



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Criminal Appeal 2 of 2006

TIPAPEK KIMITI ALIAS OLE LEMURINKA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Machakos (Nambuye & Mutitu, JJ) dated 8th October, 2002

in

H.C.C.R.A. NO. 28 OF 2002)

JUDGMENT OF THE COURT

This is a second appeal from the conviction entered and sentence awarded by the Senior Resident Magistrate at Kajiado (Miss. H. N. Ndungu) in the Principal Magistrate’s Court at Kajiado *Criminal Case No. 232 of 2001*. The appellant was in that case convicted of the offence of attempted robbery contrary to **Section 297 (2)** of the Penal Code. The particulars of the charge were that on the 25th day of January, 2000 at Rombo Masai Reserve Loitokitok in Kajiado District within Rift Valley Province jointly with others before court (they had already been dealt with in another case) while armed with dangerous weapons, namely; rifle, simis, pangas and stones attempted to rob **MUTUKU MUNYARA** of his properties and at or immediately before or immediately after the time of such attempt unlawfully wounded the said Mutuku Munyara. He had pleaded not guilty but after trial he was convicted and sentenced to death. He appealed to the superior court against the same conviction and sentence and the superior court (Nambuye and Mutitu, JJ) dismissed the same appeal stating, inter alia, as follows:

“We are satisfied and agree with her that the appellant’s conviction was based on sound evidence. We find that the appellant was convicted on cogent evidence. We do not find any evidence on record to make us belief (sic) the appellant’s allegations that his statements (sic) under inquiry should not have been admitted in evidence. We quash the appellant’s appeal against both conviction and sentence. We uphold the conviction and sentence meted out to the appellant by the learned trial Magistrate. The appeal is therefore dismissed accordingly.”

The appellant filed his own Memorandum of Appeal containing six grounds of appeal. These were adopted by his learned counsel Mr. Kiptoo in his arguments before us except that he abandoned grounds 2 and 5, and thus argued four grounds only.

In our view, the sixth ground which was only a request that the appellant gets the proceedings and that he be allowed to be present in Court on the hearing of his appeal is no ground of appeal at all. The grounds that were argued were first, third and fourth which were as follows:

“1. That the learned Judges erred in law in affirming the conviction on reliance of PW1 attributed recognition evidence (sic) without giving room to possibility of a honest witness (sic) being mistaken such as PW1 in this case in consideration of the prevailing circumstances exhaustively at the alleged scene of crime.

2.

3. That the learned judges similarly erred in law in admitting and using the extra judicial statement as corroborative evidence to convict which was:

(i) Repudiated and retracted their voluntary value lessened.

(ii) Unfairly admitted in evidence as no original Swahili copy was tendered into evidence hitherto (sic) a misdirection in law.

4. The learned judges further erred in law in not making a desired ruling to the effect that failure for alleged Motor Vehicle owners evidence pointed to omission of essential witness thus the charges up-proved (sic) beyond doubts as required.”

The brief facts that were before the subordinate court and the superior court were that Mutuku Munyara (PW1) (to whom we shall refer in this judgment as Munyara) resided and operated a business at Rombo Township. The appellant, according to the evidence of Munyara had his home near Rombo Township and had been known to Munyara for more than six years prior to the incident. On 25th January 2000, Munyara and two others were in a canter motor vehicle returning from Mombasa to Rombo. He was sitting in the front seat between the driver and another passenger. At about 8.00 a.m. they reached a place known as Olkra. The area was hilly and the road was described by him as very ragged and had potholes. The vehicle was moving slowly. Seven people appeared ahead of them. Of the seven, one had a gun and others had pangas and rungs. The one with a gun was in front. He stopped the vehicle. Munyara saw him first time when he was 30 metres away and Munyara claims to have seen him well. According to Munyara, that man with a gun was the appellant. He pointed the gun at the driver but the driver did not stop. By the time he was pointing a gun at the driver he was 15 metres away from the vehicle. The appellant shot at the people in the vehicle. After he shot once, the vehicle passed the thugs. Munyara was shot on the left leg. He was taken to hospital and his leg was amputated. Dr. Risa Kurraru (PW4) (Dr. Risa) confirmed that Munyara had a fracture of the left leg which was beyond repair and so the leg had to be amputated. He produced P3 form and in it he described the injury as grievous harm. Munyara knew all the assailants who were with the appellant at the time of the incident and gave their names to IP Samuel Okwany (PW3) who visited him at the hospital on investigation. All were people from near Rombo Township. It took sometime before the appellant was traced and arrested. On 23rd March 2001, No. 4397 Afir Mohamed (no rank given in the records) was at Rombo Police Patrol base. Acting on a report he received he proceeded with members of the public to an area near Tanzania border where they found the appellant and arrested him. The appellant was at that time wanted for various other robberies. After his arrest, IP Kimathi (PW2) (Kimathi) recorded a statement under Inquiry from him. It was admitted as evidence after trial within trial was held. When put to his defence the appellant stated as follows:

“I come from Rombo. I am a businessman. I recall 22nd March 2001. It was a Thursday. I left home going to the border. I met a KWS land Cruiser. I was stopped, arrested and taken to Loitokitok Police Station. There I was beaten and allegations I know nothing about put to me. That is all.”

The above, according to the record is the summary of what was the evidence before the subordinate court and on which that court after full consideration entered conviction. It is also what the superior court

considered on first appeal and upon which the superior court dismissed the appeal that was before it.

The entire evidence that was before the two courts below clearly shows that the appellant was convicted on the evidence of a single witness on identification or recognition together with his confession in an inquiry statement he made to IP Kimathi. It is now trite law that when the evidence before a court of law is mainly that of a single witness on identification, the court has to be extra careful before entering a conviction. That need for extra care is not reduced even when the evidence is that of recognition for there may be cases where even people who know each other very well may still make mistakes. In such circumstances, the court needs to see if there is other evidence to lend assurance as to guilt of the suspect before it, before it can enter conviction. In the well known case of **Abdalla bin Wendo and Another v. R.** [1953] 20 EACA 166 the predecessor to this Court stated as follows:

“Subject to certain well known exceptions, it is trite law that a fact may be proved by 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 the testimony of a single witness can safely be accepted as free from the probability of error.”

In the case of **R. v. Turnbull** [1976] 3 All ER 519 at page 522 Lord Widgery C.J. stated that:

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

In this case, the appellant was recognized by Munyara as one of the assailants. He disputed the same evidence and stated in his defence that he was not one of the attackers. Infact, he said he was not aware of the reasons for his arrest and that he was beaten and was forced to sign a statement that was already prepared by police officers. He did not know what they wrote in that statement.

The offence took place at about 8.00 a.m. That was in broad day light. The vehicle in which Munyara and his colleagues were was being driven slowly as the road was ragged and had potholes. The assailants approached the vehicle from the front and were therefore in full view of the victims and Munyara. Munyara says he first saw them about 30 metres away and when the incident happened the appellant was 15 metres away from Munyara and his colleagues in the vehicle. Later after Munyara and another in the vehicle were shot and were rushed to the hospital, Munyara was able to mention to IP Okwany the names of their assailants when he was in the hospital bed. In our view, the circumstance that prevailed at the time of the attack as well as at the scene of the incident were favourable for positive recognition of the appellant whom Munyara ably recognized as a person he had seen at Rombo and had known for more than six years. He recognized the appellant as the one who had a gun and who shot at him when the other assailants whose names he also gave had pangas and rungus. Further, although the evidence as to recognition was that of a single witness, it was amply corroborated by the retracted inquiry statement of the appellant which was admitted after a properly conducted trial within trial. One of the grounds of appeal before us is that the inquiry statement was improperly admitted as no original Swahili copy was tendered. The answer to that allegation is that the record that is before us and which we believe was before the subordinate court and the superior court clearly shows that the original Swahili version of the statement (which is the original thumb printed statement) was before court and it was before us. That ground of appeal cannot therefore stand. The next ground of appeal was that the statements probative value was lessened after it was retracted. In our mind, after it was admitted as evidence, even though it was retracted, its corroborative value still remained. It is that retracted statement that could not in its own be used to convict without caution and need to have it corroborated but that is not the same as to say that the retracted statement cannot be used to corroborate other evidence as was done here. It can be so used and in our minds, it was properly used as corroboration of the evidence of a single witness.

From what we have stated above, we do feel that both the subordinate court and the superior court

proceeded on sound law when they accepted the evidence of recognition that was before them. The same evidence of Munyara was clearly buttressed by other circumstances that left no doubt whatsoever that the appellant was involved in the commission of the offence. In our view, the trial court could have acted on that evidence alone to convict but added to that there was the confession contained in the Inquiry statement which was detailed and clearly lent further assurance to Munyara's evidence both on recognition and on shooting and the motive which supported the charge of attempted robbery with violence. We cannot see what would have been added to that evidence by calling the motor vehicle owner to testify before court.

The totality of the above is that we are satisfied that the appellant's conviction was based on sound considerations. We see no reason to interfere with it. This appeal stands dismissed.

Dated and delivered at Nairobi this 5th day of May, 2006.

E. M. GITHINJI

.....

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR