



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 408 OF 2009

BETWEEN

ALI MOHAMMED WANJALA .....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from a judgment of the High Court of Kenya at Busia (Ombija & Kariuki, JJ) dated 3<sup>rd</sup> December 2008) In H. C. Cr. A.No.18 of2003)*

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JUDGMENT OF THE COURT

**Ali Mohammed Wanjala, (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 are that on the night of the 27<sup>th</sup> and 28<sup>th</sup> March 2002 at Fort Jesus area Busia Township Location in the Busia District within Western Province, jointly with others not before the court robbed **Joseph Odeke Atuoto** of one radio cassette make Sony, on bicycle make Atlas, one mobile telephone make Siemen, 4 cartons of Hodari soap, 28 kilogrames of sugar, 4 jerricans of crizal cooking fat, two boxes of Kimbo, one crate of milk, one crate bread, one wall clock, Kshs. 10,500 all valued at Kshs. 60,000 and at or immediately before or immediately after the time of such robbery used actual violence to the said Joseph Atuoto.

In brief, the facts are that, while sleeping with his wife on the night of 27<sup>th</sup> and 28<sup>th</sup> March 2002, in the residential premises at the back of their shop, at about 2.30am and 3.00am **Joseph Ndeke Atuoto, PW1** , (Joseph) heard his wife **Beatrice Auma PW2** (Beatrice) screaming that they were being attacked by robbers. He woke up and found Beatrice carrying a hurricane lamp to the sitting room where gangsters had gained entry into the house and attacked his wife. The lamp was hit and it went off. Joseph flashed his torch, and one of the gangsters, the appellant, whom he had known for a few years, entered the bedroom and pushed him. A struggle ensued between them, causing the other gangsters to join in and overcome Joseph. The appellant then hit Joseph with a stick on the shoulder and the left ribs and also cut his head with a panga.

According to Beatrice, while they were sleeping on the night of 27<sup>th</sup> March 2002, she was awoken by a tap on the door. As she tried to locate the reason for the sound, 4 gangsters forced open the door, and she screamed. There was a lantern on, and she was able to see that the appellant, who she said, was the first to enter the room, and kick the lantern so that it went off. He then cut her with a panga. It was her testimony

that she had known the appellant for many years, as he was a neighbour who lived in a rental shop nearby. Beatrice then testified that the appellant and the gang demanded money, and took away the goods from the shop. After they had gone, she screamed for help. Their neighbours took them to the clinical officer's house for treatment, and she recorded a statement at the police station. It was her evidence that she had named the appellant as one of the robbers to the police. She also identified the appellant during the identification parade.

**Cpl Aibea Muchweya, PW 4**, arrested the appellant for the offence of robbery with violence after Joseph reported the robbery to the police, and that it was the appellant who had robbed them. He testified that following the arrest, the appellant's house was searched, but no stolen items were recovered.

In his defence, the appellant stated that he was a businessman, and on the date in question he was in Nairobi and that on his return he found that the robbery had already taken place. He further stated that he was at the butchery in the Rest area when he was arrested, taken to his house which was searched by the police. He was subsequently charged with the offence.

Upon consideration of the entire evidence, the learned trial magistrate having found the charge against the appellant was proved to the required standard, convicted and sentenced him to death as by law prescribed.

The appellant being aggrieved by the decision of the trial court filed an appeal in the High Court against both the conviction and sentence.

The appeal came up for hearing in the High Court and was heard by (Ombija, J. and GBM Kariuki, J. (as he then was)) who were satisfied that the prosecution had proved its case, and dismissed his appeal and upheld the conviction and sentence.

The appellant was further aggrieved by the decision of the High Court and lodged this appeal which is before us.

The appellant filed a memorandum of appeal with the following grounds:

- 1. That the two courts below erred in law and in fact by failing to appreciate that the prosecution's case was not only insufficient but unconstitutional fabricative, speculative, conjecture, discredited inconsistent in material particulars, uncorroborative and lacked probative value;*
- 2. That the two courts below erred in law and in fact by failing to appreciate that before and at the trial there were material irregularities for the failure of the prosecution to disclose relevant evidence to the defence for a fair trial as guaranteed under section 77 of the Constitution of Kenya;*
- 3. That the two courts below misdirected themselves in law and in fact by failing to consider that the prosecution aspect of recognition was not proved beyond reasonable doubt as there was no need for the prosecution to have conducted an identification parade in respect to the present case;*
- 4. That the two courts below erred in law and in fact by rejecting the alibi defence which sufficiently created a reasonable considerable amount of doubt as to the strength of the prosecution case.*

**Mr. Indimuli**, learned counsel for the appellant, relied on the Memorandum of appeal dated 8<sup>th</sup> May 2015, but consolidated the grounds into ground one, while abandoning the earlier petition of appeal. Counsel submitted that the conditions obtaining at the time were not conducive for positive identification of the appellant, as immediately upon the robbers' entry into the house, the lantern was put off, so that there was no opportunity to see and identify the appellant. That since the High Court displaced the complainant's description of the appellant; it wrongly convicted the appellant on the evidence of Beatrice, a single identifying witness. Counsel argued further that there was a discrepancy in the

evidence, as Beatrice had stated that she was cut with a panga, while Joseph was beaten with a stick, and that different mode of inflicting injuries on the victims was illogical. Counsel submitted that the courts below had failed to take into account the existence of a grudge with the appellant and that his alibi was not taken into consideration.

**Mr. Sirtuy**, learned Principal Prosecution Counsel, opposed the appeal.

It was counsel's submission that the High Court had analysed the evidence and come to its own independent findings; that this was a case of recognition as the appellant was known to Joseph and Beatrice, and that there was sufficient light which enabled them recognize him. Counsel conceded that as a consequence identification parade was rendered superfluous. Counsel submitted that the trial court and the High Court had considered the alibi and found it to be without merit.

We have considered the record of appeal, the judgments of the trial court and the High Court, the submissions of respective counsel for the appellant and the State as well as the applicable law.

In **Mwangi vs Republic [2004] 2 KLR 28** at page 30 this Court stated:

***“In Okeno v R [1972]EA 32 at p. 36 the predecessor of this Court stated, inter alia:***

***‘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 [1975] EA 336). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings 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.’***

We will begin with the issue of identification. The appellant's complaint is that, having rejected Joseph's evidence, the High Court wrongly upheld his conviction on the evidence of Beatrice, as the only other witness who identified him. From the record, the trial court found that that the appellant was properly identified by both Joseph and Beatrice, and consequently, the question of identification by a single identifying witness did not arise.

In so doing, the trial court stated thus,

***“On the issue of identification by the accused person, I find that PW 1 and 2 both identified the accused very well using the light from the lantern and the torch PW 1 Had. The light was sufficient for them to see the accused and recognize him. He was known to them for about 6 years and two years respectively. PW 1 also struggled with the accused until he was sub-dued by the other robbers. The complainant when he reported the matter to the police named the accused person and the police were able to trace him and arrest him. There was no discrepancy in the identification. The conditions for identification were not difficult; it was not a glance as PW 1 struggled with the accused person.”***

The High Court on the other hand found Joseph's evidence to be wanting and unbelievable, and had this to say,

***“According to his evidence, PW1 used to see the appellant regularly as he lived near PW1's shop and was PW 1's regular customer. PW 1 knew him very well. But it seems that he was not able to use the light from the lantern to see the attackers because the lantern was kicked and went off before he could see them. He had to flash his torch to see. PW1 told the trial Court that when he flashed his torch, the appellant went into his (PW1's) bedroom. He did not tell the trial court how well he saw the appellant. However, he struggled with him ostensibly in darkness in the bedroom. The dock identification of the appellant by PW 1 was evidentially valueless. PW 1's claim in cross -examination by the appellant that PW1 recognized the***

***appellant very well that night is not borne out by the evidence. How could he see him in darkness? He flashed his torch only once. How could he see the face of the appellant in darkness in the flash of the torch? If this was the only evidence, the case against the appellant would dimly flop for want of evidence of recognition. The allegation by PW 1 in cross-examination that the appellant was clad in "black clothes" was implausible. How could he see black colour in darkness? If he flashed his torch as he said, it is hardly likely that it would produce enough light or glare to expose the face as well as the rest of the body of the attacker! Why didn't PW1 tell anyone he had seen the appellant among the robbers?"***

A re-evaluation of Joseph's evidence shows that the High Court was wrong to discredit this evidence, as clearly, this was a case of recognition and not mere identification. Joseph testified that,

***"I had flashed my torch and identified the accused person and we struggled with him. I knew the accused prior to this incident. I knew the accused in 1995. The accused lives near my shop at International area. We regularly used to meet with him and he used to come to my shop at Burumba to make purchases. I was very familiar and knew the accused very well prior to the incident."***

During cross examination by the appellant he stated,

***"My shop where I also live is about 30 feet away from the house where you live. After robbing me you disappeared. I recognized you when you robbed me. I flashed my torch and identified you well. We struggled with you. I have a grudge with you. You were arrested by police officers you were one of the robbers..... I positively identified you when you robbed me. You were wearing black clothes on that night. I also recognized you by your facial appearance."***

In addressing how recognition evidence should be construed, this Court in the case of **Peter Musau v. Republic (2008) eKLR** stated thus:-

***"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him, and thus to put a difference between recognition and identification of a stranger. He must show for example that the suspect had been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness in serving the suspect at the time of the offence, can recall very well having seen him before the incident in question.,***

Evidently, with the light from the flashlight, Joseph saw and recognized the appellant, a person he had known for the past few years as a neighbour, and a frequent customer at their shop. With the struggle that then ensued, we consider that the prolonged physical contact with the appellant further enhanced Joseph's ability to see and recognize the appellant. In our view, the High Court wrongly inferred that it was pitch dark, with no possibility of Joseph recognizing the appellant with the torchlight, yet, unlike the lantern which had been put off, there was evidence to show that Joseph used the torch to identify the appellant.

Furthermore, when Joseph's testimony is compared with Beatrice's, we find that there are no inconsistencies that would create doubt as to its veracity.

Like Joseph, Beatrice testified that she was awakened by a sound, and that when she went to find out what it was, she saw the appellant whom she knew, yet no rationale was provided for having accepted her evidence, and dismissing Joseph's.

We can find no viable reason for the High Court to have rejected Joseph's evidence, which was plausible and reliable, and we must agree with the trial court that, Joseph properly identified the appellant through recognition.

Given this finding, it goes without saying that, the appellant's complaint no longer arises. But, had this not been the case, and assuming we were to agree with the High Court in rejecting Joseph's evidence, did the High Court rightly uphold the conviction on the basis of the evidence of a single identifying witness? Our answer to this is yes, as despite convicting on the basis of Beatrice's evidence, it will be recalled that this was a case of identification by recognition, which is **"...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."** See *Anjononi & others vs Republic [1980] KLR*.

And with regard to the conditions prevailing at the time of identification or recognition, this Court in *Wamunga vs Republic [1989] KLR, 424*, stated thus,

**"It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."**

Similarly, in the instant case after cautioning itself on the evidence of the single identifying witness, the High Court stated,

**"Where the evidence in a criminal case depends on identification or recognition of the accused, it is imperative that he ensures that there is no possibility of error in identification or recognition by ensuring that the circumstances are favourable for positive recognition of identification. In this case PW2 saw and recognized the appellant well with the light from the lantern as the latter entered the house. She knew him well and regularly saw him as her neighbor. There was no possibility of error in his recognition by PW2."**

We agree. There is no doubt that being well known to her, Beatrice was able to see and recognize the appellant in the moments before the lantern was kicked by the appellant and it went off. On cross examination by the appellant she stated thus,

**"I had known you for many years prior to this incident... I positively recognized you when you came into our house as our lantern was lit. It is true I reported and named you as one of the robbers to the police. You are called Ali Mohammed...In my first report to the police I named you as one of the robbers...I recognized your facial appearance very well. I recognized your facial appearance very well when you came into my house and robbed us."**

It is also evident that Beatrice informed the police of the identity of the appellant, as without a name or identity, it would not have been possible for the appellant to have been arrested and his house searched.

We are satisfied that the evidence pointed to the appellant as one of the members of the gang that robbed the complainant, and as a consequence, this ground fails.

It is also the appellant's contention that the evidence of Joseph and Beatrice was contradictory and illogical as Joseph was struck with a stick, while Beatrice was cut twice with a panga. In respect of the violence perpetrated by the assailants, the trial court stated thus,

**"The ingredient of robbery with violence. The accused was armed with a stick and his accomplices were also armed with pangas. The Doctor's evidence is that the injuries were caused by sharp and blunt objects."**

We find that there is no discrepancy in the evidence that was before the trial court, as, not only did the appellant use a stick to attack Joseph, there is also evidence to show that both Joseph and Beatrice were cut with a panga. Needless to say, whether the violence was carried out by the use of a stick or pangas, the victims sustained injuries at the hands of the gang that robbed them. The result is that, the ingredients for the offence of robbery with violence were duly met, leading to the conclusion that, the prosecution had proved its case. As such, this ground has no merit and accordingly fails.

On the next issue that a grudge existed between the appellant and Joseph, it was the appellant's complaint that during cross-examination Joseph admitted to having a grudge against the appellant.

Despite the statement on the possible existence of a grudge, the trial court was not told the nature or reason for the existence of a grudge. In conjunction with this, no evidence was adduced to show that there was a direct co relation between the robbery and the alleged grudge. We take the view that, without a basis for the existence of a grudge adduced for the consideration of the courts below, we find this contention to be an afterthought and as a consequence, this ground is unfounded.

Finally on the issue of the alibi raised in his defence, the appellant testified that he was in Nairobi during the robbery, and had on his return found that the offence had already taken place. In addressing this issue the trial court stated thus,

***“In his defence the accused has raised an alibi. That he was not at the place of robbery but this is a false alibi. The alibi cannot justifiably challenge the witnesses of the prosecution.”***

It is apparent that when the trial court took into account the appellant's alibi, it was found to be incredible as it was untenable when considered in light of the evidence that was before the court. Though the alibi was not analysed by the High Court, we do not consider this to have been fatal, as the alibi evidence provided was a mere statement of defence which did not shift the burden of proof or dislodge the prosecution's case in any way. We find that this ground also lacks merit and as such fails.

Accordingly, we uphold the lower courts' findings and conviction, and dismiss this appeal.

***Dated and Delivered at Kisumu this 3<sup>RD</sup> day of JULY, 2015.***

**D.MUSINGA**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

**JUDGE OF APPEAL**

**A.K.MURGOR**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**