stated *inter alia*:-

“This being the first appellate court we are bound to exhaustively evaluate the whole evidence on record as was stated in OKENO V. R. (1972) E.A. 32.”

From the foregoing the superior court was clearly alive to its duty as the first appellate court. How did the learned Judges of the superior court discharge their duty in this matter? We go back to their judgment in which they went on to say:-

“We have carefully done this and are satisfied that the learned magistrate properly convicted the appellant. The main issue was that of identification. Only the complainant (PW 1) who testified to have identified the complainant (sic). It was at night – 9 p.m. and the only light was moonlight. It is trite law that evidence of identification by a single witness and at night must be treated with caution being (sic) basing a conviction on the same. There is no indication that the magistrate did warn himself of the fact but we don't feel with the evidence on record, this led to miscarriage of justice. Though the incident happened at night PW 1 candidly told the court that he saw the appellant well. He knew the complainant (sic) before as they are from the same place. He described the clothes he was wearing. He also described what each of the two assailants did. He knew the appellant's home which was about 300 metres from the scene. His was therefore recognition of a person already knew (sic). It was therefore possible for him to make that positive identification even though there was no other light.

On top of that recognition there was clear evidence that the very next day the appellant and Kennedy tried to sell the stolen camera. PW 2 said they approached him first to sell it to him but he had no money. PW 4 JOHN ONUNDU was present. Both appellant and Kennedy told them the camera was theirs. When PW 2 told them that he had no money they went with him to home of PW 5 where they took changaa and left the camera to be held until they paid. PW 5 testified to this fact and was supported by evidence of her husband DUNCAN KAUNDA NYARIARO (PW 6). Appellant was found with the stolen camera a day after the said robbery.”

In view of the foregoing, can it be seriously argued that the superior court failed in its duty as the first appellate court? We do not think so. The superior court exhaustively examined the evidence adduced before the trial court, weighed it and drew its own conclusions.

The two courts below made a concurrent finding that the complainant identified the appellant by recognition during the robbery and that only the next day the appellant was found in possession of the camera which had been stolen during the robbery. It was argued by Mr. Oguso that it was not clear whether the appellant was the same Kiage referred to by the witnesses. We found this argument rather startling since the complainant clearly testified that he knew the appellant as they both hailed from the same place. All the witnesses who saw the appellant with the camera recognized him as Kiage. They were all talking of Kiage the appellant and not any other Kiage. This was a case of recognition and not identification of robbers. As this Court said in Anjononi v. Republic [1980] KLR 59 at p. 60:

“a recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other.”

We think we have said enough. We are in no doubt that the appellant was convicted on very sound evidence as the charge was proved beyond any shadow of doubt. Accordingly, the appeal has no merits and is dismissed in its entirety.

Dated and delivered at Kisumu this 31st day of March, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR