



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJA.)

CRIMINAL APPEAL NO. 116 OF 2014

BETWEEN

ABDI OJI BASHIR.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at

Mombasa (Tuiyott & Meoli, JJ.) dated 14th March, 2012

In

H.C.C.A. No. 61 of 2011)

JUDGMENT OF THE COURT

[1] The appellant, **Abdi Oji Bashir**, was tried and convicted by the Chief Magistrate's Court at Malindi for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. He was sentenced to death as by law provided. Being dissatisfied with the conviction, the appellant lodged an appeal before the High Court in Malindi. In a judgment delivered on 14th March 2012, the High Court (**Meoli & Tuiyott, JJ.**), dismissed the appeal and upheld the appellant's conviction and sentence by the trial court.

[2] The appellant has now lodged the present appeal. In summary, the memorandum of appeal filed by the appellant through his advocate Obaga Muriuki challenged the dismissal of his appeal in the High Court on three grounds that is: failure to re-analyze and scrutinize the evidence adduced in the trial court, and to come to its own independent conclusion; relying on inadequate recognition evidence and failure to consider the defence of the appellant.

[3] In arguing the appeal, **Mr. Obaga**, learned counsel for the appellant submitted that the learned Judges failed to fully re-analyze and re-evaluate the evidence, and that the feeble attempts made in this regard were skewed towards justifying the conviction. Counsel particularly wondered how the meeting between the complainant and the appellant was arranged in the absence of the phone evidence which the learned

Judges dismissed. Counsel contended that since the complainant did not know how to use the mobile phone, the Judges ought to have concluded that the tele-conversation between the two never occurred. Counsel also pointed out the discrepancy on the amount stated in the charge sheet as stolen, and that in the complainant's first report. He argued that the learned Judges erred in attempting to explain away this discrepancy by relying on the evidence of the complainant's wife as she was never called as a witness. Counsel faulted the learned Judges for dismissing the appellant's defence as difficult to comprehend. He asserted that the appellant's defence was credible as his contention that he was a Kenya Wildlife Service informer was corroborated by **PW4 (No. 230660 CIP Otieno)**.

[4] **Mr. Monda**, learned Assistant Director of Public Prosecution who appeared for the State, opposed the appeal stating that the learned Judges properly reevaluated and analyzed the evidence, made correct findings, and reached their own independent conclusions. In particular, that the evidence of identification of the appellant was considered by the learned Judges and concurrent findings made that the identification was based on recognition; that the conditions were favourable for a proper identification; and that the appellant was recognized by three (3) witnesses. In regard to the contention that there was a discrepancy as to the amount allegedly stolen, Mr. Monda submitted that the learned judges considered the discrepancy but concluded that the same was minor and insignificant to the appellant's case. Counsel maintained that the appellant's defence was fully analyzed by the learned Judges who properly dismissed the same.

[5] This being a second appeal, our mandate under **section 361** of the Criminal Procedure Code is to consider this appeal on issues of law only. On our perusal of the grounds of appeal and the submissions made before us, we discern two main issues. First whether the learned Judges of the High Court properly subjected the evidence that was adduced in the trial court to a fresh evaluation and arrived at their own conclusions. This is an issue of law as a first appellate court is by law obliged to re-assess and re-evaluate the evidence in order to arrive at its own conclusion. (**Okeno v Republic [1972] EA 32**). There is also the issue of identification and the failure to consider the defence both of which are also issues of law which this court is obligated to consider.

[6] In considering this appeal, we also keep in view our duty as stated in **Boniface Kamande & 2 Others v Republic [2010] eKLR**, that:

“On a second appeal to the court which is what the appeal before us is, we are under a legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it.”

[7] In a nutshell, the evidence before the trial court was that the complainant **Mohammed Hassan Kontoma (PW1)**, who is a cattle trader arranged with the appellant to meet at the Tarasa junction as the appellant had informed him that there were some ten heads of cattle available for sale. On the material day, early in the morning, the complainant in the company of two business partners **Noor Mohamed Noor (PW2)** and **Abdalla Hassan (PW3)** proceeded to the agreed venue. The complainant had Kshs.465,000/- intended for the purchase of the cattle. Before they reached the agreed venue, the complainant who was driving a motor vehicle was flagged down by the appellant. Immediately the vehicle stopped, the appellant was joined by three other men. The appellant and the three all of whom were armed with G3 and AK 47 rifles ordered the complainant to drive from the main road into a dirt road. The complainant and his companions were then ordered out of the vehicle, frisked and robbed of the sum of Kshs.465,000/- together with Kshs.5,700/- which the complainant also had in his pocket, and a Nokia phone, the robbers threatening to kill them. The robbers thereafter ran away. The matter was reported to the OCS Garsen Police Station Chief Inspector **Charles Otieno (PW4)** who referred the matter to the DCIO Tana River **Shadrack Kitheka (PW5)** for investigation. The complainant and his business associates identified the appellant to the officers through his name. The next day, the complainant received information that the appellant had been spotted in a KWS vehicle. The information was passed on to PW4 who managed to apprehend the appellant through the KWS Malindi offices. The appellant was

subsequently charged with the offence of robbery with violence and with an alternative charge of handling stolen property contrary to **section 322(2)** of the Penal Code

[8] In his defence, the appellant gave a sworn statement in which he denied knowing the complainant but admitted knowing the complainant's business associates. He explained that PW2 had called him inquiring about the availability of elephant tusks. The appellant confirmed to him that such goods were available. Thereafter because he was an informer for KWS, he alerted the KWS and road blocks were mounted to waylay PW2 and his associates. The next day, the appellant slept in a lodging. He was later arrested in connection with a robbery which he denied. The police recovered a Nokia phone which he had. He claimed that he was given the phone by his brother two years before. He maintained that he was only aware about the business of elephant tusks and that he had done such business with PW2 three times previously.

[9] From the evidence that was adduced in the trial court, it was not disputed that the appellant and PW2 knew each other well. Although the appellant denied that the complainant was not known to him, the complainant maintained that he had been introduced to the appellant by PW2. While the complainant stated that the appellant called him and arranged for a meeting in regard to the sale of cows, the appellant maintained that it was PW2 to whom he spoke to and that the conversation concerned sale of elephant tusks.

[10] In her judgment, the trial magistrate rejected the appellant's defence that the complainant was going to buy ivory tusks. In regard to the complainant's evidence, the trial magistrate summed up the complainant's evidence as follows:

“I heard chance to see PW1 Mohamed Hassan Konitoba and he struck me as a credible witness. He appeared to be still shaken from the experience. He gave an account of how accused informed him about cows and how they were to meet. It is then accused was joined by other people who were armed with firearms and they threatened him then robbed him. The complainant said he had money Kshs.465,000/- for business and Kshs.5600/- in his pocket. I found (sic) no reason to doubt him...”

[11] On their part, the learned Judges framed two issues for consideration in their judgment. Firstly, whether the identification of the appellant was conclusive and secondly, whether the general weight of the prosecution case justified the conviction. The court was also careful to warn itself that it had the obligation to consider the entire evidence and make its own conclusion.

[12] In regard to the evidence of identification, the learned Judges being alive to the fact that the appellant's conviction rested mainly on this evidence, rendered themselves as follows:

“19. Turning to the identification evidence, PW1, PW2 and PW3

all knew the appellant before the date of the offence. PW2 even knew his home. The appellant admitted he was known to PW2 and PW3.

...

22. During the trial PW1, PW2 and PW3 all maintained they saw the appellant clearly during the entire transaction. They knew him well and in fact PW2 was related to him....

...

25. The three prosecution witnesses PW1-3, gave consistent evidence as to the appellant's involvement in the robbery. At the first report to the OCS Garsen (PW4) they named the suspects. On the next day having spotted the appellant at a place called Marereni, they notified the DCIO (PW5) to mobilize and effect arrest.

26. The evidence against the appellant takes the form is (sic) recognition done in daylight. The witnesses not only gave the names of the appellant to the police during their report, but in addition they also went to his home to report to elders about what had happened.

...

30. In the case before us, the appellant was recognized by three witnesses in daylight in a transaction that must have taken at least fifteen minutes. There can be no possibility of error and the trial court was justified in returning a guilty verdict and dismissing the appellant's defence as a sham.

[13] From the above, it is clear that the appellant was known to PW2 and PW3 before the incident and therefore the identification of the appellant by these two witnesses was that of recognition. The possibility of mistaken identification is ruled out by the fact that the appellant admits that he had been in contact with PW2 and that they were to meet in connection with sale of ivory. Therefore, the appellant had knowledge of the presence of the complainant and his colleagues in the area where they were robbed. Although the appellant denied knowing the complainant, the complainant's evidence regarding the identification of the appellant was well corroborated by that of PW2 and PW3. Moreover, the incident happened in broad daylight and the circumstances were therefore appropriate for a positive identification. In our view, there was sufficient evidence supporting the identification of the appellant as one of the robbers.

[14] As regards the prosecution's evidence and the appellant's defence, the learned Judges considered the same together stating as follows:

"22. ...The appellant alleged that PW1, PW2 and PW3 were poachers engaged in an illegal business and were apparently framing him up. What does not add up is the fact that the appellant also stated that PW2 whom he admitted to know before, did not know that he was a KWS informer. He further said that the grudge between them was caused by the present case.

23. There is no evidence that anything happened to PW1 –PW3 in the material period following the appellant's alleged report to KWS to motivate them to make false allegations against the appellant. During cross examination of the witness the defence consistently raised issues regarding other suspects of the robbery who allegedly refunded money to the complainant and were not charged. It did appear that some money was refunded through intervention by elders in respect of other suspects.

24. It is therefore a complete turnaround for the appellant to imply in his defence that in fact there was no robbery and he was framed to cover up for some illegal ivory business deals. Yet, during the trial, the appellant only vaguely raised the issue that the witnesses dealt in illegal ivory goods and not cattle. The appellant's defence is therefore difficult to comprehend."

[15] From the above quoted extract of the judgment of the High Court, we are satisfied that the learned Judges re-evaluated the evidence and arrived at their own conclusion regarding the general weight of the prosecution's case vis a vis the defence posed by the appellant. Further, the learned Judges took note of the discrepancies that were apparent in the prosecution's case such as the evidence regarding the recovery of the complainant's phone from the appellant, and that concerning the amount allegedly stolen. These are issues of facts which were for determination by the trial court and the first appellate court. Suffice to state that as concluded by the learned Judges, the discrepancies are of little significance. For as we have already stated, there was sufficient independent evidence of identification of the appellant.

[16] As regards the discrepancy in the amount allegedly stolen, the learned Judges erred in taking into account hearsay evidence of what the complainant's wife was alleged to have said in regard to the money. This notwithstanding, the particulars of the charge against the appellant stated that he violently

robbed the complainant “cash of Kshs.470,700/- and a Nokia mobile phone make 2600C valued at Kshs.6000/- totaling to Kshs.476,700”. It was apparent from the evidence adduced by the prosecution that apart from PW4, who maintained that the complainant had stated that he was robbed of Kshs.715,000/- PW2 Noor Mohamed Noor, and PW3 Abdulahi Hassan who were with the complainant at the time of the robbery, all stated that the complainant was robbed of Kshs.465,000/- which was for purchasing the cattle. On his part, the complainant maintained that apart from Kshs.465,000/- he was also robbed of an additional sum of to Kshs.5,700/- which was in his pocket. This is consistent with what the complainant told the DCIO Shadrack Kitheka PW5 who was investigating the case. Therefore, PW4 must be the one who was mistaken. Indeed, the evidence adduced by the complainant was consistent with the amount stated on the charge sheet as having been stolen from the complainant.

[17] We come to the conclusion that the evidence adduced against the appellant was sufficient to sustain his conviction and that his appeal has no merit. Accordingly, we dismiss the appeal in its entirety.

Dated and delivered at Malindi this 20th day of March, 2015

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR