



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI J.J.A)

CRIMINAL APPEAL NO. 6 OF 2013

BETWEEN

MARIO MANGWENI.....1ST APPELLANT

ZADOCK WERE..... 2ND APPELLANT

DICKSON CHIRANDE3RD APPELLANT

GEOFFREY MACHOMI4TH APPELLANT

AND

REPUBLICRESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kakamega, (Chitembwe & Thurania, JJ.)

Dated 18th December, 2012

in

H.C.CR.A. NO. 277 OF 2011)

JUDGMENT OF THE COURT

1. Upon trial for the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code, the appellants were convicted and sentenced to death. Their appeals to the High Court having been dismissed, they have come to this Court on a second appeal.

2. In their memorandum of appeal, the appellants have raised more or less the same grounds of appeal which are that their identification was not positive; that the first appellate court failed to re-evaluate or properly re-evaluate the evidence on record; and that the learned Judges of the High Court shifted the burden of proof to them.

3. At the hearing, learned counsel Mr. Nyanga represented the 1st and 3rd appellants while learned

counsel Mr. Indimuli appeared for the 2nd and 4th appellants.

4. In his submission before us, Mr. Nyanga argued that had the High Court properly re-evaluated the evidence on record, it would have found that the appellants were not properly identified as the people who robbed PW1. In counsel's view, the appellants' arrests were based on purported confessions they were forced to make to the area chief in which they incriminated each other. He referred us to the evidence of PW3 who, in cross-examination, testified that Mario Mangweni, the 1st appellant, gave the names of the others to the chief who got them arrested. Counsel further argued that had the complainant identified the appellants as he claimed, he would have given their names to the chief and/or the medical officer who treated him on the night of the robbery. Instead, counsel said he gave their names to his daughter, Naomi Mukonye Kwendo PW3, who is however recorded in the Investigation Diary as having said that her father was attacked by unknown people. He also argued that while APC Fanuel Andalo, PW6, claimed that they recovered two caps at the spot near river Sasala where the three appellants stopped their vehicle, the chief testified that the caps were found at the complainants' house. Counsel faulted the High Court for failing to notice all these contradictions.

5. On identification, Mr. Indimuli, learned counsel for the 2nd and 4th appellants submitted that the complainant's identification of the appellants cannot be relied upon because he did not give their names to his family members who are the first people who went to his rescue. He said the complainant could not have given the names of his attackers to his neighbours and asked them not to reveal them to anyone as he claimed. Counsel said if that is what the complainant did, then that is clear evidence that he was not sure of the identity of his attackers.

6. Mr. Indimuli cited to us the case of **Simiyu & Another v. Republic [2005] 1 KLR**, where it was held that it was the duty of the first appellate court to thoroughly re-evaluate the evidence on record and come to its own conclusion. He said had the High Court done that in this case, it would have noted that PW1 and PW2 contradicted each other's evidence and that the appellants' alibi defences were not dislodged.

7. In response, Mr. Ogoti, learned Senior Assistant Director of Public Prosecutions dismissed this appeal as having no merit. He said this was a case of recognition of the appellants by PW1 and PW2. He submitted that unlike in the case of Simiyu (supra) where the conditions for positive identification were difficult, in this case with the bright electric light at the scene, PW1 and PW2 could not have been mistaken on the identity of the appellants who are people they had known well before. He concluded that contrary to the appellants' claims, the High Court thoroughly re-evaluated the evidence on record which dislodged the appellants' alibi defences.

8. This was a case of recognition in bright electric light. The complainant PW1 testified that his residence and shop are in the same compound. The shop is in front of the residence. At about 9.00 pm on the fateful evening as he was closing the gates, the appellants walked into his compound. The 3rd appellant shot at him but the bullet grazed the right side of his head. The second appellant cut him on the head with a panga and the 4th appellant hit him with a rungu on the head and shoulder. As the three were assaulting him, Mario, the first appellant, walked straight into the shop. When the complainant got a chance, he ran into the shop and found the 1st appellant stuffing into his pocket the money from that day's sales.

9. Even under thorough cross-examination, the complainant was categorical that he clearly saw and recognized the appellants because there was electric light from 100 watts bulbs both inside his house and outside his shop. The appellants are his village mates whom he knows very well by both appearance and names. Their houses are between 400 meters and 1km from his.

10. Attracted by the gunshot, the complainant's family members, the neighbours and the Administration police officers whose camp is about 400 meters from the complainant's shop went to his rescue. As they were taking him to hospital, the 1st 3rd and 4th appellants stopped their vehicle on the road near Sasala river. On seeing police officers, they disappeared into the nearby sugar plantation.

11. This evidence by the complainant was amply corroborated by that of Morris Milikan, PW2 who testified that on hearing a gunshot, he got out of his house and saw the appellants running past his gate from the complainant's home. From the bright light outside the complainant's shop, he was able to see and recognize them as they are people from his village whom he had known very well. At about 9.45 pm as he, administrative police officer and others were taking the complainant to hospital, PW2 again saw the 1st, 3rd and 4th appellants when the three stopped their vehicle near Sasala river, about 1 km from the complainant's home. The three ran into a nearby sugar plantation on seeing police officers.

12. PW4 and PW5, the administration police officers who were among the people who took the complainant to hospital that night corroborated the evidence of PW1 and PW2 that three people stopped their vehicle near Sasala river but ran away on seeing them.

13. We are satisfied that with the aid of bright electric light in PW1's house and outside his shop, PW1 and PW2 were able to clearly see and recognize the appellants. How else could they have been able to give the graphic details of the weapons and even the roles each appellant played? With the bright headlights of the vehicle that bore the 2 witnesses, administrative policemen and others as they took the complainant to hospital, PW1 and PW2 again clearly saw and recognized the 1st, 3rd and 4th appellants.

14. that is not all, a cap bearing the names of 1st appellant and the 2nd appellant's ID card were picked outside the complainant's home. In the sugar plantation into which the 1st, 3rd and 4th appellants disappeared near Sasala River, another cap resembling the one the witnesses had seen the 4th appellant wearing was also found.

15. With all these details, we find, as the two courts below did, that the appellants' identity was not in doubt at all. As this Court has repeatedly stated, because it is evidence of the witnesses' foreknowledge as far as the identities of suspects is concerned, the evidence of recognition is more certain than that of mere facial identification. See **Anjononi v. Republic [1976-80] KLR1566**. The ground challenging the appellants' identification must therefore fail.

16. The prosecution evidence clearly dislodged the appellant's defence. In its judgment, the High Court re-evaluated in detail the entire evidence on record including that of the appellants and the defence witnesses they called. In the circumstances, the claims that the High Court ignored the defence cases and failed to properly re-evaluate the evidence on record has no basis. Also without any basis is the claim that the High Court shifted the burden of proof to the appellants. At any rate the two counsel for the appellants did not substantiate how this was done.

17. Having carefully read the record and considered the rival submissions, we have no hesitation in finding that this appeal has no merit as the High Court carefully re-evaluated the evidence on record including that of the defence case. In the circumstances, we find no merit in this appeal and. we accordingly dismiss it in its entirety.

DATED and delivered at Kisumu this 14th day of May, 2015.

D.K.MARAGA

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR