IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 242 OF 2010

BETWEEN

PATRICK MUNYANGORI OMBATI …… APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kakamega (Kimaru & Thuranira, JJ) dated 7th December, 2011

in

HCCR NO. 226 OF 2002)

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JUDGMENT OF THE COURT

1. On 8th September 2002, the Chief Magistrate at Kakamega convicted the appellant, Peter Munyangori Ombati for the offence of robbery with violence. He was sentenced to death. He appealed to the High Court on the grounds that the evidence on his identification was insufficient to sustain the conviction and that the prosecution did not prove its case to the required standard. The High Court rejected his appeal holding that:

> ***"Upon re-evaluation of the evidence that was adduced, it was clear to the court that the prosecution indeed established to the required standard of proof beyond any reasonable doubt that the appellant was identified at the scene of the robbery. In our considered view, that evidence was of recognition. The complainant and PW2 knew the appellant prior to the robbery incident. They knew him even by name. They identified him by name at the scene of the robbery. No evidence was adduced to suggest that there could have existed a grudge between the appellant and the complainant that could have motivated the complainant to falsely accuse the appellant of the crime. The ingredient (sic) to establish the charge of robbery with violence contrary to Section 296(2) of the Penal Code was proved. The appellant, in company of others, while armed with dangerous and offensive weapons, robbed the complainant of Kshs.3,000/= cash, his identity card and his Post bank book, and in the course of the robbery injured***

the complainant. The alibi defence was rightly rejected by the trial court as having no strength to dent the otherwise strong evident (sic) adduced by the prosecution. We too are of the same opinion."

2. In this second appeal, learned counsel for the appellant, Mr. Onyango Jamsumbah, referred to the memoranda of appeal and submitted that both lower courts failed to appreciate that the appellant was tried and convicted without a charge sheet; that accordingly the appellant was not informed in sufficient detail of the charge in breach of Article 50(2)(a)(c) of the Constitution of Kenya; that the appellant's identification was improper and did not accord with the law; and that the High Court failed to carefully evaluate the evidence for if it had done so it would have found that the prosecution did not prove its case against the appellant to the required standard. For these reasons, Mr Jamsumbah urged us to allow the appeal.

3. On his part, L. K. Sirtuy, Learned Principal Prosecution Counsel, when opposing the appeal submitted that as the second appellate court, our mandate is confined to matters of law; that the High Court did properly analyze the evidence and concluded that the conviction was well founded on evidence of identification by recognition by two witnesses who positively identified the appellant. In that regard counsel invited us to have regard to the case of **Anjononi vs. Republic (1980) KLR 59** and to uphold the conviction.

4. Regarding the complaint that the appellant was tried and convicted without a charge sheet, counsel submitted that there can be no doubt that the charge sheet must have been plucked out from the file as it is clear from both judgments of the lower courts that the particulars of the charge were read to the appellant and that he pleaded thereto. With that, Mr. Sirtuy urged us to dismiss the appeal.

5. The facts as established by the lower courts against which those submissions were canvassed before us are that on 13th April 2002 at about 10.00pm, James Mwangi Gitau (PW2), a taxi operator in Kakamega town, was in the course of his business ferrying a passenger in his Datsun saloon vehicle to Scheme Estate. Whilst driving into the estate, the headlights of his vehicle illuminated "*people who had grabbed someone. The people disbursed (sic) leaving two struggling.*" On moving nearer, he found the appellant, whom he knew by the name "*Mbararo*" and called out his name whereupon the appellant "*took off leaving [the] complainant*." Unknown to him, PW 2 had stumbled upon a robbery in progress.

6. The complainant, Samuel Makawa Kuloba (PW1), testified that he was on his way home in Scheme Estate in Kakamega town on 13th April 2002 at about 10.00pm when he was accosted by assailants; some of the assailants grabbed him from behind while others grabbed him by the side; two men were standing next to him holding knives; the attackers took his pullover that he was wearing, his Identity Card, his post bank book and Kshs. 3,000.00 in cash. One of the assailants struggled to remove his trousers. He grabbed one of the attackers with whom he struggled on the ground. At that point a taxi stopped, and aided by the lights from the taxi, he realized that he knew the attacker he was struggling with on the ground; he knew him by his nickname "Mbararo". The taxi man called out the name Mbararo upon which the appellant ran away. The taxi man who had a passenger in his vehicle went away. Subsequently, PW1 assisted the police in pointing out the appellant to the police at a 'Miti Dawa' rendezvous where the appellant attempted to run away but was apprehended.

