



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MARAGA, G.B.M. KARIUKI & MWILU JJA)**

**CRIMINAL APPEAL NO. 394 OF 2009**

**CHARLES KAGO KANANDIA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(An Appeal from the Judgment of the High Court of Kenya at Nairobi (J.B. Ojwang & Warsame, JJ) dated 1<sup>st</sup> October, 2009*

*in*

*HCCRA No. 491 of 2006)*

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**JUDGMENT OF THE COURT**

1. This is a second appeal. The appellant herein, **CHARLES KAGO KANANDIA**, was charged jointly with another before the Chief Magistrate’s Court Kibera with robbery with violence contrary to the provisions of section 296(2) of the Penal Code. They also faced a further count of house breaking into a dwelling house and stealing therefrom various items contrary to the provisions of section 304(1) of the Penal Code. The two accused persons were acquitted on count two and the co-accused of this appellant was further acquitted of the charge of robbery with violence, leaving this appellant to solely face the charge of robbery with violence. This appellant was convicted and sentenced to suffer death as by law provided. His appeal to the High Court was dismissed hence his sojourn to this court.

2. The appellant in his Amended Supplementary Memorandum of Appeal raises some seven grounds of appeal as here-below:-

***“1. THAT the 1<sup>st</sup> Appellant (sic) Court erred in law by failing to evaluate the evidence presented to court which did not conform with the ingredients of the charge of robbery with violence contrary to section 296(2) of the Penal Code.***

***2. THAT the 1<sup>st</sup> Appellant (sic) Court erred in law in affirming the conviction of the Appellant while relying on recognition/ identification whereas the circumstances favouring a positive identification were difficult and stressful and not free from possibility of error.***

***3. THAT 1<sup>st</sup> Appellant (sic) Court erred in law in affirming the conviction of the Appellant***

*herein whereas the prosecution did not prove its case beyond reasonable doubt.*

4. *THAT the 1<sup>st</sup> Appellant (sic) Court erred in law in affirming the conviction of the Appellant whereas the Appellant (sic) defence was not considered.*

5. *THAT the 1<sup>st</sup> Appellant (sic) Court erred in law in affirming the conviction of the Appellant whereas the Appellant's alibi was neither considered nor displaced.*

6. *THAT the 1<sup>st</sup> Appellant (sic) Court erred in law in failing to analyse and evaluate the evidence adduced at the trial and thus came to a wrong conclusion.*

7. *THAT the 1<sup>st</sup> Appellant (sic) Court erred in law by failing to uphold the Appellant (?) conviction on the ground that the jurisdiction of the prosecutor was not vividly illustrated."*

3. In support of the appeal learned counsel for the appellant Ms. Khaemba submitted that the High Court did not evaluate the evidence and that conviction was purely based on circumstantial evidence. That there was no evidence of violence either from PW4 or indeed anyone else. Counsel added that the intruder was not identified since there existed no favourable circumstances for identification. That to her is the reason the description of the intruder was not given. Counsel urged that we be wary of the evidence of a single identifying witness and that dock identification, which is all there was in this case, is unsafe. Learned counsel added that the case against the appellant was not proved beyond reasonable doubt. She submitted further that the prosecution evidence was an afterthought and contradictory. In her further submissions counsel stated that the appellant's defence was not considered and was therefore not displaced. She went further to state that the appellant was not given an opportunity to prove his innocence by calling his witness John and thereby the trial court faulted. In conclusion counsel stated that in any case there was no robbery and if any occurred it was not committed by this appellant, and that the rank of the prosecutor was not indicated which contravened the provisions of the Criminal Procedure Code.

4. Learned Senior Assistant Director of Public Prosecution Mr. Ondari vehemently opposing this appeal described it as hopeless. He submitted that PW4 was attacked by three people armed with a knife and the appellant was arrested with the knife. He submitted further that the three ingredients of the offence of robbery with violence were proved.

Counsel stated that identification of the appellant at the scene hardly five minutes into the attack did not call for an Identification Parade. Counsel concluded his submissions by stating that the rank of the prosecutor was clearly shown as Inspector of Police; the defence of the appellant was considered by both the trial and first appellate courts; and that the appellant never applied to court to summon his witness John to come and give evidence.

5. This being a second appeal our involvement is determined by the provisions of section **361(1)(a) of the Criminal Procedure Code** and confined to dealing with matters of law only. That section provides:-

*"361(a) A party to an appeal from a subordinate court may, subject to subsection (8) appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the court of appeal shall not hear an appeal under this section –*

*a. on a matter of fact ----"*

Case law has added emphasis on that part of the law and to support that point suffice only to cite the authority of **David Njoroge Macharia v R [2011]e KLR** and quote the restatement that:-

*"Only matters of law fall for consideration ----"*

The treatment given to issues of fact in a second appeal is as in the case below:-

***“where a right of appeal is confined to questions of law, the appellate court has loyalty to accept the finding of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law and it should not interfere with the decisions of the trial or first appellate court unless it is apparent that on evidence no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin v Glyneed Distributors Limited (T/A MBS Fastenings – The Times of March 30, 1983)”.***

The above are the principles of law that will guide our determination of this appeal.

6. That the High Court did not evaluate the evidence is not borne out by evidence. We have perused the High Court judgment and can do no better than quote their Lordships verbatim in the passage that analysed and evaluated the evidence:-

***“After carefully considering all the evidence and paying much attention to the turns in counsel submissions, we have come to the conclusion that the burden of the case shows the appellant to have entered the locus-in-quo premises uninvited, armed and unlawfully, and that he was at the time armed with an offensive weapon and that he was correctly identified as one of the thieves who were stealing the residence’s effects, and who violently assaulted and tied up the complainant. In the deliberate process of binding him up, the complainant did see the appellant as one of those involved; the appellant, unable to scale the compound’s wall in time attempted to find a hide-out in the banana plantation, still armed with his offensive weapon, only to come out and be openly identified at (sic) during the fair day-time hour of 6.00 p.m. We have no doubt that the appellant was one of the robbers of the material afternoon, and several witnesses on that occasion saw him and identified him.”***

If the above does not give a proper evaluation of the evidence, coming as it does after a recap of the entire evidence at trial, then we do not know what does. On our part we are satisfied that the first appellate court properly discharged its onus of analyzing and evaluating evidence.

7. The evidence all through showed that the intruders were more than one. The evidence of PW2, Protus Gaitano, PW4 and PW5 was clear on that. When PW2 together with Peter Omuya (PW3), and Stephen Ndiche (PW5), fellow workers at Securicor (K) Ltd at the Response Alarm division, got to the premises in question in answer to an alarm raised, and accessed the compound where a crime was being committed, they saw three people running away who jumped over the wall. A check around the compound led to the discovery of PW4 (David Matundura Magoma) who was tied up and thrust into the toilet. Further, they were to encounter a person in the bananas on one side of the compound who was wielding a knife and threatening to attack one of them. Right there the requirements of the provisions of section 296 (1) and (2) of the Penal Code were satisfied. That section provides:-

***“296(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.***

***(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.***

(emphasis ours)

The ingredients of the offence of robbery with violence, as can be scanned from the law above, are threefold, to wit, the attackers are more than one, they are armed, and that there is assault or use of any form of personal violence against the person against whom robbery is committed. In this appeal, it is crystal clear that there were more attackers than one, indeed they were four, one was armed with a knife

which is unquestionably a dangerous and offensive weapon and finally, the victim of the crime, that is to say, PW4, was tied up with ropes, head covered with plastic paper and thrust into the toilet and from him was robbed Kes.500/=. All the prosecution needed to do was to prove one of the three ingredients as shown from the use of the conjunctive “or” in section 296(2) of the Penal Code but in this case all the three ingredients of the offence of robbery with violence were concurrently present and were proved to the required standard. Consequently Ms. Khaemba’s submissions to the contrary are difficult to sustain.

8. That the identification of the appellant is faulted must be discounted in the following manner. The appellant was without a doubt arrested in the *locus-in-quo* hidden in banana plants in the compound. He was armed with a knife, the very knife PW4 said was almost used to stab him. He was arrested by PW2, PW3 and PW5, knife still in hand. PW4 immediately recognized him as the man who had earlier threatened him with that very knife. Those are the concurrent findings of fact of the two courts below, by which we are bound – **M’Riungu V R (supra)**.

In those clear circumstances any doubt placed on the identity of the appellant is a desperate search in pitch darkness. The question of a single identifying witness is, in light of the evidence of PW2, PW3, PW4 and PW5 misplaced. We agree that the appellant was positively identified as one of the offenders. His guilt was proved beyond reasonable doubt.

9. There was no evidence of the two courts below failing to consider the appellant’s defence. The record speaks for itself. The appellant never sought the trial court’s assistance to avail his alleged witness by the name John. Of course the rank of the court prosecutor was clearly indicated as IP – which stands for “Inspector of Police”.

10. It is for all the above reasons that we agree with Mr. Ondari for the State that if ever there was a hopeless appeal, this must be a classicus one, with the result that we reject it, uphold the conviction and affirm the sentence.

Orders accordingly.

**Dated and Delivered at Nairobi this 4<sup>th</sup> day of March, 2014.**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

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

**REGISTRAR**

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