



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)**

**CRIMINAL APPEAL NO. 188 OF 2010**

**BETWEEN**

**DOUGLAS OGUTU OTOLA .....APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a Judgment and Orders of the High Court of Kenya at*

*Kisumu (Karanja & Aroni J) dated 25<sup>th</sup> May, 2010*

**in**

**HCCRA No. 36 OF 2009**

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**JUDGEMENT OF THE COURT**

This is a second appeal and by dint of Section 361 (1) (a) of the Criminal Procedure Code we are enjoined to consider only issues of law and pay homage to findings of fact by the two courts below - **Stephen M'Riungu & others v Republic (1982-88) I KAR 360** where this court stated that:

**“This being a second appeal, we are reminded of our primary role as the second appellate court namely to steer clear of all issues of facts and only concern ourselves with issues of law...”**

The appellant Douglas Ogutu Otolola was charged before the Chief Magistrates' Court, Kisumu, with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. It was alleged in the charge sheet that on 12<sup>th</sup> day of April, 2008 at Milimani estate in Kisumu while armed with a dangerous weapon namely a knife he robbed Caleb Owino Achieng of a motor cycle silver grey in colour registration number KBB 120 J valued at Kshs. 75,000/= and that at or immediately before or immediately after the time of such robbery he threatened to use actual violence against the said complainant.

A trial was conducted by the learned Chief Magistrate (B. Olao) who in a judgement delivered on 27<sup>th</sup> February, 2009 convicted the appellant and sentenced him to death. Those findings were challenged

by the appellant in an appeal filed at the High Court of Kenya, Kisumu, but the appeal was dismissed in the judgement delivered on 25<sup>th</sup> May, 2010 (J.R. Karanja and A. A. Aroni, JJ). That dismissal provoked this appeal premised on three grounds of appeal contained in the Memorandum of Appeal drawn by learned counsel for the appellant. In the first ground the first appellate court is faulted for failing to critically analyse the evidence as a whole to arrive at its own conclusions while in the second ground it is stated that the court erred in law in disregarding the evidence tendered by the defence thus prejudicing the appellant. In the last ground it is stated that the High Court shifted the burden of proof contrary to law.

As stated at the beginning of this judgement our duty is to consider whether there are issues of law made out to satisfy our jurisdictional mandate to consider this appeal. We will therefore consider the facts made out in the case before the trial magistrate to see how those facts were treated and whether the High Court, as first appellate court, re-evaluated the same as it was bound to do in terms of its jurisdiction.

The following facts were established by the two courts.

At about 2:00 p.m. on 12<sup>th</sup> April, 2008 **Caleb Owino Achieng (PW1) (Achieng)**, an electrician and motor cycle taxi driver, was riding a motor cycle KBB 120 J owned by **Benard Ongele (PW2) (Ongele)**. He had been given that motor cycle to operate that day by **Godfrey Ouma Okongo (PW3) (Okongo)** who normally operated it. Achieng got a customer who he dropped at Kaloleni after which he got another customer who the prosecution alleged was the appellant. The appellant asked Achieng to take him to various places in Kisumu on negotiated and agreed fares. On the way to Dunga the appellant asked Achieng if he could drive the motor cycle and Achieng agreed. As the appellant drove the motor cycle he pretended to pay a balance of the fare to Achieng but he deliberately dropped it. Achieng, suspecting nothing, alighted to pick the money but was surprised to see the appellant produce a knife which he threatened him with and the appellant then engaged gears and drove away very fast. Achieng shouted for help which alerted security guards guarding premises nearby but a car chase did not yield anything as the appellant had disappeared. None of these guards were called to testify as the investigating officer **No. 73530 P C Anthony Baraza (PW4) ( the police officer)** did not believe they could give any useful evidence in the case.

Okongo testified further that he gave Achieng the motor cycle on that day and in his own words:

**“... I recall 12.4.08 I gave it Caleb to take a customer to Kaloleni. I saw the customer. He is the accused in the dock ..”**

Both Achieng and Okongo were arrested upon a complaint to police by Ongele but were released a few days for investigations to continue.

On 26<sup>th</sup> May, 2008, about 1 ½ months after the incident, Achieng was at a bus stage in Kisumu when he recognized the appellant as the person who had robbed him of the motor cycle. He decided not to confront the appellant on his own so he called Okongo and another unidentified man and they apprehended him and finally handed him to the police officer who arrested him, detained him at Kisumu Police Station and later charged him with the said offence.

That was the case made out by the prosecution upon which the appellant was called upon to answer and in an unsworn statement the appellant, a tout with Safe Drive Coaches, narrated how at 4.00 p.m on 25<sup>th</sup> May, 2008 he was called by his friend Vincent and believed that he was being called to collect a customer. When he reached where Vincent was he saw Achieng who accused him of having robbed him of a motor cycle. He was frog matched to Kisumu Police Station where he denied the offence which denial he maintained before the trial magistrate.

When the appeal came for hearing before us on 9<sup>th</sup> December, 2014 Mr. H. B. Indimuli, learned counsel for the appellant in urging the appeal consolidated all the grounds of appeal and argued them

together. Learned counsel cited what he saw as various contradictions in the prosecution case and attacked the findings of the first appellate court which in his view failed to notice such contradictions as in the evidence of Achieng who said that he ferried a customer before taking the appellant whereas Okongo stated that he saw the appellant on the fateful day.

Mr. L. K. Sirtuy, the learned Principal Prosecuting Counsel, in opposing the appeal, thought that the first appellate court had carried out its mandate as required in re-evaluating the evidence and finding that identification had been properly established because the appellant and Achieng had been together for more than 1 ½ hours.

Learned counsel for the appellant, in reply, wondered how identification had been established when Achieng had not given any description to the police in the case where the appellant was apprehended by members of the public.

On the issue of identification the learned trial magistrate found that although evidence of Achieng was that of a single witness it was made in circumstances that were not difficult and were favourable because it was in the afternoon and Achieng and the appellant had some considerable time together as they moved from place to place. The trial magistrate also found and held that:

**“... Besides, it is also clear from the evidence of Godfrey (PW3) that when he (accused) first approached the complainant to take him to Kaloleni, he (Godfrey) was present and saw the accused well. Therefore, even if there was any doubt about the veracity of complainant's evidence of identification of the accused, (which there isn't), there is ample corroboration of that evidence in the testimony of Godfrey (PW3)...”**

The learned judges on the first appeal on re-evaluating the evidence held as much.

From the record, and as we have already referred to the same in this judgment, Achieng stated that he was given the motor cycle by Okongo at 2.00 p.m to use as a taxi and that upon taking delivery of the same he, in his own words asserted:

**“... So I went to Kaloleni and got a customer back to town. After dropping him I was stopped by another man posing as a customer...”**

Okongo testified that:

**“... I recall on 12.4.08 I gave it to Caleb to take a customer to Kaloleni. I saw the customer. He is the accused in the dock..”**

Those two pieces of evidence were totally contradictory. It was not practically possible for Achieng to have taken delivery of the motor cycle from Okongo, ferry a customer to Kaloleni and upon being stopped by the appellant in or about Kaloleni Okongo be around to see or observe the appellant negotiating for a fare with Achieng. Okongo obviously lied when he testified that he saw the appellant being ferried by Achieng. His evidence should not have been believed at all by the two courts below and the High Court, on first appeal, with respect failed in its duty of re-evaluating the evidence to see that the evidence of Achieng and Okongo was contradictory and could not be relied upon. In the absence of Okongos' evidence the only other evidence was that of Achieng which was not corroborated. He allegedly identified the appellant about 1 ½ months after the attack and even then, he could not confront him but had to call Okongo, a possible accomplice in the theft of the motor cycle, to apprehend the appellant. Added to this was the allegation that security guards were alerted by Achieng following an alleged robbery who gave chase in a car but could not catch up with the thief. None of these guards were called and the trial court and the first appeal court, should have wondered whether the whole incident was not a product of Achiengs' fertile imagination.

We agree with learned counsel for the appellant that the first appellate court failed in its duty of re-evaluating the evidence to reach its own conclusions in the appeal before it. This appeal therefore

succeeds and is hereby allowed. The appellant shall be set free forthwith unless otherwise lawfully held.

*Dated and Delivered at Kisumu this 12<sup>th</sup> day of February, 2015.*

**D. MARAGA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**