



IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 174 OF 2014

BETWEEN

GREGORY OCHIENG OSINA..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Kisumu (Ali-Aroni & Chemitei, JJ.) dated 22nd November, 2011

in

HCCRC NO. 9 OF 2011)

JUDGMENT OF THE COURT

Dr. Richard Otieno Muga “Muga” resides at Kanyamedha Location in Kisumu County. On the night of 15th June, 2010, at around 3.00a.m., he was awoken up from his deep sleep by people who had surrounded his bed and had put on electricity light in the bedroom. They ordered him not to look at them. He noticed that they were armed with axes, pangas and rungun. They put a panga on his back but when he pleaded with them not to kill him, he was told “*Professor we have nothing against you, if you have money give us*”. He directed them to his trouser in which there was Kshs. 10,000/=, they also took Kshs. 40,000/= from a drawer, a wrist watch, laptop, DVD, music system, bottles of wine, blackberry and two Nokia mobile phones, flat screen TV, travelling bag, digital radio cassette, speakers and other documents.

Muga came to notice after the robbers had left that they gained entry through the dining room window and had also cut the garage door. At the end of the harrowing experience Muga discovered that his worker, Paulman Ochieng “Ochieng” had been seriously cut, injured and was soaked in blood. He too had been injured during the encounter. They sought assistance from the neighbours and Ochieng was rushed and admitted at the Star Hospital. Muga was however, taken to Nairobi Hospital where he was admitted for 3 days. When Muga returned to the house after treatment, he found that some of the items stolen; T.V. set, digital radio and one speaker had been recovered.

As for Ochieng, he was awoken at 3.00a.m. by a bang on the door of his room. He switched on electricity light and saw a short black man holding a panga. That short black man immediately cut him on the head and hands and ordered him to sit down. He was then covered with a mattress before the robbers left.

On 27th June, 2010, he was called by Central Police Station, Kisumu, to attend a police identification parade. He was able to identify the short black man who cut him being the appellant herein. He had noticed during the incident that he had a gap in the lower teeth.

Tila Olaso “Olaso” was a neighbor of Muga. He too was awoken by noise and hurriedly came out of his house. He learnt that robbers had attacked Muga. He raised alarm and went towards Kutho Primary School when he saw the appellant carrying a T.V. set. The appellant on seeing him, placed the T.V. on the ground. He also saw another person carrying a speaker and radio. They all abandoned the items and ran into the bush.

The area Assistant Chief **Alois Anditi Abege “Abege”**, effected the arrest of the appellant on the basis of the information passed over to him by one of his informers. He had known the appellant for a long time as he was a resident of his sub-location. He thereafter handed the

appellant to Central Police Station, Kisumu.

P.C. Geoffrey Njiru “Njiru” was at Kisumu Police Station on 15th June, 2010 at 4.00a.m., when he received information from the control room that there had been a robbery at the home of Muga. He proceeded there and found the victims being prepared to be taken to hospital. Sniffer dogs were called in and followed the scent of the suspects. However, along the way, the sniffer dogs lost the scent. On going back to the scene, they found the T.V, radio and speaker having been recovered.

Identification parade was conducted by Inspector **Stephen Ndungu Njuguna “Njuguna”** on 27th June, 2010, in compliance with the rules. Ochieng was able to identify the appellant as the person who attacked him after causing members of the parade to walk and or speak.

On 24th June, 2010, the appellant was arrested by Abege. Having collected all the relevant evidence and being the investigating officer of the case, Njiru opted to charge the appellant with one count of robbery with violence contrary to **section 295** as read with **section 296(2)** of the **Penal Code** and another count of assault causing actual bodily harm contrary to **section 251** of the **Penal Code**. Count one was in respect of robbing Muga and second count for the assault on Ochieng.

The appellant denied the offences. He gave a sworn statement of defence and stated that the assistant chief came and arrested him on 24th June, 2010, and that he was brought to court on 5th July, 2010 and charged with offences he never committed. He was emphatic that Olasa never saw him carrying a T.V.

Judgment of the trial court was delivered on 14th January, 2011; wherein the appellant was convicted on the count of robbery with violence but acquitted on the assault charge. The acquittal was on the basis that the assault was in furtherance of the robbery and therefore, was one transaction. Upon conviction as aforesaid, the appellant was sentenced to death.

Aggrieved by the conviction and sentence, the appellant preferred an appeal to the High Court. That appeal was heard by Ali-Aroni and Chemitel, JJ. and was dismissed.

Undeterred, the appellant has now moved to this Court by way of a second and perhaps his last appeal. He has raised four grounds to wit; that the learned judges erred in their evaluation of evidence of identification, in relying on evidence of recognition, the ingredients of the offence were not proved and finally, that the judges failed to re-evaluate the evidence of the trial court.

