



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 14 OF 2013(R)

BETWEEN

FRANCIS MAKOKHA MUSUMBA APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Kakamega (Chitembwe, J.) dated 27th day of February, 2013

in

HCCRA. NO. 105 OF 2010)

JUDGMENT OF THE COURT

1. The appellant, Francis Makhokha Musumba, was charged with the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code. He was tried by the Magistrates' court at Kakamega and convicted. He was thereafter sentenced to death.
2. The particulars of the offence were that on 17th October 2008 at Lulonda village, in central Kakamega, the appellant, jointly with others not before the court attempted to rob Aineas Ndombi Walter of cash while armed with a dangerous weapon.
3. His appeal to the High Court was dismissed on 27th February 2013. This is a second appeal, which under section 361 of the Criminal Procedure Code must be confined to matters of law. Learned counsel for the appellant, Mr. T. Adiso, was alive to that position as he urged the appeal on the ground that the lower courts erred in law in holding that the appellant was positively identified, having regard to the circumstances obtaining during the incident. He abandoned the other grounds set out in the memorandum of appeal.
4. Counsel cited numerous precedents, including **Allen vs. The Director of Public Prosecutions [2014] 1EA132**; **Ndalu vs. Republic [2014] 1EA 386** and **Mateso vs. Republic [2013] 1EA187** for the proposition that evidence of visual identification is of the weakest kind and most unreliable and should be acted upon cautiously when the court is satisfied that the evidence

is watertight and that all possibilities of mistaken identity are eliminated.

5. Learned prosecution counsel, Mr. E. Ketoo, on the other hand opposed the appeal, urging that the conditions were conducive for positive identification; that the complainant saw the appellant three meters away, and was able to identify him; that even though the intensity of the light is not indicated, identification was not erroneous; and that the evidence of the complainant was corroborated by that of his wife, PW2.
6. In view of those rival submissions, what then were the circumstances?
7. The complainant, Aineas Walter Ndombi, (Ndombi) a teacher at Naulu Primary School, recalled that on 17th October, 2008, he returned home after transacting banking business in Kakamega. After supper at about 8.00 pm he armed himself with a torch and staff to patrol his home. He exited the house from the back door and found a jacket on the veranda. He became suspicious. He decided to check the store. He shone his torch and saw three people about three meters away from where he was. The three tried to scare him. One of them pulled out a panga. Ndombi identified him as Tom Mboya Kangati (Tom). The other two were his cousin Francis Musumba, the appellant and his wife Loran Musumba. Tom aimed a panga at Ndombi. It struck his left shoulder inflicting a deep cut. Ndombi held Tom by the throat and attempted to wrestle the panga from him. In that process, Ndombi's right hand thumb sustained a cut. Francis hit him with a staff. All the while, the attackers were demanding money. Ndombi kept screaming.
8. Ndombi's wife heard the screams and went to the scene with a lantern lamp. Francis ran away, joining his wife Lorna who had taken off into a sugarcane farm nearby. Ndombi maintained his grip on Tom until members of the public came to the scene and beat up Tom to death. Thereafter Ndombi reported the matter at Navakholo Police Station before proceeding to Navakholo Health Centre for treatment.
9. Ndombi was later called to the police station after the appellant was arrested, where he confirmed to the police that the appellant was amongst his attackers. Ndombi was emphatic that the appellant was his cousin, he came from the same village and his name was Francis Makokha Musumba. He was categorical under cross examination that the appellant was among the three people in his compound that evening; that the appellant hit him with a staff and that he knew him well; and that he demanded money from him.
10. Ndombi's wife, Pamela Malala, a teacher at Nambacha Primary School, testified as PW 2. She was in her kitchen on 17th October 2008 at about 8.00 pm when her husband went out of the house. She then heard noise, took a lantern and went outside where she saw three people with her husband. She recognized the appellant and Lorna. She screamed while calling out their names. Francis was hitting her husband with a staff as he (her husband) held on to the third person. Lorna escaped into the sugarcane farm and was followed by Francis. Neighbours came to the scene and badly beat up the third person who was being held by her husband. They later reported the matter to the police station after which her husband was treated at Navakholo Health Centre. The appellant, to whom she referred by the names Francis Musumba, was well known to her. He was her former student.
11. Charles Lepas Morijo, PW3, a clinical officer at Navakholo Sub district hospital, testified that Ndombi was treated at that hospital with a history of having been assaulted on 17th October 2008 at about 10.00 p.m. by persons known to him.
12. Sergeant Augustine Mwakio, (PW4), testified that on 18th October 2008 at about 12.30 am, he was at Navakholo Police Post when Ndombi reported that he had been attacked at his home at about 8.00 pm on 17th October 2008; that he had struggled with one of the attackers, who was killed by members of the public, while the appellant, who was armed with a club, fled when neighbours intervened. PW4 was involved in collecting the body from the scene and taking it to

the mortuary. According to PW4, investigations were ongoing and the appellant was not arrested until 19th June 2009 in connection with stealing fertilizer and the following day Ndombi identified him. The appellant was subsequently charged.

13. In his defence, the appellant stated that he is a mason and a casual labourer. That on 19th June 2009 he was at work until 6.00 pm after which he went for tea; that a person by the name Levi borrowed a colleague's bicycle to carry fertilizer; that on his way home, he was told that some people had been held over fertilizer; that he was asked to go to the police station to record a statement; that he walked to Navakholo police station and was arrested alongside seven other young men.
14. After being held for ten days, the appellant went on to say, he was charged with an offence he knew nothing about. He stated that he did not know Ndombi; that PW2 was his teacher in the school where he dropped off in 1992; that it is unlikely that PW2 would have remembered him as he left school long time ago and there were many students. The appellant asserted that on 17th October 2008 at about 8.00 p.m when the attempted robbery allegedly took place, he was at home alone sleeping and he could not have been anywhere else. He denied he was married, least of all to Lorna. He maintained that he was innocent of the charges.
15. The learned trial magistrate, after considering the evidence, was not impressed by the credibility of the appellant, saying that he *"does not appear honest"* when he denied knowing the Ndombi who claimed he was his cousin. The magistrate preferred the evidence of PW 1 and 2 who struck him as honest witnesses. The trial court was satisfied that the appellant was positively identified. In the words of the trial magistrate, *"I am satisfied that although the events were at night the accused was positively identified by the complainant and his wife with the help of the lantern and the torch they had."*
16. On its part, the High Court upon hearing the first appeal was *"satisfied that PW1 and PW2 saw the attackers and knew them. PW 1 and PW 2 knew the attackers by their names and even knew their homes."* The court was reassured that the identification was by recognition.
17. There are therefore concurrent findings by the lower courts regarding the identification of the appellant and the conditions under which that identification was made. As this Court stated in **Adan MuraguriMungara vs. R [2010] eKLR**, we must:

"Pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."
18. Both Ndombi and PW 2 were not strangers to the appellant. Ndombi referred to the appellant as a cousin. PW2 on the other hand stated, and the appellant confirmed, that he was her former student. PW 2 had a lantern and PW1 had a torch that he shone recognizing all three assailants including the appellant. When Ndombi reported the matter to the police, he stated that he knew the attackers. PW3 also stated that Ndombi informed him that he knew his attackers. We think there was sufficient evidence on the basis of which the lower courts were satisfied that the appellant was positively identified.
19. The trial court expressed the view that it formed the impression that Ndombi and PW 2 were credible witnesses relative to the appellant. The trial court was better placed than we are to assess the credibility of the witnesses. In **R vs. Oyier, [1985] KLR 353** this Court held that an appellate court should not interfere with those findings by a lower court, which were based on the credibility of witnesses unless no reasonable tribunal could make such findings or it was shown that there existed errors of law. That was not shown to have been the case.
20. Regarding the argument that doubts as to the assailants' identity are further fuelled by the fact that

the appellant was not arrested until June 2009 despite the offence having been committed on 17th October 2008, and that if his identify was clear he should have been arrested earlier, we note that PW4 was not taken to task on the matter when cross examined regarding his assertion that investigations were ongoing until the arrest of the appellant in connection with a different matter.

21. As we have already noted, the finding by the trial court was that the appellant was positively identified. That finding is based on evidence. That displaces the contention that the appellant was elsewhere when the offence was committed.

22. We do not therefore have a basis for interfering with the decisions of the lower courts. The appeal fails and is dismissed.

Dated at Kisumu this 5th day of February, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR