IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 380 OF 2010

BETWEEN

KHAMISI KATANA CHARO ……APPELLANT

AND

REPUBLIC …….....……...RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Ibrahim & Ojwang, JJ.)

in

H.C.CRA. No. 185 of 2007.)

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JUDGMENT OF THE COURT

The charge preferred against the appellant in the Chief Magistrate's Court at Mombasa, was one of robbery with violence contrary to **Section 296(2)** of the Penal Code. It was alleged that the appellant on 1st July, 2004 at about midnight at Wema area of Bamburi Location within Mombasa District of the Coast Province, jointly with others not before court, whilst armed with dangerous weapons namely rungus and pangas robbed, **Judith Abuga**, "*the complainant*" of two radio cassettes, one mobile phone and Kshs.2,000/- cash, and at or immediately before the time of such robbery wounded the said complainant.

On 24th July, 2006 when the appellant was presented in court to answer to the charge, he entered a plea of not guilty and soon thereafter his trial ensued. The complainant was a clerk at the Kenya Ports Authority and was a resident of Kingsway Estate in Bamburi, Mombasa. On 1st July, 2004 at about 12.30 a.m., she was asleep in her house with members of her family that included her daughters, **Gladys Wanjiku** (PW 2) and **Mwanahamisi Rama** (PW 4), husband, **Ramadhan Mbaya** (PW 3) and son, **Salim Ramadhan** (PW 5), when she heard pandemonium outside her bedroom window. She peeped through the window and with the assistance of the security lights illuminating the area, saw a gang of people unleashing violence on the caretaker of the residence, **Mzee Katana**, deceased. From the gang he positively recognized the appellant among them. By then he had dreadlocks and was commonly known and or referred to in the neighbourhood as "**Rasta**." He was the gang leader or the in charge as he ordered and directed the operations of the gang. Surprisingly, the deceased was his father. Somehow, the deceased managed to extricate himself from the grip of the gangsters and ran for his dear life. The appellant then

directed the gang to the house of the complainant. They forced open the main door. The complainant fled from her bedroom to the sitting room and hid under a table. Upon entering the house, the gangsters headed straight for the bedroom with the appellant, who apparently knew the house inside out telling them; "*this is the bedroom of Judith*." The house was located in a site that was still under construction. Apparently when the complainant and her family rented the unit which was complete, it was the appellant who led them in; he had been a casual worker at the construction site and occasionally ran errands for the complainant and her family, hence their familiarity with him both by voice as well as visual recognition.

When the gangsters missed the complainant, they set upon PW 3 who had taken refuge in the bathroom and hit him senseless. Just like the complainant, his attention had been drawn to the screams that were emanating from the caretaker's sentry box. When he peeped through the window in the same bedroom he also witnessed the caretaker being cut with pangas by a gang of people. One member of the gang stood out, he was the appellant, the son of the caretaker. He stood out because of his dreadlocks. The security lights outside assisted him to recognize him. As the gang attacked PW 3, they were demanding payment of Kshs.100,000/-When he could not part with the amount, they took his driving licence, identity card, and motor vehicle licence. They also demanded of him to show them the whereabouts of the complainant but this was not before they had dragged PW 5 from his bedroom and battered him as well. Both PW 3 and PW 5 noticed that the appellant was the ringleader of the gang. The electricity light was on in the house and in the bedroom. This is what enabled them to recognize the appellant in the gang. Indeed, he hit PW 5 when he looked at him. He knew his nickname as "*Rasta*" and used to work for them. He also knew that he was the son of the caretaker.

Last among those who recognized the appellant at the scene of crime was PW 4. She witnessed the attack on their house by a gang, among them was one man she recognized, namely the appellant whom she referred to as "*Rasta*". She was familiar with the appellant as he used to do manual work in the neighbourhood. There was security light where the appellant stood during the commission of the crime. That when the gang entered the house, she immediately recognized the appellant. That she knew the appellant by appearance as well as by voice.

Since the gang had not traced the complainant in the bedroom, they went looking for her everywhere in the house. They came across her hiding under a table and as they went for her, she ran out of the house but unfortunately fell in a ditch and the gang caught up with her and cut her twice on the head and also shot an arrow into her abdomen. They demanded from her Kshs.100,000/-. When she pleaded her inability to raise the amount, they viciously assaulted her and dragged her back to the bedroom. The gang and in particular the appellant ransacked her handbag and took from it Kshs.2,700/- hitting her once again on the head with a metal bar before taking her cell phone and radio from the bedroom. Done, the gang retreated into the night.

As the robbery was in progress, a neighbour, **Milton Mbogoli** (PW 9), reacted to the screams and went out of his house and called the police on his cell phone. After 15 minutes the police officers from Bamburi Police Station led by **PC Andrew Thiga** (PW 6) arrived at the scene. They found the gang having left but were informed that the ringleader of the gang was none other than the appellant. They unsuccessfully used police dogs to truck down the gang.

Immediately the gang left, both the complainant and the caretaker were rushed to Aga Khan Hospital and Jerusalem Hospital respectively, both in Mombasa, where they were admitted and treated. Unfortunately, the caretaker passed on five days later whilst undergoing treatment. When the complainant recovered, she went to see **Dr. Saidi** then attached to Coast General Hospital for purposes of filling the P3 Form. The form was however tendered in evidence by **Dr. Lawrence Ngure** (PW 7) on his behalf. According to Dr. Saidi, the complainant sustained compound fracture of frontal skull bone, cut wounds on the left side of the head and also nasal bridge. He assessed the degree of injury as maim and the weapon used as a sharp object.

Though the caretaker had been seriously injured when PW 9 came across him, he was however able to speak. He informed PW 9 that he had been attacked by his son, the appellant. The witness also knew the appellant as he too used to hire him to do manual jobs. The following morning, the appellant came

calling on PW 3 and requested him to assist him with some money so that he could take his ailing father to hospital. When PW 4 saw the appellant approach their house, he rushed to PW 9 and alerted him. PW 9 in turn contacted the police who soon came and arrested the appellant having been pointed out by PW 9. The appellant was subsequently charged as already stated.

In his unsworn statement of defence, the appellant stated that he was arrested by police officers on 2nd July, 2004 as he went to collect money from his ailing father's employer. As he waited he saw a police vehicle approach. He was asked where he had spent the night before and when he did not answer, he was bundled in the vehicle and taken to the police station where he was subsequently charged with an offence he knew nothing about.

After reviewing the entire evidence both for the prosecution and defence, **Hon. T. Mwangi**, Senior Resident Magistrate, took the view that the prosecution case was watertight and proved beyond reasonable doubt and that the appellant, jointly with others while armed with dangerous weapons, attacked and robbed the complainant of the valuables listed in the charge sheet. She accordingly rejected the defence, convicted the appellant of the offence and sentenced him to death.

The appellant was aggrieved by the conviction and sentence. He lodged an appeal in the High Court of Kenya at Mombasa. That appeal was in due time heard and determined. **Ibrahim** & **Ojwang JJ.** (as they then were) in a judgment delivered on 21st September 2010, dismissed the appeal. That dismissal precipitated the instant appeal on one ground argued by **Miss Otieno**, learned counsel for the appellant. Learned counsel, however, argued other grounds as demonstrated later in this judgment. The ground was, failure by the Judges of the High Court to discharge their duty to properly analyse and re-evaluate the evidence thereby drawing wrong conclusions on the appeal before them.

Submitting in support thereof, counsel maintained that there were material inconsistences in the testimonies of the prosecution witnesses that created doubts thereby rendering the conviction of the appellant unsafe. Some of the inconsistencies alluded to were, whether the appellant was arrested on 21st July, 2006 or 1st July, 2004 as testified to by PW 8 and PW 9; that the offence having been committed on 1st July, 2004, why was the appellant arraigned in court on 24th July, 2006, a period of about two years without the prosecution offering any explanation to the court and or to the appellant? That this unexplained delay meant that the appellant was not accorded a fair trial; that the items listed as stolen in the charge sheet were not proved to have belonged to the complainant in terms of **Section 117** of the Evidence Act; and that in the circumstances it was doubtful whether there was indeed a robbery and any of the items stolen. There were also contradictions as to where the offence was committed. That the charge sheet talked of Wema as the place of the robbery but the complainants and other witnesses referred to Kingsway Estate or Bamburi. Counsel submitted that these contradictions were not minor as to be cured by the provisions of **Section 382** of the Criminal Procedure Code.

Counsel further submitted that the circumstances obtaining at the scene of crime did not favour positive identification as the incident happened at night. That there was evidence that the streetlights were not well lit. That the participants in the robbery were many which must have caused fear and anxiety in the witnesses. Finally, there was no evidence as to how long the commission of the offence took. On the whole therefore, these circumstances could not have favoured positive recognition of the appellant according to counsel.

Responding **Mr. Monda,** learned Senior Assistant Director of Public Prosecutions, submitted that the High Court thoroughly evaluated the evidence as it set out in detail the prosecution as well as defence cases, and the respective submissions. The Court re-evaluated the evidence albeit in a different style. On the issue of violation of appellant's fair trial rights, counsel submitted that the High Court dealt with the issue and found that there was no material disclosure by the appellant during the trial as well as in the first appeal to enable the prosecution to respond to the complaint. That in any event, if indeed there was such delay, the appellant's remedy lay in damages but not an acquittal. On identification, counsel submitted that the conditions obtaining were favourable for positive recognition as there were security lights at the scene and the complainant, PW 3, PW 4 and PW 5 were only 5 metres from the scene. To counsel, the

two courts below properly directed themselves on the question of recognition and came to proper conclusion.

This is a second appeal. By dint of the provisions of **Section 361(2)** of the Criminal Procedure Code, our jurisdiction is confined to matters of law only, unless it be demonstrated to us that the first appellate court considered matters it ought not to have considered or that it failed to consider matters it ought to have considered or that looking at the entire decision on such matters the court was plainly wrong, in which case, our consideration of such matters amounts to considering matters of law as in such case, it would be accepted that the first appellate court failed to revisit the entire evidence that was before it a fresh, analyse it and evaluate it as is required of it in law in terms of **Okeno v Republic [1972] E.A 2**.

Though, counsel for the appellant in his opening remarks indicated that she was going to argue only one ground of appeal to wit; failure by the High Court to re-evaluate the evidence before it and reach its own conclusion, in the course of her submissions, she meandered or veered off and introduced other matters of law that we must determine. These were failure to arraign the appellant in court in good time and the identification of the appellant. These though were some of the grounds of appeal filed by the appellant in person but which counsel had elected to abandon.

On the first ground of appeal, we would say that we have carefully considered the ground and we do not think much of it. The manner in which the first appellate court must re-assess or re-evaluate the evidence tendered in the trial court is not a term of art which has a clear definition or format. As this Court has stated before, citing with approval the Ugandan case of **Uganda Breweries Ltd v Uganda Railways Corporation (EALR) [2002] 2** at page **641**:

> **"…..…There is no set format to which a re-evaluation of evidence by a first appellate court should conform. The extent and** (sic) **evaluation may be done depends on the manner in which the circumstances of each case and the style used by the first appellate court. In this regard, I shall refer to what this Court said in two cases. In Sembuya v Alponts Services Uganda Limited [1999] LLR 109 (SCU), Tsekoko JSC said at 11:-**
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> *'I would accept Mr. Bukenya's submissions if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first appellate court is expected to scrutinize and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the trial court.…'*
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> **In ODONGO AND ANOTHER V BONGE, SUPREME COURT OF UGANDA Civil Appeal No. 10 of 1987 (UR), Odoki JSC (as he then was) said: -** "while the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance." **I agree with the views expressed by the learned Justices of this Court in the two cases immediately referred to above."**

A thorough a perusal of the judgment of the High Court clearly shows that it subjected the evidence before it to exhaustive re-examination and no doubt reached its own independent conclusions on the evidence. It is however, correct to point out that the High Court adopted a rather peculiar and or unconventional method in doing so. It combined the summarization of the evidence before the trial with its evaluation thereof. But what is not in doubt at all is that the High Court approached the appeal with its duty as a first appellate court at the back of its mind. It appreciated that the appeal turned on the identification of the appellant by way of recognition. The High Court went to great length in examining the evidence of recognition as tendered by PW 1, PW 3, PW 4 and PW 5. It appreciated the fact that at the scene of crime, there was sufficient light provided by the security lights, that the appellant was well known to the witnesses and that even his own father had told PW 9 that he had been attacked by his own son, the appellant. Concluding on the question of recognition of the appellant, the High Court delivered itself thus:

> **"…This court has carefully considered the evidence, and come to the conclusion not only that**

the complainant and her family were subjected to colossal brutality on the material night, but also that one of the perpetrators of the assaults and robberies was indeed the appellant herein; he was well known to the complainant and her family, and was readily identified by both sight and hearing, and there could be no mistaken identity.

Therefore, we come to the conclusion that the trial court arrived at the correct finding, and applied the law accordingly."

The appellant took issue with this paragraph of the judgment. To him this was the only paragraph that attempted to deal with the re-evaluation of the evidence by the High Court. However, this is not correct at all. This was only a culmination of the style adopted by the High Court in performing its statutory duty aforesaid and already adverted to. It is self evident that indeed the High Court performed the duty albeit using a different format.

A demonstration of failure by the trial court in its duty was the alleged inconsistencies in the evidence of the prosecution. There may have been inconsistencies but, in our view they were minor and did not go to the root of the prosecution case. They can be ignored and in any event are curable by virtue of the provisions of **Section 382** of the Criminal Procedure Code. There is no doubt at all that a robbery was committed on the complainant and some of her valuables stolen. So that a confusion in the date of arrest, when and where the offence was committed, when the appellant was arraigned in court and the ownership and description of the properties in the charge sheet are really immaterial. In any event, they are matters of fact which we are not bound to consider at this stage. This ground of appeal must therefore fail.

Regarding the alleged violation of the appellant's constitutional rights to a fair hearing on account of being held in police custody for well over two years before he was arraigned in court, the appellant's own submissions before the High Court debunks that submission. Before the High Court he submitted thus:-

"…I was arrested on 1/7/2004 and was taken to Court No.2. I was released and acquitted. I was then released and arrested outside the court. I was charged before Court No.4 on 24/07/2004…."

This is as captured by Ibrahim, J. in his notes. As for Ojwang, J. he noted thus in his notes;-

"Appellant: 1/7/04 is when I was arrested. I was then left. I was arrested again. 24/7/04 I was taken to court again…."

It appears therefore that contrary to the submissions of the appellant, he was arraigned in court in good time. We can only say that the record showing that the appellant was first brought to court on 24th July, 2006 having been arrested on 1st July, 2004 is either inaccurate or it has deliberately been tampered with or manipulated for ulterior motives. Even assuming that what the appellant submitted was true, it would fly in the face of what appears in the charge sheet itself. The charge sheet shows that the appellant was arrested on 21st July, 2006 for an offence he committed on 1st July, 2004. The charge sheet further shows that he was arraigned in court on 24th July, 2006 which tallies with record of the trial court. If that be the case then the appellant was certainly charged well within the time lines set by the repealed Constitution. So that whichever way one looks at it, the appellant was brought to court within the timelines set by law. Again, even if it had been the case that the appellant suffered pre-trial violation of his constitutional rights, his remedy lay in a claim for damages and not in an acquittal as was held by this Court in **Julius Kamau Mbugua v Republic [2010] eKLR**. However, and as stated in the same decision, there may be occasions when such pre-trial violations might entitle to an acquittal of the accused. This Court stated:-

"…..However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial – related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost

memory, in such cases, the trial court could give the appropriate protection - like an acquittal…."

In the circumstances of this case however, we do not think that the two courts were confronted with such scenario. Ultimately therefore this ground is bereft of merit and is accordingly, dismissed.

Next is the question of identification of the appellant. The law is now well settled on the standard of care that the court needs to exercise before relying on and convicting an accused person on the evidence of visual identification or even of recognition, though identification by recognition is more assuring than identification of a stranger, particularly under difficult circumstances, say, at night. Of course this is not to say that a conviction cannot be founded on such evidence but all that is required is extra vigilance, care, caution and absolute assurance that the witnesses are credible and reliable. In the case of **Wamunga v Republic [1989] KLR**, this Court differently constituted had this to say:-

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it a basis of a conviction…"

In this case, we have already observed that the incident took place at night. However, both courts below formed concurrent opinions that at the scene of crime there were security lights; that PW 1, PW 3 PW 4 and PW 5 all saw the appellant amongst the gang; that he had dreadlocks; that they all knew the appellant very well as "*Rasta*" prior to the attack; that the appellant used to be hired for casual work by the complainant and some of the witnesses; that the appellant knew the house of the complainant inside out and that is why he could even tell who was sleeping in which room; and that he even directed fellow gangsters to the girls' room and that of the complainant. They further concurrently found that having known the appellant prior they were conversant with his voice and were thus unlikely to mistake him for someone else. Finally, the two courts found that the caretaker had confirmed to PW 9 that among the gang who attacked him was his son, the appellant. It is this very same gang that also attacked and robbed the complainant.

We have no reason to depart from these concurrent findings. Indeed, they were supported by the evidence. There is no evidence on record contrary to the submissions by the appellant that the security lights were not well lit. Yes, the gang was made up of many people. Ordinarily, that would pose a challenge when it comes to identification and or even recognition of one or all of them. However, in the circumstances of this case, the appellant stood out, he was the gang leader and directed operations. He had dreadlocks. He was not disguised at all, he came into close proximity with the recognizing witnesses in their house which had electricity lights on and their encounter in the house was not fleeting but took a while. Given these circumstances, we are satisfied just like the two courts below that the circumstances obtaining at the scene of crime made for positive recognition of the appellant.

The upshot is that the appeal has no merit and we order that it shall be and is hereby dismissed in its entirety.

Dated and delivered at Malindi this 15th day of July, 2016

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR