



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO 288 OF 1994

GERVIS MATHENGE THUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Original SPM's Nyeri Cr C No 696 of 1994)

JUDGMENT

PW1 and 2 are husband and wife. On the night of the 15/1/94 and 16/1/94 they were attacked by a gang of robbers who inflicted injuries on them stole from them then fled. PW1 and 2 screamed for help. Only PW3 a farmer came to their assistance. He though did not do much but went home.

Both PW1 and 2 went to the police station made a report and were referred to a clinic where they were duly treated.

PW2 was found to have a tenderness on the chest but there was no bleeding and PW1 was found to have cut wounds on the forehead and left hand was swollen. There was bleeding on the right big finger and fracture of the middle metacarpal on left hand. He had been to hospital. PW1 informed the court that he was unconscious when PW4 came and he was taken to hospital. Neither PW1 and 3 mentioned this. PW4 the police officer stated he received a report of the attack from PW1 and 2. He referred them to the hospital. Later an assistant chief brought the appellant whom he rearrested.

The assistant chief was never called to give evidence. The appellant was rearrested because PW1 stated he recognised him through his voice. The 2nd witness stated that it was dark but would agree it was the appellant who in fact was their attackers with others.

The appellant gave sworn evidence and stated – yes that night he heard screams. His mother woke him up to assist but he refused as the relationship between him and the complainant was very good. DW 2 his mother confirmed this story.

The court was informed by the counsel for the appellant that the identification of the appellant was not very clear. That the identification of the appellant at the police station was also not very clear. He relied on his 2nd and 3rd list of authorities in the cases of Joseph Leboi Ole Toroke versus Republic C.A at Nairobi Cr A 204 of 1987 and the case of Kimotho Kiarie versus Republic C.A 93 of 1983.

In the two cases it dealt with the issue of mistaken identity. The counsel though stressed the point raised in the case of Republic versus Turnbull 1976 2 All ER 549 at page 552 recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognise someone whom he knows the friends should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

Counsel thus argued that the appellant was known to the complainant. That he was recognised by his voice only. Such identification was unsafe to rely on.

There was further no identification parade of the appellant. The participation of the appellant in the offence is unclear.

In the case of Republic versus E Sebwato 1960 EA 174, in which the court held that where the evidence alleged to implicate an accused is entirely of identification that evidence must be absolutely watertight to justify a conviction.

The appellant also put up an argument on alibi. Namely, that he was not at the scene when the offence occurred. The court thus noted that the alibi should have been weighed against the evidence deduced by the prosecution. Counsel relied on the Joroke versus Republic case on this aspect.

This court herein allows this appeal which is also not supported by the state counsel.

The appeal is allowed, conviction quashed and sentence set aside. The appellant is at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 17th day of May, 1995

M.A. Ang'awa

JUDGE



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