



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ. A.)

CRIMINAL APPEAL. 110 OF 2014

BETWEEN

GEOFFREY OKINDA CHITO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisii (Makhandia & Musinga, JJ.) delivered on 20th May, 2010

in

HCCRA NO. 125 OF 2008)

JUDGMENT OF THE COURT

[1] On 8th of August, 2007, **Geoffrey Okinda Chito** (hereinafter referred to as the appellant), was charged before the Principal Magistrate's Court at Migori with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. It was alleged that while armed with a knife, and using actual violence, he robbed **Kirungu Magugu Absolom** (complainant) of a motor vehicle registration NO. KAX 667N.

[2] Seven (7) witnesses testified for the prosecution during the trial, while the appellant gave sworn evidence and called two witnesses. The prosecution evidence was that Absolom Magugu Kirungu (complainant) who was operating as a taxi driver, had been hired by three (3) clients to take them from Oyani to Bware. While on the way, one of the passengers asked the taxi driver to stop the vehicle so that he could go for a short call. When the complainant stopped the vehicle one of the passengers who was seated in the front seat, held him, while another one pulled him to the back seat, and another took control of the vehicle. The complainant struggled and managed to open the rear door and threw himself out of the vehicle. The vehicle stopped and the three men came out and started struggling with the complainant who resisted raising an alarm. On realizing that people were responding to the alarm, the complainant's assailants ran to the car and attempted to drive off. The complainant picked a stone and threw it at the person driving. The person lost control of the vehicle and it went into a ditch. The three men then came out of the vehicle and ran into a nearby sugarcane farm.

[3] As the men were running, the complainant recognized one of them. Many people came, surrounded the farm, and threatened to burn the farm. Two of the suspects came out of the sugarcane and surrendered. In the meantime, the complainant had contacted the police who also arrived at the scene. A wallet and a diary were recovered from the vehicle as well as a photo of the appellant. Johnson Agoi, chief of South Kanyamkago received information regarding the incident. He proceeded to the scene where he found two suspects unconscious. He learnt that the two had been subjected to mob justice, whilst another suspect had escaped. The matter was reported to Migori CID offices and PC Simiyu was assigned to investigate the matter. PC Simiyu proceeded to the scene and recovered the vehicle and the documents. Later with assistance from Jairus Opati Were, chief of East Kanyamkago, APC Ndunda Joseph arrested the appellant at Oyani trading centre. Mr. Maruti Lawrence, a clinical officer attached to Migori District Hospital later examined the complainant and filled the P3 form confirming that he had suffered multiple skin laceration.

[4] In his defence, the appellant denied having committed the offence and called two witnesses who both claimed that he was at Oyani and not at the scene of the robbery. One of the defense witnesses Pauline Akongo Chito who is mother of the appellant explained that after the appellant was arrested at Oyani he was brought to his house, which was searched. Nothing was recovered from the house but the police took a wallet that contained a sim card and photographs.

[5] In his judgment, the trial magistrate found that the complainant recognized the appellant during the robbery, and that the appellant's wallet and photograph were recovered at the scene in the vehicle. He therefore rejected the appellant's alibi defence, convicted the appellant and sentenced him to death.

[6] Being dissatisfied with his conviction and sentence, the appellant appealed to the High Court, contending that the evidence adduced was not sufficient to prove the case against him; that the trial magistrate erred in relying on fabricated evidence; that the evidence on identification did not meet the standard required by law; and that proof of the alleged recovery of the appellant's wallet was contradictory.

[7] In their judgment, the learned judges of the High Court concurred with the trial magistrate that the complainant knew the appellant by name and was able to describe him; that the evidence of recognition of the appellant was strengthened by the discovery of the appellant's wallet from the stolen vehicle; that the wallet placed the appellant at the scene as it contained his photograph and sim card; and that the appellant's defence was rightly rejected.

[8] The appellant is now before us in this second appeal in which he has raised eight grounds. The grounds allege inter alia that the learned judges of the High Court erred: in relying on the evidence of a single identifying witness which evidence was contradictory, unreliable and doubtful; in failing to subject the evidence that was adduced before the trial court to a fresh, exhaustive and conclusive analysis; and in failing to consider the appellant's alibi defence and the appellant's age.

[9] During the hearing of the appeal before us, the appellant was represented by Mr. Motanya, who argued the appellant's grounds of appeal in two clusters. Mr. Motanya pointed out that the evidence on the identity of the appellant was not satisfactory as the complainant who is purported to have identified the appellant claimed to know the appellant by name but did not give his name to the police; and that APC Ngunyi Joseph (PW4), who claimed he was given the name of the robber as Geoffrey Okinda did not record that name in his statement.

[10] Mr. Motanya argued that the prosecution evidence was not consistent on how the appellant was identified and how the recovery of his documents was made; that the evidence of the complainant was unreliable and not corroborated; and that the appellant's defence was not given due consideration. In support of his submissions, Mr. Motanya relied on the case of *Paul Etole & Reuben Ombima vs Republic*, Criminal Appeal No. 24 of 2000 and *Sammy Kanyi Mwangi vs Republic*, Criminal Appeal No. 60 of 2006.

[11] Ms Jacinta Nyamosi, Senior Assistant Deputy Prosecuting Counsel, who appeared for the Republic, opposed the appeal and urged the court to uphold the appellant's conviction. She maintained that the complainant recognized the appellant, as he was one of his customers whom he knew by name. That APC Joseph also testified that he was given the name of the appellant as the one who had committed the offence; that the learned judges appreciated the issue of recognition and noted that there was no need for an identification parade as the appellant was known to the witness; and that the appellant's alibi was properly rejected as the prosecution evidence placed him at the scene.

[12] We have carefully considered this appeal, the submissions of counsel and the authorities cited. We note that the appellant was not arrested at the scene and that his conviction was anchored on two factors: the evidence of the complainant who purported to have seen and recognized the appellant whom he knew by appearance; and the alleged recovery from the complainant's stolen vehicle of a wallet containing the appellant's passport photograph and sim card.

[13] We are alive to the fact that this is a second appeal and that therefore this court is concerned with matters of law only. With this in mind, we take note that the issue of identification of an accused person is an issue of law. So is the issue whether a first appellate court has discharged its duty of re-evaluating and analyzing the evidence that was adduced in the trial court with a view to arriving at its own conclusion. Therefore both issues are open for our consideration.

[14] We are in agreement with the learned judges of the High Court that as stated in *Anjononi & Others vs Republic [1976-80] 1KLR, 1566*:

“ ... recognition of an assailant can be 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”.

[15] In this case, the appellant's conviction as already stated, was anchored on the alleged recognition by the complainant. The complainant's evidence in chief in this regard was as follows:

“... I knew Okinda by appearance before then. I had seen him at Stella and Uriri. Okinda is the one who injured my neck”.

[16] Under cross-examination the same witness stated as follows:

“I knew the accused by name before his arrest. I knew him well. I knew him as Okinda by one name only ...

Police Officers found me at the scene. i.e. PC Ndegwa, Chacha and another traffic Kisii officer who rides a motorcycle. I did not tell them that Okinda robbed me. I recorded a statement. I was not asked to mention the name of Okinda. I did not write the name Okinda. Statement (DMFI 1) the members of the public identified the one who escaped as Geoffrey, this was the area chief. ...

Okinda is the one who grabbed me. I did not mention his name that he strangled me. I did not mention his name but said black, strong and muscular. Man came out first, I knew the name of Okinda before and the Chief told me of Geoffrey”.

[17] In re-examination the witness stated:

“I knew the face and the name Okinda. I did not record his name but I mentioned Geofrey from Oyani village”.

[18] It is evident that the complainant contradicted himself with regard to his recognition of the appellant. Initially he stated that he only knew the appellant by appearance but later maintained that he knew him by one name of Okinda. Later he stated that the area chief was the one who had identified the appellant as Geoffrey.

[19] There were two (2) area chiefs who testified. Johnson Agoi, the area chief of South Kanyamkago whose evidence was that he was informed of a suspect who managed to escape but could not identify the person who informed him. In his evidence this witness did not give the name of the suspect who had allegedly escaped. The other chief was Jairus Opati Were, Chief of East Kanyamkago who claimed to have been informed by Chief Johnson Agoi that the suspect was Geofrey Okinda. Thus it is obvious, that it is not the complainant who identified the appellant as the suspect and that the evidence of identification by the chief could not be relied upon as it was based on hearsay evidence. These are factors that both the trial court and the first appellate court failed to take into account.

[20] Secondly, in his report to APC Joseph and PC Simiyu, both of whom were involved in the investigation of the case, the complainant did not give out the name of the appellant. This cast doubts on the complainant’s evidence that he knew the appellant and had recognized him. In fact the complainant did not testify as to how long he had known the appellant or under what circumstances. On the other hand, PC Joseph who arrested the appellant conceded in cross examination that he did not include the name of the suspect in his statement, and that he only came to know the names of the suspects as Geoffrey Okinda Chito after his arrest. Thus, the evidence regarding the identification of the appellant by recognition was not watertight.

[21] In their judgment, the learned judges relied on the recovery of the appellant’s wallet as strengthening the evidence of identification. The learned judges did not however analyze the evidence relating to this recovery. According to the complainant, a member of the public found the wallet, diary and the appellant’s photo, inside the motor vehicle. This evidence is different from the evidence of PC Simiyu who produced the wallet and the photo of the accused claiming to have recovered them from the rear seat of the stolen motor vehicle. If indeed as testified by PC Simiyu he recovered the wallet and photograph from the complainant’s vehicle why would the complainant testify that a member of the public recovered the same items? These contradictions were not resolved and the appellant’s defence that the wallet was recovered from his house by police officers cannot be ruled out.

[22] We come to the conclusion that the learned judges of the High Court failed to reconsider and re-evaluate the evidence of the trial court; that the identification of the appellant was not watertight, and that the appellant should have been given the benefit of doubt. Therefore the appellant’s conviction was not safe and cannot be sustained.

[23] It follows that we allow this appeal and set aside the appellant’s conviction and sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

[24] This judgment has been delivered under Rule 32(2) of the Court of Appeal Rules as Githinji, JA having declined to sign it.

Dated and Delivered at Kisumu this 11th day of October, 2018

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.