IN THE COURT OF APPEAL OF KENYA

AT NYERI

CRIMINAL APPEAL 174 OF 2005

JACOB KIMATHI KABERIA …………………………… APPELLANT

AND

REPUBLIC ……………………………………………… RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Meru (Onyancha & Sitati, JJ) dated 16th March, 2003

In

H.C. Cr. A. No. 36 of 2005)

****

JUDGMENT OF THE COURT

The appellant, Jacob Kimathi Kaberia, was convicted by the Principal Magistrate Nyeri for the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code and was sentenced to death as mandatorily provided by the law. His appeal to the superior court was dismissed and he comes before us on a second appeal.

The facts of the case may be briefly stated: The complainant, Joyce Muthenya M'Imana (PW1) was a maize and beans trader in Kangeta Market in Meru North District. She was asleep in her house on 1st November, 2001 when at about 1.00 a.m. she heard dogs barking. On opening the curtains of her bedroom, she saw, through the moonlight shining outside, a gang of about 20 people. She started screaming for help and just then a gun-shot rang out and the outer door was smashed open with a big stone. The bedroom door was also cut open with an axe and some five people burst in demanding Kshs.300,000/-. They spoke in Kimeru and Kiswahili. She was cut on her leg and she gave them Kshs.50,000/- . They went out but returned immediately demanding more money. By that time she had gone under her bed but the appellant with two others pulled her out and one attacker pulled out a gun and pointed at her. She told them to take kshs.100,000/- from her box and they did. The appellant then picked up a fork jembe and hit her on her left hand, breaking it. He then asked her whether she knew him, but although PW1 knew him well, she chose to say no for fear of her life. The gang left but promised to return after one month. PW1 was then taken to Maua Methodist hospital for treatment the same night and was later transferred to Chogoria Hospital for specialized treatment on the fractured arm. The injuries were confirmed by Dr. John David Huts PW6 who produced a medical report to that effect.

It was PW1's evidence that she recognized the appellant at the time of the robbery. Earlier that day at about 2.30 pm, she had met him at her store when he wanted change for Kshs. 1,000 but she did not give him. The appellant was also one of the three attackers who pulled out PW1 from under the bed. For the period of one hour or so when they ransacked the house, the robbers were shining their torches around and their faces were not covered. As the appellant was pulling PW1 from under the bed, the hat he was wearing fell off and it was collected by the police who visited the scene. She identified the hat as the same one the appellant was wearing during the day at PW1's store. Cross-examined by the appellant, PW1 denied that she was involved as a suspect in High Court Criminal case No. 6 of 2002 at Meru; that she was the appellant's lover; and that she had visited the appellant in prison.

When PW1 was being attacked she screamed and was heard by PW2, Daniel Mbirithu who started blowing a whistle. On hearing the gunshot fired by the robbers, however, and a command that he should stop blowing the whistle, he ran off to a farm and hid himself. He neither saw the robbers nor recognized their voices. The complainant's young daughter who was in the house with her, Judy Kinya (PW3) ran off to hide in her locked bedroom when she heard the robbers and never saw any of them. She only heard the breaking of the doors and the demands for money made to her mother. Another neighbour, Samuel Itirikia (PW4), heard a gunshot at the complainant's house and went off to a tea factory blowing a whistle. He never saw the robbers either.

P.c Lawrence Angawa (PW5) received a report of the robbery at Maua Police Station the same night and proceeded to the scene at 6.30 a.m. He found the stone which was used to break the door and also collected a hat from the complainant's bedroom. He then headed to Maua Methodist Hospital where PW1 was admitted and immediately PW1 gave him the name of the appellant among two others, as part of the gang that robbed her. She also identified the hat as belonging to the appellant. P.c. Angawa recorded her statement at the hospital and later gave out instructions to Administration Policemen that the appellant be arrested if he was traced and be taken to the police station. About two weeks later, on 13th November, 2001, the appellant was arrested and was later charged with the offence.

The appellant's defence was that he was arrested on 2nd November, 2001 at 2.00 p.m. from their hotel where he was working. He denied the offence. He also insisted at the trial that the Occurrence Book (OB) at Maua Police Station be produced to confirm whether or not the complainant in her first report mentioned his name as one of the robbers. It was produced by IP. Francis Mwangi, the deputy OCS (DW1) and it confirmed that indeed the complainant gave out the appellant's name as one of her attackers at the first opportunity.

Both courts below were acutely alive to the fact that the case rested wholly on the identification evidence of the complaint, and they directed their minds to the principles governing such a case as enunciated by this Court in **Roria v. R. [1967] EA 583**. The trial court stated:-

"***Was the accused person a party to the perpetration of this robbery?***

There is evidence for (sic) the complainant that, that episode took one hour. The robbers had torches on and she alleged she identified the accused through those torches. The accused is also one of the robbers who pulled her out from under the bed where she hid. She knew him before. Accused's hat fell off in the bedroom. Indeed this is identification by a single witness as neither did PW2, PW3 or PW4 identify any of the robbers. Before the court can rely on this type of identification. The court has a legal duty to warn itself of the inherent dangers of such identifications to eliminate even the slightest possibility of even an honest mistake. I have warned myself accordingly."

After considering all the circumstances including previous knowledge of the appellant by the complainant and the conversation they held at the scene; the length of time the incident took which was one hour; the lighting available at the scene through torches; and the forthnight reporting to the police at the first opportunity, the learned magistrate believed the complainant and found it safe to rely on her sole evidence. He rejected the appellant's defence. For its part, the superior court, after a thorough re-evaluation of the evidence drew its own conclusion as follows:-

"***We have subjected the evidence of PW1 to anxious scrutiny. We have noted that the offence was committed at 1.00 a.m. We have reached the conclusion that the appellant's conviction though based on the evidence of that single witness can be safely accepted as free from the possibility of error. We believe as learned trial magistrate did, the testimony of PW1 and the detailed description of the events of that night ending up with the appellant's hat remaining at the scene of the robbery. It was the evidence of PW1, when questioned by the appellant that the appellant had worn the same "kofia" during the day and that it fell of the appellant's head when the appellant was dragging PW1 from under the bed. We also believe, as the learned trial magistrate did that PW1 had ample time to positively identify the appellant during the one-hour ordeal noting that it was the appellant who hit PW1's left hand with the fork jembe. It was the appellant who asked PW1 whether PW1 knew him. We are satisfied that having talked with the appellant during the day when the appellant was at PW1's store at 2.30 p.m. asking for change, PW1 was under no illusion in our view that her assailant was the appellant. PW1 took the earliest opportunity to give the names of her attackers to the police among them the name of the appellant. That was done on the same day of the robbery."***

The superior court also expressed its view on the line of questioning the appellant adopted in an effort to resist his connection with the hat which was exhibited and identified by the complainant as his. The court stated:-

"***During the cross-examination of PWI, the appellant suggested that he and PWI were lovers and that in fact PWI had visited the appellant in prison. When the appellant gave his unsworn testimony, he made no mention whatsoever of such an affair between him and PWI. To our mind, the appellant brought up the love affair issue in an attempt to explain the presence of his "kofia" at PWI's house on the night of the robbery. There was light from the torches which the appellant and the other robbers were flashing. We have considered the sum total of the evidence on record and have reached the conclusion that there can be no doubt that the learned trial magistrate properly applied the principles for evidence of identification by a single witness and reached the correct conclusions. We also find the same. The case of KUTEGANA V UGANDA (200) EA 420 followed."***

As this is a second appeal as stated earlier, only matters of law may be raised as we cannot ordinarily interfere with concurrent findings of fact unless they were based on no evidence at all or on a perversion of it. Before us, the appellant through learned counsel Mr. Mwongela raised three issues. The main one was the complaint that there was no basis for relying on the sole evidence of the complainant because her evidence was discredited. It was discredited because she was asleep when the robbers struck at 1.00 a.m.; there was no lighting other than the torches held by the robbers; and the situation was generally stressful. Mr. Mwongela also pointed out that in the first report to the police there were contradictions as to the amount of money stolen; the number of robbers present; absence of the appellant's name in the occurrence book; and no details on the identifying marks on the incriminating hat. For his part Mr. Kaigai, learned Senior State Counsel, urged us to accept the concurrent findings of fact made by the two courts below who assessed the credibility of the complainant as truthful and believed her. Her evidence was detailed and it withstood cross-examination; circumstances may have been difficult but there were torches shone inside the room by the robbers who had no disguise on their faces; and the fact that the complainant had met the appellant earlier in the day. He also submitted that under ***section 143*** of the Evidence Act ***Cap 80*** Laws of Kenya, no particular number of witnesses is required to prove any fact, unless there is any provision of the law to the contrary. The appeal should therefore be dismissed.

We have carefully considered the submissions of both counsel on that ground of appeal and have formed the view that the two courts below were entitled to accept the evidence of the complainant as truthful and capable of sustaining the conviction of the appellant. The relevant principle of law, as stated earlier was strictly applied. The trial court, unlike the superior court and this Court, saw and heard the complainant in the witness box and found her credible. It is not correct as submitted by Mr. Mwongela to say that the name of the appellant was not mentioned by the complainant at the first opportunity. It was in the occurrence book recorded on the day of the robbery. The information recorded earlier in the same occurrence book was given by other persons and as correctly observed by Mr. Mwongela, was silent on the details supplied by the complainant shortly after. That ground of appeal fails.

The other two issues raised by Mr. Mwongela related to the failure to consider the appellant's defence and the failure to re-evaluate the evidence. With respect, there is no substance in these complaints. The defence of the appellant was rejected upon consideration on the ground that it did not displace the prosecution evidence and was a sham, mere denial and unmeritorious. As for re-evaluation, we stated earlier that the superior court made a thorough scrutiny of the evidence and cited the principles set out in the **Roria Case** in extenso. In our view, that was an appreciation of the gravity of the matter at hand. The life of the appellant depended on the evidence of one witness and therefore all reasonable doubts had to be eliminated. We have no reason to fault that court in the manner it evaluated the evidence.

In the result the appeal has no merit and it is dismissed in its entirety.

Dated and delivered at Nyeri this 4th day of August, 2006.

P.K. TUNOI

………………….

JUDGE OF APPEAL

P.N. WAKI

…………..…..

JUDGE OF APPEAL

W.S. DEVERELL

……………………..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.