REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 16 OF 2003
(From original conviction and sentence in Criminal Case No. 612 of 2001 of the Senior Resident Magistrate's Court at Molo – R. K. KIRUI)

PATRICK KAMAU CHEGE…………………..….APPELLANT

VERSUS

REPUBLIC………………………………………RESPONDENT

JUDGMENT OF THE COURT

The appellant, Patrick Kamau Chege, was charged with two counts of robbery with violence contrary to **Section 296(2) of the Penal Code.** The particulars of the offence were that on the 11th of November 2000 at Millenium Bar, Molo Township, Nakuru District, the appellant jointly with others not before court, while armed with crude weapons namely iron bars, rungus, pangas and home made guns robbed Anne Muthoni and John Njoroge Mugo of cash and other items stated in the charge sheet and at or immediately before or immediately after the time of such robbery used personal violence to the said Anne Muthoni and John Njoroge Mugo. The appellant pleaded not guilty to both counts. After a full trial the appellant was convicted as charged on both counts. He was sentenced to death as mandatorily provided by the law. The appellant was aggrieved by the said conviction and sentence and has appealed to this court.

In his Petition of Appeal, the appellant has basically raised two issues concerning his conviction by the trial magistrate. The appellant was aggrieved that the trial magistrate had convicted him after relying on the evidence of a single identifying witness who purported to have recognised the appellant without considering the circumstances and the conditions that prevailed at the time of the robbery. The appellant faulted the trial magistrate for convicting him on the prosecution's evidence that was insufficient to prove the charge of robbery with violence. At the hearing of the appeal, the appellant, with the leave of the court presented written submissions in support of this appeal. He also presented oral submissions. He urged the court to allow his appeal. Mr Koech, Learned State Counsel submitted that the conviction and the sentence imposed by the trial court should be upheld and the appeal filed by the appellant dismissed. We will consider the arguments made by the appellant and the Learned State Counsel after briefly setting out the facts of this case.

On the 11th of November 2002 at about 1.00 am, PW 4 Anne Muthoni was selling beer and soft drinks at Millenium Bar and Restaurant. PW 4 had been employed as a bar attendant. There were about twenty customers drinking at the bar at the particular time. Among the customers was PW 2 John Njoroge Mugo. PW 4 testified that at about that time several robbers entered the bar. They ordered the customers to lie down. One of the robbers who was armed with a pistol went to the counter and ordered PW 4 to handover the cashbox. In the cashbox was Kshs 16,000/=. The robbers took the cash, a radio cassette and the drinks which they could carry with them. PW 4 testified that at the time the robbery was taking place, she had

also been ordered to lie down. It was her testimony that she could not be able to identify any of the robbers. After the robbery, PW 4 informed PW 1 Gicuri Kiarie Chege, the owner of the bar who made a report to the Police. PW 1 confirmed the items that had been stolen from his bar as stated by PW 4.

PW 2, John Njoroge Mugo, testified that he was at the bar on the material night at about 1.00 am when people who were wearing police uniform entered the bar and ordered the patrons to lie down. He testified that he was seated at the bar taking a soda, and being physically disabled did not lie on the floor as ordered by the robbers. He further testified that the robbers then robbed the bar patrons of their valuables. PW 2 testified that he was able to recognise the appellant and one Nyakundi as being among the robbers. He further stated that one of the robbers was armed with a home made gun. It was his testimony that he recognised the appellant as he had known him prior to the incident as a resident of Molo township. He further testified that there was sufficient light in the bar which enabled him to recognise the appellant clearly. It was his further testimony that during the robbery, one of the robbers known as Nyakundi robbed him of his Seiko wrist watch valued at Kshs 10,000/-. The said wrist watch was later recovered from the said Nyakundi, who was charged with the offence of robbery with violence but escaped from lawful custody before the case could be heard and determined.

PW 5 Police Constable David Mwene testified that on the 17th of March 2001 at about 7.30 am, acting on information received from an informer, he and other Police Officers went to a house situated at Kenyatta Estate, Molo. One of the Police Officers who accompanied him was a dog handler. When they reached the house, they knocked at the door and waited for the occupants to open the same. The appellant, who was in the house, jumped out of the window and ran away. The police dog was let loose and managed to apprehend the appellant. The appellant was arrested and charged with the offence of robbery with violence of the patrons of Millenium Bar, as he had been identified by one of the said patrons. PW 5 testified that he knew the appellant prior to the date of his arrest as he had been a suspect in other robberies which PW 5 had investigated.

When the appellant was put on his defence he chose to say nothing. He further did not call any witness to give any evidence in his behalf.

This is a first appeal. As the first appellate court in criminal cases, this court is mandated to re-evaluate and re-examine afresh the evidence that was adduced by the witnesses before the trial court and reach its own independent conclusion. In reaching its determination, this court is mandated to put in mind the fact that it did not have the opportunity of seeing or hearing the said witnesses as they testified and therefore cannot be expected to make any finding as to the demeanour of witnesses. This court is further required to consider the grounds of appeal put forward by the appellant in reaching its determination (See **Njoroge – versus- Republic [1987]KLR 19).**

In the instant appeal, the issue for determination by this court, is whether the evidence adduced by the prosecution proved beyond reasonable doubt that the appellant was among the robbers who participated in the robbery at Millenium bar on the night of the 11th of November 2000. The other issue for determination is whether the trial court made the correct decision in convicting the Appellant based on the evidence of a single identifying witness.

The facts of the case are not in dispute. PW 2 and PW 4 were at Millenium Bar Molo on the material night when they were robbed by a gang of robbers who were armed with a home made gun. PW 4 did not identify any of the robbers as she was ordered to lie down on the floor when the robbery was taking place. PW 2, who is disabled, was not touched and was left sitting on a chair at the counter of the bar. It was PW 2's evidence that he recognised the appellant and one Nyakundi as being among the robbers. PW 2 testified that he knew the appellant very well as he had prior to the robbery incident seen him at Molo township. PW 2 testified that he was able to identify the appellant from the ample light at the bar. The robbers had not worn any disguises during the robbery. The Seiko watch which was robbed from the appellant was later recovered from one Nyakundi who however escaped from lawful custody before he could be tried. No item stolen during the robbery was recovered from the appellant. The appellant was arrested about four months after the robbery incident on information received from an informer.

We have re-evaluated the evidence. The law on the evidence of a single identifying witness is now settled. Before a court can convict an accused person based on the sole evidence of a single identifying witness, it has to warn itself of the dangers of relying on such evidence especially in circumstances where the conditions favouring positive identification were absent – See **Roria –versus- Republic 1967 EA 583, Maitanyi –versus- Republic [1986] KLR 98.** We have warned ourselves of the inherent danger of relying on the evidence of a single identifying witness in convicting the appellant. The appellant in this case was identified by PW 2 who said that he recognised him during the night of the robbery. PW 2 knew the appellant very well prior to the robbery incident. There was ample light at the bar. PW 2 recognised the appellant and another robber whom he called Nyakundi. PW 2 had not taken any intoxicating drink. He was drinking a soft drink. It cannot be said that his vision was impaired by alcohol. When the robbers entered the bar and ordered everyone to lie down on the floor, PW 2 was left alone seated at the counter of the bar. This was because of the fact that PW 2 was physically disabled. He was not molested but one of the robbers whom he identified as Nyakundi, took away his seiko watch. PW 2 testified that he clearly saw the appellant among the robbers. PW 2 was called three times to testify in the criminal case against the appellant. In all the three instances, the evidence of PW 2 was consistent. He was emphatic that he had recognised the appellant and did not waver in his testimony. PW 2's identification of the appellant was that of recognition. As was held by the Court of Appeal in **Wanjohi & 2 others –versus- Republic [1989] KLR 415** the evidence of recognition is stronger than that of identification but a honest identification may yet be mistaken. In this case, was PW 2 mistaken in his belief that he had recognised the appellant? We do not think so. PW 2 had sufficient time to recognise the appellant and his fellow robber known as Nyakundi. There was ample light at the bar. PW 2 was sober and immediately after the robbery made a report to the Police indicating that he had recognised the appellant.

In his considered judgment, the trial magistrate stated at page 2 of the said judgment as follows:

> **"I believe PW 2 said the truth as he appeared firm and truthful even on cross-examination. Furthermore, the accused's behaviour when PW 5 and others went to arrest him appears to corroborate PW 2's evidence. He jumped out through the window and ran away and he (was) chased and caught by police dogs. That behaviour was inconsistent with that of an innocent person."**

We agree with the trial magistrate's assessment of the evidence especially as regards his finding on the consistency of PW'2 testimony. The said assessment is consistent with the evidence which was adduced by PW 2. It is our finding that all the essential ingredients of robbery with violence were proved. The appellant, in company of others, while armed with an offensive weapon, namely, a home made gun, robbed the complainants and in the course of the said robbery threatened to use physical violence on the complainants. We find no merit in the appeal filed by the appellant. We consequently dismiss the appeal and confirm the conviction and the sentence imposed by the trial magistrate.

DATED at NAKURU this 4th day of February 2005.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE