



**Kiilu & another v Republic (Criminal Appeal 113 of 2001)
[2005] KECA 335 (KLR) (18 February 2005) (Judgment)**

Peter Kifue Kiilu & another v Republic [2005] eKLR

Neutral citation: [2005] KECA 335 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 113 OF 2001
PK TUNOI, PN WAKI & JWO OTIENO, JJA
FEBRUARY 18, 2005**

BETWEEN

PETER KIFUE KIILU 1ST APPELLANT

ROBERT MAKASI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kitale (Gacheche J & G. DuluAg.J) dated 25 th June, 2004 in H.C.CR. APPEAL NOS. 205 & 207 OF 2001)

There is need for testing with the greatest care the testimony evidence of a single witness whose conduct before the incident/offence and after the incident/offence raised suspicion

The matter at hand was an appeal against the conviction and sentence for the offence of robbery with violence contrary to section 296(2) of the Penal Code. The court in allowing the appeal reiterated the duty of the first appellate court in relation to the analysis of evidence and further held that there was need for testing with the greatest care the identification evidence of a single witness whose conduct before the incident/offence and after the incident/offence raised suspicion.

Reported by Kakai Toili

Criminal Practice and Procedure - appeals - role of first appellate court – scrutiny and analysis of evidence - where the first appellate court failed to discharge its obligations - effect of - what was the duty of a first appellate court in the relation to evidence.

Evidence Law – evidence – corroboration of evidence - whether the uncorroborated testimony evidence of a single witness, whose conduct before the incident/offence and after the incident/offence raised suspicion, could be relied upon to convict an accused person(s).

Evidence Law – witnesses - demeanour of a witness - where the integrity of a witness was in doubt - where a witness in his testimony raised a negative impression about his trustworthiness - whether it was safe to accept such evidence.



Brief facts

The appellants were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that while armed with a dangerous weapon namely a pistol, they robbed PW1 (the complainant) of his 11 kilograms of mercury and cash money. The 1st appellant also faced a charge of personating a public officer contrary to section 105(b) of the Penal Code. The appellants were convicted by the trial court for the offence of robbery with violence but the 1st appellant was acquitted on the second charge. They appealed to the High Court, which dismissed their appeal. Dissatisfied with the decision of the superior court they further appealed on the grounds that the first two courts had erred in finding that the ingredients of robbery with violence had been established as required by law, and the two courts misdirected themselves as to the sufficiency of the evidence presented by the prosecution.

Issues

- i. What was the duty of a first appellate court in the relation to evidence?
- ii. Whether the uncorroborated testimony evidence of a single witness, whose conduct before the incident/offence and after the incident/offence raised suspicion, could be relied upon to convict an accused person(s).

Held

1. The two appellants were convicted on the evidence of a single witness. The court perused the evidence of PW1 at great length, and could not find any corroboration of the same on material aspects. The 1st appellant was alleged to have threatened PW1 with a gun. That gun was never recovered and was never produced. One did not know what type of gun it was as PW1 did not describe the gun and there was no evidence of any efforts made to recover it and to produce it. Further, the same witness (PW1), after the alleged incident which took place within Kitale town not far from police station, never reported the incident to the police but rather preferred to go back home and stay there for two weeks.
2. Even when PW1 met the 2nd appellant at Muloki market, clearly accidentally, he concentrated on finding out how he could rescue his lost mercury rather than reporting the alleged criminal act against him by the appellants. The record did not show whether PW1 had a licence to trade in mercury as was required by law, but if he did not have the same then the reasons of his remaining mum after the incident could easily be understood. All those were matters that the trial court had to consider. The record did not show that they were considered by the trial court.
3. Subject to certain well known exceptions, a fact could be proved by testimony of a single witness but that rule did not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it was known that the conditions favouring a correct identification were difficult. In such circumstances, what was needed was other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury could reasonably conclude that the evidence of identification, although based on the testimony of a single witness, could safely be accepted as free from the probability of error.
4. If the trial court had considered the various matters stated, it could very well have arrived at a different conclusion. Equally, although the superior court alluded to evidence by a single witness in the judgment, and stated that they had evaluated it, there was with respect nothing in the record to show that the superior court had actually evaluated the evidence as was required of the first appellate court.
5. An appellant on a first appeal was entitled to expect that the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court had to itself weigh conflicting evidence and draw its own conclusions.
6. It was not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it had make its own findings and draw its own conclusions. Only then could it decide whether the trial court's findings should be



- supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.
7. What the superior court did in the instant case was merely to scrutinize the evidence and once it found that there was some evidence in support of the trial court's decision, it dismissed the appeal. Had it evaluated the evidence related to the conduct of PW1 both before the incident when he involved himself in an illegal trade and after the incident when he apparently grew cold feet on reporting the alleged robbery and the effect that the alleged weapon used in threatening him was never recovered and no effort was made to recover it, the superior court might have come to a different conclusion from that arrived at by the trial court. Both courts, upon such an exhaustive analysis of PW1's conduct might have considered whether PW1 was a man whose evidence could be relied upon to convict the appellants.
 8. A witness upon whose evidence reliance was proposed should not make an impression in the mind of the court that he was not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicated that he was a person of doubtful integrity, and therefore an unreliable witness which made it unsafe to accept his evidence.
 9. If the trial court and the superior court had their attention drawn to the matters concerning the conduct of PW1 and the fact that his evidence was not corroborated on material aspects as well as the weakness in the investigation of the case which might have resulted in no explanation as to the non-recovery of the gun mentioned by PW1 and into ascertaining whether such a gun even existed, their conclusion might have been different particularly when it was considered that his evidence was the only evidence on the material aspects of the case. As a second appellate court, the court was not enjoined to carry out that exercise, and the appellants were entitled to the benefit of doubt created by the same.

Appeal allowed.

Citations

1. *Abdalla Bin Wendo & another vR* (1953) 20 EACA 166
2. *Okeno vR* [1972] EA 32
3. *Ndungu Kamanyi v The Republic* [1979] KLR 282

Statutes

Penal Code (cap 63) sections 105(b); 296(2)

JUDGMENT

1. The complainant in this appeal, Juma Ali Nate mbeya (PW1) (to whom we shall refer as "Juma") was a farmer and a businessman. He was buying and selling cattle, as well as cereals. From the records, it would appear that apart from those, he was also buying and selling mercury. In his evidence before the trial court, he alleged that on 4th July, 2001 at about 2.30 pm, the second appellant Robert Makasi went to his house claiming that he (2nd appellant) had a person who would buy mercury from him (Juma).
2. He had 11 kilograms of mercury worth Ksh.500,000/=. The same second appellant had taken some people to Juma from whom Juma had bought mercury. That was in June, 2001. The buyer, it would appear, was allegedly at Kitale Town. Juma and the second appellant left home and went to Kitale, with Juma carrying the mercury in a Tree Top Bottle. At Kitale, Juma was left at the gate of Kitale Club while 2nd appellant went to Kitale Guest House where he was to meet the buyer. After two hours, the second appellant returned to where Juma was left. The 2nd appellant told Juma that the buyer was at Kitale Guest House which is in section six within Kitale Town. The two then set out for the Guest House, but as they were almost 15 metres to Kitale Guest House, Juma heard people whistling behind them. Those people whistling were men and they told Juma and 2nd appellant to stop, but the two did not stop. The people apprehended them and asked them why they were not obeying orders



from Government Officers. One of those people whom he identified as the first appellant drew a gun, pointed it at Juma and said he was a C.I.D officer from Kitale and he was looking for the 2nd appellant who had illegally brought a tractor from Uganda into Kenya without a permit. They asked Juma what Juma was carrying and Juma said it was mercury. The 1st appellant and another person then told them to go to Kitale Police Station. As they were on their way to Kitale Police Station, the 1st appellant searched him after they had been led to another lodging compound and took Ksh. 5,400/= from him. By that time, the other person with 1st appellant had taken the mercury but was still there.

3. When they reached near a Mosque, and before reaching the Police Station, Juma was ordered to leave and go away completely without any complaint. He left and went home, leaving the 2nd appellant with 1st appellant and the other person. Once at home, Juma took no action on the matter till two weeks later when he met the 2nd appellant at Muloki Market. He asked the 2nd appellant what had happened and the 2nd appellant told him mercury was taken by the “policemen” and the 2nd appellant was charged with the offence of bringing a tractor into the country without a permit. Juma asked the 2nd appellant whether he knew the names of the two “policemen” and the 2nd appellant said he knew the 1st appellant as James Kinawa. Juma, together with one Murunga went to the Police Station to report on the matter and they were told by the O.C.S that there was no such officer at the station but that if Juma got him physically anywhere, Juma should report to the O.C.S for action to be taken.
4. On 10th August, 2001, Juma met 1st appellant and asked him about the mercury but 1st appellant allegedly told him it was with one C.I.D. officer. Juma requested 1st appellant to see the inspector, to see whether they would release his mercury. They went to Kitale Police Station. The 1st appellant entered the building and looked around but told him inspector was not there. The 1st appellant then took Juma to court to check if the inspector was there but the inspector was not there either. The 1st appellant then told Juma to return the following Monday. In the meantime, 1st appellant would talk to the inspector on the release of the mercury. Juma went home and the following Monday, he went to the Law Courts at Kitale where 1st appellant was to be as a witness. Juma met 1st appellant who told him in the presence of Murunga that the Inspector wanted Ksh.40,000/= to release the mercury.
5. When Murunga demanded identification by the 1st appellant that he was a Police Officer, the 1st appellant became hostile. Murunga and Juma then held him and a police officer Mr. Ochido (PW3) assisted then to arrest the 1st appellant. He was taken to the police station where he denied any allegation that he was a police officer. PC Ochido (PW3) gave Juma a note to facilitate the 2nd appellant’s arrest. He took the note to PC Moses Simatwa (PW2) of Gituamba Police Station who on receipt of the note went to 2nd appellant’s home and arrested the 2nd appellant. The two were jointly charged with the offence of Robbery with violence contrary to section 296(2) of the Penal Code the particulars of which offence were that on the 4th day of July, 2001 at Kitale Town in Trans Nzoia District of the Rift Valley Province, jointly with another not before court while armed with a dangerous weapon namely a pistol, they robbed Juma Ali Natembeya of his eleven kilograms of mercury and cash money Ksh.5,400/= all valued at Ksh.505,400/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence against the said Juma Ali Natembeya. The 1st appellant also faced a second charge of personating a Public Officer contrary to section 105 (b) of the Penal Code in that on the 4th day of July 2001 at Kitale Town in Trans Nzoia District of the Rift Valley Province jointly with another not before court he falsely presented himself to be a person employed in the Public Service namely Police Officer and assumed to arrest Juma Ali Natembeya.
6. The appellants denied the charges against them with the 1st appellant stating in his defence that he reached Kitale on 14th July 2001 and at 10.30 am as he was going to Akamba Bus stage to collect miraa sent to him from one Geoffrey Kimani of Nairobi, he was accosted by two people who alleged that he was the police officer they were looking for and who had stolen Ksh.5,400/= and



mercury from one of them. Notwithstanding his protestation, he was arrested and later charged with the offence. 2nd appellant's defence was that he was arrested by PW2 who was given Ksh.300/= by PW1, and he was later charged with the offence of robbery. He knew nothing of the offence.

7. The appellants' case came up before the Senior Resident Magistrate at Kitale, D.K. Gichuki who after full hearing convicted both appellants for the offence of robbery with violence contrary to section 296(2) of the Penal Code but acquitted the 1st appellant on the second charge of personating a Public Officer contrary to section 105(b) of the Penal Code. They were each sentenced to death. In convicting the appellants of the offence of robbery with violence contrary to section 296(2), the learned Magistrate stated as follows in pertinent parts:-

“I find that the evidence of the complainant was consistent in material particulars. The testimony of the complainant was unshaken. I saw the complainant give evidence in court and his demeanour struck me as a truthful witness who had no reason to give false testimony against either of the accused persons. I had no reason to doubt his testimony or disbelief (sic) him.”

8. The learned Magistrate concluded his judgment as follows:-

“Having considered the entire evidence and its evaluation thereof, I find that the offence of robbery in count I have (sic) been proved against both accused herein, I find them guilty for (sic) the offence as charged and convicts (sic) them for the same accordingly.”

9. The appellants were not satisfied with the conviction and naturally they were also not satisfied with the sentence of death imposed on each of them. They appealed to superior court and their appeal was placed before Gacheche J. and Dulu, Ag. J. who after hearing their appeals dismissed the same stating as follows:-

“Having evaluated the evidence on record, it is clear in our minds that this is a case of identification by a single identifying witness. However, the incident took place in broad day light at 2.30 pm and PW1 knew the first appellant well enough. The evidence given by PW1 is detailed and gives a clear picture of what each of the appellants did. We find that the circumstances were such that there was no possibility of mistaken identity.”

10. The appellants were still dissatisfied with the decision of the superior court and hence this appeal before us which is premised on two grounds namely that:-

- “1 The learned Magistrate of the first court and the learned Judges of the second court erred in law and fact by finding that the ingredients of Robbery with violence had been established as required by law.

2. The learned Magistrate of the 1st Court and the learned Judges of the second court erred in law and in fact by misdirecting themselves to the insufficient evidence presented by the prosecution to proceed to convict and sentence the 1st appellant.”

11. We have anxiously considered these appeals. There are concurrent findings of the learned Magistrate and the superior court to the effect that the evidence of PW1 was beyond reproach. Three witnesses were called by the prosecution. Of these PC Moses Simatwa's evidence is that he arrested the 2nd appellant. PC Ochido's evidence is that he arrested the 1st appellant and initiated the activities that led to the arrest of the 2nd appellant. The only substantive witness was Juma who as we have stated, was also the complainant. It is thus not in dispute that the two appellants were convicted on the evidence of a single witness. We have perused the evidence of Juma at great length, but we cannot find any



corroboration of the same on material aspects. The 1st appellant was supposed to have threatened Juma with a gun. This gun was never recovered and was never produced. One does not know what type of gun it was as Juma did not describe the gun and there was no evidence of any efforts made to recover it and to produce it. Further, the same witness i.e. Juma, after the alleged incident which took place within Kitale town not far from Police Station, never reported the incident to Police but rather preferred to go back home and stay there for two weeks. Even when he met the 2nd appellant at Muloki market, clearly accidentally, he concentrated on finding out how he could rescue his lost mercury rather than reporting the alleged criminal act against him by the appellants. The record does not show whether Juma had a licence to trade in mercury as is required by law, but if he did not have the same then the reasons of his remaining mum after the incident can easily be understood. All these were matters that the trial court had to consider. The record does not show that the same were considered by the trial court.

12. 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”.

13. In our view, if the trial court had considered the various matters we have stated herein above, he may very well have arrived at a different conclusion. Equally, although the superior court alluded to evidence by a single witness in the judgment, and stated that they had evaluated it, there is with respect nothing in the record to show that the superior court had actually evaluated the evidence as is required of the first appellate court. In the case of Okeno v. R. [1972] EA 32, at page 36, the predecessor to this Court stated:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R. [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - Shantilal M. Ruwala v. R. [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts’ findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses - See Peters v. Sunday Post [1958] EA 424”.

14. In our minds, what the superior court did in this case was merely to scrutinize the evidence and once it found that there was some evidence in support of the trial courts decision, it dismissed the appeal. Had it evaluated the evidence related to the conduct of Juma both before the incident when he involved himself in an illegal trade and after the incident when he apparently grew cold feet on reporting the alleged robbery and the effect that the alleged weapon used in threatening him was never recovered and no effort was made to recover it, the superior court might have come to a different conclusion from that arrived at by the trial court. Both courts, upon such an exhaustive analysis of Juma’s conduct



might have considered whether Juma was a man whose evidence could be relied upon to convict the appellants. In the case of *Ndungu Kimanyi v. the Republic* [1979] KLR 282, it was stated as follows:

“If the confessional statement is removed from the piece of evidence (it was a major if not the only substantial piece of evidence), only the complainant’s evidence would be left against the appellants, a proposition which the State Counsel accepted. The complainant was not a virtuous virgin. A man of loose conscience; on a previous occasion also he had been involved in a swindle operation for making easy money when he lost Shs.40,000/=. In our opinion the evidence of the complainant does not come up to the minimum standard, which we require before upholding a conviction in a criminal case. We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the Court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence”.

15. We are of the opinion that if the Magistrate’s court and the superior court had their attention drawn to the matters we have stated above concerning the conduct of Juma and the fact that his evidence was not corroborated on material aspects as well as the weakness in the investigation of the case which may have resulted in no explanation as to the non recovery of the gun mentioned by Juma into ascertaining whether such a gun even existed, their conclusion may have been different particularly when it is considered that his evidence was the only evidence on the material aspects of the case. As a second appellate court, we are not enjoined to carry out that exercise, and the appellants are entitled to the benefit of doubt created by the same.
16. We allow this appeal, quash the conviction, and set aside the sentence. The appellants are set free forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT ELDORET THIS 18 TH DAY OF FEBRUARY, 2005.

P. K. TUNOI

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

