



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 345 OF 2010

BETWEEN

JOHN MUSYIMI KAMAILI.....APPELLANT

AND

REPUBLICRESPONDENT

(An appeal from the judgment of the High Court of Kenya at Mombasa (Omondi & Odero, JJ.)
dated 11th May, 2010

in

H.C.Cr..A. No. 85 of 2009)

JUDGMENT OF THE COURT

The appellant herein *John Musyimi Kamaili* was charged with the two counts of robbery with violence contrary to **section 296(2)** of the Penal Code. In Count I the particulars were that:

“On the night of the 14th day of June, 2008 at Kilifi plantation area within Kilifi District of the Coast Province, jointly with others not before court while armed with dangerous weapons namely a pistol and other crude weapons robbed Eliakim Kilonzo of his mobile phone make Motorola C118 valued at Kshs.4,000/= and cash Kshs.4,000/= and at or immediately before or immediately after the time of such robbery used violence on the said Eliakim Kilonzo”

Whilst in Count II the particulars were that:

“On the night of 14th day of June, 2008 at Kilifi plantation area within Kilifi District of the Coast Province, jointly with others not before court, while armed with dangerous weapons namely a pistol and other crude weapons robbed Britney Kilonzo of her ID. card and cash Kshs.1,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Britney Kilonzo.”

The trial proceeded before *J. M. Nduna*, the then Senior Resident Magistrate at Kilifi Law Courts

who on 29th June, 2009 found the appellant guilty in both counts and sentenced him to death.

The appellant was dissatisfied with the decision of the trial court and filed an appeal in the High Court. On 22nd September, 2010, **Omondi & Odera, JJ** dismissed the appellant's appeal and confirmed both sentences save that the sentence in Count II was held in abeyance. Undeterred, the appellant filed this appeal.

During the hearing of the appeal before us **Mr. Ogeto**, learned counsel for the appellant argued all the grounds of appeal together save for ground numbers 1 and 4 which he abandoned. He contended that the prosecution evidence was contradictory as PW1 told the court that his phone was valued at Kshs.2,000/= and yet in his police statement he had indicated that it was valued at Kshs.4,000/=. He faulted the High Court for failing to analyze and re-evaluate the evidence adduced in the trial court. Mr. Ogeto urged us to find that the identification parade was not properly conducted and further that the appellant had explained how the injuries on his fingers were occasioned which evidence was disregarded by both the trial and the High Court.

Mr. Oyiembo, the learned Assistant Director of Public Prosecutions opposed the appeal. He submitted that the contradiction on the value of the phone was immaterial. He urged us to find that the High Court had properly re-evaluated and re-analyzed the evidence adduced and considered the defence of the appellant. He was of the view that the identification of the appellant was safe and invited us to find that the fact that the appellant refused to attend hospital in spite of the injuries on his fingers was incriminating.

The appeal before us is a second appeal. Our position as regards a second appeal is clear. By dint of **Section 361(1)(a)** of the Criminal Procedure Code we are mandated to consider only matters of law. In **Kados v R, Nyeri Cr. Appeal No. 149 of 2006 (UR)** this Court delivered itself thus on the issue:

“... This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ...”

In **David Njoroge Macharia v R [2011] e KLR** it was stated that under **Section 361** of the Criminal Procedure Code:

“Only matters of law fall for consideration and the court 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 also Chemagong v Republic [1984] KLR 213).”

Be that as it may, Mr. Ogeto for the appellant contended that the High Court had failed to re-evaluate and re-analyze the evidence. If this be the case, we agree that this would be a matter of law and not of fact.

Looking at the evidence adduced in the trial court, the prosecution called a total of seven (7) witnesses. PW1 **Eliakim Kilonzo Musyimi** was asleep in his one-roomed house at about 10 p.m. on 14th June, 2008. He heard the gate of their staff quarters being shaken. He then saw two people advance towards his door which they broke using a metal rod. He was able to see the two using the security light on the veranda. He switched on the lights in the room. He was hit on the head with the metal bar. In the meantime his wife PW2 **Britney Achieng Kilonzo** was fighting to ward off the attackers. She was armed with a panga which she used to cut the fingers of one of the assailants. In response one of the assailants shot and seriously injured her. He was wearing a mask. On 3rd July, 2008 PW1 identified the appellant at an identification parade.

PW2 was with her husband PW1 when the door to their house was broken and the two assailants

made their way into their house. She armed herself with a panga and cut the man who hit her husband on the head with a metal rod. This particular assailant unlike the one who shot her was unmasked. She told the trial court that she saw the appellant as there was “adequate security lights” as well as the lights that her husband had switched on.

PW3 **Joseph Charo** together with PW4 **Nyamawi Safari** were employees of KK Security Guards. They responded to PW1's distress call and found the two in a critical condition, PW2 having been shot in the stomach and unconscious. They took the two to hospital.

PW5 **Dr. Mutinda** filled PW1's PW2's as well as the appellant's P.3 form. He produced them as exhibits.

Acting on a tip-off, PW6 **Pc. Mango** and PW7 **IP. Nahashon Mutua** went to the appellant's house on 24th June, 2008 and found him with injuries on his fingers. He had covered the injuries with a piece of cloth. PW7 produced the identification parade form(s) filled by **IP. Wangila**, who had since been transferred from Kilifi Police Station showing that PW1 had identified the appellant. In his defence, the appellant elected to make an unsworn statement. He narrated how on 12th June, 2008 he was cleaning the chimney of his lamp which fell off and cut his right hand four times as well as his left hand. He went to hospital on 24th June, 2008 and he was treated.

It is the above evidence that the appellant contends that the superior court failed to analyze and re-evaluate to his detriment.

On our part, we find that the contradictions as to the value of PW1's phone is of no material consequence.

On the issue as to whether the appellant was properly identified, we too find that PW1 and PW2 had more than sufficient time to identify the appellant. PW1 heard a commotion outside long before his door was broken. He was able to see the assailants using the security light on the veranda. When the two assailants gained entry into their one-roomed house, PW1 and PW2 saw the appellant as PW1 had switched on the lights. The one-roomed house forced them into close proximity. It is the evidence of PW1 and PW2 that unlike the second assailant who shot PW2 in the stomach the appellant was unmasked. We find that the duration of the attack, the close proximity, the fact that the appellant was not disguised as well as the intensity of the electric light was sufficient for positive identification of the appellant. What is more is that PW1 had had sufficient time to compose himself – he heard the gate being shaken and he woke up PW2. He saw the two assailants using the security light on the veranda before his door was smashed. After the duo gained entry into their one-roomed house, he switched on the lights. Both PW1 and PW2 told the trial court that they identified the appellant who unlike his colleague was unmasked. We also have the evidence of PW2 who cut the appellant's fingers. The incident was on 14th June, 2008 and it is instructive to note that when the appellant was found in his house in Mnarani on 24th June, 2008 he had not sought any medical help. The appellant's defence was that he had been cut by his chimney as he was cleaning it. We find that this was an outright lie as if a chimney fell whilst being cleaned, it could not surely cut his left hand four times and his right hand one time. This evidence was a fabrication by the appellant. As to the appellant's contention that he sought medical help, we find that this was on 24th June, 2008 after he had been arrested by PW6 and PW7. Indeed, he too had a P3 form filled after he was taken to hospital by PW6 and PW7.

Further PW1 was able to pick the appellant at a properly conducted police identification parade. We find that the evidence against the appellant was sacrosanct and the High Court properly re-evaluated and re-analysed the evidence.

For the foregoing reasons, the appeal is dismissed.

Dated and delivered at Malindi this 20th day of February, 2014

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR