



IN THE COURT OF APPEAL

AT NYERI

(SITTING AT MERU)

(CORAM: WAKI, NAMBUYE & KIAGE, J.J.A)

CRIMINAL APPEAL NO. 40 OF 2016

BETWEEN

GEORGE MIRITI KALUNGE

MOSES MUTEMBEI KIRIMI.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Meru (Lesiit & Musyoka, JJ.) dated 31st November, 2013

in

HC.CRA. NO. 145 & 148 OF 2010)

JUDGMENT OF THE COURT

Even though the appellants through their learned advocate Mrs. Ntaragwi raised and argued some five identical grounds as captured in the supplementary memorandum of appeal dated 14th March 2017 in these second appeals, we intend to address only the first ground which is that;

“1. The learned Judges erred on point of law in failing to reconsider and evaluate before the trial court hence upheld the conviction which greatly prejudiced the appellant.”

The learned Judges (Lesiit and Musyoka JJ.) in dismissing the appellants’ appeals upheld the appellants’ convictionS and sentences of death imposed by the principal magistrate’s court for the robbery with violence they having robbed one **Peter Gitobu Miruki** of Kshs. 52,000 while armed with dangerous weapons namely stones during which they injured the complainant.

In arguing that ground of appeal **Mrs. Ntaragwi** submitted that the learned Judges did not subject the entire evidence to a thorough analysis and therefore failed to properly deal with the contradictions and inconsistencies that surrounded the appellants’ identification at the scene as the complainant’s assailants.

Counsel contended that there were serious conflicts in the evidence adduced with regard to caps left at the scene that allegedly belonged to the appellants, as well as the circumstances surrounding their alleged identification, including the fact and intensity of moonlight, and whether they were conducive to a positive and safe identification. Counsel was of the view that there were details of evidence that the learned Judges needed to interrogate so as to properly discharge their duty, but they failed to do so.

Even though **Mr. Mungai**, the learned senior prosecuting counsel in opposing the appeal maintained that the appellants were properly convicted in his response to the entire appeal as argued, we think that the single ground we have identified is sufficient to dispose of the appeal without our having to go into its substantive evidentiary merits. In fact, we would go as far as to say that, properly-understood, the ground raises a jurisdictional question in so far as it questions whether or not the learned Judges discharged their primary duty which the appellants, who were moreover unrepresented by counsel before the learned Judges were entitled to expect. That duty has been restated in a long line of authorities of this Court and its predecessor. It was expressed in **OKENO vs. REPUBLIC** [1972] 32 at p 36; thus;

“The High Court on the face of it appears to have approached the matter on the basis of whether the magistrate’s findings could be supported by the evidence, instead of whether they should be supported. It is appropriate on a second appeal only to decide whether a judgment can be supported on the facts as found by the trial and first appellate courts, as this is purely a question of law. The first appellate court must reconsider the evidence, evaluate it itself and draw its own conclusions, in deciding whether the judgment of the trial court should be upheld, as well as course as deal with any questions of law raised on the appeal, see Selle v. Associated Motor Boat Co., [1968] E.A. 123.”

In **KILU & ANOTHER vs. REPUBLIC** [2005] 1 KLR 174 the same principles were adverted to and this Court proceeded to allow the appeal on the basis that it was quite clear that had the High Court and the lower court in that case properly analyzed the evidence, they would have seen obvious weaknesses in the evidence of the sole witness who had been called and who gave the impression from his conduct that he was not a straight-forward person but one of doubtful integrity so that it was unsafe to accept his evidence and use it as the only basis for convicting the appellant. The Court pointed out that as a second appellate court it was not enjoined to carry out that exercise of re-evaluation and analysis of the evidence.

In the case before us, we note that even though the learned Judges were aware of the duty imposed on them as a first appellate court and even cited this Court’s decision of **KINYANJUI vs. REPUBLIC** [2004] 2 KLR 364 where it was stated that the court must look at the evidence afresh and re-evaluate and re-examine the same before reaching its own conclusions, what they proceeded to do appears to us, with the greatest respect, to be a rather startling negation of those very guidelines. All the learned Judges did appears to have been a summarization of what the trial court found without the independent weighing, comparing, contrasting, questioning and interrogating that a fresh and exhaustive re-appraisal and re-evaluation should entail. All they said was this, and we think it was awfully inadequate given the kind of evidence that was presented at trial;

“We have perused the record of the lower court. It is our view that the evidence was overwhelmingly against the appellants. It was direct and damning. There is nothing that can be faulted about it. The complainant was attacked by persons who were known to him. He recognized them and called them by their names. These persons were the appellants. He gave the name of the first appellant to those who came to his aid shortly thereafter. The caps recovered at the scene were also positively linked with the appellants. There was evidence that several other witnesses met with the appellants shortly after that running away from the scene. The appellants were therefore clearly and positively identified as the assailants of the complainant space. This evidence was not shaken on cross-examination.”

As we should not and therefore cannot ourselves embark on an analysis and appraisal of matters of fact with a view to arriving at *de novo* conclusions thereon, a task which is outside our jurisdictional purview in view of **section 361** of the Criminal Procedure Code which restricts second appeals to matters of law only, we will not go into a consideration of the other grounds of appeal raised and urged before us.

Indeed, were we to go into them we would potentially embarrass the court that is by law entitled and require to engage in that exercise.

The case not being an obvious one that would have called for an acquittal, we are of the view that it would be in the interests of justice that the High Court be given the opportunity to properly discharge its duty as first appellate court.

We accordingly allow the appeal to the extent that we set aside the order dismissing the appellants' first appeal. We order that the file be remitted to the High Court at Meru for the hearing of the appeals of the two appellants by a properly constituted bench excluding Lesiit and Musyoka JJ. The appeals shall be mentioned before the High Court within *fourteen (14) days* of the date hereof with a view to fixing a date for the expeditious hearing and disposal of the said appeals.

Dated and delivered at Meru this 10th day of October, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR