



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MALINDI
(CORAM: OKWENGU, MAKHANDIA, SICHALE, J.J.A)
CRIMINAL APPEAL NO. 26 OF 2013

BETWEEN
PETER OOKO OTIENO.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from Judgment of the High Court of Kenya at Mombasa (Ojwang & Azangalala JJ) dated 23rd November, 2010

In

HCCRA No. 34 OF 2010)

JUDGMENT OF THE COURT

[1] The appellant **Peter Ooko Otieno** was charged before the Principal Magistrate's Court in Kwale with two counts of Robbery with violence contrary to **section 296** (2) of the Penal Code. He was tried and convicted of one of the counts in which he was alleged to have robbed **Esther Wangui Wairimu** (PW1) (Esther) of her Samsung mobile phone valued at Kshs.20,000/-, but was acquitted of the second count in which he was alleged to have robbed Anne Njeri. He appealed against his conviction and the mandatory death sentence to the High Court. His appeal was heard and dismissed in its entirety by **Ojwang** and **Azangalala** JJ (as they then were). Being dissatisfied, the appellant has now appealed to this Court raising five grounds in a memorandum of appeal which he prepared in person. At the hearing of the appeal, the appellant was represented by **Mr. Ngumbau Mutua**, learned counsel, who abandoned the first and second grounds and collapsed the third and fourth grounds which he summarized as failure to re-evaluate and analyse the evidence; and ground five as failure to consider the appellant's defence. The appeal was opposed by **Robert Oyembo** Assistant Deputy Public Prosecutor, who urged the Court to dismiss the appeal maintaining that there was sufficient evidence to support the appellant's conviction, and which evidence revealed that the appellant was acting in concert with the other robbers who escaped.

[2] The circumstances that informed the appellant's arrest and subsequent arraignment in court

were as follows: - On the night of 16th February, 2008 at 11.30pm, Esther, her sister **Leah Wanjiru** (Leah) and cousin **Anne Njeri** (Anne) were dropped at their house in Ukunda by a taxi. As they got out of the vehicle, they were accosted at the gate by three men who were armed with guns. The three men ordered them to lie down, and robbed them. Esther was robbed of a Samsung mobile phone valued at Kshs.20,000/- ,while Anne was robbed of a wedding ring valued at Kshs.4,000/- . **Alfan Suleiman Mwamsema** (Alfan) who was a watchman at the gate observed what was going on and immediately raised an alarm and within minutes a Group 4 security vehicle arrived with more guards. Two of the robbers managed to escape but the watchman and Esther managed to apprehend the appellant at the *locus in quo*. During the struggle, the appellant dropped a bracelet, watch and Kshs.500/- which Esther identified as hers. A toy gun was also recovered from the appellant. The Alfan who assisted in apprehending the appellant also testified, as did Corporal **Daniel Matheka** (Daniel) of Diani Police Station, who re-arrested the appellant and caused him to be charged.

[3] The appellant gave a sworn defence in which he explained that he was accosted by two men who robbed him of his phone and Kshs.800/- and ordered him to take them to his home. On the way, his assailants confronted a vehicle at a gate and ordered the occupants of the vehicle to come out and lie down. The appellant was also ordered to lie down as his assailants robbed the occupants of the vehicle. The robbers then left, and it was thereafter that Group 4 security guards came. One of the victims of the robbery identified the appellant as one of the robbers. The appellant denied having robbed Esther or Anne.

[4] The trial magistrate was satisfied that the appellant was the one who robbed Esther stating that: -

“... I have no doubt as to this fact because the incident was at the gate where there was bright light and infact accused was caught by the victims at the scene and his weapon recovered...”

[5] The trial magistrate further rejected the defence of the appellant stating:

“... the evidence of the prosecution was well collaborated and unchallenged that accused had laid in wait in darkness with the other two men and appeared with them all carrying guns. That they all gave orders and each aimed at a different door of the vehicle. Also that they all robbed the victims as the other two escaped, the victims held unto the accused who then dropped the toy gun and the items of PW1 and was caught at the scene these factors put together clearly (sic) and was not a captive as he claims. Had he been a captive it is clear he had opportunity to scape. There was opportunity to scape particularly as the complainant herein were being attacked...”

[6] The trial magistrate did not convict the appellant of the second count of robbery as Esther's cousin Anne was never called to testify.

[7] In his appeal to the High Court, the appellant raised several issues and filed written submissions in support thereof. The issues raised included; the contention that the charge sheet was defective as the toy pistol which the appellant was alleged to have had was not a dangerous or offensive weapon; that the circumstances were not favourable for a positive identification, and the possibility of the appellant having been the victim of mistaken identification was not ruled out; that material witnesses were not called to testify and the evidence adduced by the prosecution was inconsistent and contradictory, and therefore not sufficient to sustain a conviction; and that the appellant's defence was not properly considered.

[8] The learned judges of the High Court, found no merit in the appeal noting that the manner in which the toy pistol was used satisfied the requirement of section 296 (2) of the Penal Code and that the appellant was not only positively identified but was caught red handed by the prosecution witnesses during the commission of the offence.

[9] In arguing the appeal before us, learned counsel Mr. Ngumbau, maintained that the High Court failed to re-evaluate and analyse the evidence, and that had the judges done so, they would have noted that there

were material contradictions and inconsistencies in the prosecution evidence. In particular counsel pointed out that the fact that the witness stated that the appellant was lying down was consistent with the appellant's defence that he was a victim of the robbery. He reiterated that the appellant's defence which was sworn was not properly considered or given due weight.

[10] We have carefully considered this appeal and the rival submissions made before us. This being a second appeal, our mandate is restricted to dealing with issues of law only. As was observed in *Ganzi & 2 others vs Republic [2005] 1KLR 52*, we are bound by the concurrent findings of facts by the courts below unless it is established that the findings of facts are not based on evidence or were arrived at as a result of mis-direction.

[11] Both the trial court and the High Court made concurrent findings that Esther, Leah and Anne were attacked and Esther robbed just at the gate to her house. There is sufficient evidence to establish this finding and we are bound by it. In our view the two main issues that arise in this appeal and which are inter related are: - whether the appellant was positively identified as one of the robbers and whether the appellant's defence of mistaken identification was properly considered.

[12] It is evident that the robbery occurred at night. However, both the trial court and the High Court made concurrent findings that there were lights at the gate and neighbouring houses. Moreover, the fact that the appellant was arrested at the gate to the complainant's house was not disputed. The question is what was the appellant doing at the gate? Was he a victim of robbery as well as he alleged? Esther and Leah, gave clear evidence that the appellant was not just a passive participant at the robbery scene, but that he actively participated in the robbery. Esther maintained that she personally held onto the appellant when the security guard vehicle approached, and that at that time the appellant was in the process of forcefully removing a gold chain from Anne. The evidence of Esther and Leah was well corroborated by that of the security guard Alfan who helped apprehend the appellant. Therefore, the evidence implicating the appellant was more than mere identification, as he was caught red handed during the robbery. The recovery of a toy gun from the appellant during his arrest removed any doubt as to the appellant's mission. In the circumstances, the appellant's defence that he was a victim of mistaken identification was properly rejected.

[13] We come to the conclusion that the appellant's appeal has no merit as his identification was positive and the circumstances of his arrest at the scene left no doubt that he was one of the persons who robbed Esther. Accordingly we find no substance in this appeal and dismiss it in its entirety. Those shall be the orders of the court.

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

H. 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