



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OUKO & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 77 OF 2013

BETWEEN

JOSHUA NJOGU KINIARU APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from a judgment of the High Court of Kenya (F. Ochieng and L.A. Achode JJ) dated 12th March, 2013

in

HC. CR. A. 20 OF 2009)

JUDGMENT OF THE COURT

The appellant, Joshua Njogu Kaniaru has challenged in this appeal his conviction and sentence following the dismissal of his first appeal to the High Court.

The learned trial magistrate (L.K. Mutai) having heard the evidence presented by the prosecution witnesses in support of the charge of robbery with violence contrary to **section 296 (2)** of the Penal Code and the defence of the appellant was persuaded that the charge was proved and proceeded to convict and sentence the appellant to death.

In dismissing the appellant's first appeal, the High Court (Ochieng and Achode, JJ), like the trial magistrate, found that the offence charged was proved against the appellant for the reasons that he was positively identified (indeed recognized) by the complainant, Willy Wanyoike and an independent eye witness, Mary Waithera Kimani; that the appellant was in company of two other persons and at the time of the robbery wounded the complainant.

The appeal was argued by Mr. Amutallah, learned counsel for the appellant on the following 3 grounds contained in the Supplementary Memorandum of Appeal, the second ground having been abandoned:-

“1. That the learned trial Judges (sic) faulted in points of law by failing to note that there was no proper identification of the appellant.

2. That the learned trial Judges (sic) erred in law by failing properly re-evaluate and re-analyze the entire evidence on record as duty bound.

3. That the learned trial Judges (sic) grossly erred in law by concluding that the prosecution case was proved beyond reasonable doubt, failing to note that the same remained unproved as required in law.”

The appeal was opposed by Mr. Kivihya, learned counsel for the respondent who urged us to dismiss the appeal for lack of merit. In his view, the appellant was properly identified and the charge proved.

The jurisdiction of this Court on second appeal is stated as follows in **Section 361 (1)** of the Criminal Procedure Code:-

“361 (1) 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, and severity of sentence is a matter of fact; or**
- b. **against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under Section 7 to pass that sentence.”**

This jurisdiction has been explained in a long line of cases and for that reason we shall cite only one, **Njoroge V. Republic** [1982] KLR 388 where it was emphasized that:-

“On second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the Court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence.”

The evidence before the two courts below was that on 10th July, 2007 at 7.30 pm the appellant was in a bar where he had taken his “*merry-go-round*” contribution to a certain person. As he sat in the bar waiting for the person and having a beer, he saw the appellant, who has been known to him since childhood, come into the bar through the back door and walking out through the front door. After taking three bottles of beer, the complainant decided to leave. Outside the bar he met the appellant with two other persons who were unknown to him but who he saw clearly and could indentify. The appellant, confronted him, demanding money. One of the appellant’s confederates hit the complainant on the head with his fist. The complainant grabbed the appellant and a struggle ensued, in the course of which both fell down with the complainant pinning the appellant down on the ground. At this stage, the complainant was hit on the head with a stone. He lost consciousness thereafter. Mary Waithera Kimani, who was engaged in her business nearby witnessed all this and confirmed that the appellant was well-known to her.

Although Stephen Kamau Kangera who ran a butchery business near the scene of the robbery did not witness the robbery, he however heard the commotion and upon getting to the scene he found the complainant with injuries. The latter told him that he had been attacked and robbed by the appellant. That is the summary of the relevant prosecution evidence.

The appellant for his part denied participating in the commission of the offence and maintained that he met two men who arrested him for no apparent reason.

In view of this *alibi* defence and the prosecution evidence claiming that he was at the scene of crime the sole issue before the two courts below and indeed before us is that of identification, but of a category known as recognition as acknowledged in **R. Turnbull** [1976] 3 WLR 445, where it was cautioned that a conviction resting entirely on evidence of recognition must be treated with the greatest caution and circumspection as “*it is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken.*” In **R. V. Bentley** [1991] CLR 620, the English Court of Appeal commented that:-

“A recognition which was the type of identification evidence here, could not be regarded as trouble free because many people had experienced seeing someone on the street that they knew and later discovered that they were wrong.”

The circumspection treatment of such evidence expected of the court entails consideration of factors such as:-

- i. the length of time the witness had the suspect under observation,
- ii. the distance between the witness and the suspect,
- iii. the lighting condition,
- iv. how long the witness has known the suspect.

Both the complainant and Mary Waithera Kimani were categorical that they knew the appellant prior to the date of the robbery, with the former claiming he had known him since childhood. Both witnesses also insisted that the scene of the robbery was well-lit with electricity light from business establishments in the vicinity. This is how the complainant described the attack and the scene:-

“He stood with 2 others. As I passed them accused held me by the shirt-front. We faced one another..... I then grabbed the accused and we both fell down. I was on top of accused.....I knew accused well from before. He hails from my village and I have known him since childhood.....The scene was well lit with security lights. The scene was surrounded by shops and the security electricity lighting shone well from all sides and so visibility was very clear. It was bright like daytime at the scene. I didn’t identify the other 2 persons who were with accused but I saw their faces well.”

Mary Waithera Kimani on the other hand said:-

“I heard screams. I moved towards the directions where screams were coming from. The scene was well lit with security lights and as I approached I saw 2 men standing while the complainant on the ground (sic) but on top of the accused person. I was able to identify the complainant very well since I knew him from before and the lights were in plenty. I was also able to identify the accused person very well from the scene since we knew him from before and the scene was well lit. As I stood nearby one of the 2 aforesaid men grabbed the complainant off the accused before the accused was hit with a stone.....I rushed to where the complainant was. I was joined by other people who included Kamau whom I believe is a witness herein and who owned a butchery which was so close to the scene. I hadn’t differed with accused prior.”

It is quite clear to us, and we so find from the evidence reproduced above and upon confirmation by both Stephen Kamau Kagera and PC Frankline Muriithi, that there was sufficient light at the scene of the robbery. We are further satisfied on the evidence that the two main eye witnesses knew the appellant prior to the attack. The learned Judges of the High Court properly re-evaluated the evidence before them and arrived at the correct decision regarding identification.

There being evidence that the appellant was in the company of two other persons during the robbery in which the complainant was attacked, injured and lost Kshs. 6,000/=, all the necessary ingredients of the offence of robbery contrary to **section 296 (2)** of the Penal Code being present, with respect, the learned Judges correctly found the charge proved beyond doubt and the appellant’s *alibi* defence displaced.

In the result, we dismiss this appeal in its entirety.

Dated and delivered at Nairobi this 23rd day of May 2014.

W. KARANJA

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JUDGE OF APPEAL

W. OUKO

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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.

DEPUTY REGISTRAR

/mgkm