REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: KWACH, AKIWUMI & KEIWUA, JJ.A.)
CRIMINAL APPEAL NO. 55 OF 2000

BETWEEN

JAMES MWAZUZU MWAZOME .... APPELLANT

AND

REPUBLIC .... RESPONDENT

Appeal from a judgment of the High Court of Kenya at Mombasa (Waki, J & Commissioner Tutui) dated 5th November, 1999
in
H.C.CR.A. NO. 356 OF 1993)
****

JUDGMENT OF THE COURT

James Mwazuzu Mwazome, the appellant, and one Laban Mwakwomba Mwawana were jointly charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that on the night of January, 31st 1992 at about 2.00 a.m, the accused broke into the shop of one Janet Mshai Kutoyi robbed her of one weighing machine and other items and money. The accused had also attacked the complainant and inflicted injuries from which she bled profusely. Prior to the attack the complainant had been asleep in a room at the back of the shop when she heard a loud bang which awakened her and she went out to the verandah, where she noticed that the door to the back of the shop and that of her room had been forced open with a stone. At the verandah, she saw three persons and was able to recognise the appellant whom she had known since his childhood and had visited her shop frequently. The appellant sought to know what these people wanted and one of them shouted in the Kikuyu language "Rehe Mbesha" meaning bring money.

The appellant on noticing that the complainant had recognised him, lifted his shirt and covered his face. Thereupon the three persons, set upon the complainant and inflicted several cuts from which she bled profusely and had to be taken to hospital from where the police visited her and she gave the name of the appellant as one of those who broke into her shop, attacked and robbed her. In the course of these attacks, the complainant heard the appellant shout in the Kiswahili language that "huyu atatupaka damu" meaning she was going to smear them with blood.

In the course of her cross-examination by the appellant the complainant stated:-

"I knew you and I saw you. When you noticed that, you covered your face with your shirt. I had not seen you during the day. I knew you since your childhood. There was light in my room. I saw you before I was cut. Whenever your companion shown light in your direction you would conceal your face.".

In his judgment, the learned magistrate, before whom the appellant and his co-accused were tried, had this to say in relation to the ability of the complainant to recognise the appellant:-

"It is noted that the robbery was committed at night. PW1 said that the robbers had a torch and that several occasions one of the robbers pointed the torch in the 2nd accused's direction and she managed to see him well. Ow ing to the above circumstances, the court does not doubt that P.W.1. properly recognised the 2nd accused whom she knew very well prior to the incident.".

The first appellate court's judgment had been attacked by Mr. Mungatana, Counsel for the appellant. In his view, that court did not re-evaluate the evidence relating to the lighting which allegedly enabled the complainant to recognise the appellant and such failure, he submitted, occasioned a failure of justice in respect whereof, the appellant was entitled to be acquitted. That court in its judgment had this to say:-

"In the present case appellant 2 was standing in the same room as PW1 and a torch light was shone towards his face and PW1 immediately recognised him. There has been no suggestion that t he light from the torch was inadequate. He also spoke when he told the others she will smear them with blood. We do, however, agree that there is need for exercise of caution as the possibility of a mistake of recognition of relatives, friends and people who are well known to the identifying party sometimes are made. But the circumstances of each case must also be taken into account. Although from the record, the learned magistrate did not warn herself of the danger of convicting on the basis of a singl e identifying witness, she was alive to that danger but had no doubts that PW1 was certain of the person she had seen on the night of the attack.".

In view of these concurrent findings and evaluation of the evidence regarding the manner in which the appellant had been recognised by the appellant, it can hardly be successfully contended as counsel for the appellant did, that the first appellate court failed to evaluate that evidence of recognition. We accordingly reject that contention. We are also satisfied that in the circumstances of this case, in which the complainant had been injured and such injuries confirmed by other prosecution witnesses, like the son and daughter of the complainant, who responded to her screams and went to the scene of the attack, there is no merit in the complaint that the failure of the prosecution to call the doctor who filled the police P.3 form had occasioned a miscarriage of justice.

Though, the first appellate court, did not seem to have considered the defence of the appellant, that he was not at the scene of the robbery at the time in question, we, however, agree with Mr. Gumo, for the respondent, that the appellant's defence contained in six lines of the records, was not meaningful to negate the fact that he had been positively recognised by the complainant at the time of the robbery. All he said in his defence was that he woke up at Werugha on 31st January, 1992 and worked in his "shamba" until 4:00 p.m., when the police came and arrested him together with Laban Mwakwomba Mwawana, his then co-accused.

In the result, the appellant's appeal fails and is hereby dismissed.

Dated and delivered at Mombasa this 18th day of January, 2001.

R. O. KWACH ....

JUDGE OF APPEAL

A. M. AKIWUMI ....

JUDGE OF APPEAL

M. KEIWUA ....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR