



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE, & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 7 OF 2014

BETWEEN

SULEIMAN OTIENO AZIZ..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi

(Mbogholi and Achode, JJ.) dated 24th September 2013 in

H.C.C.R.A. No. 158 of 2009)

JUDGMENT OF THE COURT

In this second appeal, the appellant, ***Suleiman Otieno Aziz***, challenges his conviction and sentence to death by the Chief Magistrate's Court at Nairobi for the offence of robbery with violence. The High Court confirmed the conviction and sentence in his first appeal, leading to the appeal now before us. In his supplementary memorandum of appeal dated 18th May 2016, the appellant contends that the first appellate court erred in four respects, namely by relying on unsafe identification evidence; by failing to re-evaluate and reappraise the evidence; by failing to draw an adverse inference from the prosecution's failure to call important witnesses; and by disregarding his defence. The respondent counters that the court never committed any of the alleged errors and prays for dismissal of the appeal for lack of merit.

Before we delve into the four grounds on the basis of which the appellant impugns his conviction and sentence, it is apt to briefly set out the facts in appeal as settled by the two courts below. On 8th December 2008, at about 3.30 pm, the complainant, ***Agnes Muthoni Chege (PW1)*** withdrew ***Kshs 300,000*** from her bank account at ***Equity Bank, Kimathi Street Branch***, Nairobi intending to deposit the same in an account at ***Standard Chartered Bank, Moi Avenue Branch***, Nairobi, in furtherance of a transaction in which she was purchasing a shop. She put the money in a leather bag and started walking to the latter bank. Along the way, she was accosted by a person who blocked her path. Immediately, the appellant seized her by the neck from behind and pushed her into a wall. He subjected her to such a tight chokehold that she urinated on herself as she tried to catch a breath. As PW1 struggled with the appellant, the first assailant and others relieved her of the bag containing the money and ran away. The appellant stayed a little longer holding PW1 to give his accomplices an opportunity to make good their escape.

As it turned out, the appellant was not so lucky himself. When he let go of PW1, the roles were immediately reversed and now it was PW1's turn to hold onto the appellant as he attempted to escape. She grabbed his hand and held tightly onto him. When the appellant eventually managed to break loose, PW1 started shouting and screaming. She attracted the attention of members of the public who chased the appellant, apprehended him a short distance from the scene of the attack, and proceeded to give him a thorough beating. It was PW1's evidence, accepted by the trial and first appellate courts, that she never lost sight of the appellant from the place of her attack to the point where he was arrested.

Ag. Inspector of Police, Tom Omwonyi (PW2) who happened to be in the vicinity at about 3.50 pm, rescued the injured appellant and arranged for him to be treated at Kenyatta National Hospital, where he was admitted. On her part PW1 proceeded to Central Police Station and reported the robbery. When he was released from the hospital, the appellant was on 23rd December 2008 charged with robbery with violence contrary to **section 296(2)** of the **Penal Code** before the Chief Magistrate's Court, Nairobi, to which he pleaded not guilty.

PW1 produced as exhibit her bank statement from Equity Bank which showed withdrawal of Kshs 300,000 from her account on the material day. When put on his defence, the appellant stated that he was a scrap metal dealer and used to buy scrap metal at Standard Bank. On the material day his business associates had given him 25 kg of aluminum to take to Kamukunji. He was not paid properly and when he explained to his associates, they started beating him up in the street. In the process PW1 came along and claimed that he had robbed her of her money.

As we have already adverted, the trial court held that the prosecution had proved its case beyond reasonable doubt and convicted the appellant as charged and sentenced him to death. His first appeal was unsuccessful, leading to this second appeal.

Mr. Nyachoti, learned counsel who represented the appellant submitted, as regards identification of the appellant that there was no credible evidence to prove that it was the appellant who held PW1 in a chokehold. He contended that PW1 was held from behind and could not see her assailant. He further argued that due to the tight chokehold, PW1 was in shock and dazed and her ability to recognise her assailant is questionable. Accordingly, the circumstances were not conducive for proper identification of the assailant. The appellant relied on ***Maitanyi v. Republic [1986] 1 KLR 198*** in support of that submission.

It was further contended that the trial court had not adequately considered the appellant's defence and that the first appellate court had not properly re-appraised the evidence, otherwise it could easily have noticed that the appellant's defence was not properly or adequately considered. Counsel urged that proper evaluation of the evidence would have readily shown that the appellant was arrested and charged in a case of mistaken identity. Lastly the appellant urged that the two courts below erred by failing to draw an adverse inference from the failure of the prosecution to call witnesses from members of the public who arrested the appellant.

The respondent opposed the appeal through **Ms. Maina, Senior Principal Prosecution Counsel** who submitted that from the facts, there was no possibility of mistake as regards the identification of the appellant because the offence was committed in broad daylight and PW1 never lost sight of the appellant from the time he subjected her to a chokehold until he was arrested. Counsel further submitted that the appellant's defence was fully and adequately considered and found to be an afterthought in light of the strong prosecution evidence, which did not require the calling of any other additional witnesses.

We have duly considered the record of appeal, the judgments of the two courts below, the memorandum of appeal and the submissions by respective counsel. As this is a second appeal, by dint of **section 361** of the **Criminal Procedure Code** we are enjoined to consider only matters of law. (See ***Kainga v. Republic [1982] KLR 213***).

It cannot be gainsaid that evidence of identification by a single witness is always admitted with great circumspection because of the real risk that the identifying witness may be honest but genuinely

mistaken. (See *Maitanyi v. Republic (supra)* and *Wamunga v. Republic [1989] KLR 424*). Accordingly the court is obliged to consider very carefully the circumstances under which the witness claims to have made the identification to satisfy itself that there was no possibility of mistake. The duty of the court in that regard was articulated as follows in *Anthony Kangethe Mwangi v. Republic, Cr. App. No 24 of 2010*:

It is well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. Where reliance is placed on a single identifying witness to convict, the law requires the evidence on identification to be weighed with greatest care. The court must satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult.

Turning to this appeal, we are satisfied that the trial court was quite alive to its duty to consider the evidence of identification very carefully before relying on it. This is how the court addressed the issue:

“The court is aware of the dangers of convicting on the evidence of one identifying witness. The circumstances of identification as described by the complainant are explicit and free from the possibility of this being a case of mistaken identity. His role is very well described and the complainant never lost sight of him till he was arrested.”

For its part the first appellate court closely evaluated the evidence and satisfied itself that the identification of the appellant was safe. The court quoted no less than four authorities (*Abdalla Bin Wendo & Another v. Reginam [1953] 20 EACA 166*, *Roria v. Republic [1967] EA 583*, *Kamau v. Republic [1975] EA 139* and *Cleophas Otieno Wamunga v. Republic [1989] KLR 424*) on its duty to scrutinize with utmost care the evidence of visual identification. Ultimately, it was also satisfied like the trial court that the identification of the appellant in the circumstances of the case was safe.

On our part we do not see any basis to fault any of the two courts below. The offence was committed at about 3.30 pm in broad daylight in a Nairobi street. PW1 was candid that she did not know the appellant before the incident. Her evidence, which the two courts below accepted, was that after the appellant’s accomplices robbed her of the money, she held onto the appellant as he made his escape. A few moments earlier the appellant had held her in a deadly chokehold in a bid to subdue her, while the other robbers relieved her of the money. As he ran away from her, she struggled with him, screamed and members of the public responded and arrested the appellant a short distance from where PW1 had been attacked. It was also the evidence of PW1 that she never lost sight of the appellant from the moment he escaped from her grip to the time when he was arrested. The chain of events from when the appellant freed himself from PW1 to when he was arrested was not broken and that evidence is therefore very assuring regarding the identification of the appellant. The person who had held PW1 in a chokehold was the same person who was arrested a short distance after escaping from PW1’s grip. (See *Safari Kombe v. Republic, Cr. App. No. 122 of 2014*). We do not find any merit in this ground of appeal.

What we have said above will also dispose of the appellant’s claim that the first appellate court failed to evaluate the evidence. The record speaks for itself that the court carefully reappraised the evidence as it addressed the issues raised by the appellant in the first appeal.

As regards the complaint that his defence was not adequately addressed, nothing is further from the truth. The trial court considered the appellant’s defence and rejected it in these terms:

“The accused person’s defence that he was being beaten by some other people because he had not given them their money for the scrap that he had been given to deliver is not tenable given the strong evidence of identification given by the prosecution as analyzed above. Though in law he is not under any obligation to prove anything, his defence did not cast any doubt on the prosecution evidence and the same is rejected.”

The first appellate court similarly evaluated the appellant’s defence and concluded:

“In light of the complainant’s evidence as to the circumstances of the appellant’s arrest set out above, the appellant’s defence that it was his colleagues who set upon him and beat him for not giving up the proceeds of the aluminium that he had delivered at Kamukunji is not tenable.”

Once again, in light of the foregoing, we are satisfied that this ground of appeal too is bereft of merit.

The last ground of appeal is that the courts below erred by failing to draw an adverse inference on the prosecution’s failure to call as witnesses, members of the public who arrested or witnessed the appellant’s arrest. First, under **section 143** of the **Evidence Act**, in the absence of a provision of law requiring a specific number of witnesses, no particular number is required to prove any fact. Secondly, as propounded in ***Bukenya v. Uganda [1972] EA 549***, the proposition that the court may draw an adverse inference from the prosecution’s failure to call important and readily available witnesses arises in cases where the evidence called by the prosecution is barely adequate. In ***Donald Majiwa Achilwa & 2 Others v. Republic, Cr. App. No 34 of 2006***, this Court explained the position thus:

“The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses’ evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case.”

In this case the evidence on record cannot by any stretch of imagination be described as barely adequate. PW1 and PW 2 testified to the circumstances under which the appellant was arrested and their evidence was accepted by the two courts below. In our view no purpose would have been served by calling other witnesses to repeat that evidence, which was already before the court.

For all the above reasons, we are satisfied that the appellant was properly convicted of the offence of robbery with violence as charged. We find no merit in this appeal and hereby dismiss it in its entirety. It is so ordered.

Dated and delivered at Nairobi this 14th day of July, 2017

R. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

K. M’INOTI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR