



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. K. KARIUKI (PCA), MWILU & OUKO JJA)

CRIMINAL APPEAL NO. 558 OF 2010

MOSES MOHAMMED FADHILI APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi by

(Justices Lesiit & Makhandia) dated 29th September 2008

In

HC. CR. Case No. 241 of 2002)

JUDGMENT OF THE COURT

1. **BEN AMBUGA ONDIBA** and his friend and neighbor **WILLIAM MACHOKA** were, on the 11th day of December 2001 at about 11.00 pm walking to their houses within Kenyatta Estate in Nairobi from Masandukuni, a social place within their estate. They met gangsters who stopped them and demanded from them money and mobile phones. Before the duo could respond to the gangsters, the latter threatened them with the pangas they had. The duo were roughed up, brought down to the ground and robbed of various belongings including money. They reported the incident to the Kenyatta Police Post the following day. Sometime later they were summoned to the Police Post where they identified the appellant herein **MOSES MOHAMMED FADHILI** as one of their attackers on that fateful night of 11th November, 2001.

2. The appellant was subsequently charged, tried and convicted on two counts of robbery with violence by the Senior Resident Magistrate’s Court Kibera and sentenced to suffer death as by law prescribed. His appeal to the High Court was not successful, hence his second appeal to this court.

3. The appellant was represented by two counsel at his second appeal. Learned counsel Mr. Andrew L. Kariu filed what he titled “SUPPLEMENTARY MEMORANDUM OF APPEAL” dated the 3rd July 2013. At the hearing it was converted to Memorandum of Appeal. In it counsel raised six (6) grounds as hereunder:-

“1. The Learned Judges of the High Court erred in Law by failing to note that (sic) was a defect in the charge sheet.

2. The Learned Judges of the High Court erred in Law by disregarding the Defence and evidence of the Appellant.

3. The Learned Judges of the High Court erred in Law by upholding (sic) conviction which was not proven beyond reasonable doubt.

4. The Learned Judges of the High Court erred in Law by failing to subject the entire evidence to afresh (sic) and exhaustive scrutiny as demanded by Law.

5. The Learned Judges of the High Court erred in Law by basing a conviction on identification.

6. The Learned Judges of the High Court erred in Law by convicting the Appellant on witness (sic) and evidence which does not corroborate the charge.”

4. On the 10th July 2013 the appellant’s second advocate Mr. John Swaka filed a Supplementary Memorandum of Appeal and raised nine (9) grounds of appeal as follows:-

“1. The learned judges of the superior court erred in law in upholding a conviction arising from an unfair trial which contravened Section 211 of the Criminal Procedure Code.

2. The learned judges of the superior court erred in law in upholding a conviction arising from a defective charge sheet.

3. The learned judges of the superior court erred in law in upholding a conviction where the evidence tendered was at variance with the particulars of the charge sheet.

4. The learned judges of the superior court erred in law in upholding a conviction based on erroneous recognition evidence.

5. The learned judges of the superior court erred in law by upholding a conviction anchored on contradicting/ inconsistent evidence.

6. The superior court erred in law by upholding a conviction by failing to give due consideration to the defense.

7. The learned judges of the superior court erred in law upholding a conviction without exhaustively re-analyzing and re-evaluating the trial court proceedings, as should be duty of the 1st Appellate Court.

8. The superior court erred in law by upholding a conviction by mis-directing itself that the prosecution had proved their case beyond reasonable doubt.

9. The superior court erred in law by upholding a conviction based on violation of the Appellant’s rights as envisaged under Section (sic) 72 – 77 of the Repealed Constitution.”

5. At the hearing of this appeal Mr. Kariu combined his grounds numbered 2, 3, 5 and 6 and argued them jointly. He told us that the appellant’s conviction was based on recognition yet there was no such evidence on record. Counsel added that the evidence of PW1, PW2 and PW3 was full of contradictions, even contradictions upon contradictions. He wondered what the exact number of attackers was, were they four, seven or just one or five? He said that the evidence of

PW3 who said he was woken up by noises was worthless as he did not identify the person making those noises. Stating that the offence was committed at night, PW3 having just woken up and PW1 and PW2 being drunk, there could not have been any identification in such circumstances. Counsel concluded that the conviction that followed was most unsafe.

6. On his part Mr. Swaka arguing his grounds 1, 3 and 7 separately submitted to us that the appellant's right to a fair trial was violated. That there was no indication of what language(s) PW1 and PW2 used in giving their evidence contrary to the clear provisions of **Section 188(4)** of the Criminal Procedure Code. Counsel went on to add that there was variance in the particulars of the charge and the evidence adduced as there was no evidence of ownership of the robbed items. Nor was there evidence that the finger of PW1 was cut. He said that there was evidence from PW4 that the offence was committed on 12th December, 2001 while the charge sheet gave the date as 11th December, 2001, just as there was contradictory evidence that the arrest of the appellant was effected on 26th December, 2001 and elsewhere the date of arrest is given as 26th January, 2002.

Mr. Swaka further submitted that the High Court did not re-evaluate the evidence on record otherwise it would have noted that there was no indication of the language used and also that there was failure to indicate the ownership of the items said to have been robbed off the victims of the crime. He said that the failure to comply with the requirements in the case of **OKENO v R (1972) EA 32** to wit, as a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions, rendered the conviction unsafe and urged us to allow this appeal.

7. Both counsel relied on various case law to buttress their respective arguments all of which we have considered.

8. Senior Principal Prosecution Counsel Jacinta Nyamosi was of the opposite view, that the conviction was rightful. She said that the ample evidence of PW1, PW2 and PW3 on recognition of the appellant was sound evidence. On the contradictions, Counsel submitted that they were minor and could not shake the prosecution case. These were, the number of attackers and a variance on dates which she saw as mere typos. Counsel submitted that the offences that the appellant faced were proved to the required standard.

9. In a second appeal we are enjoined to consider matters of law only – see **Section 361(1)** of the **Criminal Procedure Code** which provides:-

“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 in

In **NJOROGE V R [1982] KLR 388** this Court re-emphasizing the above law held:-

“On a second appeal, the Court of Appeal is only concerned with points of law. In such an appeal, the court is bound by the concurrent findings of facts made by the lower courts unless they were not founded on evidence.”

10. The evidence of PW1, 2 and 3 was that they recognized the appellant as a resident of their estate whom they had known for over five years. Infact, PW1 said he had seen the appellant from his tender age and for over ten years by the time of the attack. PW2 and PW3 were categorical that the attackers were youth from the neighbourhood, four of whom they recognized. The site of the attack was said by these witnesses to be well-lit, a fact that was not pursued in cross examination. Agreeing with the trial court on the circumstances surrounding

identification/recognition of the appellant as one of the attackers, the High Court stated:-

“We have on our part re-evaluated the evidence and agree with the learned trial magistrate’s finding. We are satisfied that the conditions of light prevailing at the scene of robbery was (sic) bright and that from the circumstances of the case, the Appellant was positively identified through recognition. The identification was safe and free from the possibility of error or mistake.”

We must agree. The appellant had no burden to discharge at trial, to that we are alive. However, when all these three neighbour witnesses said they recognized him, nothing arose to suggest, in cross examination or otherwise, that these were total strangers to the appellant who could not have recognized him. We think that the two courts below properly directed their judicial minds to the issue of identification and arrived at the correct result on the same.

11. The point taken on contradictions as to the number of attackers is in truth a non-issue. We say so because what is consistent is that there were more than one attacker, for whereas PW1 said the attackers were four, PW2 said they were seven but two ran away leaving five. The provisions of **Section 296(2)** of the Penal Code require, for the offence of robbery with violence to be proved, that there is more than one robber, or that some violence is meted on the victim, or that the attacker(s) is (are) armed with dangerous or offensive weapons. The presence of any of those requirements/ ingredients will constitute the offence of robbery with violence. In the appellant’s case all the three ingredients of the offence co-existed, for which reason we reject the ground on contradictions.

12. We were told that the proceedings were conducted in a language that was not indicated and thereby the appellant was prejudiced. We have painstakingly perused the record. That is not borne out by the record. On the day the appellant took plea the record reads:-

“Interpretation: English/Kiswahili”

On subsequent days, the appellant who was not represented by counsel ably cross-examined the prosecution witnesses. Nothing was raised about the appellant not being able to understand the proceedings. He did not call for interpretation to whatever language he wanted. This was his to do. He did not do it. On the contrary he followed the proceedings well, cross-examined witnesses and indeed gave his own defence. Additionally, the law is this:-

“For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not understand what went on during trial.”

See **GEORGE MBUGUA THIONGO V R Criminal Appeal no. 302 of 2007.**

Again in the case of:-

DAVID NJUGUNA WAIRIMU V R [2010]e KLR Criminal Appeal no. 28 of 2009

it was stated, dealing with the issue of language,

“The record clearly reflects that the appellant fully participated in the proceedings, asked questions in cross-examination, himself gave evidence in his defence.”

That stands on all fours with this appeal the consequence of which is that the ground of appeal based on language must and hereby fails. A fair trial was had by this appellant.

13. It simply is not correct to state that the appellant’s defence was not considered. The record

is clear. The trial magistrate found the appellant's defence irrelevant. The High Court agreed, and so do we, and for this further reason that the appellant said nothing to account for his whereabouts on 11th December, 2001 at about 11 pm. He admitted that he lived in the same estate as the victims of his criminal conduct of 11th December, 2001. Instead of offering some plausible defence, nay, a protest of his alleged innocence, and answer specifically to the charges he faced, he went off-course and engaged in unhelpful irrelevancies. The courts below worked with what the appellant gave them by way of defence and they lacked the capacity and jurisdiction to improve on it. On our further part we agree that the defence offered was no defence and did not address the specific charges leveled against the appellant.

14. There was no evidence of variances between the charge, the particulars of offences and the adduced evidence that was apparent on the record. It was enough that the victims of the robbery, being PW1 and PW3 lost their money, watch and phone in the incident and that violence was meted on them by more than one robber. We must and do reject the allegation of differences as stated above.

15. We must correct an error of law that both courts below failed to address. The appellant was convicted on two counts of robbery with violence and sentenced to suffer death on both counts. Of course one does not die twice. The correct position in law is that the appellant should have had one of the sentences held in abeyance. Accordingly we order that the appellant will suffer death under count I as prescribed by law. The sentence under count II shall be held in abeyance.

16. Our involvement with this appeal reveals that the same has no feet to stand on and the same must fail and we order that it be and is hereby dismissed in its entirety.

It is so ordered.

Dated and Delivered at Nairobi this 9th day of May, 2014.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR