



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

Criminal Appeal 119 of 2005

SHADRACK KARANJA NYAMBURA APPELLANT

AND

REPUBLIC RESPONDENT

**(An appeal from the Judgment of the High Court of Kenya at Nairobi (Lesiit & Ochieng, JJ.) dated
21st September, 2004**

in

H.C.CR.A. NO. 758 OF 2001)

JUDGMENT OF THE COURT

This is a second appeal against the conviction of the appellant for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. It had been alleged in a charge laid before Kibera Senior Resident Magistrate that the appellant did on the 7th day of February, 2001 along Ngong road in Nairobi, jointly with others not before the court, rob **Alfred Atsiaya** one bicycle, one pair of shoes, one wrist watch and cash Shs.1000 all valued at Shs.7,300/= and at or immediately before or immediately after such robbery used personal violence on the said **Alfred Atsiaya**. Upon his conviction he was sentenced to death which is the only lawful sentence for the offence.

The appeal before us can only be on a matter of law as provided under **section 362** of the Criminal Procedure Code. It turns on one main issue argued by learned counsel for the appellant Mr. Wamwayi, and that is: *identification by a single witness*. There were also other complaints relating to the failure to consider the appellant's defence; and defects in the charge sheet. These grounds will be examined presently; but first, the concurrent findings of fact made by the courts below upon consideration of the evidence tendered by three prosecution witnesses and the appellant.

At about 7.30 p.m on 7th February, 2001, Alfred Atsiaya (PW1) (**Atsiaya**) was cycling along Ngong road heading to his home area, Riruta Satellite. Suddenly, at a point on the said road, a person grabbed him and violently pushed him off the road and he fell into a ditch. The person then followed him wielding a knife and grabbed him by the shirt. He ordered him to keep quiet. Two other men then joined the assailant and one of them took away the bicycle and disappeared with it. The other man removed his shoes and wrist watch and also stole 1000/= from his trousers. The second man followed the man who

had taken the bicycle. Atsiaya was left with the knife-wielding man who demanded more money but Atsiaya said he had none. The assailant then set upon him and repeatedly stabbed him on his chest, arm, ear and arms as Astiaya screamed for mercy. When he stopped screaming, the assailant left him in the ditch and walked towards Kibera direction. Atsiaya then got up from the ditch and started screaming for help. On hearing the screams, the assailant returned wielding the same knife and started chasing Atsiaya who ran towards Adams Arcade. He felt weak however and so the assailant caught up with him and they started struggling in the middle of the road. Several motorists then came along hooting and flashing their full lights. They stopped and grabbed the assailant beating him senseless and left him for dead. The whole incident took about one hour. Atsiaya then called the police from a telephone booth in Adams Arcade and the police arrived within five minutes. When they reached the spot where the assailant was left lying, he was gone! Atsiaya was taken for treatment and he recorded his statement with the police. The injuries he suffered were confirmed by *Dr. Zephania Kamau* (PW3).

Five days later on 12th February, 2001, Atsiaya was in a motor vehicle on Naivasha road when, at a bus stage in Kawangware area, he saw the man who had assaulted him. The man was standing at a bus stop and so Atsiaya alighted from the vehicle and went to talk to him. The man had fresh marks on his face and mouth which was still swollen. He wore the same white jacket he wore five days earlier. Atsiaya asked him how he suffered the injuries and the man said he had an accident at Adams Arcade. When he was told about the robbery at the same place however, and that he had stabbed Atsiaya with a knife, the man started running way but Atsiaya grabbed him and called for help. Members of the public responded and held the man as Atsiaya went to call the police. When he returned the man had been beaten senseless by members of the public and he lay there unconscious. The police took him to hospital for treatment and later charged him with the offence of robbery with violence. That man was the appellant now before us.

In his defence, the appellant said he was severely beaten up by his brother on 12th February, 2001 when they disagreed on a certain woman. He was at the bus stop when Atsiaya found him waiting for a matatu to take him to hospital. He had a swollen right hand, mouth and left temple and he had told Atsiaya that he had fallen down, before Atsiaya accused him of a robbery he knew nothing about. Some ten drunkards then came along and beat him up until he became unconscious. He came to in Kenyatta National Hospital where he was treated and he was subsequently charged with an offence he did not commit.