In support of the appeal, the appellant filed through **Wilberforce Wangonda**, learned counsel written submissions which he relied on and briefly highlighted. Counsel submitted that the identification parade was badly conducted, that the informer who told Abege that the appellant was one of the suspects of the robbery was never called to testify. On identification, counsel submitted that Ochieng never gave the description of the appellant to the police. Further, it was the submission of counsel that though Ochieng claimed to have switched on the light which enabled him to see the appellant, the intensity of the light was never tested.

Counsel further submitted that though Olasa claimed to have seen and recognized the appellant carrying the T.V. at 3.00a.m., he did not state how he was able to see the appellant in darkness. Worse still it did not add up according to counsel, why the appellant would be apprehended nine days after the robbery at his home and yet Olasa and Abege claimed to have known him since childhood.

Counsel also referred to the material discrepancies with regard to the identification of the appellant as well as the identification parade and contended that these discrepancies rendered the evidence incredible and not free from possibility of error. That those discrepancies should have been resolved in favour of the appellant. In support of all the above submissions, counsel referred us to the Force Standing Orders, **Oluoch v Republic [1985] KLR 549**, where observance of identification parade rules was emphasized, **James Karani M’Ikombo v Republic, Nyeri Criminal No. 30 of 2010** on the need to interrogate the intensity of the light and the requirement to give a description of the assailant to the police before the identification parade.

On recognition, it was counsel’s submission that Olasa and Abege who allegedly knew the appellant and recognized him were not victims of robbery. Consequently, their recognition of the appellant count for nothing. That the upshot of all the foregoing was that the appellant was not placed at the scene of crime and therefore the prosecution had failed miserably to prove its case against the appellant beyond reasonable doubt.

With regard to ingredients of the offence, counsel submitted that none of the three ingredients that is to say, the offender is armed with a dangerous or offensive instrument, the offender is in company with one or more person(s) or, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, was proved. Counsel sought refuge in the case of **Oluoch v Republic [1985] KLR**, for this proposition. In the result counsel prayed that the appeal be allowed.

Mr. Kakoi, learned Principal Prosecution Counsel in opposing the appeal also relied on his written submissions which he briefly highlighted. On identification, he submitted that the appellant was properly identified and recognized. On the question of the ingredients of the offence, it was the submission of counsel that it was manifestly clear that all the essential ingredients of the offence were proved. On the failure of the trial court to re-evaluate the evidence of the trial court so as to reach its independent conclusions, counsel maintained that the whole judgment of the High Court is dedicated to the re-evaluation of the entire trial court record. There was no aspect that was not looked into. He therefore urged us to dismiss the appeal.

This is a second appeal and our jurisdiction is limited by dint of **section 361(a) of the Criminal Procedure Code** to dealing with matters of law only but not to delve into matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court. In the case of **Njoroge v Republic [1982] KLR 388**, this Court observed that, on second appeal the Court should focus on points of law but accepting and being bound by the concurrent findings of fact by the two courts below, unless those findings were not backed by evidence, or are based on a misapprehension of the evidence, or the two courts are shown demonstrably to have acted on wrong principles in coming to

those conclusions. Refer also on an enunciation of those principles, in the case of **Chemagong v Republic [1984] KLR 611.**

From the grounds of appeal argued before us, we consider the following to be issues of law to merit our interrogation; identification and or recognition, ingredients of the offence of robbery with violence and failure by the High Court to re-evaluate the evidence on record of the trial court.

On the issue of identification and or recognition, it has been stated time without number that where the only evidence against an appellant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it a basis of conviction. See for instance, **Wamunga v Republic [1989] eKLR.** It has also been held that recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. See **Anjononi & Others v Republic [1980] KLR 59.**

In this case, the appellant contests his identification or recognition on account of contradictions or discrepancies in the evidence of the prosecution, badly carried out police identification parade and the fact that during the incident, Ochieng was badly beaten such that he could not have been in a position to identify any of the attackers. Further, that the witnesses who purported to recognize the appellant were not victims. On the other hand, the respondent takes the view that there were no contradictions in the prosecution case and if they were, they were minor, the identification parade was properly conducted and the circumstances obtaining at the scene of crime were suitable for positive identification and therefore the appellant was positively identified and or recognised.

The contradictions referred to by the appellant are that during the police identification parade, the parade members were asked by Ochieng to open their mouths, whereas Njuguna testified that Ochieng requested the parade members to walk one at a time, that David Ochieng, a Clinical Officer who attended to Ochieng claimed that Ochieng told him he did not know who had attacked him because of the pain he was experiencing and yet in his testimony, Ochieng said he could identify the attackers.

We would agree with Mr. Kakoi, that indeed these contradictions, if at all were minor and did not go to the root of the prosecution case and in particular with regard to the conduct of the police identification parade. The fact of the matter is that the identification parade was carried out and Ochieng picked out the appellant. Ochieng may have told the Clinical Officer that he did not know his attacker. We do not see where the contradiction in this statement is. It is true that he did not know the attackers by name. He only described the only attacker he saw as a short black man with a gap in his teeth.

Was the police identification parade carried out badly and in violation of Police Standing Orders? This assertion is anchored on the fact that Ochieng did not give a description of the appellant to the police before the police identification parade was conducted. This complaint is neither here or there. First, the appellant was satisfied with the manner the parade was conducted and willingly signed the forms. Secondly, he chose and had three of his friends attend the parade as witnesses. In any event, Ochieng had stated that he could identify the appellant on the basis that he was short, black and with a gap in the teeth. Finally, on this aspect, the two courts below reached concurrent conclusions that the police identification parade was conducted in accordance with the law. We have no reason to upset that finding.

On identification of the appellant, Ochieng in his testimony stated:

“Then I saw a short black man with a panga and he cut me on the head, hands and ordered me to sit down ...”

He continued:

“When he told me to lie down is when I saw the gap ...”

During cross-examination he was emphatic;

“I saw you clearly and you told me to sit down ...”

It should be noted that by the time the appellant forced himself into the house, Ochieng had already woken up and switched on electricity light in the house. Clearly therefore, the house was well lit. How else would Ochieng have noticed that the appellant was short, black and had a gap in his teeth unless there was bright light in the house. Furthermore, the appellant fitted the above description by Ochieng. Finally, the two courts below once again reached concurrent findings that the appellant was positively identified by Ochieng at the scene of crime and that there was sufficient light in the house that enabled him to do so. We have no reason to depart from those concurrent findings as well.

On recognition, Olasa stated in his testimony thus:

“... then I saw Ochieng the accused. He was carrying a T.V. and he placed the T.V. down and was another carrying speakers and radio ...”

During cross-examination he stated:

“I know you as Ochieng and your mother was my employee.”

Contrary to the submissions by counsel for the appellant that this encounter was at 3.00a.m., the record shows that it was actually at 5.00a.m.

The question of darkness thus cannot arise and at that time the possibility that it was day break with sufficient light on the horizon cannot be ruled out. This would have enabled Olasa to see the appellant clearly. After all, and as he said “*the accused is a boy I have known since his birth. I saw him being born ...*” The appellant maintains that the evidence of recognition is worthless on the basis that Olasa was not a victim. We are not aware of a requirement and no authority was cited to us that a witness who recognizes an accused must be a victim of his crime. This was therefore a case of both recognition and identification combined as the two courts below correctly held.

With regard to the ingredients of the offence, we advert to the case of **Oluoch v Republic** (supra). In that case it was held that robbery with violence is committed if the following circumstances obtain: -

“(a) The offender is armed with any dangerous and offensive weapon or instrument; or

(b) The offender is in company with one or more person or persons; or

(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.”

As correctly pointed out by Mr. Kakoi, the three factors above are disjunctive and the prosecution only need to prove one factor for the offence to be held to have been committed. In this case, there is unchallenged evidence that the appellant was one of the robbers; he was in the company of others, therefore, the robbers were armed with *rungus*, *pangas* and axes; they robbed Muga of his money and other accessories and finally, they and in particular the appellant, attacked Ochieng whom he seriously injured. It cannot therefore be denied that from the foregoing, all the ingredients of the offence were met and or proved.

Regarding the last ground of appeal on want of re-evaluation by the High Court of the evidence tendered before the trial court, we are satisfied that the complaint is unmerited. The learned judges in their judgment delved into the background of the appeal, summarized the evidence of the prosecution witnesses as well as defence. They then reverted to their duty as a first appellate court thus;

“... our duty is to evaluate the evidence on record and only interfere with the lower court’s decision if it’s manifestly clear that it never reached a finding that was sound both in law and fact.”

From there, they went into great detail regarding the evidence of identification of the appellant by Ochieng at the scene of crime as well as at the police identification parade. They also adverted to the evidence of recognition by Olasa. They then concluded that this being a case of both recognition and identification, the conviction of the appellant cannot be faulted.

We are satisfied on the basis of the foregoing that the judges of the High Court were alive to their statutory duty of re-evaluating the evidence tendered before the trial court so as to reach their own independent conclusions on that evidence.

On the whole therefore, the appeal lacks merit and is accordingly dismissed in its entirety.

Dated and delivered at Kisumu this 19th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.