REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
CORAM: TUNOI, GITHINJI & DEVERELL, JJ.A
Criminal Appeal 160 of 2004
BETWEEN

1. JOSEPH NJIRU NJAGI

2. DAVID NJERU NDWIGA……………………….………………….APPELLANTS

AND

REPUBLIC…..……………………………………………………..…RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Juma,

Mitey, JJ) dated 19/3/03
in
H.C.CR.A. NOS. 69 & 70 OF 2001)
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JUDGMENT OF THE COURT

JOSEPH NJIRU NJAGI **(**first appellant) and ***DAVID NJERU NDWIGA*** (second appellant) were convicted by the Senior Resident Magistrate, Embu, of the offence of robbery with violence contrary to ***section 296(2*****)** of the Penal Code and each sentenced to death. Their respective appeals which were consolidated were dismissed by the High Court.This is therefore a second appeal. The first appellant has unfortunately died during the pendency of the appeal while undergoing treatment at Naivasha District Hospital. Thus his appeal has abated under ***Rule 68(1)(a)*** of the Court of Appeal Rules.

On the night of 12/11/2000 ***Lilian Ciomwari Philip (PW1****)*, the complainant, was asleep in her house at Gaciari village, Runyenjes, Embu District. At about 3 a.m., people called her to open the door of the house saying that they wanted money. She opened the bedroom window and saw six people outside whom she could not recognize at that moment.

The door of the house was broken open and some people entered into the house. The electricity lights were not working and it was dark inside the house. The robbers however had torches which they were flashing. She was forced to sit down in the sitting room. She was beaten as people demanded money. Two of the robbers entered into the bedroom and removed 300/=. The robbers demanded more money. She was beaten again. The robbers searched the house for about 15 minutes. Thereafter the complainant was pulled outside the house and told to search for money around the house. There was bright moonlight and complainant recognized the second appellant (who was the first accused at the trial) who is her neighbour as he tried to hide his face. The robbers left after they failed to get more money.The robbery was reported at Runyenjes police station. ***P.C. Jeffreson Okongo (PW3***) and another police officer went to the house of the complainant at 6 a.m. They did not find the complainant who had already left for police station to

report. On the way back ***P.C. Okongo*** suspected the second appellant because he was a "habitual criminal." The second appellant was found in his house sleeping and was arrested. He was taken to the police station where ***P.C. Okongo*** found the complainant. The second appellant in his unsworn statement denied the charge. The two courts below were however satisfied that the complainant identified the second appellant during the robbery.

There is one main ground of appeal thus:-

> ***"The learned appellate judges misdirected themselves as to sufficiency of proper circumstances to warrant an identification (recognition) hence arriving at the wrong conclusion that the identification of appellants was free of error or mistake."***

The second appellant was convicted solely on the evidence of a single identifying witness at night.

Following the well known decision in ***ABDALA WENDO V. R (1953) 20 EACA 166***, this Court has on many occasions emphasized that to justify a conviction the evidence of a single witness should be tested with the greatest care especially when the prevailing conditions are not favourable to correct identification and that before the court can base a conviction on such evidence it must be satisfied that such evidence is absolutely watertight (see for instance, **KIARIE V REPUBLIC [1984] KLR 741; MAITANYI V REPUBLIC [1986] KLR 198** and **MURUBE V REPUBLIC [1986] KLR 356).**

In this case the complainant claimed that she recognized the second appellant who is her neighbour with the aid of moonlight when she was pulled outside the house to search for more money. When cross-examined by the second appellant, she stated that the second appellant was standing on guard on the doorway to the house and had a long stick. Mr. Orinda, the learned Principal State Counsel, did not support the conviction saying that the conviction was unsafe and probably insupportable because the circumstances of identification were difficult.

The complainant's evidence in respect of the identification of the second appellant was in four sentences, thus:

> ***"Outside the house the moon was bright … Outside I recognized Njeru Mukuthu here as he tried to hide his face from me and he was dressed in the same jacket he has today. He is here (pointing at Accused 1). He is someone I know well before that day as he comes from my neighbourhood where I have lived from 1991".***

The learned trial magistrate without testing the evidence merely stated that she was satisfied beyond a reasonable doubt that the second appellant was properly identified by the complainant "as circumstances became very favourable that night". Similarly, the superior court did not subject the evidence of identification of the second appellant to a fresh and exhaustive examination and reach its own independent conclusion as is required to do. The superior court merely stated:

> ***"The learned trial magistrate directed himself quite properly on the issue of there being sufficient light to be able to identify the appellants …".***

We would agree with the learned Principal State Counsel that the circumstances for identification were difficult. The only source of light was moonlight. The complainant had been beaten before she was pulled outside the house. There were six robbers. Earlier when the robbers called her to open the door she had opened the bedroom window and looked outside. She had seen six people with the aid of moonlight but she did not identify them at that time However, she did not describe the full circumstances under which she recognized the second appellant outside the house. From her evidence the second appellant tried to hide his face from the complainant. The complainant did not say how long she observed the second appellant outside the house; how far the second appellant was from the complainant, how many of the six robbers took her outside the house; whether there was any obstruction, how far the second appellant was and how often she used to see him or give evidence of such like factors as would show that her evidence was reliable and free from error.

It is evident that the quality of the complainant's evidence of the identification of the second appellant was poor. There was no other independent evidence. It is not the report of the complainant which caused the arrest of the second appellant as he was arrested because of his "bad character" before the complainant made the report of robbery at the police station. As we have said, the two courts below did not test and analyse the evidence of identification of the second appellant. In the circumstances, the evidence of the complainant on the identification of the second appellant cannot be said to be free from the possibility of error, and, it is, in our view, unreliable. The learned Principal State Counsel has properly conceded the appeal.

Accordingly, we allow the second appellant's appeal, quash the conviction and set aside the sentence. The second appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 3rd day of November, 2005.

P. K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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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