



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA

(CORAM: TUNOI, SHAH & BOSIRE, J.J.A.)
CRIMINAL APPEAL NO. 67 OF 2000
BETWEEN

SHADRACK MUTETI MAWEU APPELLANT
AND
REPUBLIC RESPONDENT

Appeal from a judgment of the High Court of Kenya at
Mombasa (Waki, J. & Commissioner Khaminwa) dated
13th March, 2000

in
H.C.CR.A. NO. 126 OF 1997)

JUDGMENT OF THE COURT

The appellant, Shadrack Muteti Maweu (the appellant), was charged in the Chief Magistrate's Court, at Mombasa, with two counts, and after his trial he was convicted on the first count of robbery with violence contrary to section 296(2) of the Penal Code, but was acquitted on the second count of rape contrary to section 140 of the Penal Code. He was thereafter sentenced to the mandatory death sentence in respect of the former count. His conviction was based on visual identification evidence of a single witness at night time with the aid of moonlight and her subsequent identification of the appellant in an identification parade which was held about one and a half months after the robbery. There was no other evidence to connect the appellant with the commission of the offence.

The appellant's first appeal to the superior court was dismissed, principally on the ground that the circumstances under which the alleged robbery was committed favoured a correct and unmistakable identification of the appellant. The court therefore found no merit in his appeal. In his home made memorandum of appeal the appellant challenges that finding on the ground that had the superior court fully evaluated and analysed the evidence of identification, it would have come to the conclusion that the circumstances obtaining at the time of the said robbery were difficult and did not favour a correct identification.

In Patrick Nabiswa v. Republic, Criminal Appeal No.80 of 1997 (Unreported) this court had the following to say regarding visual identification: "This case reveals the problems posed by visual identification of suspects. This mode of identification is unreliable for the following reasons which are discussed in BLACKSTONE'S CRIMINAL PRACTICE 1997, section F18.

(a) Some persons may have difficulty in distinguishing between different persons of only moderately similar appearance, and many witnesses to crimes are able to see the perpetrators only fleetingly, often in very stressful circumstances,

(b) Visual memory may fade with the passage of time; and

(c) As is in the process of unconscious transference, a witness may confuse a face he recognised from the scene of the crime (it may be of an innocent person) with that of the offender."

The complainant in both the aforesaid counts was M.W.M (P.W.1), a resident of [particulars withheld] in Kwale District. On 8th September, 1996 at about 11:00 p.m. her house was invaded by a gang of at least three robbers who ransacked her house, took away a number of items among them her clothes, those of her husband and cash.

They then raped her before they escaped. It was her evidence that as the robbers moved from one room to the other in search of money they went along with her. The only source of light in the house came from the moon which she said was bright.

With the help of that light, she said, she was able to identify the appellant not only as one of the robbers, but also as the man who raped her. It was her evidence that because the robbers were with her for about 3 hours she had ample time and opportunity to identify him. Her evidence in that regard was as follows:

"There was moonlight outside but it was dark inside. They came at about 1:00 a.m. not 11:00 p.m. as written down. They stayed with us for about three hours. The first cock crow (sic) at 3:00 a.m. All the time we were with them talking with them going outside and coming back inside."

P.W.1's husband, M.K.J (P.W.2), who was in the same house testified that although he saw the robbers he was not able to identify any of them. Their son Y.M (P.W.3) who was also present, likewise was not able to identify any of the robbers. So only P.W.1 identified the appellant.

Regarding the circumstances obtaining at the time and place of the robbery P.W.2's evidence was as follows:

"Our house was dark and they were using torches since it was dark. I did not identify any of them. The whole act took place more than three hours because they stayed a very long time with us. Outside people could see each other well if they were close to each other but it was dark inside."

The appellant was arrested on 4th October, 1996 on the basis of information the police received from police informers. The appellant was reported to have been in a bar boasting that although he had committed the robbery and the rape the police were unable to connect him with the same. The police arrested him from the bar and later conducted an identification parade with P.W.1 as the identifying witness. P.W.1 identified the appellant from a line of nine people.

Mr. Kiarago for the appellant submitted before us that the evidence before the trial court did not show that the circumstances at the scene of the robbery were favourable for a correct identification of the appellant. He urged the view that had the first appellate court fully evaluated and analysed the evidence as it was required to do as a first appellate court, it would have become clear that P.W.1 mistook the appellant as one of the people who robbed her.

The robbery and rape complained of occurred at night time. There is no evidence that any form of light other than moonlight was available both inside and outside P.W.1's house which would have aided the complainant in positively identifying her attackers. It is possible that using moonlight she was able to identify the appellant.

However her evidence was that she did not know the appellant before and there were no special features on him which would have made her to particularly recall him. This is not a case of recognition. Besides although this court has often said that identification parade evidence does lend assurance to the testimony of a single witness regarding identification, P.W.1 did not point out the appellant until after the passage of

over one and a half months after the robbery. It is possible her visual memory had faded with the passage of time. This is a criminal case in which the appellant stands convicted of a capital charge. The court must be satisfied as to his guilt beyond reasonable doubt that he was positively identified before confirming his guilt. As the evidence stands, it is clear that P.W.1 could possibly have been mistaken as to his participation in the robbery and rape. The doubt must in the circumstances be resolved in favour of the appellant.

In the result and for the reasons we have endeavoured to give there is merit in the appellant's appeal which we accordingly allow, quash his conviction for the offence of robbery contrary to section 296(2) of the Penal Code, set aside the sentence of death which was imposed on him, and order that he be released forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 20th day of July, 2000.

P. K. TUNOI

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

S. E. O. BOSIRE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR