



IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 122 OF 2014

BETWEEN

MUSA OUMA OBARE.....FIRST APPELLANT

NICHOLAS OUMA OWELLE AGOL *alias* BONGO...SECOND APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from the judgment of the High Court of Kenya at Kisumu (Muchelule & Chemitei, JJ.) dated 14<sup>th</sup> July, 2014*

in

HCCRA NO. 29 OF 2012)

\*\*\*\*\*

JUDGMENT OF THE COURT

[1] **Moses Ouma Obare *alias* Musa** and **Nicholas Ouma Owelle Agol *alias* Bongo** (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> appellants), together with two (2) others, were charged with several offences of robbery with violence contrary to **section 296(2)** of the **Penal Code**, with corresponding alternative counts of handling stolen property contrary to **section 322(2)** of the **Penal Code**.

[2] Following the trial before the Senior Resident Magistrate's Court at Bondo, both appellants were convicted of count three (3) of robbing Kennedy Okoth Ouma (Ouma) contrary to section 296(2) of the Penal Code. In addition, the 2<sup>nd</sup> appellant was convicted of counts 1, and 2 of robbing Charles Nyagaga Omino (Charles) and Erick Omondi Ng'or (Erick) respectively, contrary to section 296(2) of the Penal Code. The appellants were each sentenced to suffer death.

[3] Being aggrieved by their conviction and sentences, each appellant lodged an appeal before the High Court. Their appeals were consolidated and heard by the High Court sitting at Kisumu. In the consolidated appeal, the appellants raised several issues including, that their rights under **Article 26(1)** of the **Constitution** regarding right to life was violated; that the appellants right to representation under **Article 50(2)(h)** of the **Constitution** was violated; and that the charges against the appellants were improperly consolidated.

[4] In addition, the appellants also took issue with the prosecution evidence contending that the mobile phones produced in evidence were not positively identified by the complainants nor connected to the appellants; that the evidence adduced was not sufficient to establish the ingredients of the offence which the appellants were charged with; that the burden of proof was erroneously shifted to the appellants; that the evidence of identification was insufficient to sustain a conviction; that the evidence adduced did not support the contention that the appellants were armed with dangerous weapons or that a witness suffered injury or was threatened with injury; that the trial magistrate erred in convicting the appellant on the basis of contradictory evidence; and that the evidence regarding the doctrine of recent possession did not meet the required standard.

[5] In their judgment, the learned judges of the High Court found that there was no evidence that the appellants demanded for an advocate at the States' expense, nor was there substantial injustice occasioned by the fact that the appellants were unrepresented. Further, that no prejudice was occasioned to the appellants by the consolidation of their trials. In regard to the issue of identification, the learned judges found that, Charles, who was the complainant in count 1, positively identified the 2<sup>nd</sup> appellant, whom he described as black, stout and having dreadlocks; that Tyrus, who was also charged with the appellants, was confronted by Ouma on the same night of the robbery, and two phones recovered from him; that Ouma identified the 1<sup>st</sup> appellant and 2<sup>nd</sup> appellant as having been amongst the robbers who attacked him

and robbed him of his phone.

[6] In addition, the learned judges found that this evidence was consistent with the evidence of Ouma's mother who testified that the 1<sup>st</sup> appellant returned to her the phone that was stolen from Ouma; that there was sufficient light which enabled Charles and Ouma to identify the appellants; and that the 1<sup>st</sup> appellant did not deny having taken the phone to Ouma's mother. The learned judges found the evidence of Erick Omondi who purported to have recognized Kevin Odhiambo Ombogo (Ombogo) who was also charged with the appellants, as unreliable and therefore acquitted Ombogo of the charges but dismissed the appeal of the 1<sup>st</sup> appellant, 2<sup>nd</sup> appellant and Tyrus. Before the hearing of this appeal commenced, we were informed that Tyrus who had not appealed died in prison.

[7] During the hearing of the appeal, learned counsel, Mr. Omondi Ogwel who appeared for the appellants relied on written submissions which had been duly prepared by the firm of Odhiambo B.F.O. & Company Advocates. Briefly, the appellants submitted that the evidence of identification fell short of the threshold provided in **R. vs Turnbull [1977] QB 224** as applied in **Warunga vs Republic [1989] KLR 424** amongst others.

[8] It was argued that in his evidence Charles did not testify as to the intensity of the light; and the fact that Caleb Juma Owanga (Caleb) who was with Charles at the time they were accosted, was not able to identify any of the alleged robbers created doubt. Further, that the description of the 2<sup>nd</sup> appellant as given by Charles, was not accurate as the 2<sup>nd</sup> appellant did not have any dreadlocks.

[9] With regard to the identification parade, it was submitted that the same was not conducted fairly as the witnesses who all come from the same locality converged at the police station where the 2<sup>nd</sup> appellant was being held. It was noted that it took more than a month to have the 2<sup>nd</sup> appellant apprehended and therefore Charles could have seen the appellant before the parade.

[10] With regard to the evidence of recognition, it was submitted that the evidence of Ouma in this regard was not safe to rely on, and that his purported identification of the 2<sup>nd</sup> appellant amounted to dock identification which was worthless. The appellants urged the Court to find that their conviction was not supported by evidence and allow the appeal.

[11] **Ms Jacinta Nyamosi**, Senior Assistant Director of Public Prosecutions, who appeared for the State supported the conviction and urged the Court to dismiss the appeal. She maintained that both appellants were properly identified by four (4) prosecution witnesses and that even if the evidence of Erick was rejected, the evidence of the four witnesses was sufficient. In addition, the lighting was adequate and the identification could not be faulted.

[12] This being a second appeal, our jurisdiction is limited under **section 361** of the **Criminal Procedure Code** to consideration of matters of law only (**M'Riungu v R [1983] KLR 455**). In considering the appeal, we can only interfere with the findings of fact of the trial court if we are satisfied that the findings are not based on evidence or that they are based on misapprehension of the law.

[13] In this case, the appellant has raised the issue of identification which is basically a conclusion of law drawn from the findings of fact. The appellants have also faulted the learned judges of the high Court for failing to discharge their legal obligation of re-examining and evaluating the evidence that was adduced in the trial court. Both these issues are issues of law which we must address.

[14] In **Karanja & Another v Republic [2004] 2 KLR 140**, this Court stated at P. 148:

***“ ... this Court has consistently insisted that test with greatest care be carried out by the trial court before a conviction based on identification of an accused can be entered. The first appellate court is enjoined on appeal to reconsider the evidence, evaluate it itself and draw its own conclusion in deciding whether the judgment of the trial court should be upheld. See case of Okeno v Republic (supra). It goes without saying that on a conviction based on identification, the first appellate court would have to analyze the same evidence of identification as thoroughly as the trial court, of course always putting in mind that it has no advantage of seeing and hearing the witness and their demeanour and giving allowance for the same.”***

[15] As already stated, the 2<sup>nd</sup> appellant was convicted of counts 1, 2 and 3. The evidence against the 2<sup>nd</sup> appellant was basically that of identification. He was identified by Charles, the complainant in count 1 as one of the five (5) robbers who attacked Charles and robbed him of his Nokia 2300 phone. Charles explained that the incident took place at about 7.30 p.m., but that he was able to identify the 2<sup>nd</sup> appellant with the aid of a torch light which one of the robbers flashed. Charles also managed to identify the 2<sup>nd</sup> appellant during an identification parade. Ouma, the complainant in count 3, also identified the 2<sup>nd</sup> appellant as having been one of the persons who robbed him. Ouma knew the appellant before and therefore identified him through recognition and by his nick-name “Bongo.” Ouma's recognition of the 2<sup>nd</sup> appellant was facilitated by the aid of lights from a passing vehicle. In addition, the 2<sup>nd</sup> appellant spoke to Ouma, hit Ouma and took Ouma's Nokia 1202 phone.

[16] Although the 2<sup>nd</sup> appellant was identified by two witnesses, these witnesses were talking about two separate incidents i.e. the robbery against Charles, and the robbery against Ouma. Therefore, their evidence in regard to the specific robbery charges is akin to the evidence of a single witness and needed to be treated cautiously.

[17] As regards Charles, there was no evidence regarding the intensity of the torch light. Secondly, if as the witness contends one of the robbers flashed the torch, the torch light could only have been directed at the witness and not at the other robbers. Therefore, if at all the witness saw one of the robbers when the torch flashed, it could only have been for a fleeting moment and not sufficient for identification of someone whom the witness did not know before. This makes the identification of 2<sup>nd</sup> appellant by Charles during the identification parade doubtful. More so since his brother Caleb who was present during the robbery was unable to identify any of the robbers.

[18] The other witness Ouma who was the complainant in the third count claimed to have seen the 2<sup>nd</sup> appellant with the aid of light from an oncoming vehicle. This witness knew the 2<sup>nd</sup> appellant before. He also testified that the 2<sup>nd</sup> appellant spoke to him and warned him not to “play with his life”, before hitting him and taking his phone. The witness reported the robbery to his mother and named the 2<sup>nd</sup> appellant by his nick name “Bongo.” He also reported this to the police the next day. It is evident that this witness positively identified the 2<sup>nd</sup> appellant. Although the light from the oncoming vehicle was only for a while, his altercation with the 2<sup>nd</sup> appellant including the verbal threat made it possible for the witness to be sure of his recognition of the 2<sup>nd</sup> appellant. Moreover, the witness was consistent in naming the 2<sup>nd</sup> appellant as his assailant.

[19] The 2<sup>nd</sup> appellant was also identified by Erick Omondi who was a complainant in count 2. Erick testified that he was accosted by a group of six (6) people and that of the six (6) he knew one (1) person before and identified that person as Kevin Odhiambo Ombogo (Ombogo) who was the 3<sup>rd</sup> accused during the trial and the 3<sup>rd</sup> appellant during the first appeal. The witness maintained that he saw his attackers as it was just approaching 7.00p.m, and there was light. He claimed also to have recognized the 2<sup>nd</sup> appellant whom he knew by appearance. It is noteworthy that the learned judges of the High Court were not impressed by the evidence of this witness and rejected his identification of Ombogo stating as follows:

***“In regard to the 3<sup>rd</sup> appellant, we do not find any credible evidence from the witness that positively identified him at the scene. PW 8 who could have nailed him proved inconsistent. He told the court that the incident took place at around 7.00p.m. The intensity of the light at this hour is clearly subjective. It would have been helpful had the prosecution called PW8’s brother, one Odhiambo to corroborate his evidence. We find that it was clearly unsafe for the trial court to have convicted the 3<sup>rd</sup> appellant as there were doubts on the question of identity which is cardinal in such offences.”***

[20] As regards the 2<sup>nd</sup> appellant’s identification by Erick, the learned judges of the High Court did not analyze the same though it dismissed the 2<sup>nd</sup> appellant’s appeal thereby upholding his conviction in regard to count 2. Having concluded that the evidence of Erick was unreliable, and that his identification of Ombogo was doubtful, and the 2<sup>nd</sup> appellant having also been identified in the same circumstances, the evidence of Erick could not be relied on as the basis for the 2<sup>nd</sup> appellant’s conviction on count 2.

[21] As regards the 1<sup>st</sup> appellant, his conviction in regard to count 3 also basically relied on the evidence of Ouma and his mother. Ouma identified the 1<sup>st</sup> appellant as having been among the group that robbed him and stated that he specifically took his scarf. The 1<sup>st</sup> appellant was known to the witness and therefore the possibility of a mistaken identification was minimal. In addition, the 1<sup>st</sup> appellant was the one who took Ouma’s phone that was stolen during the robbery to Ouma’s mother. We are therefore satisfied that the identification of the appellant by Ouma was reliable and that Ouma’s evidence was supported by the evidence of his mother. In the circumstances, the 1<sup>st</sup> appellant’s defence was rightly rejected.

[22] The upshot of the above is that we allow the 2<sup>nd</sup> appellant’s appeal to the extent of setting aside the 2<sup>nd</sup> appellant’s conviction and sentence in regard to counts 1 and 2. However, we uphold the conviction of the 1<sup>st</sup> and 2<sup>nd</sup> appellants in regard to count 3. As regards sentence, the appellants were given the opportunity to mitigate and the trial magistrate exercised his discretion. In the circumstances we have no reason to interfere. The appeal against sentence is therefore dismissed.

Those shall be the orders of the Court.

**Dated and delivered at Kisumu this 15<sup>th</sup> day of November, 2018.**

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR.**