



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

HCRA NOS.102 OF 2014 AND

HCRA NO.101 OF 2014

(CONSOLIDATED)

BETWEEN

RONALD KHAMASI SHIKOMA1ST APPELLANT

FELIX MUHONGO MURWA2ND APPELLANT

AND

REPUBLICRESPONDENT

**(Being an appeal from the judgment delivered on 22/07/2014 by Hon. S.M. Shitubi CM in
Kakamega CMCR. Case No.2096 of 2013)**

J U D G M E N T

Introduction

1. The two appellants, Ronald Khamasi Shikoma and Felix Muhongo Murwa were the first and second accused respectively in Kakamega CMCR. Case number 2096 of 2013 in which they were jointly charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence were that on 8th December 2013 at Mukulusu sub location, Kakamega East district within Kakamega County jointly with others not before Court while armed with dangerous weapons namely pangas robbed DAVID CHUMBA INDIA of kshs.5000/= and immediately after the time of such robbery used actual violence to the said DAVID CHUMBA INDIA. They denied the offence when they appeared for plea on 07/10/2013. The Prosecution called 6 witnesses to testify against the appellants.

Facts and Evidence

2. From the testimonies of the 6 Prosecution witnesses, the facts and the evidence of the case against the appellant ran like this. On 08/09/2013 at about 8.30pm, the complainant herein, David Chumba India who testified as PW1 was in his house at Mukulusu sub location. He was together with his wife Ivly Alusa PW2. David Chumba India (David) buys and sells chickens in Shinyalu and Lubao areas, and on that day he had sold 10 chickens for kshs.5000/=. He had kept the money in the bedroom.
3. Then David heard a person say “hodi” as the person knocked at the door. When he sought to

- know who was knocking at the door the person outside answered “I am Rama”. Since David knew Rama, he got up and went and opened the door. Before David went to open the door, there was some light in the house from the Koroboi (tin) lamp. As soon as David opened the door, 3 people entered the house. The 3 people were Rama, Ronald Khamasi (1st appellant) and Felix Muhongo (2nd appellant). Then Rama ordered David to sit down which he did. As David sat down, the 1st appellant cut him on the right hand with a panga. By then, the tin lamp had been put off. The 1st appellant asked David for money, while the 2nd appellant who had a torch, was flashing it around both on David and Rama. Through those flash lights David again saw the 1st appellant whom he had first seen as the trio entered the house when he (David) opened the door. The light from the tin lamp had enabled David to see all the three before the tin lamp was put off.
4. The 1st appellant and Rama went to the bedroom to look for money and they took the kshs.5000/= which was money realized by David when he sold the 10 chickens. The 1st appellant and Rama returned to the sitting room where David and his wife were and demanded more money saying the kshs.5000/= was not enough. At that point Ivly told the trio that she was going to get more money for them but when she got up, she dashed out through the back door which was open and she started screaming.
 5. On hearing Ivly’s screams, the three robbers ran out of the house. Ivly testified and confirmed the testimony given by David as to how the robbers knocked on the door and how David opened the door upon Rama whom they both knew identified himself that he was the one knocking on the door. She also testified as to how she pretended she was going to get more money for the robbers before she stepped out and started screaming.
 6. Ivly’s screams fell onto the ears of Robert Shibuyanya who testified as PW3. Robert buys and sells vegetables. On the evening in question, at about 8.30p.m he was in his house when he heard screams coming from David’s home. At first he thought David was beating Ivly but when he heard Ivly shouting and saying that her husband was being killed he ran out of the house armed with a torch. On the way to David’s house Robert saw some people running. He flashed at them with his torch but they ran off. He then rushed to David’s home and found David struggling with someone. He hit that person and the person fell down. Robert identified that person as Felix who is the second appellant in this case. Robert and David continued to beat the 2nd appellant who then pleaded with them not to kill him. The 2nd appellant also told Robert and David that he was with Ronald (the 1st appellant herein) and Rama who is still at large. Other neighbours came to David’s home and took both David and the 2nd appellant to hospital for treatment. Robert later recorded his statement. Robert stated that when he saw the 2nd appellant at David’s home he (2nd appellant) had a panga and a torch. Both of these weapons according to Robert were taken away by the village elder.
 7. One Jacob Jumba Mudehedi, PW4 (Jacob) of Mukuywa village also heard the screams by Ivly on 08/09/2013 at about 8.00pm while he was in his house. On hearing the screams he came out of his house to listen, he realized that the screams were coming from David’s home. David and Jacob are cousins. Initially Jacob thought David was beating his wife and he wanted to go and persuade David to stop what he was doing. Jacob then armed himself with a rungu and a torch and ran towards David’s home and on the way he also heard David’s screams. On arrival at David’s house, he found David holding Felix the 2nd appellant as he (David) screamed. Jacob knew the 2nd appellant. Jacob also saw some other people running away namely the 1st appellant and another. Jacob hit the 1st appellant on the head twice with the rungu but the 1st appellant managed to run away into the bush. Jacob could not go after the 1st appellant for fear that he (1st appellant) might have been armed with a panga.
 8. On returning to where David was Jacob noticed that David had been cut on the left arm and was bleeding. He also noticed that the 2nd appellant was injured on the back. Jacob stated that when he saw the 1st appellant the two were very close and that is how he was able to hit him twice on the head with a rungu. He also said that he used his torch to see the 1st appellant before hitting him on the head. Jacob also said that he knew both appellants very well as they come from the same area with him.
 9. Kennedy Njaya, a Clinical officer at Kakamega County hospital testified as PW5. He is the one

who examined David after he was attacked by people he (David) knew. According to PW5 David was injured on the right hand and the chest and also had an injury on the back muscles. The examination was done some 8 days after the incident and after he had received treatment at Shamakhubu Health Centre on 08/09/2013. PW5 classified the injuries suffered by David as harm. PW5 produced David's treatment card from Shamakhubu as PExhibit 1a, the treatment card as PExhibit 1b while the P3 form was produced as PExhibit 1c. PW5 confirmed that the injury suffered by David was inflicted by a sharp object.

10. The last Prosecution witness PW6 was No.88760 Police Constable Ernest Mugo of Kakamega Police Station. He was the Investigating officer in his case. He testified as follows:- On 09/09/2013 David went to the Station and reported that at about 8.30p.m on 08/09/2013, he had been attacked by 3 people who were known to him after he opened the door for them when one of the robbers, Rama identified himself as the person who was knocking on the door. PW6 narrated the entire story given to him by David and also stated that both Robert and Jacob had answered to Ivly's and David's screams and on arrival, the two had found David struggling with the 2nd appellant. he also testified on how Jacob had met the 1st appellant running away but managed to hit him twice on the head with a rungu.
11. PW6 visited the scene on the following morning and established that David's house had 2 bedrooms and 2 external doors. PW6 recovered one cap – MFI – 2 which David told him belonged to the 1st appellant. After further investigations the 2 appellants were arrested, but Rama managed to escape probably to Mombasa. PW6 also stated that David had a cut on the arm. Once the appellants were arrested they were taken to Kakamega Police Station from where they were arraigned before Court. PW6 produced the panga as PExhibit 3. On cross examination by the 1st appellant PW6 could not say why the panga was not produced in Court for identification.

The Defence Case

12. At the close of the Prosecution case the appellants were found to have a case to answer and they were put on their defence. Both appellants chose to give unsworn evidence in which each one of them gave their respective unsworn statements denying that they committed the offence. Neither appellant called witnesses.

Judgment of the learned Trial Court

13. After a careful analysis of the evidence that was placed before it the learned trial Court concluded that the Prosecution had proved the case against the appellants beyond reasonable doubt. They were each found guilty as charged and convicted accordingly. They were sentenced to suffer death as by law established.

The Appeal

14. The appellants were aggrieved by both conviction and sentence. They filed their respective petitions of appeal which were consolidated by an order of this Court on 03/03/2015. The 1st appellant raised the following 5 grounds of appeal:-

1. **THAT, I pleaded not guilty to the above appended charges.**
2. **THAT, the learned trial magistrate erred in law and facts when she failed to note the complainant confessed during the trial that it was night and there is no light mentioned.**
3. **THAT, the trial magistrate erred in law and facts by failing to consider the(sic) that the evidence that the prosecution intended to use was not availed to me.**
4. **THAT, the learned trial magistrate erred in law and facts by failing to observe that there was no description of robbers disclosed to the authority on their first report to clear doubt on prosecution case.**
5. **THAT, the learned trial magistrate erred in law and facts when she failed to consider the truth that I was not arrested with anything that the prosecution alleged was stolen.**

15. On his part, the 2nd appellant raised the following 5 grounds of appeal:-

1. **THAT, I pleaded not guilty to the above appended charges.**
2. **THAT, the trial magistrate erred in law and facts by failing to observe that there was no description disclosed to the authority on their first report to clear doubt on prosecution case.**
3. **THAT, the learned trial magistrate erred in law and facts when she failed to consider the truth that I was not arrested with anything that the prosecution alleged was stolen.**
4. **THAT, the learned trial magistrate erred in law and facts when she failed to note the complainant confessed during the trial that it was night and there is no light mentioned in this case.**
5. **THAT, the learned trial magistrate erred in law and facts by failing to consider the facts that the evidence that the prosecution intended to use was not availed to me.**

The appellants pray that the appeal be allowed, conviction quashed and sentence set aside.

16. On this first appeal, this Court is expected to rehear the appellant's case by reconsidering and evaluating the evidence afresh with a view to reaching its own conclusions in the matter, remembering only that it does not have the privilege enjoyed by the trial Court of seeing and hearing the witnesses. In Arum -vs- Republic [2006] 2EA 10, it was held inter alia that "A Court hearing the first appeal has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusions on the same but always observing that the trial Court had the advantage of Seeing the witnesses and observing their demeanor and so the first appellate Court would give allowance for the same. Okeno -vs- Republic [1972] EA 32 followed." Also see Muriithi -vs- Republic [2006] 2EA 222.

Issues for Determination

17. We have carefully considered the evidence on record afresh. We have also carefully considered the judgment of the learned trial Magistrate and note that the Prosecution's case will fall or stand depending on whether the appellants were properly identified recognized during the robbery. The reason for this is that the alleged crime was committed around 8.30pm on the material night under what can properly be described as difficult circumstances.

The Arguments

18. The appellants put in written submissions. The 1st appellant argued that upon his arrest he was not found in possession of anything that could connect him to the offence. He also submitted that David contradicted himself when in one breath he said it was 1st appellant who cut him and in the next breath said that it was the 2nd appellant who cut him. He also submitted that the evidence by PW1 and PW2 was contradictory and further that there was no way PW4 could have known that 1st appellant was at the scene since the 1st appellant is said to have disappeared into the bush. The 1st appellant contested his recognition by any of the witnesses saying that the witnesses did not state what sort of light they used to recognize him. Finally, the 1st appellant submitted that since the weapons allegedly used during the robbery were not produced as exhibits there was no evidence to connect him to the crime. He also submitted that the Prosecution case should have been dismissed because the arresting officer was not availed as a witness.

19. The 2nd appellant submitted that apart from proving that David suffered some injuries during a violent robbery there was no evidence to connect him to the offence. He also argued that no recoveries were made to connect him to the offence. Reliance was placed on the case of Mwangi -vs- Republic [1974] EA 108 but we hasten to add that this authority is irrelevant in our considered view because the issue was one of possession of a firearm (recently stolen property) some thirteen months after its theft and that such possession could not be treated as recent possession.

20. Regarding his recognition by David and Ivly, the 2nd appellant contended that the two could not have recognized him because first the light from the tin lamp could not have been sufficient and

- secondly because that lamp was said to have been blown out as soon as the robbers entered the house and ordered David and Ivly to sit down. He also argued that the allegation that the 2nd appellant was a neighbour to David and Ivly could not stand because there was no evidence to that effect.
21. The 2nd appellant also pointed to some contradiction in the evidence of David and Ivly as to who actually cut David and whether it was Rama or the 2nd appellant who put off the tin lamp. He urged this Court to make a finding that visibility was not conducive for proper recognition of the appellants, and in particular the 2nd appellant. It was also the 2nd appellant's contention that the evidence adduced by the Prosecution in this case was all circumstantial but that the same was too contradictory and too inconsistent to form a continuous and unbroken chain connecting the 2nd appellant to the offence. The 2nd appellant also questioned why he was not taken to the Police after being taken to hospital if indeed, he was caught at the scene and beaten and then taken to hospital.
 22. The 2nd appellant also argued that the circumstances for identification of the robbers were less than conducive. That there was not enough light from the tin lamp which could have enabled David and Ivly to say with any degree of certainty that the appellants were among the robbers; that in any event if the tin lamp was put out immediately the robbers entered the house then it was highly unlikely that David and Ivly could tell who had entered the house.
 23. Finally, the 2nd appellant submitted that the trial Magistrate clearly shifted the burden of proof from the Prosecution to himself and that as such this Court should give him the benefit of the doubt as the Prosecution failed to prove its case beyond any reasonable doubt.
 24. The State, through Prosecution Counsel Mr. S. Ngetich vehemently opposed the appeals as consolidated. Regarding ground 2 of the 1st appellant's appeal and ground 4 of the 2nd appellant's appeal on the issue of identification, Counsel submitted that when the assailants entered the house, the Koroboi (tin) lamp was burning and that since all the three were not strangers to David and Ivly, it was easy to recognize them. Counsel also submitted that since the 2nd appellant did not manage to escape from the scene, there was no doubt that he was properly recognized by all the witnesses.
 25. On ground 3 of the 1st appellant's appeal and ground 5 of the 2nd appellants appeal, Counsel submitted that the issue of whether or not witnesses statements were provided was neither here nor there because after their feeble initial request for the same they chose to proceed with the hearing without the statements. Counsel submitted that no prejudice accrued to the appellants because they fully cross examined the witnesses.
 26. Counsel argued ground 4 of the 1st appellant's appeal and ground 2 of the 2nd appellants appeal together. He submitted that the appellants complaint that the names/description of the attackers was not given by the first report was irrelevant because the first report was not relied upon by the Prosecution and this ground of appeal should therefore fail.
 27. Finally, regarding ground 5 of the 1st appellant's appeal and ground 3 of the 2nd appellants appeal, Counsel submitted that though no stolen items were recovered from the appellants there was other sufficient evidence on record to link the appellants with the robbery. He urged the Court to dismiss the two appeals. The appellants did not make any reply to the respondent's submissions.

The Law

28. The central issue in this appeal is one of identification or recognition since the Prosecution's case is that the appellants were people who were known to the Prosecution witnesses. The guidelines to be applied by Courts before evidence of visual identification is accepted as a basis for a conviction were laid down in the case of **R -vs- Turnbull [1976] 3 All ER 549.** Courts are cautioned to warn themselves of the inherent dangers of the same before convicting an accused on the basis of such evidence. In the case of **Joseph Ngumbao Nzaro -vs- Republic [1991] 2KAR 212.** The Court of Appeal held, inter alia that "a careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, was essential." In the case of **Simiyu & another -vs- Republic [2005] 1KLR 193,** the Court held,

inter alia, that “In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by the person or persons who gave the description and purport to identify the accused and then by the person or persons to whom the description was given.” The case of **Wamunga –vs- Republic [1989] KLR 424** is also relevant. In the said case, the Court of Appeal expressed itself thus on the issue of visual identification: “we now turn to the more troublesome part of this appeal, namely the appellant’s conviction on counts 1 and 2 charging him with robbery of Indakwa (PW1) and Lillian Adhiambo Wagude (PW3). Both of these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them....., what we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever a case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused, which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery CJ in the well known case of **Turnbull –vs- R [1976] 2 All 549 at page 552** where he said,

“Recognition may be more reliable than the identification of a stranger; but even when a witness is purporting to recognize someone he knows the jury should be reminded that mistakes in recognition of close relatives and friends, are sometimes made.”

29. In the case of **Paul Etole & another –vs- Republic Criminal Appeal No.24 of 2000** (unreported), the Court of Appeal stated the following on the same issue of visual identification:

“.....evidence of visual identificationcan bring about miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused the Court should warn itself of the special need for caution before convicting the accused. Secondly it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when a witness is purporting to recognize someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused’s case the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger.”

30. In the case of **Nzaro –vs- Republic [1991] KAR 212** and **Kiarie --vs- Republic [1984] KLR 739**, the Court of Appeal emphasized that evidence of identification/recognition at night must be watertight to justify a conviction. This was also the position of the Court of Appeal in the case of **Douglas Muthanwa Ntoribi –s- Republic [2014] e KLR** where the Court said that “on the issue of recognition the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-

“I flashed my torch and saw the accused. He was 2 metres away from me. That the appellant was not only seen but was positively and correctly identified or recognized by PW1, the complainant. The learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error

31. In the instant case, the evidence of identification/recognition of the 1st appellant is found in the testimonies of David and Ivly. This is what David said:-

“on 8.9.2013 at 8.30p.m, I was in my house. I heard a person say, “hodi”, knocking at my door. I was with my wife Ivly Alusa. He knocked once. The second time I asked who it was. He said, “I am Rama”. I opened the door. I knew Rama. When I opened 3 people entered. They were Rama, Ronald, Khamasi and Felix Muhongo. They ordered me to sit down. It is Rama who ordered me. I sat. Ronald who is 1st accused in the dock cut my right hand with a panga. When they entered my koroboi (tin) lamp was burningI saw Ronald. Rama put off the tin lamp just after they had come in. I had already seen them.”

32. From the above testimony, we are satisfied that David who knew all the assailants including the 1st appellant herein was able to see and recognize the 1st appellant together with Rama and the 2nd appellant before Rama put off the tin lamp which was alight when the trio entered the house. We have no doubt in our minds that David clearly and positively recognized the 1st appellant who also cut him on the right hand. During cross examination, the 1st appellant did not put David's testimony that he (David) had recognized him using light from the tin lamp to the test; and as such we have no reason to doubt David's testimony that he had already seen and recognized the 1st appellant before the light from the tin lamp was put off.

33. As regards Ivly's evidence touching on recognition of the 1st appellant this is what she said, “on 8.9.2013 at 8.30p.m I was in the house with my husband we heard a person knock at the door. David asked who it was and one said “ I am Rama” David went and opened the door. 3 people entered. They were, Rama, Ronald and Muongo. They entered carrying pangas up. Muongo had a panga. Our korobi (tin) lamp was on. They told us to sit down. I sat. However David was resisting he was cut on the hand. It is Muongo who cut him.” We note that Ivly's evidence as to how many people entered the house corroborates that of David. She also gave names of the 3 people who entered the house the two appellants being among them. The only specific weakness we note here is in connection with who between the two appellants cut David on the hand. While David testified that it was the 1st appellant, Ivly stated that it was the 2nd appellant. Our own assessment of this contradiction is that it does not weaken the Prosecution's case in so far as the presence of the 1st appellant at the robbery scene is concerned. Both David and Ivly saw him at the scene. They knew him and they recognized him as being one of the 3 robbers. It is instructive to note that the 1st appellant did not dispute the evidence by both David and Ivly that he was at the scene armed with a panga when they were attacked and robbed on the material night.

34. We now turn to the identification/recognition of the 2nd appellant. Both David and Ivly testified that he was one of the 3 robbers who entered the house when David opened the door after Rama who is still at large identified himself to David as the person knocking on the door. The 3 robbers were Rama, 1st appellant and 2nd appellant in that order as they entered the house.

35. David also stated and was supported by Ivly that when Rama and the 1st appellant escaped David held onto the 2nd appellant while screaming for help. David did not let go of the 2nd appellant and as they struggled Robert came to the scene and hit the 2nd appellant until he (2nd appellant) fell down. He was beaten by other members of the public who came to David's help. Jacob was one of those people. Both Robert and Jacob knew the 2nd appellant and they recognized him that night when they found David struggling with him. We have no doubt in our minds that the 2nd appellant was clearly and positively identified by more than one witness as being at the scene on the night of the attack on David. In his cross examination of the witnesses, neither appellant cast any doubt on the evidence of the witnesses that indeed the two of them were part of the 3 man-gang which attacked David, cut him on the right hand and stole kshs.5000/- from him. The attackers were armed with pangas.

36. The next issue for us to consider is whether the ingredients of the offence of robbery contrary to Section 296 (2) of the Penal Code was proved. In our humble view the Prosecution proved the requisite ingredients of the offence of robbery as charged under Section 296(2) of the Penal Code. The offence is proved if the Prosecution proves:

- i) That the accused person is in the company of another or others; or
- ii) That the accused person is armed with dangerous weapons; or
- iii) That before, during or after the robbery the accused person uses actual violence to any person.

37. There is clear evidence in this case that the appellants were in the company of each other and also in the company of one Rama who is still at large. There is also ample evidence that they were armed with pangas. Even if it were to be argued that no pangas were produced as exhibits there is evidence that David was injured during the attack and that his ksh.5000/= being proceeds from sale of 10 chickens was stolen. All that the Prosecution needed to prove is the presence of one of the ingredients and it has been proved that the attack on David and his wife Ivly was done by three people who entered the house together wielding pangas. The two appellants were clearly identified by the witnesses and none of them said anything that shook the evidence given by the Prosecution.

38. Having said the above, and after a careful scrutiny of the grounds of appeal raised by the appellants, we find that there is no merit in the appeals. We have paid special attention to ground 6 of appeal where the appellants complain that they were not provided with witness statements. The record shows that on 05/11/2013, the Court ordered the Prosecution to provide the appellants with copies of charge sheet and witness statements. When the case came up on 11/11/2013, each appellant told the Court "I need statements". When the case finally took off on 14/01/2014 there was no further request by either appellant for witness statements. In our view, there is a rebuttable presumption that the witness statements were supplied as requested. The presumption was not rebutted. We need say no more on this issue.

39. In the premises, the appellant's appeals on both conviction and sentence are dismissed. We uphold the findings of the learned trial Court. The appellants still have a right to appeal to the Court of Appeal within the stipulated time of 14 days from the date of this judgment.

40. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 10th day of February 2016.

RUTH N. SITATI

ANTONY C. MRIMA

JUDGE

JUDGE

In the presence of:

.....present in person.....for 1st Appellant

.....present in person.....for 2nd Appellant

.....Mr. Omwengafor Respondent

.....Mr. S. Lagat.....Court Assistant