



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & MWILU, JJ.A)

CRIMINAL APPEAL NO. 11 OF 2015

BETWEEN

ALEX LICHUA LICHODO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the Judgment of the High Court of Kenya

at Nairobi (Msagha & Achode, JJ.) dated 7th April, 2014

in

H. C. Cr. A. No. 57 of 2010)

JUDGMENT OF THE COURT

1. **Alex Lichua Lichodo**, the appellant, was charged before Senior Principal Magistrate's Court at Limuru with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code, Chapter 63, Laws of Kenya and one count for the offence of escape from lawful custody contrary to **section 123** of the Penal Code. The particulars of the offence of robbery with violence were that on 7th March, 2009 at Kamirithu sub-location in Kiambu West District within the then Central Province, the appellant jointly with another not before court, robbed Joseph Waweru Njeri of cash Kshs.500/= and at or immediately before or immediately after the time of such robbery used actual violence against the said Joseph Waweru Njeri. In count II it was alleged that the appellant while in lawful custody at Tigoni Police Station having been arrested in respect of the offence in count I, escaped from such lawful custody.

2. The appellant pleaded not guilty to the charges. The prosecution called a total of six witnesses in support of its case against the appellant. It was the prosecution's case that PW1 was walking home to Kamirithu on the evening of 7th March, 2009 at about 8.30 pm when he was accosted by two men. One held him by the neck as the other relieved him of his wallet that contained Kshs.500/=. He screamed for help as he held onto one of the men and members of the public responded immediately. They helped to apprehend the two men and took them to the village elder. PW2 John Mbugua Karege, testified that on the material date at about 9.00pm, he was at home when Albert called him and told him that they had arrested two people alleging to be police officers. He requested Albert to bring the two to his home and when they were brought, the two identified themselves. PW2 further testified that he escorted the two

men to Tigoni Police Station where they were booked in by PW3 P C Isaiah and PW4 P C Paulo Hamisi. According to the testimony of PW3 and PW4, the appellant together with his friend were booked in and later escaped, but were subsequently re-arrested and charged. PW5 P C Josephat Kuria was among the police officers who re-arrested the appellant. He testified that on the material date, duty officer Corporal Mutisya brought in about 20 prisoners and that the appellant was among them. The appellant was handcuffed with another who also had been charged with the offence of robbery with violence. PW5 testified that it was later that he learnt that the appellant had disappeared and he informed Corporal Mutisya who authorised and conducted a search for the appellant. On 13th March, 2009, PW5 together with PW4 received information on the whereabouts of the appellant, and arrested him.

3. In his defence, the appellant gave a sworn statement. He testified that he was an Administration Police Constable and that on the material date he was taking a walk at Kwambira with a friend, when they came upon two drunk persons. His colleague started to talk to them whereupon they screamed attracting members of the public to the scene. The members of the public arrested the appellant and his friend and took them to the police at the road block and later on to Tigoni Police Station. Later that night a police officer at Tigoni Police Station released them, only to be re-arrested subsequently.

4. Being convinced that the prosecution had proved its case, the trial court convicted and sentenced the appellant to death for the offence of robbery with violence and to one year for the offence of escape from lawful custody. Aggrieved with the trial court's decision, the appellant filed an appeal in the High Court. The learned Judges (Msagha & Achode, JJ.) in their Judgment dated 7th April, 2014 dismissed the appeal. The court, however, set aside the sentence issued against the appellant in respect of the offence of escape from lawful custody and directed the same to be held in abeyance. That decision is what has instigated this second appeal based on the following grounds:-

“(i) The learned Judges of the 1st appellate court erred in law by failing to re-consider and re-evaluate the evidence afresh as provided by the law.

ii. The learned Judges of the 1st appellate court erred in law by failing to appreciate that the prosecution had failed to prove its case to the standard required in law that is prove (sic) beyond reasonable doubt.

iii. The learned Judges of the 1st appellate court erred in law and in fact by failing to appreciate that (sic) the provision of section 169 of Criminal Procedure Code.

iv. The learned Judges of the 1st appellate court erred in law by failing to appreciate that the appellant's constitutional rights were flouted and violated.

v. The learned Judges of the 1st appellate court erred in law by failing to take into account and or failed to consider and or failed to give reasons why the defence was disregarded.”

5. At the hearing of this appeal, Ms. Herine Kabita, learned counsel for the appellant, submitted that the courts below relied upon a single identifying witness without warning themselves of the danger of doing so, and which evidence was not sufficient to sustain a charge of robbery with violence. The evidence of the single witness was not corroborated, given that the conditions for identification of the appellant were not favourable. She referred the court to the case of ***Richard Gitau Njogu vs R - Criminal Appeal No. 128 of 2005 (Nairobi)***. She further argued that the appellant's defence was not given due consideration.

6. Mr. C. O. Orinda, learned Assistant Director of Public Prosecutions, appeared for the state and opposed the appeal stating that it had no merit. He argued that the appellant was arrested at the scene of robbery by members of the public who responded immediately and found PW1 still holding on to him as he shouted for help. Mr. Orinda submitted that PW1 did not lose sight of the appellant and that although he escaped; he was later traced and re-arrested. He further submitted that both the trial court and 1st appellate court warned themselves of the dangers inherent in basing a conviction on the evidence of a single identifying witness. Finally, he argued that both courts did indeed consider the appellant's defence, and found it un-

believable.

7. Having considered the grounds of appeal, submissions by counsel and the law, we are of the considered view that the following issues fall for our determination:-

Was the identification evidence of a single witness sufficient to warrant the conviction of the appellant?

Did the prosecution fail to call crucial witnesses in this case? If so what is the effect of the said failure on the prosecution's case against the appellant?

8. This being a 2nd appeal, this Court is restricted to address itself on matters of law only. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong vs R [1984] KLR 611*. In *Kaingo vs R (1982) KLR 213 at p. 219* this Court said:-

“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 C/o Karanja vs Karanja vs R (1956) 17 EACA 146*)”.

9. It is not in dispute that the evidence of identification was based on the evidence of a single witness, PW1. It is a well settled principle that evidence of visual identification in criminal cases can cause miscarriage of justice if not carefully tested. A court must always satisfy itself that in all circumstances it is safe to act on such identification, particularly where the conditions favouring a correct identification are difficult. See this Court's decision in *John Njoroge Mwangi vs Republic - Criminal Appeal No. 55 of 2007*. In *Abdulla Bin Wendo & Another vs Reg (1953) 20 EACA 166*, it was held that,

“Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known the conditions favouring a correct identification were difficult.”

See also *Roria vs Republic (1967) EA 583* and *Ogeto vs Republic (2004) 2 KLR*

10. Applied to the present appeal, and having perused the record of the trial court and that of the 1st appellate court, it becomes manifestly clear that PW1 identified the appellant herein as the person who robbed and assaulted him on the material date. In his evidence, PW1 testified that on the material day at around 8.30 pm, he was walking home to Kamirithu when he was accosted by two men. One held him by the neck as the other relieved him of his wallet that contained Kshs.500/=. He screamed for help as he held onto one of the men and members of the public responded immediately. They helped to apprehend the two men and took them to the village elder and were later escorted to the police the same night of the offence. PW2 testified that on the material date, the appellant together with another were brought to him by members of the public who wanted to lynch them for having attacked the complainant. In his testimony, he positively identified the appellant as the person who was handed over to him by the public. PW3 and PW4 testified that they were the Police Officers on that material date who booked in the appellant together with another for robbery at Tigoni Police Station. They also testified that they knew the appellant was an Administration Police Officer.

11. We are satisfied that both the trial court and 1st appellate court warned themselves of the dangers inherent in basing a conviction on the evidence of a single identifying witness and we reiterate the sentiments of the 1st appellate court that;

“On the evidence of identification, we are alive to the fact that although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. – See the often cited case of Maitanyi v Republic Cr. App No. 60 of 1986 (1986) KLR pg 198, in which the Judges of the Court of Appeal Nyarangi, Platt, and Gachuhi JJA, summarised the points to ponder when considering the evidence of a single identifying witness.”

12. We note and find that both the trial court and the 1st appellate court were mindful of the requirements of identification and properly applied their minds to the subject before coming to the conclusion that the appellant had been positively identified by the complainant and that PW3 and PW4 managed to identify the appellant as well because he was known to them prior to the incident. We also agree with the holding of this Court in Anjononi & Others vs Republic (1976-80) 1 KLR 1566, which was cited by the 1st appellate court, and whose holding is to the effect that:-

“The proper identification of robbers is always an important issue in a case of capital robbery emphatically so in a case where no stolen property is found in the possession of the accused

Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

Based on the foregoing we find that the evidence on identification was watertight as PW1 never lost sight of the assailant, and in fact he was found holding him by the members of the public who answered his screams for help.

13. On the subject of whether the prosecutor failed to call crucial witnesses, we do concur with the trial court and the 1st appellate court that the evidence of the complainant was sufficient and convincing and there was no need for the prosecution to call any more witnesses on the said issue.

Section 143 of the Evidence Act, Chapter 80, Laws of Kenya provides,

“No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact.”

Further, in Julius Kalewa Mutunga vs Republic - Criminal Appeal No. 31 of 2005, this Court held,

“ ...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

14. Having expressed ourselves as above we see no reason to interfere with the concurrent findings of the two lower courts. Accordingly, we find the appeal lacking in merit and is dismissed.

Dated and delivered at Nairobi this 31st day of July, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR