REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Appeal 112 of 2005

ENOS MBANJA OKURU ……..…… APPELLANT

AND

REPUBLIC ….…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Ochieng, JJ) dated 6th July, 2004

in

H.C.CR.A. NO. 428 OF 2001)

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JUDGMENT OF THE COURT

The appellant ***ENOS MBANJA OKURU*** was convicted by Senior Principal Magistrate Nairobi of one count of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code and was sentenced to the mandatory death sentence. His first appeal to the superior court was dismissed.

The complainant ***Margaret Wahu*** (PW1) (Wahu) was asleep in her house at Mutuini near Karen on the night of 12th November, 2000. Her daughter ***Elizabeth Njoki*** (Njoki) (PW2) was also asleep in a separate room in the same house. The complainant's son ***Geoffrey Muigai Waweru*** (Waweru) was asleep in a nearby house in the same compound.

At about 10.30 p.m. Njoki heard noise from the road. She woke up and peeped through the window. She saw 4 people enter the compound. The 4 people had torches which had lighted the compound. There was also moonlight. The 4 people banged the door and called the complainant to open the door saying that they were police officers and were looking for a thief. Wahu also looked outside through the window and saw the 4 people. The door of the house was kicked open and two people entered into the house. They kicked open the door to Njoki's bedroom and entered into the bedroom. They were armed with pangas and knives. One of the two people whom Njoki identified as the appellant pulled the other person away when he saw Njoki saying that she was not the one and that they were looking for her mother. The appellant and the other person proceeded to the bedroom of Wahu, broke the door open and entered into the bedroom. The lamp was on and the two people had torches. The two people stole a T.V. set, a bicycle and Shs.12,000/= from Wahu's bedroom. Wahu recognized the person who took the T.V. set, bicycle and money as Enos, the appellant, who was her former tenant. The appellant slapped Wahu telling her not to look at him. After the robbers left, Wahu screamed saying that she had identified Enos.

Waweru and neighbours pursued the robbers towards the forest but they did not catch up with them. Waweru and the members of the public went to the appellant's home. They found him just entering into his house and arrested him. The appellant was taken to Wahu's house and later to Mutuini Police Post.

The appellant raised a defence of alibi at the trial. He stated that he was asleep in his house at the material time and that he was awakened at midnight by people who asked him to give them their T.V. set, radio and bicycle.

The trial magistrate recognized that the prosecution case was dependent on the identification of the appellant by Wahu and Njoki. After evaluating the evidence, the trial magistrate was satisfied that the two witnesses were credible; that the prevailing circumstances at the material time were conducive to a proper identification and that the two witnesses infact identified the appellant, she disbelieved the appellant. The trial magistrate said in part:

> "***I find the testimony of these witnesses very consistent and corroborative and credible".***

And later:

> "***I do not believe the defence by accused person. There was no evidence even to remotely suggest that the complainant had a grudge against the accused person.***
>
> ***I find that the accused's defence has not cast any doubt on the prosecution case. I find that the circumstances prevailing at the time he was identified by complainant and PW2 were conducive to a proper identification".***

The superior court reviewed the evidence and concluded:

> "***Having reviewed the evidence adduced before the trial court, we are satisfied that the appellant was positively identified by PW1 and PW2 who we find to be credible witnesses".***

The main ground of appeal states:

> "***1. That the learned appellate judge erred in law by upholding that the purported identification by recognition was positive and conclusive without observing that the circumstances that prevailed were not conclusive to enable a proper identification".***

The conviction of the appellant was dependent of the evidence of identification (recognition) by two witnesses at night. It is recognized that evidence of visual identification in criminal cases can cause miscarriage of justice if it is not carefully tested. In ***Kiarie v Republic*** [1984] KLR 739, this Court said that where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction. In the same case, the Court stated that it is possible for a witness to be honest but mistaken and a number of witnesses to be all mistaken.

Lastly, although recognition is more reliable than identification of a stranger, such evidence of recognition should be tested carefully seeing that mistaken recognition of close relatives and friends are sometimes made. (See ***Anjononi and Others v The Republic*** [1980] Kenya LR 59 at page 60, ***Wamungi v Republic*** [1989] KLR 424.

In this case, the two courts below found Wahu and Njoki to be credible witnesses. This Court can only disturb that finding on the credibility of the witnesses if it is satisfied that no reasonable tribunal would make such a finding (see ***Ogol v Murithi*** [1985] KLR 359. Wahu testified that when the appellant was taking the goods from her bedroom, the person behind him had shone torchlight on him. She testified in part:

> "***It was the accused who took them. When he was taking them the person behind him show (sic) his lights on him. I saw him. He then slapped me on the face and told me not to look at him …***

He is called Enos. He is my tenant in the rooms nearby. They were armed with pangas and a small knife. He called me "cucu" and told me if I do not give them money he would kill me. The other thug was lighting torch for him so that he could remove the T.V. from the carton.

Wahu testified that she had no grudge with the appellant and that she had detained the appellant's goods for failure to pay rent for 3 months.

Similarly, Njoki testified that he knew the appellant before. She said:

"***I knew Enos before. He used to be our tenant some time back. He was our tenant some time back. He was our friend. He used to visit us".***

The evidence of Wahu that she screamed mentioning the name of appellant after the robbers left was supported by the evidence of Njoki and Waweru. It is Waweru who led the members of the public to the house of the appellant. The appellant did not, in his defence at the trial deny either that the two witnesses knew him before or that he used to be a tenant of Wahu.

The superior court subjected the evidence to a fresh exhaustive examination and came to the same conclusion as the trial court that the two witnesses were credible and that they recognized the appellant as one of the two robbers who entered into the house.

On our part, we are satisfied that the evidence of the recognition of the appellant by the two witnesses was free from any possibility of error and that the appellant was properly convicted.

In the result, we dismiss the appeal.

Dated and delivered at Nairobi this 10th day of November, 2006.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

…….**……**

JUDGE OF APPEAL

J. W. ONYANGO OTIENO

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR