



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

CRIMINAL APPEAL NO. 29 OF 2009

HENRY ABWANJO AMUKUNDU 1st APPELLANT
EDWARD ASWANI 2nd APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case number 154 of 2008 of the Senior Resident Magistrate's Court at Maseno)

Coram

Karanja, Aroni – JJ
Mr. Gumo for state
Court clerk Laban / Ochollah
Appellants in person

JUDGMENT

The appellants, **Henry Abwanjo Amukundu** and **Edward Aswani** had initially filed separate appeals number 26 and number 27 of 2009. Later the appeals were consolidated and given a new number 29 of 2009. This is the appeal which we heard. It arises from the conviction and sentence of the two appellants by the Senior Resident Magistrate at Maseno in Criminal case number 154 of 2008 in which the appellants were charged with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code in that on the 28th February 2008 at Essabalu Sub –location Emuhaya District of Western Province, jointly with others not before court, while armed with dangerous weapons namely rungas and pangas robbed **Wycliffe Malilo Nyamema** of a bicycle make hero valued at Kshs. 4,000/= and **Fredrick Anwani Esitika** of a bicycle valued at Kshs. 4,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said persons.

Additionally, the first appellant faced two alternative counts of handling stolen goods contrary to Section 322 (2) of the penal code. In both instances the appellant was said to have handled stolen property i.e. two bicycles. However, the first alternative count was defective for duplicity in that both the elements of receipt and retention were lumped up in a single charge (**See, Selimna Mbeu Owuor & Another vs= Republic Criminal Appeal No. 68 of 1999.**)

Be that as it may, the appellants pleaded not guilty on all counts. They were tried, convicted and sentenced to death on count one. They were however acquitted on the second count. The first appellant was also acquitted on all the alternative counts. Both were dissatisfied with the conviction and preferred this appeal on grounds that:-

- (i) **The learned trial magistrate erred in law and fact in convicting the appellants on materially insufficient, conflicting, inconsistent and contradictory evidence.**
- (ii) **The trial Magistrate erred in law in failing to comply with the provisions of Section 207 of the Criminal Procedure Act (sic) and established criminal practice on substitution of the charges against the appellants and therefore occasioning the appellants injustice.**
- (iii) **The trial magistrate erred in law and fact in failing to appreciate that the circumstances prevailing were not favourable for a correct identification and / or recognition.**
- (iv) **The learned Magistrate erred in law and fact in holding that the prosecution had proved its case beyond all reasonable doubt.**
- (v) **The judgment does not comply with the provisions of Section 169 of the Criminal**

Procedure Act (sic).

(vi) The trial magistrate erred in law and fact in shifting the burden of proof of innocence to the appellants and thereby occasioning the appellants injustice.

The grounds were argued on behalf of the appellants by **Mr. Odhiambo**, learned counsel, holding brief for **Morigoi Ondieki & Co Advocates**. The learned Assistant Deputy Public Prosecutor, **Mr. Gumo**, opposed the appeal on behalf of the State/Respondent.

In his arguments, Mr. Odhiambo concentrated on grounds one (1), three (3) and four (4) of the appeal and abandoned the rest of the grounds. He combined grounds one and three and submitted that the learned trial magistrate failed to appreciate that the circumstances were not conducive for proper identification since the offence occurred in the night at about 7:00 p.m. and having been accosted by a group of five youths, the complainant (PW1) must have been terrified and confused. Further, there was no evidence in support of the alleged recognition by the complainant who merely said that he had recognized the first appellant without stating the circumstances under which the recognition was made nor giving indication as to any source of light.

Learned counsel went on to submit that the first appellant was named by one Elijah and not the complainant as per the evidence of PW4 and that when the first appellant was mentioned the complainant was present.

Learned counsel, contended that the identification of the appellants could not have been without mistake and that although evidence of recognition may be reliable it is prone to mistakes.

On ground four, the learned counsel contended that the prosecution failed to prove its case beyond reasonable doubt as there was no corroboration of the complainant's evidence which was contradictory and that the prosecution failed to meet the threshold for the offence of robbery. In that regard, the decision in the case of **Martin M. Karindi =vs= Republic criminal Appeal Number 76 of 2007 at Nyeri** was relied upon.

On his part, **Mr. Gumo**, submitted that the circumstances were conducive for positive identification in that the appellants had torches which emitted sufficient light to enable the complainant see and recognize them. Further, the appellants were previously known to the complainant and that they were in the view of the complainant for long. He (complainant) knew them by name and mentioned them accordingly. Mr. Gumo also submitted that there was evidence of recovery which corroborated the evidence of identification. In any event, this court has a duty to subject the evidence to a further scrutiny and form its opinion. The learned State Counsel contended that the prosecution case was proved beyond reasonable doubt such that the conviction was proper and safe. He urged this court to disallow the appeal.

Having heard both the counsel for appellants and the learned State Counsel, our duty is to revisit the evidence and draw our own conclusions. In doing so, we bear in mind that the trial court had the advantage of seeing and hearing the witnesses.

The case for the prosecution was founded on the facts that on the material date at around 7:30 p.m. the complainant **Wycliffe Mariro (PW1)** was riding a bicycle heading to his home. He was along the Kisumu / Busia road and had flashed his torch to help him see in the darkness. On the way near the veterinary office off the main Kisumu/ Busia road he was confronted by a group of about five youths who surrounded and flashed a torch on his eyes. His bicycle was held by one of these people. They threatened to steal his money. His left shoulder was hit with a club and the bicycle taken away from him. Two women passerby appeared and moved on. The complainant followed and alerted them of what had be-fallen him. The women screamed as the attackers fled. The complainant gave chase but despite of a bottle being thrown at him, he grabbed his bicycle which was then abandoned. Many people appeared at the scene but he continued chasing the attackers. One of the attackers was apprehended and beaten up by members of the public. Another attacker was identified as the first appellant Henry Abwanjo whom the complainant recognized. He (first appellant) was placed in police custody after being arrested while asleep in his house.

A second attacker called David was also recognized by the complainant who identified him as the second appellant.

Fredrick Inwani Esitika (PW2), a bicycle taxi operator (boda – boda cyclist) was at the Maseno School on that material date and time waiting for passengers when five youths appeared from the Maseno direction heading towards the direction of Luanda town. They were on the other side of the road before they crossed to the side where he (PW2) was with a woman waiting for her luggage. The group of five questioned the two before cutting Fredrick (PW2) on the head with a panga. Two of them chased away the woman. He remained with two others who beat him up and pulled away his bicycle. He left the

bicycle and rushed to Maseno Hospital to seek treatment. Police Officers and an assistant Chief arrived at the hospital and informed him that his bicycle had been recovered.

He (PW2) said that there was moonlight at the time of the attack. He was therefore able to recognize Henry Abwanjo and Edward Aswani as having been in the group of attackers. He identified them as the first and second appellants and said that it was appellant one and others who pulled away his bicycle while it was the second appellant who was brought to the hospital by the police.

Rebecca Olisa (PW3) was on the material date and time at a bus stage in Maseno waiting for her luggage being transported from Nairobi. She saw a group of five youths appear from the direction of the Maseno hospital. She was at the time with Fred (PW2) who was to carry her home on his bicycle taxi. The group of youths suddenly confronted and questioned them as to what they were doing there. In the process, Fred was cut on the head with a panga. She (PW3) ran away but two of the youths pursued, roughed her up and demanded money. She ran towards the Maseno Police Station but did not reach there. She could not even reach her home and had to spend the night outside. On the following day she found Fred admitted to the Maseno Mission Hospital with serious injuries on the head. She reported the matter to the assistant Chief who had already received the necessary report. She said that she recognized two of the attackers as having been Henry Abwanjo Amakunda (appellant one) and Edward Aswani (appellant two). She said that the street light at the bus-stage enabled her to see and identify the two appellants who had a club fitted with nails and were flashing torches.

The Assistant Chief of Essabo Sub – location, **Leonida Okemo (PW4)** was in her house on the material date at about 8:30 p.m. when she heard people screaming while chasing a thief. Thereafter, she received a call and was informed that a suspected thief was being beaten in Mwitundi village. She relayed the information to the O.C.S Luanda Police Station and thereafter received a second call and was told that the suspect had been killed. On the way to the scene she met the O. C. S. and they proceeded together towards that destination. On arrival they found the suspect known as Edward covered with leaves. He could not talk and was taken to Maseno Mission Hospital.

A person called Elijah Inguchi informed the chief that one Omuka also known as Henry Abwanno Mukambi (first appellant) was among the attackers and that Fred (PW2) had also been attacked and injured.

The Chief followed the first appellant into his home and arrested him.

A clinical officer at Butere District hospital, **John Shighali (PW5)**, formerly attached to Emuhaya District Hospital examined Fredrick (PW2) on the 2nd March 2008 and compiled the medical report (P3 form) which confirmed that the patient had sustained bodily injuries as a result of the attack against him on the 28th February 2008.

P.C Daniel Odongo (PW6) of Luanda Police Station accompanied the O. C. S. and the Chief to the scene where a theft suspect had been assaulted by members of the public. It was alleged that the suspect had stolen a bicycle whose owner was also at the scene.

On being interviewed, the said owner of the bicycle informed P. C. Odongo that the suspect and others had attempted to rob him of the bicycle. As the suspect was seriously injured and was thought to have died. P. C. Odongo and his team took him to the Maseno Mission Hospital where they found other victims of acts of robbery. Two stolen bicycles were later recovered by the Chief on information received from a suspect said to have been the first appellant.

P. C. Odongo said that the second suspect (second appellant) who was undergoing treatment in hospital escaped from the hospital but was re-arrested later at a place called Ebusakami.

With the testimonies of the aforementioned witnesses, the prosecution closed its case. The appellants were then placed on their defence and in a sworn statement, the first appellant (Henry) said that he was at work as usual on that material 28th February 2008. Thereafter, he returned to his home but was arrested in the night and taken to the home of the assistant Chief from where he was picked by the police. He denied the charges and contended that he knew nothing about the exhibited bicycles.

In his sworn statement, the second appellant (Edward) said that he was at work on the material date upto 4:00 p.m. He went home thereafter and to Maseno town. He was heading back home about 7:00 p.m. when he met many people who were strangers. They beat him up. He fell down but was rescued by the police who took him to Maseno Mission Hospital and then to Nyanza Provincial Hospital. He was later discharged but was arrested and taken to Luanda Police Station. He denied the charges and contended that he did not know why he was attacked.

Having considered the evidence in its totality we are satisfied that the complainant (PW1) was indeed attacked and robbed of his bicycle by a group of about five young men. The bicycle was however

recovered after being abandoned by the fleeing culprits.

Fredrick (PW2) was the complainant in the second count of robbery with violence. He was also attacked and robbed of his bicycle almost at the same time as the first complainant (PW1). In the process, he (PW2) was seriously injured and admitted in hospital. He also said that the culprits were a group of five youths.

Rebecca Olisa (PW3) confirmed the attack and robbery committed against Fred (PW2). The two were together at the time even though Rebecca fled to safety and ended up spending the night outside her home. The occurrence of the two concurrent and / or consecutive acts of robbery was established without any dispute.

The dispute lay in the identification of the appellants as having been among the five youths. Indeed ground three of the grounds of appeal is a direct challenge of the prosecution evidence of identification. It is notable that the offences occurred in the hours of darkness at about 7:30 p.m. The conditions for identification of the culprits were therefore not conducive. In such circumstances, a trial court is expected to treat any evidence of identification with extra caution so as to overrule the possibility of false and /or mistaken identification. Whether or not the identification was by recognition extra caution must always be applied.

In convicting the appellants on count one, the learned trial magistrate remarked:-

“Concerning count 1 Wycliffe said the 2nd accused whom he called David was arrested by members of the public as he fled. He saw him as he was being arrested. He further said he recognized the 1st accused as one of the assailants and took the police to his home the same night where he was arrested”.

With due respect to the learned trial magistrate, this was a very sketchy way of looking at the evidence of identification. There was no attempt to show that the evidence of identification by the first complainant (PW1) was free from the possibility of error. There was also no attempt to show that even if the offence was committed in the night there was in existence favourable conditions for the identification of the culprits or either of them.

In our view, the evidence of identification by the first complainant (PW1) was far from satisfactory. He clearly said that he was flashing a torch as he rode on his bicycle when he met the five youths. He did not say that he flashed the torch at the youths so as to see and recognize them. Instead, he said that the youths surrounded him and flashed a torch on his eyes before they embarked on their mission to rob him of his bicycle. If therefore a torch was flashed on his eyes, there was no possibility of him having seen and recognized any of the robbers. He was blinded by the torch flash and by the time people came to his rescue the robbers had fled from the scene.

It was erroneous for the learned trial magistrate to say that the evidence of identification by the complainant (PW1) was corroborated by that of PW4 and PW6 and by the recovery of the stolen bicycles. PW4 was the assistant Chief. She was not at the scene of the offence. She went there after being informed that a suspect had been lynched by members of the public. The suspect turned out to be the second appellant. The Chief said that she was given the name of the first appellant not by the complaint (PW1) but a person called Elijah Inguchi who was not called as a witness for the prosecution.

PW6 was the investigating officer. He went to the scene where the second appellant had been assaulted by members of the public and helped take him to hospital. He said that he was informed of the arrest of a suspect by the assistant Chief and that after the arrest, the suspect gave direction where the two stolen bicycles could be found. The assistant Chief then went for the bicycle.

PW6 in referring to an arrested suspect must have been referring to the first appellant who was actually arrested by the assistant Chief. The evidence by the Chief (PW4) and the police officer (PW6) was on the arrest of the suspects and the recovery of the stolen bicycles. It could not therefore have corroborated the first complainant's (PW1) evidence of identification against any of the appellants.

The evidence on the recovery of the stolen bicycles could also not offer any corroboration because it was not clear as to how the bicycles were recovered and from whom.

The complainant (PW1) indicated that his bicycle was recovered after it was abandoned by the culprits. Fred (PW2) said that the assistant Chief told him that his bicycle had been recovered. The assistant Chief did not say how she recovered the bicycles. She did not even say that the bicycles were recovered while in the possession of any of the appellant.

It is clear from the foregoing facts that the identification evidence by the first complainant (PW1) could not be relied upon whatsoever. It was not free from the possibility of error.

We think that the complainant (PW1) did not identify any of the culprits and his mention of the two

appellants was mere dock identification. Fred (PW2) said that he recognized the two appellants. He implied that he was able to do so with the help of moonlight. However, he did not indicate the intensity of the moonlight, whether it was bright enough to enable positive identification of a suspect. He mentioned the two appellants by name yet there was nothing to show that he gave the names to the assistant chief (PW4) and / or the investigating officer (PW6).

It seems to us that most likely than not, Fred (PW2) was also not in a position to see and identify the culprits who attacked and robbed him. His mention of the moonlight came from nowhere as the person with him (i.e. PW3) talked of street lights. His evidence of identification against the appellants was not reliable and free from the possibility error. His was also mere dock identification.

Rebecca (PW3) was with Fred (PW2) at the time. She indicated that she took off when the attack commenced yet said that she recognized the two appellants whose names she knew. She mentioned street lights as having been the source of light at the scene yet Fred (PW2) never mentioned the lights and instead mentioned moonlight.

We do not think that Rebecca (PW3) identified any of the attackers. She had no opportunity to do so notwithstanding the presence of street lights or even moonlight. We believe that both Rebecca and Fred resorted to conjecture in order to justify their evidence that they identified the two appellants with the help of moonlight and / or streetlights.

All in all, the purported identification of the appellants by the complainants (PW1 and PW2) and Rebecca (PW3) was not reliable. The learned trial magistrate would have simply noted the fact had he treated that evidence with great care and caution.

For those reasons we hold that although the prosecution proved that the offences were committed against the complainants, it failed to prove beyond reasonable doubt that the appellants were among those responsible.

The appellants conviction by the learned trial magistrate was therefore unsafe.

In the end result, the appeal is allowed in its entirety. The conviction is quashed and the sentence set aside. The appellants are hereby set at liberty unless otherwise lawfully withheld.

Dated, signed and delivered at Kisumu this 19th day of October 2010.

J. R. KARANJA
JUDGE

ALI-ARONI
JUDGE

JRK/aao