The learned trial magistrate was in no doubt that Atsiaya had positively identified the appellant as one of the three persons who had robbed him of his property, and especially the one who had viciously attacked him with a knife. She relied on his sole evidence to convict the appellant and expressed herself as follows: -

“In my opinion, the length of time the complainant spent in accused’s company – one hour - was adequate for complainant to carefully study accused’s face. The complainant was very certain as to the role accused played during the incident. The accused’s face was lit up by the motor vehicles headlights at the scene after motorists stopped to rescue complainant and beat up the accused. That in my opinion was adequate or sufficient light that enabled complainant’s clearly see the accused’s face. That is why complainant later on positively identified accused as one of the robbers. At the time he caused accused to be arrested, he further identified accused by the gap in his gum where the teeth had been dislodged due to the earlier beatings. The court also observed this gap in accused’s mouth. He further saw the accused’s face was still bruised, a confirmation of the earlier beating accused received from the motorists. The accused still wore the same blooded (sic) white jacket on the day he was arrested.

All these above facts prove that the complainant could not possibly have mistaken accused to be one of the robbers.”

The issue of identification was raised before the superior court as it was before us. That court however, after re-evaluation of the evidence, came to the same conclusion and stated: -

“A perusal of the record shows that the complainant was with the appellant for almost one hour. He says that during that time, he (the complainant) had ample opportunity to study the face of the appellant. The complainant also testified, during cross examination, as follows:

“You are the one who stabbed me repeatedly. When you were beaten that night, your teeth were dislodged. I was with you for about an hour, so I had a good chance to see your face. The motor vehicles headlights lit up the scene on the road and I saw you. I do not know how you escaped from that road where I thought you had almost died, as you appeared unconscious. I stood there on the road looking at you as you lay there.”

We have re-cited the foregoing piece of evidence at length, as we believe that it illustrates a number of factors. The complainant was in the company of the appellant for a period of about an hour. By all standards, that is a long period of time, during which if someone was able to see another person, he ought to be able to identify the said person later. Secondly, the complainant testified that vehicle headlights lit up the scene, thus enabling the complainant to see the appellant clearly. Thirdly, the complainant saw the appellant being beaten up, until his teeth were dislodged. To our minds, that observation by the complainant cannot be deemed as an after thought. Earlier in his evidence in chief, the complainant had already made reference to *“Fresh marks on his (appellant’s) face and mouth due to the beatings he had received on the fateful night.”*

To our minds, when the complainant made reference to the fact that the appellant’s teeth were dislodged, by the beatings he got, that is only a question of detail. We do not agree with the appellant that it was an afterthought.

But perhaps the most telling aspect of the evidence we have recited above is the fact that after the appellant had been beaten up, he appeared to be unconscious, in the assessment of the complainant. At that time, the appellant simply lay there, whilst the complainant stood on the road, looking at him.

In the light of the foregoing circumstances, we hold the considered opinion that the appellant was positively identified by the complainant.”

We are now told by Mr. Wamwayi that the two courts below made an error of law in finding, on the facts, that the identification of the single witness was free from error. That is because there was no report made to the police by the complainant about the injuries the appellant had suffered and yet, he purported to testify in court that the appellant had a gap in his mouth. There was no evidence from a doctor to confirm that the appellant had such a gap and that it was sustained in the beating during the robbery. There was also no exhibit of any jacket to support the finding that the appellant wore the same bloodied jacket which helped the complainant to identify him. Mr. Wamwayi also submitted that it was necessary for the two courts below to weigh the evidence with the greatest care and to inquire into the circumstances that made it possible to identify the appellant, for example, the lighting conditions, and the physical features of the appellant. It did not matter that the witness was honest, he could have been mistaken. Those were the standards set by this court in **Maitanyi v Republic [1986] 2KAR 75** and **Roria v R [1967] EA 583**.

We have anxiously considered this ground of appeal particularly because of the gravity of the offence and the fact that the appellant’s conviction was based on the evidence of a single witness on identification. We have nevertheless come to the conclusion that there was no error of law or principle committed by the courts below in their finding that the appellant was properly identified.

It is trite, and learned counsel for the appellant Mr. Wamwayi did not submit otherwise, that it is lawful for a court to convict on the evidence of a single witness. Indeed there is no number of witnesses required to prove any fact and **section 143** of the **Evidence Act** expressly so provides, thus: -

“No particular number of witnesses shall in the absence of any provision of law to the

contrary be required for the proof of any fact.”

As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive – see **Oloo s/o Daitayi & others v R (1950) 23 EACA 493**. The superior court in this case was satisfied that there was no oblique motive in the prosecution’s failure to produce other witnesses from the group of motorists and the mob which attacked the appellant on the two occasions narrated by the complainant. We agree with that finding. Nevertheless, as Mr. Wamwayi correctly submitted, the law requires that in relying on a single witness to convict, the evidence on identification must be weighed with the greatest care and the court must satisfy itself that in all the circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification were difficult.

On our perusal of the record we discern that the two courts below were alive to the dangers of relying on the evidence of a single witness on identification. The trial magistrate in particular clearly warned herself and examined the demeanor and credibility of the complainant before examining other factors favouring correct identification. She stated: -

“The court is very much aware of the danger of acting on the uncorroborated testimony of the complainant. However, I had opportunity to observe the complainant’s demeanour as he testified on the witness box. I am satisfied that the complainant gave truthful evidence which remained unshaken under cross examination by accused. The complainant gave cogent evidence which I have no reason to doubt.”

In her assessment of the demeanor and credibility of the appellant, the trial magistrate was the best judge. As the predecessor of this Court stated in **Peters v Sunday Post [1958] EA 424** at page 429.

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusions originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

The assessment of the witness by the trial court was accepted by the superior court and we do not ourselves find fault with it. We dismiss that ground of appeal.

As the appeal rested on that main issue, we need not examine the other two complaints in detail. Suffice it to say that the defence put forward by the appellant was displaced by the prosecution evidence which was accepted as truthful. It may appear however, that in stating as she did, that the appellant did not call his brother or the woman they disagreed on as witnesses, and further that he did not produce medical documents to support the allegations of injury, the trial magistrate may unwittingly have been shifting the burden of proof, which in law never shifts, to the appellant. The superior court made no reference to those statements, but we think they were made in the context of assessing the credibility of the appellant which was found wanting. The law, at any rate, allows for the shifting of evidential burden where any fact is especially within the knowledge of the accused person. That is **section 111** of the Evidence Act.

Finally Mr. Wamwayi submitted that the charge sheet was defective as it omitted to state that the appellant was armed with a dangerous weapon. The matter was neither raised before the trial court nor the superior court. We apprehend that the issue was raised perhaps because of misunderstanding of the decision of this court in **Juma v Republic [2003] 2 EA 471** where it was held that where the prosecution is relying on the ingredient of being armed, it must be stated in the particulars of the charge that the weapon or instrument with which the appellant was armed was dangerous or offensive. The example given in that case was a knife and a stone which are not inherently dangerous or offensive items but the use to which they may be put would make all the difference. The same issue was raised in **Moneni**

Ngumbao Mangi v R, Cr. Appeal No. 141/05 (ur) and this Court examined in detail the essential ingredients of the offence of robbery with violence under **section 296(2)** of the Penal Code as analysed in **Johana Ndungu v Republic, Cr. App. 116/95 (ur)**. After noting that the charge sheet in that case stated, as it does in this case, that the appellant “robbed” the complainant, the court continued: -

“The word “robbed” is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain or retain stolen property. The predecessor of this Court so held in OPOYA V. UGANDA [1967] E.A. 752.

In the current appeal there was evidence to the effect that the appellant stabbed the complainant wounding her seriously. She was taken to the hospital immediately after the event and attended to by Dr. Jamlick Muthuri (PW7) who classified the injuries sustained by the complainant as grievous.

As already stated there are three ingredients, any one of which is sufficient to constitute the offence of robbery with violence under *section 296(2)* of the Penal Code. If the offender is armed with any dangerous or offensive weapon or instrument that would be sufficient to constitute the offence. Secondly, if one is in company with one or more other person or persons that would constitute the offence too. And lastly if at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person that would be yet another set to constitute the offence. In the present appeal evidence was adduced and accepted by the two courts below that the appellant wounded the complainant by stabbing her with a knife. That falls in the third category stated above. Clearly, the offence of robbery with violence was committed.

In view of the foregoing we are satisfied that the charge was not defective since the prosecution relied on the fact that the appellant wounded the complainant during or immediately after the robbery. Experience has, however, shown that most robberies are committed by gangs of people who are dangerously armed and that they invariably wound their victims leading to death in some cases. We must emphasize that any of the ingredients as stated earlier would be sufficient to constitute the offence of robbery with violence. We must therefore reject Mr. Munzyu’s submission to the effect that the charge was defective.”

In view of that authority, we do not think there is any merit in the objection raised with regard to the irregularity in the charge sheet. At all events, we do not find, in view of the provisions of **section 382** of the Criminal Procedure Code, that any prejudice was caused to the appellant.

For the foregoing reasons we are satisfied that the appellant’s conviction was based on sound assessment of the evidence on record and we find no merit in the appeal laid before us. It is dismissed in its entirety.

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

E.O. O’KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR