



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, (PCA), VISRAM & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 40 OF 2008

BETWEEN

DANIEL MWANGI WAMBUI APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ojwang & Dulu, JJ) delivered on 15th April, 2008 in

H.C.CR. A NO. 238 OF 2005)

JUDGMENT OF THE COURT

The appellant **DANIEL MWANGI WAMBUI** was charged with three counts of the offences of robbery contrary to section 296(2) of the Penal Code. The particulars in count 1 were that on the 3rd day of June, 2004 at Kinoo village in Kiambu District, within Central Province jointly with others not before court being armed with offensive weapons namely iron bars and rungas, robbed **GEORGE OMONDI OTIENO**, one Radio Sony, one iron box, two pairs of shoes and one half coat jacket all to the total value of Kshs. 21,550.00 and at immediately before or immediately after the time of such robbery threatened to use actual violence to the said **GEORGE OMONDI OTIENO**.

In Count II, the particulars were that on the 3rd day of June, 2004, at Kinoo village in Kiambu District, within Central Province jointly with others not before court being armed with offensive weapons namely iron bars and rungas robbed **LUCY WANGARI THUO** her T.V Set (JVC,) and one Radio all to the total value of Kshs. 17,500.00 and at immediately before or immediately after the time of such robbery threatened to sue actual violence to the said **LUCY WANGARI THUO**.

Whilst in Count III the particulars were that on the 3rd day of June, 2004 at Kinoo Village in Kiambu District, within Central Province jointly with others not before court being armed with offensive weapons namely iron bars and rungas robbed **ANN NZOKI NJOROGE** her mobile phone (NOKIA 8210), Radio Sony, and cash all to the total value of Kshs. 24,000.00 and it immediately before or immediately after the time of such robbery threatened to use actual violence to the said **ANN NZOKI NJOROGE**.

The trial proceeded before Mrs. M. W. Murage then Principal Magistrate, Kikuyu who recorded the

evidence of **VICTORY MUSANI OTIENO, PW1; LUCY WANGARI, PW2; ANN NJOKI NJOROGI, PW3; JOAN WAMBUI MBUGUA, PW4; P.C. FREDRICK ODERO, PW5; GEORGE OMONDI, PW6** and that of **PAUL MUTETI, PW7**. On 1st December, 2004 the appellant was found to have a case to answer whereupon he elected to make a sworn statement of defence. In a one page judgment delivered on 13th April, 2005 the appellant was found guilty of the three counts of robbery and was **“... sentenced to death in the three counts as provided by law.”**

The appellant was dissatisfied with the outcome of his trial and he preferred an appeal. On 15th April, 2008, Ojwang, J (as he then was) and Dulu, J dismissed the appellant’s appeal thus provoking the appeal before us.

The appeal came for hearing before us on 4th October, 2016. Mr. Kariu learned counsel for the appellant urged two grounds. Firstly, it was learned counsel’s contention that the appellant was not positively identified and secondly that the charges against the appellant were not proved beyond reasonable doubt.

Mr. Muriuki, the learned Senior Principal Prosecution Counsel on behalf of the State opposed the appeal. He urged us to find that the appellant’s identification was by recognition and that the charges against the appellant were proved beyond reasonable doubt.

The appeal before us is a second appeal. The position at law as regards a second appeal is that our mandate under Section 361 (1) of the Criminal Procedure Code is limited to consideration of matters of law only. In **Karingo v Republic [1982] KLR 213**, the court restated the principles upon which such an appeal is considered as follows:-

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence

on which the trial court could find as it did, (Reuben Karari s/o Karanja versus Republic [1950] 17 (EACA 146)”

In **Okeno v Republic [1972] EA 32**, the duty of a first appellate court was stated as thus:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya -vs- R [1957], EA 336), and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala-vs- R [1975], EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported.”

Hence, there is an obligation on the first appellate court to re-consider and re-evaluate the evidence tendered during the trial and come to its own conclusion and this creates a corresponding right to which an appellant has a legitimate expectation. If the first appellate court fails to fulfill this obligation then this becomes a matter of law.

On our part we have carefully looked at the record and scrutinized the proceedings of the trial court. The conviction of the appellant was based on the evidence of PW1, PW2, PW3 and PW6 who all said they identified the appellant. The time of the commission of the offence was around 2.00 a.m. The complainants were attacked by many people who impersonated Police Officers. These thugs hit the security light that was outside the complainants’ houses. PW1 said she identified the appellant using torch light. On the other hand, PW2 and PW3 said they identified the appellant as their lights were on. PW2 told the trial court that she had known the appellant before as he **“... normally roam (sic) at the barber’s shop,”** whilst PW3 said that the appellant had fetched water for her once. It therefore follows that the

PW2's and PW3's "**knowledge**" of the appellant (if any) was indeed minimal. Is it possible that they mistook him to have been one of the thugs that robbed them on that night? It would appear to us that this possibility cannot be ruled out. More so when we note that the appellant was arrested from his house barely less than an hour from the time of the robbery and yet no item of that robbery was found in his possession. Indeed, the prosecution "**corroborated**" their evidence by stating that the appellant wore a jacket that was identified by the complainants. However, the High Court noted that different witnesses said different things as to the colour of the jacket the appellant was said to have been wearing on that night. In analyzing this evidence the first appellate court is on record stating as follows: "**... In the light of judicial notice which we hereby take, that the dark colour of the jacket could, at night have erroneously been thought by different observers to be green or blue or black.**"

Is it also possible, given that this offence was committed during the hours of darkness that some witnesses may have erred in thinking that the appellant was one of the assailants? The possibility of mistaken identity cannot be ruled out bearing in mind that the witnesses saw the same jacket as being "**green, blue or black.**"

We further note that the proceedings in the trial court do not show that it addressed itself on the intensity of the light and whether the duration of time that the appellant is said to have spent with the complainants was sufficient for positive identification. Moreover, PW2's and PW3's contention that they had known the appellant was not fully interrogated. PW2 stated that she used to see the appellant roaming at the barber's shop whilst PW3 said she had sent him to fetch water once. Was this sufficient for one to say that they knew the appellant? It would appear to us that the appellant was not previously well known by the complainants. PW 2 and PW3 did not know the appellant by name. The appellant was removed from his house where he was found sleeping. The possibility of a mistaken identity cannot be overruled. It is also disturbing to note that the trial court in its judgment made adverse comments on the appellant's defence. It stated:

"Accused has not challenged this evidence. ... His defence tells how he was arrested."

With respect to the trial magistrate, it has been said without number that the onus of proof is on the prosecution and an accused person is under no obligation to prove his innocence **Woolington v DPP 1935 AC 462**. It was therefore wrong to have demanded that the appellant "**challenge**" the prosecution evidence so as to prove his innocence. It cannot be said that the failure to do so lends credence to the prosecution case. It was not for the appellant to fill gaps in the prosecution case.

It is therefore our considered view that the 1st appellate court failed to re-analyse and re-evaluate the evidence adduced at the trial court, as had they done so, they would have arrived at a different conclusion. As stated above, this failure becomes a matter of law and hence gives us the mandate as stipulated in Section 361(1) of the Criminal Procedure Code.

We believe we have said enough to show that this appeal is for allowing. Accordingly, the conviction and the sentence of the appellant is hereby set aside. He is to be forthwith released unless he is otherwise lawfully held.

Dated at Nairobi this 2nd day of December, 2016.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR