



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CRIMINAL APPEAL NO. 30 OF 2015

BETWEEN

JACKSON WANYOIKE NJUGUNA1ST APPELLANT

JOSEPH MAINA NJOROGE2ND APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Hon. Muchemi & Odunga, JJ.) delivered on 27th November, 2013

in

H.C. Criminal Case No. 323 of 2008)

JUDGMENT OF THE COURT

[1] This is a second appeal against the appellants' conviction and sentence for the offence of robbery with violence. As such, this Court is alive to the fact that by dint of **Section 361 (1)** of the **Criminal Procedure Code**, its jurisdiction is confined to matters of law only. Furthermore, we remind ourselves that this Court will normally not interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably, to have acted on wrong principles in reaching their findings. This much was restated by this Court in **Alvan Gitonga Mwosa vs. Republic [2015] eKLR**.

[2] With the above in mind, a brief background of the matter as presented before the trial court was that on 25th June, 2007 at around 5.30 am, whilst going to work, the complainant Anthony Muchiri (PW 1) a soldier at the material time based at the Moi Air Base Eastleigh, somewhere near Matopeni Primary School, was confronted by three men who demanded money from him as well as his mobile phone. He handed over Kshs.150/-and a Sagem mobile handset. He however requested for his SIM card from the robbers but instead, they threw an object at him, injuring his left eye. In the course of the scuffle, PW1 was able to recognize two of the assailants as the 1st and 2nd appellants being persons well known to him.

[3] Following that nasty encounter, PW 1 alerted his wife who screamed thereby attracting their neighbors, among them Dennis Maweu (PW 2), who immediately came to their aid. Based on PW 1's account as to the identity of his assailants, the neighbors were able to apprehend the appellants later that same day. Both appellants were taken to Kayole police station, where PC No. 85233 Nicholas Muli (PW 3) re-arrested and detained them. Meanwhile, PW 1 visited Doctor Zephania Kamau (PW 4) who attended to his wound. Unfortunately, the complainant was left permanently maimed and without his left eye.

[4] Both appellants were subsequently arraigned before the Chief magistrates' court at Makadara where they were charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The following being the particulars as per the charge sheet;

“On the 25th day of June, 2007 at Matopeni village Kayole, within Nairobi area, jointly with another not before court, being armed with offensive weapons namely iron bars, robbed Anthony Muchiri Kariuki a mobile phone make Sagem -3020 valued at

Kshs. 5,000/- and cash money 150- and at or immediately before or immediately after the time of such robbery used actual violence to the said Anthony Muchiri Kariuki.”

[5] The two appellants denied the charge and following a full trial in which the prosecution called four witnesses, the trial court found the appellants had a case to answer and placed them on their defence. In his sworn testimony, the 1st appellant stated that on the material day at around 1pm, he was heading to a hotel for tea when he came across a crowd beating up a man whom he recognized as Leishatan Lampate. Upon enquiring about the matter, he was told to sit down and later charged with an offence he knew nothing about. As regards the 2nd appellant, he gave a wholly divergent account of how he was accompanied by a colleague on the material date, together, they had gone to Kayole police station to check on a friend who had been arrested. Whilst at the station waiting for the OCS, PW 2 came with three other persons and arrested the 2nd appellant and his colleague for an offence he knew nothing about.

[6] The 2nd appellant went on to add that his arrest was despite the fact that the complainant had acknowledged that he was not the one they were after. Following the unwarranted arrest, they were taken to Kayole police station where he found the 1st appellant and Mr. Leishatan. At that point, his employer, one John Muguanje spoke to a police officer known as Mutua and gave him Kshs.15,000/- as a result of which Leishatan was set free and the 2nd appellant was detained in place of the said Leishatan. As per the 2nd appellant, his was a case of trumped up charges which only arose because unlike Leishatan, he was unable to bribe the police.

[7] Unconvinced by the appellants' defence, the learned trial magistrate, in a Judgment delivered on 18th September, 2008 found both appellants guilty as charged and sentenced them to suffer death. Dissatisfied with the said outcome the appellants appealed before the High court. The appeal was heard and by a judgment delivered on 27th November, 2013 (**Muchemi & Odunga, JJ.**), dismissed it as the learned Judges found no justifiable reasons to fault the decision by the trial court on both fact and law.

[8] Undeterred, the appellants lodged this second appeal. The same is premised both on the homegrown grounds of appeal filed by the appellants themselves, as well as the supplementary grounds of appeal filed by their learned counsel. In a nutshell, the appellants fault the decision of the High court which they contend erred by; failing to find that the evidence was insufficient to sustain a conviction; failing to re-analyze and re-evaluate the evidence tendered before the trial court; upholding the conviction notwithstanding the fact that it was premised on evidence of identification which did not meet the required legal threshold; upholding the conviction despite the fact that the prosecution failed to call crucial witnesses; rejecting the appellants' plausible defence evidence and; failing to find that the conviction was fatally defective given the trial court's failure to comply with the requirements of **section 211** of the Criminal Procedure Code (CPC).

[9] During the hearing of the appeal Mr. Sakwa, learned counsel for the appellants took issue with the evidence of identification of the appellants which he submitted was unsafe to sustain a conviction. In his view, even though PW 1 claimed to have known the appellants, he neither mentioned their names nor gave their description to assist in their arrest. Moreover, the circumstances for positive identification were difficult. In counsel's view, the evidence does not connect the appellants to the crime. Moreover, from the testimony of PW 2, it can be inferred that crucial witnesses such as the investigating officer were never called to testify. It was argued that on the whole, the High court failed to re-analyze and resolve all these inadequacies in the appellants' favour. Consequently, counsel urged us to allow the appeal and quash the conviction and sentence.

[10] Opposing the appeal was Senior Assistant Director of Public Prosecutions (SADPP) **Mrs. Murungi** who submitted that the identification of the appellants was reliable as it was done with the aid of the moonlight. In addition she submitted the appellants were persons known to the complainant, with whom they even conversed in the course of the robbery. According to counsel, recognition is a more reliable mode of identification. Consequently, there were no discrepancies in the prosecution's evidence and even though the investigating officer was never called as a witness, the testimony of the arresting officer who re-arrested the appellant after they were apprehended and taken to the police station by neighbors was sufficient to secure a conviction.

[11] In a brief rejoinder, **Mr. Swaka** pointed out that save for the identification purportedly done by the complainant; nothing else linked the appellants to the crime. More importantly he submitted there was no witness called to corroborate the complainant's testimony. In addition, the stolen items were never recovered on the appellants or at all; thus leaving serious doubt regarding the appellants' guilt.

[12] As mentioned in the opening paragraph, this is a second appeal and this Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings (see. **Chemangong -vs- R, [1984] KLR 611**) and also **Karingo -vs-R, (1982) KLR 213 at pg. 219**, where this Court stated that:-

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs-R, (1956) 17 EACA 146)”.

[13] The first issue which we discern for our determination is whether the High court re-evaluated the evidence as by law required. In this regard, the appellants have contended that the evidence tendered at trial, particularly with regard to their identification; failed to meet the required threshold; that the two courts below erred in failing to find as much. The evidence adduced by the complainant (PW 1), was that the two appellants were persons known to him and he was at the time of the robbery able to see the two by virtue of the moonlight which lit the scene. PW 1 said he even engaged the appellants in a conversation before the attack; besides he was even able to mention the first appellant by name. This is what the witness had to say in his own words:-

“I know Wanyoike by name...There was full moonlight. I saw Wanyoike and accused 2. I did not know the third man. I told my neighbor the people who attacked me. They were the ones who arrested the accused the same day relying on my description.”

[14] On cross examination, the witness further stated that he had known the 1st appellant for a year and that he usually saw the 2nd appellant at the village (Matopeni). He however acknowledged having no idea who the third accomplice was. This mystery man was however

identified albeit casually, by PW 2 who stated that aside from PW 1's identification, he also received a corroborating report of the attack from a maasai man; who identified the third accomplice as 'Eddy' However, PW 2 added that at that point, though all three were on the run, the maasai was able to show PW2 and the other neighbours where the appellants were. Upon being apprehended, the 1st appellant even informed PW 2 that he gave the stolen phone to a third party; whom he simply identified as Ngige. The witness also stated that he had known the 1st appellant for 5-6 years.

[15] From the foregoing, it is evident that this was a case of recognition and not just mere identification. In the case of Wanjohi & 2 Others v. Republic [1989] KLR 415, this Court held that

“Recognition is stronger than identification but an honest recognition may yet be mistaken.”

In addition, in the words of Lord Widgery. CJ in R v. Turnbull and Others [1976] 3 All ER. 549;

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

All these matters go to the quality of the identification evidence. If 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.”

[16] This much was appreciated by both courts below, we therefore find no plausible reason to interfere with those findings. As to the allegation that the first appellate court failed to re-evaluate the evidence; there was no denial that the area was well lit; nor was there any allegation of any bad blood between the complainant and the two appellants. In fact, from the evidence on record, there is no discernible reason as to why the complainant would want to falsely accuse the appellants. To the contrary, on being apprehended, the 1st appellant admitted having given the stolen phone to one Ngige. Coupled with the identification of the two appellants, this evidence was damning enough to sustain a conviction.

[17] The second issue regarding failure by the prosecution to call crucial witnesses; it is evident that the High court found that failure by the prosecution to call PW 1's wife or the rest of the individuals who apprehended the appellants was not fatal to the case as their evidence would not have been of any additional value to the evidence on record. We agree with that conclusion. PW 1's wife was never a witness to the crime.

All she did was to raise an alarm and enlisted the help of neighbours who apprehended the appellants. Her role in the chain of events though necessary, was tangential. The prosecution case was still solid notwithstanding the absence of the complainant's wife's testimony. This is because the account of identification of the appellants was given by PW 1 while that of their apprehension was given by PW 2. The first appellate court addressed itself thus on this issue:-

“Similarly, we find that the failure to call the members of the public who arrested the appellants caused no prejudice to either the appellants or the prosecution. Since there is no particular number of witnesses who are required for proof of any fact unless the law so requires we do not agree with the appellants' submissions that the failure to call other persons mentioned in the proceedings was necessarily fatal to the prosecution case...”

In addition, under **Section 143** of the Evidence Act:-

“No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact.”

[18] In this case, we are not able to discern any apparent added value that the 'missing' witnesses would have added to the already formidable case presented by the prosecution. The finding by the trial court that those additional witnesses were not crucial to the case; and the affirmation of that finding by the High court was thus proper.

[19] On the allegation that the prosecution failed to satisfy the ingredients for a charge of robbery with violence, we refer to the case of Odhiambo & Another v Republic (2005) 2 KLR 176; where this Court explained the ingredients of the offence of robbery with violence as follows:-

“The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the Penal code. Other ingredients or elements under section 296(2) include being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under section 296(2), the prosecution must choose and state which of those elements distinguishes the charge from the one defined in section 295.”

Not only were the appellants found to have acted in concert, they were also proven to have been armed and to have occasioned grievous harm upon the complainant during the commission of the offence.

[20] On whether the appellants' defences were considered; it is our considered view just like the two courts below that the testimony of the 1st appellant was a mere denial and in the face of the strong evidence tendered by the prosecution, and was rightly rejected. As regards the 2nd appellant's defence, it was highly inconsistent, particularly as regards the circumstances of his arrest which too did not dent the prosecution's evidence.

[21] Finally, the appellants also challenged the conviction contending it was fatally defective owing to the trial court's failure to comply with the provisions of **Section 211** of the Criminal Procedure Code. The Section provides as follows:

“At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).”

It is apparent from the record of appeal that the appellants gave sworn statements of defence. We can safely therefore, infer that this section was duly complied with and as the appellants were informed of their options to either give sworn or unsworn testimony and call witnesses if they so wished. They apparently opted to give sworn testimony without calling any witnesses. That ground of appeal thus fails. In any event, the same was never raised during the first appeal and we find it to be a non starter in this appeal as well. On the whole therefore, the appeal on conviction is without merit and is dismissed.

[22] However on sentence, we must take cognizance of recent developments in the Law in this area and apply it to the present case, particularly because the same is advantageous to the appellants. In its recent decision in ***Francis Karioko Muruatetu and another vs Republic, (2017) eKLR*** the Supreme Court of Kenya, pronounced that the mandatory aspect of the death sentence as the only lawful sentence was unconstitutional. The Court therefore effectively removed the fetters placed on the courts' discretion when passing sentence in cases which hitherto carried the death penalty as the only lawful sentence upon conviction. This decision allows us to interrogate whether the death sentence herein should be maintained as the only option. We observe that both appellants were first offenders and when they were offered an opportunity to mitigate; they both pleaded for leniency and forgiveness claiming that they were young aged about 25 years. The 1st appellant said he had a wife and two children whom he used to take care of. The 2nd appellant sought forgiveness and said he was an orphan and used to take care of his siblings.

[23] This mitigation as compelling as it is, has to be considered alongside the gravity of the offence; the appellants inflicted upon the victim grievous harm, he lost one eye during the attack. We have also considered the appellants were convicted in September, 2008 which means they have served more than ten years in prison. Taking all the circumstances of this case, the appeal on conviction fails but it succeeds only on sentence which we substitute with a period of fifteen years. Accordingly, although the appeal on conviction fails, we are inclined to interfere with the judgment in regard to the death sentence which we hereby set aside and substitute thereto with a term of fifteen (15) years from the date of conviction.

Dated and Delivered at Nairobi this 8th day of February, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR