



**IN THE COURT OF APPEAL
AT NAIROBI**

CORAM: GICHERU, TUNOI & O'KUBASU, JJ.A

CRIMINAL APPEAL NO. 36 OF 2000

BETWEEN

DAVID MUSEMBI MUE APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Osiero & Etyang JJ.A) dated 27th May, 1999

in

H.C.CR. NO. 68 of 1998)

JUDGMENT OF THE COURT

The appellant David Musembi Mue was convicted by the Senior Resident Magistrate, Machakos on a charge of robbery with violence contrary to Section 296(2) of the Penal Code and sentenced to suffer death as is mandatorily required by law. The appellant's first appeal to the superior court against conviction and sentence was dismissed by Osiero and Etyang JJ, on 27th March, 1999. This is, therefore, a second appeal.

The complainant, Simon Maingi Nyamai (PW1), a businessman at Katangi Market, left the said market riding a bicycle on 3rd March, 1996 at about 9.50 p.m. He was going home. Then two people emerged from the bush and blocked his way ordering him to stop. One of the two people was armed with bow and arrows while the other man had a stick. The complainant was shot with an arrow and the two people robbed him of his Shs.750/-, a wrist watch and a pair of spectacles. During the attack the complainant was able to recognize the appellant as there was bright moonlight and the complainant knew the appellant well. Since the complainant was screaming one Benedetta Kataa (PW2) rushed to the scene and found the complainant lying down. PW2 was also screaming and so many more people came to the scene and carried the injured complainant to hospital where he was treated by Dr. Fredrick Obango (PW6) who classified the degree of injury as harm. PW6 testified to the effect that the injuries must have been inflicted by sharp and blunt objects.

As a result of the above, the appellant was arrested and charged. Perhaps, it should be pointed out that the appellant was jointly charged with another person who, unfortunately, died before the trial commenced. The appellant in his defence stated that there was a grudge between him and the complainant and that this grudge emanated from cultivation rights. He denied having committed the offence. In his unsworn statement, the appellant stated:-

"I did not rob anybody. Complainant and I had disagreed because he has said I should not cultivate his sons land".

At the trial, the prosecution based its case on recognition. Accordingly, the appeal to this Court turned entirely on the issue of identification by a single witness. Mr. Mogikoyo for the appellant conceded that the evidence against the appellant was that of recognition but he went on to argue that there was doubt as to whether the complainant was robbed.

Here we have concurrent findings by the trial and the first appellate courts to the effect that the appellant was properly identified by the complainant and that the complainant was indeed robbed as stated in his evidence. In dealing with the issue of identification the learned Senior Resident Magistrate in his judgment stated:-

"I am well aware of the danger of relying too heavily on the evidence of a single witness especially on identification.

In the present case, the night was bright by moonlight. The complainant knew the accused very well. The complainant had 10- 15 minutes to see the accused. Recognition and (sic) quite different from identification of a complete stranger".

We note that the trial court referred to the English decision in R.V. Turnbull (1976) 3 All E.R 549 in which the following directions were given:-

"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications.

In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way as for example by passing traffic or a press of people? Had the witness even seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police?

Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.

The above guidelines were found appropriate and have been followed by Kenyan courts as stated by this Court in Joseph Ngumbao Nzaro V.R (1988-1992) 2 KAR 212

It must be appreciated that it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when the conditions favouring a correct identification might be difficult. (See Abdalla Bin Wendo and Another V.R (1953) 20 EACA 166). And in Roria V.R (1967) E.A 583 the issue of identification was taken a step further when this Court stated:-

"A conviction resting entirely 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".

As we have already stated the trial court was alive to the fact that this was a case based entirely on evidence of identification by a single witness and it referred to the principles of law relating to such evidence. And the first appellate court having evaluated the evidence afresh, as it was required to do, came to the following conclusion:-

"The totality of that evidence as we have stated above, is that the appellant was known to the complainant very well, that there was a bright moonlight and appellant's identification by the complainant was positive and free from error. The trial Magistrate applied the principles of law relating to identification as pronounced in the case of R.V. TURNBULL (1976) 3 ALL E.R 549 as applied by the Court of Appeal in JOSEPH LEBOI OLE TOROKE VR C.A Cr. APPEAL NO. 204 of 1987 (Nairobi) and JOSEPH NGUMBAO NZARO V R CR. APPEAL NO. 44 OF 1987".

The conviction of the appellant was therefore safe and the sentence of death was the statutory mandatory sentence in the circumstances. This appeal fails and we dismiss it".

On our part we would say that this was a case of recognition as opposed to identification. The complainant knew the appellant, a fact which the appellant did not dispute. There was bright moonlight when the complainant was attacked. There was clear evidence that the complainant was confronted by the appellant and his companion (now deceased) and that these two were armed with a bow and arrows and a stick. They ordered the complainant to stop. They proceeded to attack the complainant by shooting him with arrows. The complainant was injured and had to be admitted in hospital as a result of the injuries sustained during the incident in which the complainant's Shs.750/- and a wrist watch were stolen by the assailants (the appellant and his companion).

Section 296(2) of the Penal Code under which the appellant was convicted provides-

"(2) If the offender is armed with any dangerous or offensive weapon or instrument or is in the company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death".

In the present case, the appellant was armed with a bow and arrows which were both dangerous and offensive weapons. These offensive weapons were put to use when the appellant shot at the complainant injuring him. Hence there was use of personal violence when the complainant was robbed of his money (750/-) and wrist watch. In our view the essential ingredients of the offence had been established.

As one final point we wish to emphasize that this was a case of recognition as opposed to identification. In Anjoni and others V.R (1980) Kenya L.R 59 this Court stated:-

"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in 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 was not favourable. This was, however, a case of recognition, not identification of the 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".

In view of the foregoing we are satisfied that there was no mistake as to the identity of the appellant and he was properly found guilty and convicted. This appeal, therefore, fails and the same is dismissed.

Dated and delivered at Nairobi this 3rd day of November, 2000.

J.
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E.

GICHERU

JUDGE OF APPEAL

P.
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K.

TUNOI

JUDGE OF APPEAL

E.
.....

O.

O'KUBASU

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR