



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJA)

CRIMINAL APPEAL NO. 151 OF 2014

BETWEEN

CALEB NAMAI AKHALAAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kakamega (**Muchemi & Chitembwe, JJ**) dated 8th June, 2010 in **HCCRA No. 51 of 2006**)

JUDGMENT OF THE COURT

1. **Caleb Namai Akhala**, the appellant herein and four others were jointly tried for several offences by the Senior Resident Magistrate Court at Mumias. The appellant and **David Khamala Akulunya (David)**, were convicted of the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** and acquitted of the other charges, while three of the co-accused were acquitted of the robbery and rape charges and found guilty of handling suspected stolen property contrary to **section 322(2)** of the **Penal Code**. The appellant and David were each sentenced to death, while the other three co-accused were each sentenced to serve two(2) years imprisonment. The appellant and David each filed an appeal in the High Court against the judgment of the trial court. David died before the High Court proceedings were finalized and his appeal therefore abated.

2. The circumstances leading to the appellant's arrest as found by the two lower courts were that on the night of 30th November, 2005, at about 10.30p.m., two men broke into the house of **EW (E)**. She was raped and robbed of several items and also wounded in the process. Amongst the items of which E was robbed were several items specified in the charge sheet including beddings. During the trial seven witnesses testified in proof of the prosecution case. These were **E; TS (T)**, E's granddaughter, who was with E at the time of the robbery; **AOS (A)**, a neighbour who responded to E's alarm; **Dr. Peter Avava (Dr. Avava)**, the medical officer at Butere district hospital who examined E after the ordeal, **Saidi Shikoba Ali (Saidi)**; a community policing officer who assisted in the arrest of the appellant, **Aggrey Maina Makokha (Makokha)** the assistant chief, and the arresting officer, **PC Richard Langat (PC Langat)**.

3. The evidence implicating the appellant was that of E who identified him as having been one of the men who entered her house, raped and robbed her of several items and Aggrey who responded to E's screams and identified the appellant whom he knew before as one of the assailants and Saidi who also responded to E's screams and confirmed that E mentioned the appellant and two others as having been amongst the people who robbed her. Saidi was present when the appellant was arrested from a house where he had locked himself in and testified that three blankets identified by E as among the stolen items, were recovered from the appellant's house.

4. In his unsworn statement of defence the appellant stated that he was coming from work on the material day when he heard of the robbery. He was arrested by the police on 5th December, 2005 for smoking bhang. He was taken to Butere police station where he met his co-accused. He therefore had nothing to do with the offence.

5. The trial court found that there was a robbery during which E was wounded and robbed; that during the robbery E was able to see her assailants amongst whom she identified the appellant whom she had seen before; that the appellant was well known to Aggrey who was able to recognize him when he flashed his torch as the appellant escaped; that the appellant's name was given to the police when the matter was reported; that at the time of the appellant's arrest, some stolen items were recovered from the appellant's house; that the recovery of the stolen items placed a burden on the appellant to explain and justify how he came by the stolen property, which the appellant failed to do; and that the charge against the appellant was therefore proved beyond reasonable doubt.

6. Upon hearing the appeal for the appellant, the High Court found that the appellant was positively identified by both E and Aggrey; that though the incident happened at night both E and Aggrey could not have been mistaken in their identification; that the identification was not by a single identifying witness; that three of the E's blankets were recovered from the appellant's house; and that the trial court did not shift the burden of proof. The Learned Judges therefore dismissed the appeal holding that the conviction was proper.

7. Dissatisfied with the judgment of the High court, the appellant has now come before us in this second appeal, in which he has raised two grounds of appeal contending that the learned Judges erred in law and in fact in failing in their duty to re-evaluate and subject the entire evidence on record to a fresh scrutiny and exhaustive analysis; and failing to scrutinize the evidence of identification with great circumspection, thus grossly misdirecting itself, that the evidence on record was cogent and credible enough to sustain a conviction.

8. During the hearing of the appeal, learned counsel Mr. Omondi, appeared for the appellant, whereas Mr. Ketoo, the Senior Prosecution Counsel appeared for the respondent. Mr. Omondi relied on written submissions that he had duly filed. In the submissions Mr. Omondi pointed out that the offence took place at night; that it was incumbent on the High Court to test the reliability of the identification evidence; that there was no evidence of the intensity of the light used for identification; that the appellant was identified by a single identifying witness, and that the identification was dock identification; and that there was no evidence that the recovered blankets belonged to E. On sentencing Mr. Omondi submitted that the appeal against sentence should be allowed as the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017]**, case declared death sentence to be unconstitutional.

9. **Mr. Ketoo**, learned prosecuting counsel opposed the appeal. He submitted that the three blankets recovered from the appellant were identified by the complainant as having been stolen during the robbery; that the appellant did not explain his possession of the stolen blankets and therefore the presumption in the doctrine of recent possession was applicable; that all the ingredients of the offence of robbery with violence were proved; and that the issue of sentencing was left to the discretion of the court.

10. Under **section 361(1)** of the **Criminal Procedure Code** a second appeal to this Court can only be on a matter of law. In determining this appeal we are alive to the guidance given by this Court in **M'Riungu v. Republic (1983) KLR 455** that;

“Where the right of appeal is confined to the question of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the 1st appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision was bad in law.”

11. We have carefully considered the record of appeal, the written and oral submissions, the authorities cited and the law. We have identified the following issues of law that fall for our determination: whether the High court properly discharged its mandate of re-evaluating and analyzing the evidence on record; and whether the appellant was positively identified. In regard to the issue concerning subjecting the evidence before the trial court to a fresh analysis we can do no better than reproduce herein the judgment of the High Court in that regard:

“The main issue for determination is whether the appellant was properly identified as one of the robbers and whether he was found in possession of any stolen item.

From the prosecution case, PW1 testified that she was able to identify the appellant with the help of torch light. She saw the appellant when her hands were being tied. She could see properly and had seen the appellant before. There were torches being flashed. It is the appellant who snatched her torch.

On his part, PW3's evidence is that he identified the appellant and one David Khamala. The two escaped. He gave the appellant's name when recording his statement. The complainant and Pw3 are the only witnesses who identified the appellant. From the prosecution case we are satisfied that the appellant was properly identified. According to the complainant, she saw the appellant. The robbers tied her hands and started removing items from her house. There was torch light from the robbers and she also saw the appellant using her torch before the appellant took it. The appellant contends that the conditions were not favourable for proper identification. However, we do find that the appellant was properly identified as both the complainant and PW3 could not have been mistaken in their identification that night.

According to the evidence of PW5, Saidi Shikola Ali and that of the investigating officer PW7 Richard Langat, three blankets belonging to the complainant were recovered from the appellant's house. This is corroborated by the evidence of PW6 the area assistant chief Aggrey Maina Makokha. In his defence, the appellant stated that he was arrested for smoking bhang and not because of the robbery. He denied committing the offence.

In the end, we are satisfied that the appellant was properly identified even though the source of light was from torches. The trial court did not shift the burden of proof. The identification was not by a single identifying witness. It is PW3 who gave the appellant's name to the police after having seen him escaping from the scene. Further, the appellant was found with some of the stolen items five days after the robbery. We do find that the conviction by the trial court was proper.”

12. We are satisfied from the above extract of the judgment, that the learned judges of the High Court properly discharged their mandate, of subjecting the evidence to a fresh analysis and re-valuation as a first appellate court as stated in **Okeno v Republic [1972] EA 32**, and correctly came to its own decision.

13. This court in **Robert Kariuki Wachiuri & another v Republic [2016] eKLR** stated:

“Some of the factors that a court of law should bear in mind when determining whether circumstances prevailing at the time and place of the incident favoured positive identification or otherwise of the assailant were set out by the court in

the Maitanyi versus Republic [1986] KLR 198. A court of law ought to be conscious of the fact that many witnesses do not properly identify another person even in day light and it is therefore prudent for such a court to ascertain the nature of the light available, the type of light, its size and its position in relation to the suspect when dealing with the issue of identification.”

14. The learned Judges analyzed the evidence regarding identification and upheld the trial court’s findings that the appellant was positively identified though the source of light was from torches; that identification was not by a single identifying witness; that Aggrey gave the appellant’s name to the police having seen him escape from the scene; that the appellant was found with some of the stolen items five days after the robbery; that the appellant failed to explain his possession; and that the trial court did not shift the burden of proof.

15. On our part, we have considered the evidence and do find that the conviction of the appellant was not based exclusively on the evidence of a single identifying witness. Both E and Aggrey identified the appellant. Aggrey knew the appellant and was therefore able to identify him through recognition. There was also sufficient evidence that three blankets belonging to the complainant which were stolen during the robbery were recovered from the appellant, and that the appellant was unable to explain his possession. We therefore come to the conclusion that the learned Judges of the High Court properly analyzed and re-evaluated the evidence and came to the correct conclusion that the appellant was positively identified and that there was ample evidence in support of the charge against him. We are therefore satisfied that the appellant’s conviction was safe and his appeal against conviction fails.

16. With regard to the sentence, in the case of **William Okungu Kittiny v Republic, Criminal Appeal No. 56 of 2013**, this Court referring to the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic [2017]**, has recently held at paragraph 9 that:

“From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in para. 69, applies Mutatis Mutandis to section 296 (2) and 297 (2) of the penal code. Thus, the sentence of death under section 296(2) and 297(2) of the penal code is a discretionary maximum punishment.”

17. In sentencing the appellant, although the trial court gave the appellant an opportunity to give his mitigating circumstances, the trial magistrate considered his hands tied by the sentence of death provided under section 296(2) of the Penal Code which he considered mandatory. It is therefore evident that the trial magistrate did not exercise his discretion in sentencing. The learned judges of the High Court did not address the issue of sentence. In accordance with the decision in **WILLIAM OKUNGU KITTINY VS REPUBLIC** (Supra) we find it appropriate to intervene. We note that the appellant has been in custody for the last thirteen (13) years and that the only thing he said in his mitigation is that he has been in remand for a long time. In our view, the offence of which the appellant was convicted being serious, a prison term of thirty years would be appropriate.

18. The upshot of the above is that, we dismiss the appellant’s appeal against conviction but allow the appeal against sentence, set aside the sentence of death that was imposed by the trial court, and substitute thereto a sentence of 30 years imprisonment to take effect from the date the appellant was sentenced.

Those shall be the orders of this Court.

DATED and delivered at Kisumu this 27th day of June, 2019

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR