



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, P.C.A., VISRAM & AZANGALALA, JJ.A.)

CRIMINAL APPEAL NO. 147 OF 2016

BETWEEN

1. MOSES OBURA MATIKA

2. HENRY AWAY MAKHOTA.....APPELLANTS

3. SILA SAMSON

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at

Nairobi (Mboghli & Achode, JJ.) dated 25th November, 2014

in

H.C. Cr. C. Nos. 275, 276 & 277 & 2008)

JUDGMENT OF THE COURT

[1] The appellants, *Moses Obura Matika*, *Silas Samson Ongala* and *Henry Aywa Makhota*, ("hereinafter 1st, 2nd and 3rd appellants" respectively), were convicted by Kibira Senior Resident Magistrate, of robbery with violence contrary to *section 296 (2)* of the *Penal Code (Cap 63)* and sentenced to death. Their appeals to the High Court were dismissed by *Mboghli Msagha* and *L. A. Achode, JJ.*, hence the appeal before us premised upon nine grounds which raise the following issues: identification which they claim was not positive; alleged failure to appreciate their defences; failure to re-evaluate the evidence and alleged failure to prove the charge beyond reasonable doubt.

[2] The facts of the case may be stated to put the appeal in proper perspective. On 1st February, 2007, in the afternoon at about 1.00 p.m., armed robbers entered the residential premises of *Yaru Kumar, (PW 2)*, (*Kumar*), where he lived with his mother, *Saraja Lumb, (PW 1)*, ("the complainant"). At the time of the attack, *Kumar* was at his Bookshop in Ngara area of Nairobi. The complainant was in the house in the

kitchen when three armed robbers entered with two house helps, **Emily Naliaka Wanyonyi, (PW 3), (Emily)**, and **Judith Shirathwo, (PW 4), (Judith)**. The robbers took the complainant to the video room where they took her purses in which there was a sum of Kshs. 3,800/= and a Nokia mobile phone. They then took her to her bedroom where they broke into her husband's cupboard where an unknown amount of money was taken. From her cupboard, they took Kshs. 3,500/=. The robbers also took her gold bangles and her watch.

[3] During the robbery, **Emily** kept screaming despite beatings she received from the robbers. The screams alerted neighbours one of whom switched on an alarm thereby attracting a security firm officers who visited the scene. The robbers ran from the house with their loot on hearing the alarm and before the security officers arrived.

[4] Both **Emily** and **Judith** testified that they identified the appellants at the scene. The complainant was however, not so sure. When **Kumar** arrived after being informed of the robbery through his phone by the complainant, he found the 1st and 2nd appellants had been arrested. He testified that the 3rd appellant was hiding in a neighbour's toilet. He proceeded there and found police officers trying to flush him out. When the 3rd appellant came out of the toilet, police officers recovered a mobile phone from him which mobile phone he identified as the complainant's.

[5] Kumar further stated that police officers asked the 1st and 2nd appellants to remove whatever they had in their pockets. According to him, the complainant's bangle and Kshs. 3,800/= were recovered from them. Among the recovered sums were notes of Kenya Shillings 5/=, 10/= and 20/= which were then out of circulation. Among the police officers who visited the scene, was **PC Ronald Anyoka, (PW 5), (PC Anyoka)**, who was also the investigating officer. He confirmed the recovery of a bangle and Kshs. 3,800/= from the 1st and 2nd appellants. He also confirmed the removal of the 3rd appellant from the toilet and the recovery of the Nokia mobile phone from him.

[6] The appellants gave unsworn statements in which they denied committing the robbery. The 1st appellant stated that at the material date, he was returning from football practice at Kangemi when he was accosted by members of the public and security guards who assaulted him severely claiming that he was a robber. The 2nd appellant stated that he was on his way home when he was stopped by members of the public and security guards who beat him up but was rescued by police officers who took his bangle and Kshs.2,500/= which he had been given by his erstwhile employer a **Mrs. Derick**. On his part, the 3rd appellant testified that on the material date at about 2.00 p.m., he was job-hunting when he was stopped by watchmen who beat him up alleging that he was a robber but was rescued by police officers.

[7] On the above evidence, the learned trial magistrate found that Emily and Judith had positively identified the appellants in circumstances which were conducive to such positive identification. It was also the finding of the trial magistrate that the recovery of the complainant's bangle and old notes of Kshs. 5/=, Kshs. 10/= and Kshs. 20/= on the 2nd appellant buttressed the house helps' identification of the 2nd appellant. With regard to the 3rd appellant, the trial magistrate found that the recovery of the complainant's mobile phone on him reinforced the identification evidence of **Emily** and **Judith**.

[8] On the same evidence, the learned Judges of the High Court stated:

"Considering that the offence took place during the day and that the appellants were arrested soon thereafter when PW 3 and PW 4 identified them, their memories were still fresh.

In addition, the 2nd appellant was arrested in possession of the bangle belonging to the complainant while the 3rd appellant had in his possession a mobile phone belonging to the complainant. Those recoveries did not only place the appellants at the scene of the robbery but confirmed that they were the robbers.

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The defences of the appellants could not withstand the weight of the evidence adduced by the prosecution witnesses".

In the end, the High Court dismissed the appellants' consolidated appeals as already observed.

[9] **Mr. Ondieki**, learned counsel for the appellants relied wholly on the supplementary grounds of appeal he filed which, as we have already observed, raised the issues crystallized above. In his oral submissions before us, learned counsel referred us to aspects of the evidence adduced before the trial court which, according to him, showed that the complainant did not identify his attackers and further, that the members of the public and security guards who arrested the 1st and 2nd appellants were not called as witnesses to confirm the identification of the appellants by **Emily** and **Judith**. In learned counsel's view, the failure to call those members of the public and security guards left gaps in the prosecution case which case was also frizzled with inconsistencies thereby creating doubt in the case against the appellants which doubt should, according to learned counsel, have been resolved in favour of the appellants.

It was learned counsel's further argument that the doctrine of recent possession was improperly applied. This contention with all due respect was not elaborated - save that, in his view, the 2nd and 3rd appellants gave reasonable explanation for their possession of the subject items.

Mr. Ondieki also took issue with the failure of the 3rd appellant to cross examine the complainant which, according to learned counsel, violated the 3rd appellant's right to fair trial.

With regard to the duty of the two courts below, learned Counsel contended that they failed respectively to evaluate and re-evaluate the evidence particularly as regards the testimonies of the appellants which learned counsel claimed were not properly appreciated.

[10] **Mr. Wanyonyi**, learned *Senior Assistant Deputy Prosecution counsel (SADP)*, in supporting the conviction of the appellants, submitted that in addition to identification of the appellants at the scene, they were found with items stolen during the robbery. In his view, the prevailing circumstances favoured a positive identification. The learned **SADP** further contended that despite the failure of the complainant to make a positive identification, **Emily** and **Judith** corroborated her evidence and further that items robbed from the complainant were recovered from the appellants who were arrested soon after the robbery within the vicinity of the scene of the robbery.

All these, according to **Mr. Wanyonyi**, was evaluated by the two courts below who reached concurrent findings on facts. In his view, the witnesses who were called proved the case against the appellants beyond reasonable doubt notwithstanding the failure to call members of the public and security guards who arrested the 1st and 2nd appellants.

On alleged failure of the 3rd appellant to cross-examine the complainant, learned counsel contended that the failure was explained by the High Court and was not in any event, fatal to the case put forward by the prosecution.

[11] We have considered the record, submissions of learned counsel and the law. We are alive to our duty as a second appellate court which is to consider only issues of law. See **section 361** of the **Criminal Procedure Code**.

[12] It is also our duty to consider and decide whether or not in discharging its function the first appellate court applied the principles enunciated in the case of ***Pandya -v- R. [1957] EA 336*** and ***Okeno -v- Republic [1972] EA 32***. In the former, the Court stated as follows, at page 337:

"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole

and its own decision thereon. It has the duty to rehear the case and re-consider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witnesses but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen".

And in Okeno -v- Republic (supra) at page 36, the principles were reiterated as follows:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya -v- R. [1957] EA 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. See Peters -v- Sunday Post [1958] EA 424".

[13] Having considered the record, the judgment of the High Court and in the light of the above principles, we have come to the conclusion that the learned Judges of that court fully discharged their duty. Although they did not make express advertence to that duty in their judgment, they considered in outline the evidence which was adduced before the trial court, re-evaluated it and arrived at their own independent conclusions thereon. The learned Judges considered the issues of identification, circumstances surrounding the robbery and the arrest of the appellants, the recovery of the stolen items, the failure to cross-examine the complainant by the 3rd appellant and the appellants' defences. In the premises, our view is that the High Court Judges carried out their duty satisfactorily.

[14] With regard to the issue of identification, the two courts below accepted the testimony of **Emily** and **Judith** that they had sufficient time to observe the appellants who were not masked and therefore positively identified them given that the robbery was staged in broad daylight at about 1.00 p.m. That was not the only evidence which placed the appellants at the scene of crime. The two courts below accepted the testimony of the witnesses that the 2nd and 3rd appellants were separately found with a bangle and mobile phone respectively which were both positively identified by the complainant. There was an additional piece of evidence which, in our view, completely displaced the 3rd appellant's defence; his arrest. He was found in a toilet which belonged to the complainant's neighbour. On being searched, he was found with the complainant's mobile phone which she and her son **Kumar** positively identified. The arrest was effected in the presence of **Kumar** by among others, **PC Anyoka** who doubled as the Investigating Officer. [15] The two courts below reached concurrent findings on matters of fact as regards the identification of the appellants. On this point, we have stated before time without number that we cannot interfere with findings of fact by the two courts below, unless we are satisfied that there was no evidence at all to support the same or that there was a serious misdirection which led to injustice. In the case of Muriungi -v- Republic [1983] KLR 455, we stated:

"Where a right of appeal is confined to questions 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 law or mixed findings of fact and law and should not interfere with the decision of the trial on first appellate court unless it is apparent on the evidence that no reasonable tribunal could have reached that conclusion which would be the same thing as holding that the decision is bad in law".

We are unable to hold that there was no evidence of identification apparent on the face of the record of the trial court. We are therefore unable to agree with **Mr. Ondieki** that the evidence of identification was not positive. This case is clearly distinguishable from the case of Daniel Muthomi Marimi -v- Republic [2013] eKLR, where identification was not found to be positive and where possession of stolen items was

found inconclusive. This case is also distinguishable from the case of ***David Odhiambo & Another -v- Republic [2005] eKLR***, which turned on whether the weapon used during the robbery was dangerous or offensive which is not the case here. The case of ***James Mwangi -v- Republic [1983] KLR 326***, on which counsel for the appellants also placed reliance turned on circumstantial evidence unlike in this case where there was direct evidence of identification and recovery of items stolen from the complainant.

[16] We have also come to the conclusion that nothing should turn on the failure of the 3rd appellant to cross-examine the complainant. We are of that view because he was arrested hiding in a toilet next to ***Kumar's*** house and on being searched, the complainant's mobile phone was found in his possession. ***Kumar*** testified that he was in fact the one who had purchased the mobile phone for his mother, the complainant. In the premises, no amount of cross-examination of the complainant could change those facts.

[17] Another complaint raised by the appellants was that the trial court and the High Court improperly dismissed their defences. On this issue, the record of the trial magistrate and the High Court speak for themselves. The learned Senior Resident Magistrate, after setting out, in outline, each appellant's defence, concluded:

"The two house helps properly identified the three accused persons as the assailants. This is an incident that happened during the day and I see no possibility of a mistaken identity.

Secondly, the evidence of the two (2) house helps is reinforced by the fact that a bangle belonging to the complainant was recovered from accused 2. Accused 2 was found with old Kenya currency of Kshs. 20/-, Kshs.

10/= and Kshs. 5/= notes. These notes were positively identified by the complainant's son, (PW 2).

The three (3) accused persons were arrested very close to the scene of the robbery immediately after the said robbery.....

Accused 3 was found in possession of a cell phone belonging to the complainant. I find the explanations given by each accused person on how he happened to be at the scene unconvincing. In any event, I find the evidence against them to be overwhelming and inconsistent with their plea of innocence".

[18] And the learned Judges of the High Court considered the circumstances under which the robbery was committed and the testimonies of ***Emily, Judith, Kumar*** and the Investigating Officer. In their judgment, the evidence of identification and the application of the doctrine of recent possession ousted the defence put forward by the appellants. They concluded thus:

"Those recoveries did not only place the appellants at the scene of the robbery but confirmed that they were the robbers. No plausible explanation of their possession of those personal effects could be convincing".

[19] The above excerpts from the judgments of both the trial magistrate and the first appellate court show plainly that both courts below carefully considered each appellant's defence and found it displaced by the evidence adduced by the prosecution. In our view, having found ***Emily*** and ***Judith*** credible witnesses and having accepted the recovered items as those of the complainant, the conviction of the appellants was inevitable. In the end, in our view the ground of appeal alleging failure of the courts below to adequately consider the appellants' defences cannot be sustained.

Given our above analysis, the complaint that the case against the appellants was not proved beyond reasonable doubt is, in our judgment, absolutely without merit. It is our finding that the case presented by the prosecution against the appellants was watertight.

The upshot of all the above is that this appeal cannot succeed. We agree with **Mr. Wanyonyi** that the appellants were properly convicted as charged. The appeal is accordingly dismissed.

Dated and delivered at Nairobi this 17th day of February, 2017.

P. KIHARA KARIUKI, P.C.A.

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR