



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, KIAGE & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 20 OF 2009

BETWEEN

WYCLIFF KHATECHI 1ST APPELLANT

ALFRED KIMATA KIHONGA 2ND APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a sentence of the High Court of Kenya at Nairobi (Ojwang & Dulu JJ.) dated 11th February 2009

in

H.C.C.R.A NO. 483 OF 2005

JUDGMENT OF THE COURT

The appellants **ALFRED KIMATA KIHUNGWA** and **WYCLIFF KHATECHI** were jointly charged, tried, convicted and sentenced to suffer death on a single count of robbery with violence contrary to **Section 296(2)** of the Penal Code before the Chief Magistrate's Court at Kibera. The particulars of the offence were that;

“On the 7th day of December 2004 at Jamhuri road, jointly with others not before court, while armed with a knife [they] robbed Karanja Omari of a bicycle and one mobile phone make Motorola all valued at Kshs. 6,499 and at, immediately after or immediately before the time of such robbery used personal violence to the said KARANJA OMARI.”

A précis of the prosecution case was that on 7.12.04 at about 6.45am the complainant Karanja Omari (PW1) was cycling from BM Security Headquarters along Jamhuri Road where he worked as a supervisor. As he rode his bicycle across a field nearby, he came upon some four men. Two of them took hold of his bicycle while the other pair menaced him with a sword each. They had fished the swords from the hip trouser and shirt sleeve, respectively. One of them hit him with the sword on the left shoulder while the other ransacked PW1's pocket and took out his cell-phone which he gave to one of the other robbers. The other took possession of PW1's bicycle and the two walked off leaving two of the

accomplices still restraining the complainant.

Just then, two passersby appeared and PW1 seized the opportunity to slip away from the remaining two robbers. He ran towards his place of work screaming. The two robbers gave chase but soon turned to flee when members of the public appeared. PW1's colleague fetched a sniffer dog and soon all were in pursuit of the robbers towards a forest nearby. PW1, the dog handler EVAN MAKOLI KIMAU (PW2) and the charging crowd chased two of the robbers. They were eventually apprehended, thoroughly beaten and escaped a lynching by PW1's pleas to the charged crowd. The bicycle was found abandoned but the phone and the swords were not. PW1 positively identified the bicycle as his and also the two appellants as being among the robbers.

Aggrieved by the conviction and sentence, the appellants first appealed to the High Court but the learned Judges (Ojwang, J.(as he then was) and Dulu) who found their appeals devoid of merit and dismissed them.

In their appeal to this court, the appellants challenge the decision of the two learned Judges of the High Court on several grounds as captured in the Supplementary Memorandum of Appeal filed on 24.6.13 by their learned counsel Mr. John Swaka who abandoned the grounds previously filed on 4.10.05 and on 8.7.13. These grounds can be summarized as follows;

- The charge sheet was defective and the evidence tendered was at variance with its particulars
- The conviction based on identification was erroneous
- The evidence was contradictory and inconsistent and the judges failed to exhaustively reanalyze and re-evaluate it.
- Vital witnesses were not called
- Due consideration was not given to the defence
- The prosecution case was not proved beyond reasonable doubt.

In his submissions before us, Mr. Swaka contended that the charge sheet was at variance with the evidence in so far as it stated that the assailants were armed with a knife yet PW2 testified that they had a whip and a panga. Learned Counsel also took issue with the absence of description of the weapon as dangerous. Moreover, Mr. Swaka pointed out that whereas the charge sheet identified the locus of the offence as Jamhuri Road, the evidence was to the effect that the complainant was attacked in a field.

Counsel also assailed the learned Judges of the High Court for failing to conduct a proper and thorough evaluation of the evidence with the result that they affirmed convictions that were based on evidence that was riddled with contradictions and inconsistencies.

The appellants' advocate next faulted the identification evidence upon which the appellants were convicted. He contended that the same was poor and not free from the possibility of error. He submitted that PW1's description of the appellants was inadequate. Counsel then invited us to take judicial notice that there might have been fog which would have hampered the identification of the assailants. He added that a positive identification of the appellants would have been further hampered by the fact that the attack would have traumatized PW1 so that his senses were not at their optimum for accurate identification.

Mr. Swaka completed his submission by stating that the two courts below ought to have drawn negative inferences from the prosecution's failure to call vital witnesses. By these he meant the members of the public who aided in the arrest of the appellants.

The State opposed the appeal with Miss Mary Onudo the Assistant Director of Public Prosecutions (the ADPP) contending that the convictions of the appellants as entered by the subordinate court and confirmed by the High Court were safe and proper. The ADPP submitted that the offence was committed in broad daylight and the identification of the appellants was free from any possibility of error. Moreover, she submitted, this was a case of chase, apprehension and recovery which lent great assurance to the identification of the appellants.

On whether the charge sheet was defective, the State submitted that it was not. Counsel urged that under **Section 296(2)** of the Penal Code any one of three ingredients was sufficient to found a conviction and that in this case the ingredients were proved. She therefore dismissed as minor the non-description of the weapon as dangerous since the other ingredient of the offence of robbery were cited and proved. She was equally dismissive of the alleged variance between the charge, which she described a minor and immaterial. She placed reliance on **Section 382** of the Criminal Procedure Code as curative of any such variance which at any rate, occasioned the appellants no prejudice. She asserted that the learned Judges of the High Court had in fact done a thorough and exhaustive re-evaluation of the evidence before themselves concluding that the appellants were guilty of the offence charged.

On the complaint that the prosecution failed to call vital witnesses, Miss Oundo's submission was that the evidence before court was not 'barely adequate' so as to invite the drawing of the negative inferences that had such witnesses been called their evidence would have been prejudicial to the prosecution. Rather, counsel argued that a fact may be proved by a single witness and the prosecution was under no duty to call a superfluity of witnesses. She was categorical that the members of the public referred to would not have added any value or weight to the evidence already tendered.

As a second appellate court, our jurisdiction is limited by **Section 361** of the Criminal Procedure Code to hearing appeals on matters of law. We are therefore slow to disturb the factual findings of the two courts below. We endorse the position taken by this Court in **KARINGO Vs. R [1982] KLR219** at 219;

“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 s/o Karanja V. Republic [1950] 17 EACA 146)”

Looking at the record and the facts as we endeavored to set them out earlier in this judgment, we are unable to find that the conviction of the appellants was based on no evidence. We therefore give the concurrent findings of fact by the two courts below their due respect even as we deal with the questions of law raised in this appeal.

The determination of this appeal turns mainly on the question of identification. The complaint is that the learned Judges of the High Court did conduct a thorough and exhaustive re-appraisal and assessment of the evidence as a whole consistent with their duty as spelt out by this Court in many cases including **OKENO Vs. R [1972] E.A 32**. This is what the Court had to say of the appellants' identification;

“..on the merits, the time of day, we would take judicial notice, was well-lit from natural source; the robbery incident took place in the open field; the robbers had not disguised themselves in any manner; we must conclude that the complainant saw them well.

Identification was greatly enhanced by the instantaneous process of chase-after-the-thieves; with PW2 and his sniffer-dog being involved; with members of the public joining in – this chase process ended with the arrest of the two persons who were, in our opinion, not mistaken by identification; these persons were the appellants herein.”

The learned Judges of the High Court cannot be faulted for finding as they did. We find no basis for Mr. Swaka's assertion that there was fog on the material morning. This was never suggested at the hearing of the case and we were unable to accept counsel's invitation that we take judicial notice of it. The cogent and consistent evidence from the complainant and PW2 regarding the conduct, chase and arrest of the appellants dispels any doubts with regard to the correctness of their identification as the robbers.

Whatever differences there may have been in the prosecution evidence consisted in minor discrepancies and inconsistencies. They were not of a material character and did not dilute or weaken the probative force of the evidence on record.

As to whether the members of the public who participated in the chase and apprehension of the appellants should have been called to testify, we do not think their not being called in any way detracts from the strength of the prosecution case.

Miss Oundo argues that the prosecution need not call a superfluity of witnesses. In the text, **Essentials of Criminal Prosecution in Kenya** [2010] (Law Africa) P.O. Kiage comments on this subject thus;

“It is not necessary for the prosecution to call a multiplicity of witnesses, some of whom may be merely cumulative and repetitive. It is enough to call such number as are sufficient to prove its case. Where, however, the prosecution fails to call a material witness without any apparent reason, the court is entitled to presume or infer that the evidence which that witness would have given would, if produced, be unfavourable or adverse to that party as pointed out in Bukenya Vs. Uganda [infra]” (at p143)

It was not pointed out to us who the uncalled witnesses were. Nor was the possible materiality of their evidence shown.

The adverse inference can only be made, in our understanding of the decision in **BUKENYA AND OTHERS Vs. UGANDA** [1972] 594 where the evidence already tendered by the prosecution is “barely adequate.” As we have observed already, the evidence adduced against the appellants was not borderline, but quite overwhelming.

The court should be slow to arrive at negative inferences out of the prosecution’s choice of witnesses to call. We regard as good law the decision of this Court in **MWANGI Vs. REPUBLIC** [1984] KLR E.A 595 on this point:

“Whether a witness should be called by the prosecution is a matter within the discretion of the prosecutor and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive.”

No such motive has been suggested in the non-calling of the unnamed members of the crowd that chased the appellants. We find no defect in the prosecution’s election not to call them.

The upshot of our holdings is that the appeals by the two appellants are devoid of merit and are hereby dismissed in their entirety.

Dated and delivered at Nairobi this 31st day of January, 2014.

P. KIHARA KARIUKI

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PRESIDENT

COURT OF APPEAL

P.O. KIAGE

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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

/mwn