IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 10 OF 2014

BETWEEN

BERNARD OUMA ABAI JAUGENYA.....1ST APPELLANT

PATRICK OMONDI OPONDO.....2ND APPELLANT

AGGREY OTIENO OYUGA.....3RD APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kisumu (Muchelule and Chemitei, JJ) dated 10th October 2013,

in

H.C.CR.A No.134 of 2012)

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JUDGMENT OF THE COURT

Bernard Ouma Abai Jaugenya, Patrick Omondi Opondo and Aggrey Otieno Ouma, the 1st , 2nd and 3rd appellants respectively, were jointly charged with the offence of robbery with violence contrary to ***section 296 (2)*** of the ***Penal Code***. The particulars of the offence were that on the 2nd August 2011 at Ulamba Sub-location in Siaya District within the former Nyanza Province, being jointly armed with clubs and rungus, they robbed Kennedy Ouma of a mobile phone make Nokia valued at Kshs. 5,500/-, cash Kshs. 6,000/- a torch valued at Kshs. 200/- and a blue jumper valued at Kshs. 300/- and immediately before or immediately after the robbery used actual violence on the complainant, ***Kennedy Ouma, PW2 (Kennedy).***

The appellants pleaded not guilty.

Upon consideration of the entire evidence, the learned trial magistrate, having found the charges against the appellants were proved to the required standard, convicted and sentenced them to death as by law prescribed.

The appellants, being aggrieved with the decision of the trial court, filed an appeal in the High Court against both the conviction and sentence.

The appeal came up for hearing in the High Court and was heard by (Muchelule and Chemitei, JJ,) who were satisfied that the prosecution had proved its case, dismissed the appeals and upheld the conviction and sentence.

The appellants were further aggrieved by the decision of the High Court and lodged this appeal which is before us on grounds that the High Court had failed to analyse the evidence and arrive at its own conclusion; that the burden of proof was shifted; and that the courts below did not take into account the appellants' evidence.

Mr. Indimuli, learned counsel for the appellants, informed us that the main complaint was that the High Court failed to reanalyze and revaluate the evidence in arriving at the convictions of the appellants, particularly on the issue of identification. Counsel submitted that the appellants' conviction was based on Kennedy's testimony that he recognized them. Counsel argued that this was not plausible, as, he had also testified that he did not identify any of the assailants as he was hit from behind. It was counsel's further submissions that when Kennedy together with ***Belinda Atieno Ouma, PW 3 (Belinda)*** and ***Joshua Onyango Randigo PW 4, (Joshua)*** returned to the scene with torches, they did not testify as to the intensity of the torchlight so as to be in a position to identify the assailants. Counsel concluded that as a consequence, the assailants were not properly identified.

Another issue was that the complainant's initial report contradicted his testimony and the charge sheet, as there was nothing to prove that Kshs. 6,000/- and a mobile phone were stolen from him. Finally, counsel contended that the lower courts did not take into account the appellants' alibi evidence.

Mr. Ketoo, learned counsel for the prosecution, opposed the appeal. Counsel countered regarding the alibi evidence that when the trial court and the High Court weighed this out against all the evidence adduced by the other witnesses, they found it to be insufficient and incapable of dislodging that evidence.

On the issue that the evidence was at variance, counsel stated that the complainant's evidence remained consistent as his testimony, as read together with the charge sheet and the statement showed that he was robbed of Kshs. 6000/- and a mobile phone.

Counsel further submitted that the P3 form produced by ***Nyamwembe Simon, PW 1,*** showed that the complainant had been subjected to violence as a result of which he had sustained serious injuries, which was sufficient proof that a violent robbery had taken place.

Finally, on the issue of recognition and identification, counsel submitted that the complainant's testimony showed that he was carrying a torch at the time of the incident, and that with it he saw three people who were well known to him. That, the 3rd appellant's orange marvin that he had been seen wearing during the day was recovered at the scene of the attack. Counsel concluded that the entire evidence pointed to the appellants as the people who had assaulted the complainant.

We have considered the evidence and the submissions of counsel, and are of the view that the issues for our consideration are whether the courts below subjected the evidenced to a re-evaluation in ascertaining whether the appellants were properly identified; and whether the courts below took into account the appellants' alibi evidence.

Beginning with the issue of identification, both the trial court and the High Court found that the appellants were properly identified through recognition.

In addressing the parameters for identification by way of recognition, this Court in ***Peter Musau v. Republic (2008) eKLR*** stated thus:-

"We do agree that for evidence of recognition to be relied upon, the witness claiming to

recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him, and thus to put a difference between recognition and identification of a stranger. He must show for example that the suspect had been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness in seeing the suspect at the time of the offence, can recall very well having seen him before the incident in question."

In the case of ***Terekali & another vs Republic [1952] EA*** the court stated that a first report by the complainant is a good test by which the truth and accuracy of a subsequent statement can be gauged.

According to Kennedy, on the night of the attack as he closed his shop he saw the three persons standing on the roadside near his shop. With the aid of his torchlight, he was able to identify them as the three appellants whom he knew. As he was walking home, he was suddenly hit with an object on his left jaw, and fell down. Kennedy testified that after he was attacked, he crawled to his grandmother's house where after recovering sufficiently he immediately informed Belinda and Joshua of the names of his assailants. He thereafter returned with them to the scene where the appellants were seen emerging from behind a bush. An orange marvin which Kennedy said he had seen the 3rd appellant wearing during the day was also retrieved from the scene.

Kennedy made a similar report of the attack and named his attackers to ***PC Dismas Makokha, PW 5,*** the next day. It was his evidence that he knew the 2nd appellant who was working in a nearby homestead, he also confirmed that he knew where the 1st appellant lived.

From this evidence, we can discern that Kennedy was attacked soon after closing his shop, where the only persons in the vicinity at the time were the appellants, whom he knew and recognised. After the attack, Kennedy again saw the appellants at the scene when he returned with Brenda and Joshua. He immediately reported the appellants' names to Belinda and Joshua to whom he recounted his ordeal, and to PC Dismas Makokha when he reported the attack to the police.

In our view, the appellants, being the only persons who were seen by Kennedy immediately prior to, and following the attack, ruled out the possibility of the attack having been perpetrated by other persons. We further consider that the evidence that he did not identify the person who attacked him should be construed to mean that, he did not see exactly which of the three appellants hit him, not that the appellants' identities were unbeknown to him. They were persons he knew and recognized. He immediately named them in a first report made to both Brenda and Joshua and to the police.

When this evidence is considered in the light of the retrieval of orange marvin at the scene, which the 3rd appellant did not deny belonged to him, we find that this effectively placed the appellants at the scene of attack. As such, the only conclusion that can be reached is that, Kennedy positively identified the three appellants as the persons who attacked him on the material night. We find that when all the evidence is taken into account, this ground fails.

The next issue was that the prosecution had not adduced any evidence to prove that the complainant had been robbed.

Section 296(2) of the Penal Code details the ingredients appertaining to a charge of robbery with violence. These are where the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other personal violence to any person, he shall be sentenced to death.

In ***Johana Ndungu v. Republic, Criminal Appeal No. 116 of 1995,*** this Court sets out the requirements in these words:-

"(i) Therefore, the existence of the afore described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.

(1)If the offender is armed with any dangerous or offensive weapon or instrument, or

(2)If he is in company with one or more other person or persons or

(3)If, at or immediately before or immediately after the time of the robbery, he wounds, beats , strikes or uses any other violence to any person."

Evidently, to secure a conviction, the court need only establish the presence of at least one of the ingredients.

Kennedy was attacked by assailants and suffered injuries to his left jaw. Nyamwembe Simon, the clinical officer, presented a P3 form that corroborated this evidence. The report indicated that Kennedy had suffered injuries on his face inflicted by a blunt weapon. Belinda and Joshua's evidence also corroborated the fact of the sustained injuries. The statement, charge sheet, and the report made to PC Dismas Makokha which stated that Kennedy was robbed of a mobile phone and cash of Kshs. 6,000/- further fortifies the evidence of an attack and robbery. Based on the concurrent findings of the trial court and High Court that Kennedy was attacked and robbed by the three appellants on the night in question, we find no reason to interfere with those decisions and this ground fails.

The contention that the complainant's evidence was inconsistent was considered by the High Court which found that there were no contradictions between the charge sheet, the complainant's report and his testimony all of which indicated that Kennedy was robbed of Kshs. 6000/- and a mobile phone valued at Kshs. 5,500/- make Nokia a torch and a jumper. Likewise we can find no inconsistencies in that evidence and dismiss this ground.

With respect to the issue that the appellants' alibi evidence was not considered, the High Court stated thus;

"The alibi raised by the appellants in our opinion does not stand. They were each unable to explain where they were on the material day."

In his defence, the 1st appellant stated that he left home to buy paraffin at Ngiya market and returned home at 7pm. The 2nd appellant stated that he works in Ngiya where he makes bricks and that he was arrested on 3rd August 2011. The 3rd appellant stated that he resides in Gem where he is involved in construction, and that on 5th August he was arrested. We are satisfied that the High Court took into account the appellant's defence and rightly concluded that, since the offence was committed on the 2nd August 2011, and the appellants only testified as to their whereabouts on 3rd and 5th August 2011, the question of alibi evidence could not be said to arise. There being no alibi evidence placed before the court, we find that this ground lacks merit.

From the aforegoing, we find that the lower courts properly analysed and reevaluated the evidence which pointed to the appellants as being responsible for the attack, and as a consequence we have no reason to interfere with their concurrent findings.

As such, the appeal has no merit and is accordingly dismissed.

It is so ordered.

Dated and delivered at Kisumu this 27th day of May, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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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.

DEPUTY REGISTRAR