



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, AZANGALALA & J. MOHAMMED, J.J.A)

CRIMINAL APPEAL NO. 95 OF 2014

BETWEEN

PAUL ODHIAMBO ASANYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal from a sentence of the High Court of Kenya at Nairobi (Ogola & Kamau, J.) dated 22<sup>nd</sup> November, 2013*

*in*

*HC.CRA. 203 OF 2010)*

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**JUDGMENT OF THE COURT**

The Appellant, **Paul Odhiambo Asanya**, (hereinafter referred to as “*the appellant*”) was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were stated to be that on the 17<sup>th</sup> day of December, 2010 at Mbagathi Road in Langata area within Nairobi, the appellant jointly with another not before the court, while armed with dangerous weapons namely, knives and, stones robbed **Maxison Mutua**, of his properties, to wit, a mobile phone make Samsung d-980 one national identity card, a Nation Media Staff identity card, a bunch of house keys, Jubilee Insurance Card, a medical card, one pair of leather shoes, one wrist watch, a CD and cash of Kshs.9,900/= all valued at Kshs.45,600/= and at the time of such robbery, wounded the said Maxison Mutua.

The case of the prosecution was that shortly after 7.00 p.m. on 17<sup>th</sup> December, 2010 the complainant, who was PW1 at the trial, was on his way to his house off Mbagathi road when he saw a lady hurrying from the opposite direction followed by a man. The complainant gave way to the lady to pass but as he did so, he was grabbed from behind by someone who removed his mobile phone from his pocket. The complainant realizing he was under attack, gave the person his watch. The person took him aside and held him by the neck. The person hit him on his right ear with a blunt object. The man who was approaching from the opposite direction and who was behind the hurrying lady joined the attack. He beat the complainant and the two wrestled him to the ground as they kicked him. The complainant resisted the attack by hitting one of the attackers in the arm. One of the attackers then hit him with a stone. In the struggle the complainant claimed to recognize one of his attackers as a guard at their residential premises who also used to wash his car at a fee. When he recognized him, he called out his name and sought his assistance. That was not to be as his companion ordered him to stab him which instruction was not obeyed. The attack however continued and they took the complainant’s ATM card, Identification card, money, house and office keys. The complainant was worn out and feigned death. His attackers took the opportunity to take his shoes and escaped. The complainant crawled to a nearby bus stage for assistance but got none. He then crawled to a nearby estate gate where a guard named, **Julius Momanyi Nyakieya** (PW 2), telephoned the complainant’s friend, **Mercy Nkirote Ringera** (PW3). The latter, in the company of two men, went to the complainant’s aid. They first took him to Family Health Clinic for first aid and then to Nairobi Hospital where he was admitted for six days.

The following morning, **Clement Oduori Nelima** (PW 4), who was a guard at Mbagathi where the appellant also performed guard duties, reported on duty. He observed blood stains on the appellant’s shoes and long trouser. On enquiry from the appellant about the blood stains, the appellant was irked and wanted to fight him. The appellant then left since PW 4 had taken over his duties for the day.

PW 2 reported the attack on the complainant at Langata Police Station on 20<sup>th</sup> December, 2010, which report was received by **PC Hillary Kyalo Kimuyu** (PW 8). The latter visited Nairobi Hospital where the complainant was admitted. He claimed that the complainant informed him that one of his attackers was a guard where he lived. PW 8 visited the scene where a wrist watch, a belt and a blood-stained stone were

recovered. He also visited the complainant's residence where he observed blood stains on the sentry box and on the perimeter wall. He interviewed the day guard (PW 4) who reported the events of the morning after the attack on the complainant. Scenes of crime personnel were informed and they took swabs of the blood from the sentry box and perimeter wall.

PW 8 later interviewed the appellant when he reported on duty. He also observed that his trouser had blood stains. At his house, blood stained shoes were recovered and he arrested the appellant. His employer, **Samson Odhiambo Omogi** (PW 5), was then informed of the arrest.

PW 8 forwarded the blood stained shoes, trouser, stone and blood swabs scooped from the entry box and perimeter wall to the Government Chemist for analysis. Also forwarded with those exhibits were blood samples of the complainant and the appellant. At the Government Chemist, **Moses Mwaura** (PW 6), an analyst examined the blood stains and blood samples and found that the blood stains on the shoes, stone and perimeter wall were of blood group "O" which was the blood group of the complainant. He also found that the appellant had blood group B.

The complainant was later examined by **Dr. Kamau** (PW 7) who then filled and signed the P3 form in respect of the injuries sustained by him. PW 7 found on the complainant, darkening of the skin on the lower right eyelid.

He also found a scar and swelling on the upper part of the ear lobe. A chest x-ray revealed a fracture of the 7<sup>th</sup> left rib. Pw 7 assessed the degree of injury as grievous harm.

At the trial, the appellant elected to give a sworn statement in which he narrated the events of 19<sup>th</sup> December, 2010. On that day he claimed he witnessed a road tragic accident which involved a motor vehicle and a pedestrian who got injured and bled. The appellant alleged that he went to the assistance of the injured pedestrian and as he placed him in the same vehicle which had knocked him down, his bleeding stained his trousers and shoes. On 20<sup>th</sup> December, 2010 he reported on duty at 6.30 p.m. when he was visited by police officers who took him to his house where his pair of shoes were taken. He was taken to Langata Police Station where blood samples were taken from him.

On cross-examination, the appellant acknowledged that his blood stained trouser was taken from him at the police station and that whereas he was on duty on 17<sup>th</sup> December, 2010 he witnessed no accident on that day.

After setting out the above evidence, the trial magistrate (E.O. Obaga, Principle Magistrate) delivered himself as follows:

***"....the presence of blood of complainant on accused's properties corroborates the complainant's evidence that accused was one of the two people who attacked him. The accused does not deny that blood stained trouser and shoes were removed from his house. His only defence is that the blood was from an accident victim who he assisted lift on to a vehicle on 19/12/10. This is an afterthought. There is evidence from PW 4 Clement Oduori Nahma.***

***This was a day guard at the complainant's residence. He testified that accused used to guard at night whereas he guarded during the day. He testified that on the morning of 18<sup>th</sup> December 2010, he reported on duty on [at] 6.00 a.m., ready to take over from night guard who is accused. He noticed that accused's shoes had blood stains. He sought to know where the blood came from but the accused did not tell him the source. He instead became hostile to him. He wanted to fight him. He left him alone. Later in the course of the day police officers came and interrogated him. It is therefore clear that the accused's clothes and shoes were stained on the night of 17/12/2010 and it cannot be true that the clothes were stained on 19/12/2010. I find his defence to be a pure lie on oath. The accused is the one who attacked and robbed the complainant."***

The learned Principal Magistrate convicted the appellant as charged and sentenced him to death.

The appellant appealed to the High Court on the principal grounds that the circumstances for a favourable identification did not exist; that he was framed and convicted on insufficient evidence; that the evidence did not prove the case beyond reasonable doubt and that his defence was not considered.

At the first appeal, the learned Judges of the High Court (F. Ogola and J. Kamau, JJ) after setting out the evidence before the trial court delivered themselves as follows:-

***"22. The court has carefully considered the submissions by both the appellant and the State and the evidence adduced in the trial court and concurs with the finding of the trial magistrate that the blood stains and PW 6's report squarely placed the Appellant at the scene of the attack of PW 1.***

***23. The court rejects the Appellant's evidence that the lighting was not interrogated for the reason that the mode of identification was through recognition by PW 1 who resided in the place where the appellant worked. PW 1 even called him by name and asked him to assist him but he refused.***

2. ....

***PW 6's evidence thus displaced the Appellant's argument that the blood belonged to another unidentified pedestrian because as seen in his conclusive report, the blood found on the appellant's trousers and shoes matched that of PW 1.***

***36. From the aforesaid evidence, what has emerged is that there was theft of PW 1's possessions, PW 1 was injured and there***

*was (sic) more than one (1) person who was involved at the time of the attack. The court found that the Appellant was properly identified.....*

**37. This court is thus satisfied that the prosecution was able to prove its case beyond reasonable doubt as all the ingredients of a robbery with violence contrary to Section 292**

**(2) of the Penal Code were present in the charge against the appellant.....**

**38. ....the trial magistrate properly convicted the appellant and that the conviction was safe.....”**

The learned Judges in the end dismissed the appellant's appeal.

The appellant, being dissatisfied with the dismissal of his appeal, has now appealed before this court citing three grounds of appeal in a supplementary memorandum of appeal lodged by his learned counsel **Mr. Nyaga**. Mr. Nyaga abandoned a memorandum of appeal and an earlier supplementary memorandum of appeal which had been filed by the appellant himself. The three grounds on which Mr. Nyaga relied however raise the following issues:- that identification of the appellant was not positive; that the case was not proved beyond reasonable doubt and that the appellant's defence was improperly dismissed.

Mr. Nyaga, in his submissions before us, referred to aspects of the evidence adduced before the trial court which, according to him, showed that circumstances for a positive identification were absent. Citing our decision in **Mutonye Kariuki & Another -v- Republic [2014] eKLR**, learned counsel argued that the quality of light at the scene, the distance the source of light was from the scene and the length the appellant observed his attackers were not interrogated by the High Court. Learned counsel further submitted that the finding of stains of blood group O on the shoes and long trouser of the appellant was not conclusive that the blood was from the complainant as the blood group is a common one and could have come from any other person including the pedestrian who, the appellant claimed, was hit by a motor vehicle and whose blood was not examined. It was also learned counsel's view that failure to examine the blood of the pedestrian was indicative of the failure of both courts to consider the appellant's defence.

In the premises according to learned counsel the prosecution did not prove its case against the appellant beyond reasonable doubt.

**Mr. Orinda**, the learned Assistant Director of Public Prosecutions (A.D.P.P.), in supporting the conviction of the appellant, submitted that the appellant was challenging findings of fact of the courts below which is outside our purview. In his view, although failure to re-consider and re-evaluate the evidence by the 1<sup>st</sup> appellate court, would be a point of law, the appellant had not complained of such failure. Consequently, according to learned counsel, the findings of fact should not be disturbed.

On the complaint about poor identification, the learned A.D.P.P. submitted that the same had been dealt with by both lower courts. Mr. Orinda appreciated that in all cases of robbery, the perpetrators do not intend to be recognized but in our case the complainant knew the appellant and even called out his name during the attack. He also explained how he had known the appellant who he recognized through light from moving motor vehicles. Mr. Orinda further submitted that identification was not the only evidence.

There was also the doctor's testimony of blood stains matching that of the complainant being found on the shoes and long trouser of the appellant. Further, according to the learned A.D.P.P., the appellant was arrested on information given by the complainant which testimony was corroborated by the appellant's own colleague who took over guard duties from the appellant at day break.

On alleged insufficiency of evidence, the learned, ADPP submitted that given the concurrent findings of facts by the two courts below, this Court cannot consider the alleged insufficiency.

On the alleged failure to consider the defence, learned counsel submitted that the defence was clearly an afterthought as the appellant had never suggested the same during cross-examination of all the prosecution witnesses including his colleague and the investigating officer. Both courts below considered that defence and rejected it, in his view, properly.

Having considered the record, the grounds of appeal, the submissions of learned counsel and the law, we feel impelled to discuss, albeit briefly, the roles of the first and the second appellate courts. This is in view of the stand points taken by counsel when they appeared before us in this appeal.

The first appellate court is duty bound to reconsider the evidence, evaluate it and draw its own conclusions in deciding whether the judgment of the trial court should be upheld. It should also deal with any questions of law raised on appeal. On the role of the first appellate court, the predecessor to this court, in **Pandya -v- R [1957] E.A. 336, at page 337**, stated as follows:

***“On first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”***

In the case of **Okeno -v- Republic [1972] E.A. 32 at page 36**, those

principles were reiterated as follows:-

***“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 -v- R [1957] E.A. 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. Only then can it decide whether the magistrate’s findings should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters -v- Sunday Post [1958]EA 424.”***

So the 1<sup>st</sup> appellate court affords an appellant a second hearing, so to speak. For its part, the second appellate court is only concerned with issues of law. It is also its duty to consider and decide whether or not in discharging its function, the first appellate court applied the principles enunciated in ***Pandya -v- R.*** and ***Okeno v R (Supra)***. In other words, what the second appellate court is obligated to do is to decide whether a judgment can be supported on facts as found by the trial and the first appellate courts. It is not the function of the second appellate court to place itself in the shoes of the first appellate court by reconsidering and re-evaluating the evidence adduced in the trial court and drawing its own conclusions. See also ***section 361(1)*** of the Criminal Procedure Code.

In the light of the above principles and on our consideration of the judgment of the High Court, we think the learned Judges of that court were alive to their duty and discharged it admirably. They made express advertence to that duty in their judgment. They indeed set out, in outline, the evidence which was adduced before the trial court and reconsidered, re-evaluated it and arrived at independent conclusions thereon. The learned Judges considered the issues of identification, standard of proof, the ingredients of the offence of robbery with violence, the appellant’s defence and made their conclusions thereon. The appellant was therefore accorded his legal procedural rights. We are not therefore at all surprised that the appellant through his learned counsel, Mr. Nyaga, did not complain about the manner in which the High Court Judges carried out their duty. Yet in his oral submissions before us learned counsel appeared to invite us to re-consider and re-evaluate the facts as established by both the trial court and the High Court. We decline that invitation.

The issue of poor identification raised by the appellant is indeed an issue of law. However, the courts below found that the appellant was known to the complainant prior to the attack. The two courts below also found that during the attack the complainant called out the appellant’s name and sought his assistance. They also accepted that the light from motor vehicles at the scene was sufficient for purposes of a positive identification. That was not the only evidence which placed the appellant at the scene. The complainant was viciously attacked and bled. Pw 6, ***Moses Mwaura***, the Government Chemist, analyzed the complainant’s blood and found that it was blood group “O”. He also analyzed the appellant’s blood and found it was group “B”.

PW 6 was also given the blood stained stone which was found at the scene of the attack. He was also given blood swabs from the perimeter wall surrounding the complainant’s residence, and blood stained safari boots. Also supplied to PW 6, were blood samples of the complainant and the appellant. After analysis of the above items, PW 6 established that blood stains matching that of the complainant i.e blood group „O? was found on the appellant’s safari boots. The two courts below accepted that the complainant’s blood was found on the appellant’s safari boots.

Then there was the evidence of Clement Oduori Nelima (PW 4) the appellant’s colleague who also guarded the same premises guarded by the appellant on shifts. The two courts below accepted the evidence that the day after the attack, PW 4 observed that the appellant’s long trouser and shoes had blood stains and when PW 4 sought information on how the appellant’s said wear had blood stains, he was annoyed and wanted to fight him.

The two courts below further found that the evidence of recognition given by the appellant was corroborated by the evidence of PW 6, the Government analyst, the evidence of PW 4 the appellant’s colleague at work and the evidence of PW 8, the investigating officer. The two courts below therefore reached concurrent findings on matters of fact as regards the identification of the appellant. As we have stated above and before time without number, it is the law that we cannot interfere with findings of fact by the two courts below, unless we are satisfied that there was no evidence at all to support the same or that there was a serious misdirection which led to injustice. In the case of ***M’riungu -v- Republic [1983] KLR 455***, we said:

***“Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent on the evidence that no reasonable tribunal could have reached that conclusion which would be the same thing as holding that the decision is bad in law.”***

In the end, we are unable to agree with Mr. Nyaga, that the evidence of identification was not positive. In those premises the appellant’s appeal challenging his conviction on account of improper or mistaken identification cannot be sustained. The case of ***Mutonya Kariuki & Another -v- Republic (supra)*** on which the appellant sought reliance is clearly distinguishable from the facts of this case. There, identification was by a single witness who had not known the appellant prior to the attack and who was shown the appellant when he was arrested by members of the public. Furthermore, none of the members of the public who arrested the appellant was called to testify at the trial and there was no nexus between the appellant’s and the persons who attacked the complainant as the chain of events from the time of the attack and the arrest was broken. Besides, we found that the two courts below had failed in their respective duties to evaluate and re-evaluate the evidence presented at the trial. That is not, as already observed above, the position in this case

The other issue raised by the appellant was that the trial court and the High Court improperly dismissed the defence put forward by the appellant. On this issue the record of the trial court and the High Court speak for themselves. We have already quoted the relevant excerpt from the judgment of the magistrate.

On their part the High Court Judges stated, in part:

***“24. However assuming that there was indeed an accident on 19<sup>th</sup> December, 2010 as had been alleged by the Appellant, it is not***

*clear to this court how his shoes which were found at his house at Kibera Garage area had blood that was also found on his trouser and which PW 6 found to have belonged to the same blood group as that of PW 1. PW 4 was also emphatic that he saw blood stains on the sentry [box] and on the appellant's shoes when he reported to work on 18<sup>th</sup> December,2010. PW 6's evidence thus displaced the Appellant's argument that the blood belonged to an unidentified pedestrian because as was seen in his conclusive report, the blood found on the appellant's trousers and shoes matched that of PW 1.*

*26 The evidence that he saw a vehicle make a u-turn and hit a pedestrian is very sketchy and appears to this court to have been an afterthought."*

It is plain therefore that both the learned trial magistrate and the learned Judges of the High Court carefully considered the appellant's defence and found it displaced by the evidence adduced by the prosecution particularly the evidence of the complainant who knew the appellant prior to the attack; the evidence of the appellant's colleague (PW 4) who noticed blood stains on the appellant's shoes and trouser the morning after the attack on the complainant; the evidence of the investigating officer (PW 8) and the evidence of the Government Analyst (PW 6) who testified that the blood stains found on the appellant's shoes was of the same blood group as that of the complainant. In the end, in our view, the ground of appeal alleging failure of the courts below to consider the appellant's defence cannot be sustained.

Our analysis above demonstrates that the complaint that the case against the appellant was not proved beyond reasonable doubt is absolutely without merit, as in our view, the case presented by the prosecution against the appellant as we have demonstrated was water-tight.

The upshot of all the above is that this appeal cannot succeed. We agree with Mr. Orinda that the appellant was properly convicted as charged. The appeal is accordingly dismissed.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF JULY 2015**

**E.M GITHINJI**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true Copy of the original*

**DEPUTY REGISTRAR**