7. Police constable Hezron Mokenye (PW3) stated that he was at Kakamega Police Station on 14th April 2002 when the officer in charge of that station requested him to accompany PW1 to go arrest a suspect; PW1 directed him to a hotel in Scheme Estate where they found the appellant taking 'Miti ni Dawa' liquor and escorted him to his house where he conducted a search before taking him to the police station after which he was subsequently charged.

8. Ayienda Sandifin (PW4), a clinical officer at Kakamega Provincial Hospital, testified that he examined PW1 at the hospital on 14th April 2002 who presented him with a history of the

assault; he found tenderness on the right forearm, upper chest and upper back and classified the injuries as "harm". He produced the P3 form that he completed upon examination.

9. In his defence, the appellant denied committing the offence and stated that he resides in Kambi Somali estate; that on the date PW1 was allegedly robbed he was sick at his home and that he was arrested at his place of work for an offence he did not commit.

10. Based on the evidence, the lower courts made concurrent findings that the circumstances under which the complainant was attacked were conducive for positive identification and that the appellant was indeed positively identified. In this regard, the trial court expressed itself as follows:

> ***"It does not appear to be in dispute that both PW1 and PW2 knew the accused before. PW1 said accused was one of the people who attacked him this night and took his property and that when the taxi appeared with lights on, which he says he used to recognize the accused. PW2 says he arrived on the scene driving the taxi and the lights fell on the attackers who he called by name he knows him. Accused took off and dropped pullover which turned out to belong to PW1 and which PW1 said was one of the taken items. This was at night but both PW1 and PW2 say the vehicle lights hit on the accused and they recognized him. I have considered that at night the circumstances of recognition have to be carefully tested to make sure that there was no possibility of error or mistaken identity. I have considered prosecution and defence. I saw these witnesses as they gave evidence and saw the accused as he was recognized and as he gave evidence in defence. I know the accused faces a capital charge and the evidence that should convict him should be full (sic) proof. I am certain that the accused is among the people who robbed PW1 and find so and find the alibi is fake and an afterthought."***

11. As already noted the High Court upon re-evaluating and analyzing the evidence arrived at the same conclusion. We have no basis for interfering with the concurrent findings by the lower courts. As this Court stated in **Karingo vs. Republic [1982] KLR 213**]:

> ***"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. R* (1956) 17 EACA 146*)"***

12. The evidence of PW 1 and PW2 placed the appellant at the scene of crime. They recognized him as one of the assailants. The words of this Court in **Anjononi & Others V R** (supra) that "*Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other*" ring true. There is therefore no merit in the complaint by the appellant that his identification was improper or did not accord with the law. We are satisfied that the prosecution proved its case beyond any reasonable doubt and that the High Court discharged its mandate to re-evaluate the evidence and to draw its own conclusions.

13. We turn now to the complaint that the lower courts failed to appreciate that there was no charge sheet and that the appellant was not informed in sufficient detail of the charge he was facing.

14. We have perused the original handwritten record of the trial court. The first two pages of that record have been plucked out. The typed notes of the trial court show that the court stated the substance of the charge and every element thereof to the appellant on 18th April 2002 before he was called upon to plead. There is no indication however of how the appellant pleaded to the charge, but the record shows that a hearing date was on that occasion scheduled. Based on our examination of the record, there is no doubt in our minds that the same has been tampered with so

as to eliminate the charge sheet and the record of the appellant's plea. As to who did, that we are not in a position to say.

15. What we are able to ascertain from the record is that the hearing commenced on 31st July 2002 and the appellant cross-examined prosecution witnesses without difficulty. Throughout the trial, there is no indication that the appellant complained that he did not have the charge sheet or did not know the nature of the charge he was facing. The judgment of the trial court and of the first appellate court contain the substance of the charge as well as the particulars clearly indicating that the appellant was charged with robbery with violence contrary to section 296(2) of the Penal Code.

16. We therefore reject the complaint that the courts below failed to appreciate that there was no charge sheet and that the appellant was not informed in sufficient detail of the charge he was facing. We are fortified in our view by the decision of this Court in **Samuel Karani vs. Republic, Cr. Appeal No. 320 of 2006 [2009] eKLR** where a similar complaint was rejected by the Court on the basis that, even though the charge sheet was missing in that case, there was other evidence showing that there was a charge sheet in which the appellant therein was charged with another with robbery with violence.

17. For those reasons, the appellant's appeal fails and is accordingly dismissed.

Dated at Kisumu this 3rd day of July, 2015.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. **K. MURGOR**

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JUDGE OF APPEAL

I certify that this is a true

Copy of the original.

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DEPUTY REGISTRAR