



IN THE COURTAPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: GITHINJI, KARANJA & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 50 OF 2015

BETWEEN

BAKARI ETAN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal against the Judgment of the High Court of Kenya at Meru (**Onyancha, J.**) dated 6th October, 2005*

in

H.C. Cr. A. NO. 182 OF 2003)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court dismissing the appellant's appeal against conviction and sentence of death handed down by the Principal Magistrate, Maua for robbery with violence contrary to **section 296(2)** of the Penal Code.

The appellant was jointly charged with two others. The appellant was the second accused at the trial. The charge stated that on 13th August 2002 at around 7.00 p.m. at Karama shopping centre, the three accused persons jointly with others robbed Eunice Karengesa Manyara of 20 packets of cigarettes and cash Kshs. 10,000.

The prosecution called five witnesses at the trial namely, **Eunice Karengesa Manyara** (PW1), the complainant, **Peter Sisina Manyara** (PW2), the husband of the complainant, **P.C. Henry Nyamu** (PW3) who arrested the first accused at the trial and the appellant on 12th February 2003; **P.C. Hedrick Malon** (PW4) who arrested the third accused at the trial on 24th February 2013 and **IP Francis Mwangi** (PW4) who conducted an identification parade on 24th February 2003 where the complainant and her husband identified the appellant herein as one of the robbers.

According to the evidence of complainant and her husband Peter, the robbery occurred at about 7.00 p.m. when they were closing the shop. The complainant and Peter were inside the shop and the hurricane lamp was on. Peter went outside to close the shop when he met with four people at the door, one of whom pointed a gun at his chest and told him to go back. Two people entered into the shop, pointed a gun at the complainant and ordered both to lie down. Peter obeyed and one person started taking the money from cash box after which he demanded more money from the complainant. The complainant who was outside started screaming and the robbers left, firing seven gun shots as they left. The robbery was reported to the police who visited the scene. The 1st accused at the trial was arrested by PC Henry Nyamu on 12th February 2013 at Muriri Administration Police Camp. The same police officer arrested the appellant at Isiolo Market on the same day.

The 3rd accused was an administration police officer at Isiolo and was collected from CID Office Isiolo by PC Hedrick Malon on 24th February and taken to CID Isiolo.

The appellant made unsworn statement at the trial denying involvement in the robbery and claimed that the charge was fabricated.

The trial magistrate acquitted the first accused at the trial because he was not identified by the complainant and her husband at the scene. The 3rd accused was acquitted because, though identified by the complainant and her husband at the scene, no identification parade was conducted relating to him.

The appellant was convicted because his identification at the scene by the complainant and her husband was supported by identification at the identification parades. The High Court reasoned that there was sufficient light from hurricane lamp at the shop; that the appellant was at close range with the complainant when the appellant was taking the Shs. 10,000/-, and also when he asked the complainant for more money; that 25 minutes that the robbery took, was long enough time to enable the witness to clearly see his face and that the identification parade was properly conducted.

The main ground of appeal is that the trial court and the 1st appellate court erred in law in failing to properly and critically analyse the evidence of identification particularly whether the circumstances of identification were favorable and free from error. **Ms. Jacqueline Nelima**, learned counsel for the appellant submitted, amongst other things, that no inquiry was made as to the size of the hurricane lamp, intensity of light, distance from the light, and the point at which positive identification was made. She further submitted that identification parade was held 6 months after the robbery, that there was no basis upon which the witnesses were called for identification parade and that no description of the appellant was given before the arrest.

Mr. Musyoki, the learned prosecution counsel conceded the appeal saying that there were glaring loopholes which should have been considered; that appellant was arrested 6 months after the robbery; that no description of the appellant was given and that as Peter was lying down he had no opportunity of seeing the appellant.

We have considered the grounds of appeal and the respective submissions.

It is apparent from the record of the proceedings that the two eye witnesses- the complainant and her husband gave brief evidence. The robbery occurred early in the evening although Peter testified that it was not pitch dark. The fact that the hurricane lamp had been lit indicates that darkness had set in. Obviously, there was no sufficient lighting.

Although the complainant estimated that the robbers were in the shop for about 25 minutes, she admitted that she had no wrist watch. On the contrary, the description of the robbery by the two eye witnesses indicates it was a sudden robbery involving use of a gun which took a very short time to execute. It follows that the circumstances for positive identification were unfavourable.

The evidence further shows that no investigation was done. Indeed the investigating officer did not give evidence. The only evidence tendered related to arrest of the appellant and the conduct of an identification parade.

There was no evidence to explain why the appellant was arrested or any other independent evidence to link him with the robbery.

The two eye witnesses did not know the appellant before and did not give any description to police which could have led to his arrest.

The arrest of the appellant and the conduct of an identification parade six months after the robbery both weakened the credence of the evidence of his visual identification of a stranger by two eye witnesses.

The first appellate court failed to re-evaluate, re-consider the evidence and arrive at its own independent conclusion. Had it done so, it would have come to the inevitable conclusion that conviction solely based on the evidence of visual identification was unsafe in the circumstances. The learned prosecution counsel quite properly conceded the appeal.

For the foregoing reasons the appeal is allowed, the conviction is quashed and the sentence of death set aside. The appellant shall be set at liberty unless lawfully held for another offence.

Dated and delivered at Meru this 21st day of December, 2016.

E. M. GITHINJI

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a

true copy of the original

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