



IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 378 OF 2012

BETWEEN

BARSON STEPHEN MESHACK..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at

Mombasa (Odero & Nzioka, JJ.) dated 6th September, 2012

in

H.C.Cr.A.No. 286 of 2010)

JUDGMENT OF THE COURT

On the night of 10th March, 2009 at Likizo Cottages in Msambweni District of the then Coast Province an incident of robbery with violence occurred. Apparently, **PW1 Mbithi Joel Muasya**, who was the driver cum manager and the complainant in respect of count four in the charge-sheet had on 10th March, 2009, at about 7 p.m., taken the owner of Likizo Cottages, **Dr Kurt Lux** and two of his friends, **Stein Mazel Martin** and **Baver Wolfgang**, to have dinner at Ushago Restaurant, in Diani, Msambweni District. Kurt, Wolfgang and Martin were the complainants in counts one, two and three respectively in the charge-sheet. At about 10 p.m. as they returned to the cottages and were waiting for the gate to be opened by one of the watchmen, **Ali Alfani PW2**, and unknown to them, there were thugs lurking in the neighbourhood ready to pounce on them. As they drove in the four thugs forced their way into the compound past PW2. Sensing that the thugs meant no good since they were armed with what appeared to be a pistol, PW2 took to his heels toward the alarm and switched it on. He thereafter proceeded to the parking bay where he found the thugs molesting, harassing and robbing the occupants of the motor vehicle aforesaid. Indeed they had dragged them out of the motor vehicle. In the process they stole various items that included cash, mobile phones, a bag, bracelets, and driving licence. As all these were going on, there was another security guard, **Stephen Muria Mulwa PW3**, who had taken cover and could not be seen by the thugs. After seeing the thugs rob the occupants of the vehicle, he aimed an arrow at one of them but missed. However, the arrow hit a tree. This startled the thugs who started running away towards the gate with the guards in hot

pursuit. As they approached the gate, one of them fell down. He was immediately apprehended by the security guards. However the other three managed to make good their escape. Responding to the alarm, group 4 security guards soon arrived and the thug who had been arrested was handed over to them. They in turn handed him over to police officers led by **Sgt. Samuel Sokong (PW4)** who arrived at the scene having been called thereat by PW1. In the meantime on 14th March, 2009, PW1 was examined by Samuel Githui, a clinical officer based at Msambweni District hospital. His examination revealed that PW1 had indeed been injured during the robbery, the injuries being assessed as harm and the weapon used as blunt. The thug who fell down and was subsequently arrested and handed over to the police was the appellant. He was taken to the Diani Police Station where upon conclusion of the investigations he was charged with four counts of robbery with violence contrary to **section 296(2)** of the Penal Code, the other three victims of the robbery being the complainants in respect of counts one, two and three. In all the counts, it was alleged that on 10th March, 2009, at Likizo Cottages in Diani Beach in Msambweni District within the Coast Province, the appellant jointly with others not before court while armed with dangerous weapons namely toy pistols and rungun robbed respective victims of the items set out in the respective counts and at or immediately before or immediately after the time of such robbery threatened to use actual violence on those victims.

The appellant duly entered a not guilty plea and his trial soon thereafter ensued. Put on his defence, the appellant elected to give a sworn statement of defence and called a witness. He denied any involvement in the robberies. His story was that on 10th March, 2009, he worked as an animator at Ocean Village Hotel until about 5 p.m., then proceeded to partake of alcohol at Vine Pane bar until about midnight when he left for home whilst tipsy. Along the way he was accosted by a man armed with a pistol who pushed him into a compound and he fell down but he continued kicking him. A few minutes later he heard people running outside. He rose and as he was sprucing himself up, two men with arrows confronted him and threatened to kill him. When he explained to them that he had been hijacked, the duo pressed Group 4 Security company alarm whose guards came and he was driven away and handed over to Diani Police station. He was later charged with offences he knew nothing about.

His witness, **John Odongo Haggai (DW1)** only testified to the fact that he knew the appellant and that on 10th March, 2009 he had been with him until when he left work at about 4 p.m. for a drink.

The trial court having carefully considered and evaluated the evidence led by the prosecution as well as that of the defence acquitted the appellant in respect of counts one, two and three pursuant to **section 215** of the Criminal Procedure Code on account of the fact that the prosecution did not call the complainants or any of them to testify. However, in respect of count four, the appellant was found guilty and consequently sentenced to death.

Aggrieved by the conviction and sentence, the appellant lodged an appeal to the High Court. The appeal was heard by **Odero and Nzioka, JJ.** In a judgment delivered on 7th September, 2012, the two Judges dismissed the appeal in its entirety.

Undeterred, the appellant has now come to this Court by way of a second and perhaps last appeal. In his attempt to impugn the judgment of the High Court, the appellant has advanced four grounds; that he was a victim of circumstances; that he was also a victim of mistaken identity; that the prosecution case was not proved beyond reasonable doubt; and failure by the judges to consider adequately his defence.

At the hearing of this appeal before us on 13th May, 2014, **Mr James Ogero Ogeto**, learned counsel for the appellant submitted that the appellant was only identified by the clothes he wore on the material day, a T-shirt. However the physique of the appellant was not described nor was the T-shirt tendered in evidence. Since this was the only item used to identify the appellant, in its absence, both courts below ought to have doubted the alleged identification and resolved the doubts in favour of the appellant.

In response, **Mr Wohoro**, learned Senior Assistant Director of Public Prosecution submitted that the appellant was arrested at the scene. He was identified by PW1, PW2, and PW3. That there was enough light at the scene and visibility was therefore a non-issue. In the premises the appellant's conviction and sentence was safe.

We are keenly aware that this is a second appeal and that our jurisdiction is delimited and ring fenced by the provisions of **section 361** of the Criminal Procedure Code. Our jurisdiction is limited to considering matters of law only. We are barred from considering matters of fact, the assumption being that such matters of fact would have been adequately evaluated and considered by the courts below and would deserve no further input by this Court.

The only issue of law raised in the grounds of appeal and the oral submissions made by counsel for the appellant appears to be identification of the appellant. However to us this is a non-issue. This is because the appellant was arrested at the scene of crime. The appellant concedes that much. However his defence is that he was a victim of circumstances. That as he was on his way home after a long session of drinking and being tipsy he was suddenly confronted by a man armed with a pistol who pushed him aside and poked him with the pistol. He then pushed him into a compound and forced him to lie down on his stomach. After about 5 minutes, he heard people running outside. When he stood up, he was arrested by security guards and later handed to the police who subsequently charged him with the offence. Basically the appellant was saying that he had been hijacked by the thugs and forced into a compound in which a robbery was committed. He had no hand in the robbery and that he was merely a victim of circumstances being at the wrong place at the wrong time.

How did the trial court handle that defence? It stated:-

"It is noted that the accused took up this issue with the witnesses (PW1, PW2 and PW3) who all denied that anyone had been forced to lie at the gate or that there had been a 5th thief guarding anyone at the csge (sic). To me, this remains a mere allegation of accused that cannot challenge the evidence of the prosecution that accused had ran into the compound with the other 3 and participated in the robbery only for him to fell (sic) down as he aimed at escaping. In my (sic) case if accused was drunk and on his way home as alleged, I do not see why the thieves would bother kidnap him and keep him under guard at the gate while the intended victims had all gone into the compound. And none of them (sic) witnesses talked of a 5th thief at the gate. This, to me, implies that if al (sic) all accused had been hijacked in that manner, he would have got the opportunity to escape the moment the thieves ran into the compound. He would not have remained on the ground. In any case, there was concrete and well corroborated evidence that he had failed (sic) down before being caught within the compound, not while lying down as he alleges ..."

How about the High Court? This is how it delivered itself on the issue:-

((In his defence the appellant denied that he went to the cottages with any intention of committing a robbery. He claims that the other men kidnapped him as he walked home drunk and forced him to accompany them on their nefarious mission. Contrary to what the appellant alleges in his submission we find that the trial magistrate did give proper and adequate consideration to the defence raised by the appellant ... We too would question why persons who were out to commit a robbery would saddle themselves with a drunk who would only serve to slow them down or even to blow their cover. What purpose would have been achieved by kidnapping the appellant. This defence is so fanciful as to be totally unbelievable. The trial magistrate was quite correct in dismissing it ... The facts show quite clearly that the appellant was amongst the group of four men who invaded the compound and proceeded to rough up and rob the occupants. Whilst his companions managed to escape the appellant's own escape bid was thwarted because he fell down and was thus apprehended by the G4 security."

From the foregoing, it is quite clear that the two courts below rejected the appellant's defence and

rightly so in our view. It was all about which between the two stories advanced or told by the prosecution and the appellant was credible and believable by the courts. The two courts chose to go with the prosecution story as opposed to the appellant's. Given the evidence on record, that was the right choice. With this concurrent findings by the two courts and there being no basis for us to interfere with those findings, we are similarly satisfied that the appellant was arrested at the locus in quo and was an active member of the gang that assaulted and robbed PW1, of his Kshs.3,000/- and a driving licence.

It is on this basis that we find the appeal lacking in merit. Accordingly it is dismissed in its entirety.

Dated and delivered at Mombasa this 26th day of June, 2014.

H.M.OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR