REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(Coram: Chunga, C.J.,Tunoi & Shah, JJ.A.
CRIMINAL APPEAL NO. 52 OF 2000
BETWEEN

BONIFACE OKEYO.....APPELLANT
AND
REPUBLIC.....RESPONDENT

Mombasa (Hayanga, J. & Comm. Khaminwa) dated 22nd October, 1999
in
H.C.CR.A. 79 OF 1998)
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JUDGEMENT OF THE COURT:

The appellant was tried and convicted by the Senior Principal Magistrate Mombasa on a charge of robbery with violence contrary to section 296(2) of the Penal Code Cap 63 Laws of Kenya. He was sentenced to death as provided by law.

The particulars of the charge alleged that on 16th of March, 1997 at about 2.00 a.m., at [particulars withheld] in Mombasa district, jointly with others not before the court, the appellant robbed one M.M of the items mentioned in the charge and at or immediately before or immediately after the time of such robbery, used personal violence to the said M.M. the complainant in the case, gave evidence in the Senior Principal Magistrate's court as PW1 and will be referred to accordingly in this judgment.She testified that on the night of the offence, she was asleep in her house when a gang of robbers broke into the house, attacked her, raped her, and forcibly robbed her of the items in the particulars of the charge. Two of the gangsters escorted her outside the house where they raped her in turns in full moonlight which enabled her to identify the two robbers.

Also in PW1's house, but sleeping in a different room, was one K.M who gave evidence in the Senior Principal Magistrate's court as PW3 and will be referred to accordingly in this judgment.He testified that, as he was asleep in his room, a gang of robbers, numbering about six, broke into the house and into his room, and attacked him. He was forced under the bed where, according to him, in the torch lights carried by the robbers, he was able to identify one of the robbers. As he was being attacked, two robbers left his room and went to another room within the house. He then heard PW1 crying from outside the house. He peeped out through the window and, in the bright moonlight, was able to see and identTihfey frooubrb eorfy thwea sr obsbuebrsse.quently reported by PW1 to the police and investigations commenced following which, the appellant was arrested.There is no evidence that either PW1 or PW3 described the appellant to the police in their report or subsequent police statements.

Nevertheless, three weeks later namely on 7th April, 1997, both PW1 and PW3 attended an identification parade conducted by one Inspector of Police Mary Njenga who gave evidence in the Senior Principal Magistrate's court as PW5. The Inspector testified that the two witnesses were able to identify the appellant at the identification parade. The identification parade form which was produced in the trial

as exhibit No. 17, shows that the appellant complained that PW3 knew him. The form further shows that the appellant made no remarks on the form in regard to PW1.

The appellant, on the above evidence, was then placed on his defence by the Senior Principal Magistrate and he gave an unsworn statement in which he denied the offence. He described how he was arrested on the 4th of April, 1997 by administration police officers at about 4.00 p.m. He was taken to the police station and subsequently appeared in an identification parade where he was identified by two people who had seen him.

Having heard the evidence from the prosecution and the defence, the Senior Principal Magistrate subsequently gave judgment on 20th March, 1998 in which, as stated earlier, he convicted the appellant as charged and sentenced him to death. In convicting the appellant, the Senior Principal Magistrate believed the evidence of PW1 and PW3 and found that the two witnesses positively identified the appellant.

Following his conviction and sentence, the appellant appealed to the High Court largely on the grounds that his identification by PW1 and PW3 was not safe and positive enough to support conviction. The appeal was heard before one Judge sitting with a Commissioner of Assize and, in their judgment dated 22nd October, 1998, they dismissed the appeal and confirmed the conviction and sentence.

Before us, the appellant has now brought a second appeal through his advocate Mr. Wameyo on four (4) grounds which were argued together. The gravamen of Mr. Wameyo's submission was that the evidence of identification of the appellant by PW1 and PW3 was not safe and positive enough to support the conviction.Mr. Wameyo submitted that the only source of light which assisted PW1 to identify the appellant was alleged bright moonlight which, according to Mr. Wameyo, was not enough. He submitted that PW1 had just woken up from sleep and must have been shocked and in emotional state because of the attack. Under the circumstances, Mr. Wameyo submitted that the conditions were not favourable for positive identification. He submitted that PW1 did not give any description of the appellant to the police at the time of the report and failure to do so weakened the quality of identification.

On PW3, Mr. Wameyo submitted that the witnesses' alleged identification of the appellant through torch light in the room was inadequate and unsatisfactory. According to Mr. Wameyo the witness had also just woken up from sleep by the disturbances in the house and the only source of light available to him in the room was from the alleged torches carried by the robbers. Additionally, the witness was forced to lie under the bed from which position he could not possibly make positive observation and identification of the attackers.

For the preceding reasons, Mr. Wameyo submitted that, although the appellant was identified by two witnesses, the circumstances of identification were so poor and unfavourable and therefore, accurate and positive identification of the appellant was not possible.He also submitted that, although the two courts below concurrently believed PW1 and PW2 had found identification to be positive, they did not fully and adequately assess the circumstances and conditions of identification. If they had done so, Mr. Wameyo submitted, they would not have arrived at the conclusion at which they did arrive. For the State, Mr. Gumo Senior State Counsel, supported the conviction and sentence. He stressed that the appellant was identified by two and not one witness. He also stressed that there were two sources of light which assisted the witnesses to identify the appellant namely from the torches carried by the robbers and the moonlight.Finally, Mr. Gumo stressed that the two courts below had made concurrent findings on the appellant's identification by the two witnesses, and, accordingly, this being a second appeal, we should not upset those findings in the absence of any errors, omissions, or misdirections.

The law on identification cannot be in dispute in our courts. The evidence must be scrutinised carefully and the court must be satisfied that identification is positive and free from the possibility of error. All surrounding circumstances, particularly circumstances under which identification was made must be scrupulously considered. In this appeal, we have taken into account all the matters addressed to us by Mr. Wameyo on behalf of the appellant and Mr. Gumo for the Republic.We note that PW1 did not give any description of the appellant to the police. We note also that the identification parade was conducted some three weeks after the attack and the offence when the witness allegedly identified the appellant. We

further note that the only source of light available to the witness was the alleged bright moonlight because the witness did not say she relied on the torches which the robbers carried.

In regard to PW3, we note that the witness relied on two sources of light. First he said that he was able to identify the appellant through the light from the torches in the room. In this connection however, it must be remembered that the witness said that he was forced to lie under the bed and could only see the legs of one of the robbers.From that position, we are not satisfied that the witness was able to make positive observation and identification of any of the robbers.

PW3 also relied on the moonlight. However, the evidence does not show that he came out of the house during the period of the attack. He only peeped through the window and, according to him was able to see and identify four of the robbers. We note also that, like PW1, this witness (PW3), did not give any description of the appellant to the police at the time of the report. Finally, we note that the witness also attended the identification parade some three weeks after the attack and the offence. Under these circumstances, we are not satisfied that identification of the appellant by PW3 was positive and safe.

As we stated earlier, evidence on identification must be considered with circumspection. All conditions of identification must be subjected to careful analysis in order to assess whether identification is free from the possibility of error. This is the effect of the three decisions quoted to us by Mr. Wameyo on behalf of the appellant.

We are mindful of the fact that we are dealing with a second appeal and, as such, we must not reopen issues related to facts. Nevertheless, identification is always an issue of mixed law and fact. Where, therefore, a submission is made that the lower courts have failed to fully evaluate circumstances and conditions of identification, we think, such a submission leads to an issue of law which would justify our intervention even in a second appeal such as this.

We are satisfied that the two courts below did not subject the evidence of identification to the required critical analysis. The issues addressed to us by Mr. Wameyo and which we have dealt with in this judgment, were not fully considered and given their due weight. Under these circumstances, we arrive at the conclusion that the appellant's conviction was not safe and cannot stand.

Before we conclude this judgment however, there are two other matters which, though not raised by the appellant's counsel, have caused us considerable concern in this appeal. These arise from the judgment of the High Court on first appeal where it said as follows:

> ***"the appellant himself narrated how he was arrested. He did not raise any serious defence to the charge except to state that he was not guilty."***

In another part of the judgment the High Court further said as follows:

> ***"the appellant had full opportunity and did cross-examine the witnesses but no crucial evidence arose out of his cross-examination"***

We are satisfied that in the two passages, the High Court on first appeal seriously fell into error by appearing to shift the burden of proof to the appellant. It is trite law that in criminal cases the burden of proof rests throughout on the prosecution to establish the guilt of an accused person beyond reasonable doubt save in few exceptions of which this was not one. The appellant had no duty in law to raise a serious defence, nor did he have a duty to elicit crucial evidence by cross-examination of prosecution witnesses. We are satisfied that the burden of proof was, clearly, placed on the appellant and this is another reason to fortify the conclusion we have reached that the conviction was unsafe and cannot stand.

Lastly we observe that the High Court, in yet another part of the judgment, said as follows:

> ***"the appellant himself participated in the parade and had nominated a friend - his in-law, Rehema Batwira to be present at the parade. When the appellant was asked if***

he was satisfied by the way the parade was conducted he quickly stated that the identification witness No. 2 knows me."

The High Court relied on what the appellant said at the identification parade to find that his identification by PW3 was accurate and positive because, according to the High Court, the appellant himself had conceded that PW3 knew the appellant.

Several things flow from this. First, if it is true that PW3 knew the appellant, possibly before the offence or had seen the appellant before the parade, then there was no need for an identification parade as it would have been prejudicial to the appellant. Secondly, and most important, the witness himself ("PW3") never said in his evidence in court that he knew the appellant before the offence or otherwise.

We are satisfied, for the reasons stated above, that the High Court again seriously fell into error by relying on what the appellant said at the identification parade to show that his identification by PW3 was positive. Indeed the High Court, erroneously appeared to treat the case as one of recognition simply because of what the appellant said at the identification parade but which was not confirmed by PW3 in his evidence.

For all the reasons given in this judgment we allow this appeal, quash the conviction, set aside the sentence and order that the appellant shall forthwith be set free unless otherwise lawfully detained.

Dated and delivered at Mombasa this 17th day of January, 2001.

B. CHUNGA

CHIEF JUSTICE

P.K. TUNOI

JUDGE OF APPEAL

A.B. SHAH

JUDGE OF APPEAL

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

DEPUTY REGISTRAR