



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, P. KIAGE & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 35 OF 2010

BETWEEN

DANIEL WYCLIFF NAMAI ..... APPELLANT

AND

REPUBLIC .....RESPONDENT

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

Kisii,(D. Musinga & A. O. Muchelule., JJ) dated 2nd February, 2010

in

HCCRA NO. 188 OF 2006)

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JUDGEMENT OF THE COURT

This is a second appeal by the appellant Daniel Wycliffe Namai from the concurrent findings of the two lower courts where the appellant was convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to death. Being a second appeal we are concerned with an examination of issues of law but not matters of fact which the courts below have made findings upon unless, of course, there has been misdirection on the treatment of facts. See the cases of Njoroge v R [1982] KLR 388 and Thiongo v R [2004] IEA 333 on the role of this Court on 2nd appeal like this one.

The seemingly uncomplicated facts of the case as made out by the prosecution through the witnesses were that on 27th April, 2005 at 7:40 p.m while Florence Akinyi Odongo (PW1) (Florence) was serving her family the evening meal, intruders suddenly entered the house. They were dressed in police uniform and one brandished a gun. Electric light was on. Florence and her family were ordered to lie down and demands for money were made; Florence was then led upstairs where her husband Walter Odhiambo Ogwada (PW5) (Walter) had locked the bedroom door upon hearing the commotion downstairs. The intruders used a solar battery to break this door and entered the bedroom. Amid beatings Florence handed her handbag to the appellant, a person she knew well before as he was not only a neighbour but operated as a "boda boda" rider in the same neighbourhood and who was one of the attackers.

In the handbag was cash money. Other items were also taken by the thieves from the bedroom and the sitting room. The thieves left; alarm was raised and police arrived and were given the appellant's name as one of the robbers. In the house that evening about to be served supper before the robbers burst in, were sister to Florence **Linet Achieng Odongo (PW2) (Linnet)**, and another relative **Leonard Ogwada (PW3), (Leonard)** who testified before the trial court giving the same facts. All knew the appellant and had dealt with him through his said boda boda business and they gave the appellant's name to the police immediately after the incident.

On the same night of 27<sup>th</sup> April, 2005 at 9.30p.m **Dancan Otieno (PW4) (Dancan)** who operated a boarding house called Odia Lodge sold Room No. 7 to the appellant who was accompanied by a woman. The two occupied that room for the night. The next morning police visited this room and found not only the appellant's bicycle but also recovered a handbag which Florence identified as hers which was stolen the night before. Inside the handbag was a Receipt issued by Marowa Hardware, a business operated by Walter and Florence and which receipt was tendered in court as part of the prosecution evidence.

It is No. 231425 Police Inspector **Alfred Ouko (PW6) (Alfred)** who with other officers visited Room 7, Odia Lodge, and recovered the bicycle and handbag.

These were the facts which the prosecution presented to the trial court which found that the appellant had a case to answer.

In a sworn statement the appellant denied the charge and testified that on the material day he was with a woman friend, Jeniffer, and Tom Odhiambo. He booked a room at Odia Lodge after which the 3 visited another hotel where they had supper and drinks and he finally retired to bed with Jeniffer. The next morning he was confronted by police officers and upon visiting the said Room 7 he was surprised to find his bicycle and girlfriend missing. He was then assaulted, passed out and came to in a mental hospital.

Tom Odhiambo gave evidence on behalf of the appellant stating that he spent the evening upto 9:00 p.m with the appellant and his girlfriend where they had drinks and supper.

In a judgement delivered on 18<sup>th</sup> August, 2006 the learned Principal Magistrate (Ezra O. Awino) found the charge facing the appellant had been proved to required standard, convicted the appellant and sentenced him to death. The first appeal to the High Court of Kenya at Kisii (D. K. Musinga, J (as he then was) and A. O. Muchelule, J) was dismissed provoking this appeal.

Seven grounds are taken in the Memorandum of Appeal drawn by the appellants counsel D. A. Oluoch. In the first ground the learned judges are faulted for not re-evaluating the evidence to reach their own independent conclusions. In the second ground it is stated that the learned judges upheld the conviction based on misapprehension of evidence and the law. In the third ground it is said that the appellant's defence was ignored. The fourth and fifth grounds are similar where it is said that upholding the appellant's conviction was based on a displacement of the onus of proof. In the sixth ground the learned judges are faulted for finding the appellant guilty when particulars of the charge were not supported by the evidence and in the final ground it is said that the learned judges erred in failing to hold an adverse inference against the prosecution for withholding evidence which would have assisted the court in arriving at a just decision.

Miss D. A. Oluoch, the learned counsel for the appellant urged all the grounds of appeal together when the appeals' came up for hearing before us on 8<sup>th</sup> April, 2014. Learned counsel submitted that the first appellate court failed in its duty of re-evaluating evidence and that had it done so, it would have noted discrepancies in the evidence. Such discrepancies, stated counsel, included evidence such as that of Florence who stated that there was Kshs. 5,000/= in her handbag while the charge sheet had an amount of Kshs. 7,000/=. Learned counsel further faulted evidence of identification submitting that it was not proved beyond reasonable doubt that electric lights were on for long enough to enable prosecution witnesses to identify the attackers. The appellant's counsel also contended that the doctrine of recent

possession could not apply because Florence handbag was recovered in the absence of the appellant and that, in any event it was not proved to the required standard that the handbag belonged to Florence. And why was the arresting officer not called – wondered learned counsel for the appellant.

Mr. C. A. Abele, the learned Assistant Director of Public Prosecutions in opposing the appeal submitted that the first appellate court had carried out its duty of re-evaluating the evidence and came to its own independent conclusions as required by law. On identification, learned counsel for the respondent submitted that proof was watertight because circumstances for identification were favourable as the first three prosecution witnesses all knew the appellant and were surprised when he entered the house as an attacker.

We have considered the record of appeal, the submissions made before us and the law.

On identification Florence, her sister Linet and their relative Leonard all testified that the appellant entered their house wearing what appeared to be police uniform. They all knew the appellant who was not only a neighbour but they had all dealt with him in his boda boda business. The robbers entered the house when electric light was on. The trial magistrate held that these witnesses had properly identified the appellant through recognition and stated in the course of the judgement:

**“... This was identification by recognition by people who knew the accused, it is not the kind of case that you conduct identification parade, parade is not conducted for people well known to each other..”**

There was also the further evidence that Florence, Linet and Leonard all reported to the police the same night that the appellant was one of the robbers who had entered their house. The appellant was arrested immediately and Florence's handbag recovered in a room in a lodging house which the appellant had booked in and spent the night. Inside the handbag was a receipt issued by a hardware business operated by Florence and her husband. All those facts were reviewed by the first appellate court which satisfied itself that they were true.

We are satisfied that the two courts below properly carried out their duties in law. This appeal has no merit and it is accordingly dismissed.

*Dated and Delivered at Kisumu this 20<sup>th</sup> day of June, 2014.*

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original

**DEPUTY REGISTRAR**