REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: TUNOI, O'KUBASU & GITHINJI,JJ.A.)

CRIMINAL APPEAL NO. 231 OF 2003

BETWEEN

KOTALEN NGOILINYA MEPUKORI……..…..…..… APPELLANT

AND

REPUBLIC……..… RESPONDENT

(Appeal from the judgment of the High Court of Kenya at

Nairobi (Mbogholi, J) dated 29
th
July, 2003
in
H.C.CR.APPEALNO.1038 of 2000)
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JUDGMENT OF THE COURT

Kotalen Ngoilinya Mepukori, the appellant herein, was convicted of robbery with violence contrary to ***Section 296(2)*** of the Penal Code and sentenced to death as mandatorily provided by the law. His appeal to the superior court was dismissed, hence, he comes before us by way of second and final appeal. The evidence before the learned Senior Resident Magistrate (Miss Ndungu) was to the effect that the complainant**, Abednego Musyimi Kinyili** (PW1) who operated a bar business within Kajiado town entered the bar at about midnight on 4th April, 2000. At about 3.00a.m, he went to the counter from where he took Kshs.8,500/- from his employee, **Jane Mueni** (PW4). He then left for his home together with **Dorothy Wambui Karagu** (PW2). While on the way home, Kinyili was attacked by two people who chased him up to a bar called Savannah where the assailants caught up with him.They inflicted injuries on his right ankle joint and right wrist. They robbed him of Kshs.8,500/- and a wrist watch. Outside the said Savannah bar the security lights were on and with the aid of the said lights he recognized the appellant as one of those who robbed him. Kinyili knew the appellant as he had previously employed him (appellant) as a watchman. On the following day the appellant was arrested and a green jacket recovered from him. This was the same jacket that the complainant said that the appellant was wearing when the attack took place. There was further evidence to the effect that on the material night the appellant had been seen in the complainant's bar by **John Nyiatai** (PW3), a watchman at that bar and **Jane Mueni**, (PW4) an employee of the complainant.These two witnesses (PW3 and PW4) confirmed that the jacket which was recovered from the appellant was the same jacket that the appellant was wearing when he was seen at the complainant's bar.

In his defence the appellant denied the offence, saying that he was arrested by the police at night and placed in custody for no reason. The learned trial magistrate considered the evidence before her and believed the prosecution witnesses. After analyzing the evidence and bearing in mind that the case against the appellant was based on evidence of identification by a single witness, the learned trial magistrate in her judgment stated inter alia:-

> ***"I caution myself that this is the evidence of a single witness. However, I had no doubts at all in my mind that the complainant positively identified the accused person as one of his assailants. He knew him well as he had formerly employed him. I believed he saw and recognized him."***

Having so expressed herself, the learned trial magistrate convicted the appellant and sentenced him accordingly.

The appellant being dissatisfied by the decision of the trial court filed an appeal to the High Court. His appeal was considered and rejected. In its judgment, the superior court (Mbogholi Msagha and Mutitu JJ) said:-

> ***"On our part, we have gone through the record and noted that the offence was committed at night.However, we are in agreement with the learned trial magistrate that since there were lights outside the scene of the attack and that the appellant had been known to the complainant before, he was properly recognized by the complainant. The green jacket was also recovered from him and this he did not deny during the trial. We agree that this conviction was based on the evidence of single witness but was strong enough. Further the learned trial magistrate recognized and warned herself that it was dangerous to convict on such evidence but had no doubt whatsoever that the appellant was positively identified."***

When this appeal came up for hearing before us on ***30th June, 2005***, Mr. Mutisya, the learned counsel for the appellant submitted that his main ground of appeal was identification, and in our view, he was right. Mr. Mutisya pointed out that although the learned trial magistrate cautioned herself of the danger of identification by a single witness, the evidence of the single witness was not positive. Mr. Mutisya raised the issue of first report by the complainant. In his view the complainant ought to have given the name of the appellant if, indeed, the appellant had been his watchman.

In supporting the conviction and sentence of the appellant, the learned Deputy Chief State Counsel, Mr. Oriri Onyango, submitted that this was a case of recognition as the appellant was known to the complainant. Mr. Onyango gave a brief summary of the sequence of events emphasizing the fact that there was ample light at Savannah bar, the scene of the robbery.

On our part we wish to observe that according to the evidence, the appellant was seen in the complainant's bar by the watchman, **John Nyiata**i (PW3) and the bar maid **Jane Muen**i (PW4). A few hours later, the complainant was attacked by two people who robbed him of Shs.8,500/= and a wrist watch.The complainant recognized the appellant as one of the assailants. The appellant's jacket which he was wearing when he was seen by Nyiatai and Mueni was recovered from his house.

The only point of law raised by this appeal is the issue of identification. This was identification by a single witness during the night. In **RORIA VS. R [1967] E.A. 583 at p. 584 Sir Clement De Lestang V-P** sated:-

"A conviction resting entirety on identity invariably causes a degree of uneasiness, and as LORD GARDNER, L.C. said recently in the House of Lords in the course of a debate on s.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the Court to interfere with verdicts:

> ***"There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it***

is in a question of identity."

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

Both the trial Court and the first appellate court were satisfied that the appellant was properly identified as one of those who robbed the complainant on the material night.

It should be remembered that the appellant was known to the complainant, hence this was a case of recognition rather than identification. In **ANJONONI AND OTHERS VS. THE REPUBLIC** [1980] Kenya L.R. 59 at p.60 this Court stated:-

> ***"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was however, a case of recognition, not identification of assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

The facts of the present appeal would appear to be on all fours with those in the above cited authority.

Both Mr. Onyango for the State, and Mr. Mutisya for the appellant, appeared to raise issues relating to the facts of the case in the trial court but we must remind them that a second appeal (*like the present one*) must be confined to points of law and this Court would not interfere with concurrent findings of fact of the two lower courts unless they are shown to have not been based on evidence – See **KARINGO V. REPUBLIC** (1982) KLR 213.

Having considered the points of law raised in this appeal and the submissions by counsel appearing for the State and the appellant, we are satisfied that the appellant was convicted on very sound evidence. His conviction was inevitable and the superior court was entitled to uphold it. We see no reason to disturb the concurrent findings of the two courts below. Consequently, this appeal is hereby dismissed in its entirety.

Dated and delivered at Nairobi this 16th day of July, 2005.

P.K. TUNOI

JUDGE OF APPEAL

E.O. O'KUBASU

JUDGE OF APPEAL

E.M. GITHINJI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR