



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, AZANGALALA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 187 OF 2012

BETWEEN

**BONFACE AGOMBA Alias NANDWA CHENELWA.....APPELLANT**

AND

**REPUBLIC .....RESPONDENT**

*(Appeal from a conviction and or Sentence, Judgment of the High Court of Kenya at Kakamega (Lenaola & Onyancha JJ) Dated 23<sup>rd</sup> February, 2012*

in

**Kakamega H.C.C.RA. No. 60 of 2009)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. The appellant herein **Bonface Agomba** Alias **Nandwa Chenelwa** was arraigned before the Senior Resident Magistrates' Court at Vihiga in Criminal Case No. 646 of 2005 with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars were that, on the 25<sup>th</sup> day of January, 2004 at Masigulu village Central Maragoli location in vihiga District of the Western Province, jointly with others already before Court while armed with dangerous weapons namely pangas, axes and "rungus" robbed **James Kabaka Likeya** of cash (k) Sh 2,000.00, and one torch valued at Kshs. 80.00 all to the total value of Kshs. 2,080.00 and at or immediately before or immediately after the time of such robbery used personal violence to the said **James Kabaka Likeya**"

2. The appellant denied the charge. The prosecution called a total of five (5) witnesses namely **James Kabaka Likeya (PW1)**, **Zerephaya Musimbi Kabaka (PW2)**, **Siddiq Mugasia Kadenge (PW3)**, **Francis Wasike (PW4)**, and **No. 67936 CPC Ezra Serem PW(5)**. The appellant **Bonface Agomba** was the sole witness for the defence. After assessing, evaluating and analysing the evidence tendered before her, the learned trial magistrate in a judgment dated the 3<sup>rd</sup> April, 2009 delivered himself thus:-

***"PW1 stated that he had a torch with three batteries that night. When he came out of the toilet he flushed the torch on the faces of six people whom he identified as Bonface Agolomba***

*a.k.a. Nandwa, Kennedy Imbuga, Muihehe, Watu, Kevolwe and another sixth person whose name he later in his testimony gave as Mwambuki. He stated that Nandwa was the one who hit him on the head, Imbuga cut him on the hand while Kevolwe took items and money from him (the complainants) shirt pocket. PW2 stated that she came out of the house with the optimus lamp on when she heard her husband (the complainant/scream. PW2 stated that she saw many young men whom she could not count. She stated she identified Mwambuki, Imbuga, Kevolwe and a person commonly known as Nandwa who came from behind raising a panga. PW1 and PW2 testified that PW2 threw the lamp she had at the thugs. The person called Nandwa, from the evidence on record is the accused person herein. The accused, the complainant and PW2 were from the same village called Matsigulu. That is clear from the testimony of PW1, PW2 and the accused himself. I find that the accused person was a person known to the complainant and PW2 even prior to the time of the incident. The two recognized the accused on that material night. And, from the evidence of PW3 the accused had on 18<sup>th</sup> January, 2004, sent PW3 to warn the complainant that he would cut him after the accused asked PW3 why the chief PW1, and the police used to go to his home. According to the evidence of PW5, the complainant gave the name of the accused to PW5 as one of the robbers who attacked him on the material night. I find PW1 and PW2 credible witnesses. I have no reason to doubt the veracity of their testimonies. I am satisfied that there was sufficient lighting at the material time that enabled PW1 and PW2 to see the thugs. And each one of PW1 and PW2 recognized the accused playing an active role during the incident. There is clear evidence of recognition of the accused, and the circumstances of this case with regard to the recognition and lighting well match, those in Anjononi versus Republic [1980] KLR59 except that in this case it was the complainant who had the source of light which was a torch and his wife (PW2) came out with an optimus lamp. And as the Court of Appeal said in the Anjononi case (Supra) at page 60, this was.....a case of recognition not identification of the assailant; recognition of an assailant is more reliable than identification of a stranger because it depends on the personal knowledge of the assailant, in some form or other"*

*For these reasons based on the evidence outlined above, I find that there is proof beyond reasonable doubt, that the accused was one of the people who plobbered the complainant on the material night. The evidence against the accused is clear, consistent, credible, and reliable and is not controverted. I find the accused guilty of the offence charged and accordingly convict him of the same under the provisions of Section 215 of the Criminal Procedure Code..."*

3. The appellant was aggrieved by that decision and he appealed to the High Court at Kakamega vide Criminal Appeal No. 60 of 2009. After re-evaluating, re-assessing and re-analyzing the evidence in a judgment delivered by **S. Chitembwe, J.** on behalf of **D.A. Onyancha** and **I. Lenaola JJ** on the 23<sup>rd</sup> day of February, 2012, the two learned Judges made findings inter alia that the complainant (PW1), was seriously injured during the incident; that these injuries had been confirmed by (PW4), a medical officer; that when (PW5) visited the complainant at Mukumu hospital, (PW1) gave to (PW5) the names of the appellant as one of the robbers; that (PW1) and (PW2's) evidence was significant because PW1 and PW2 were able to speak about the identity of the attackers a few hours after the attack; that the initial report is always critical where recognition is alleged; that the evidence presented to the trial Court was not in doubt.

4. On recognition the learned judges ruled that, the appellant had been properly recognized by PW1 when PW1 pointed a torch he had to the group of people standing near his pit latrine; that similarly PW2 with her pressure lamp was able to recognize the appellant; that both PW1 and PW2 separately gave the names of the appellant to (PW5); that PW1 as the area chief was aware of his subjects; that the appellant in his defence admitted that he was well known to PW1; that PW2 on the other hand said that she had known the appellant since he was seven (7) years old. On that account the learned Judges were convinced that the recognition of the appellant in connection to the omission of the offence was proper and issues of mistaken identity arose.

5. Turning to the appellants defence, the learned Judges found that the alleged grudge between appellant and PW1 had only been raised at the point when the appellant tendered his defence and not in PW1s' cross examination and was therefore a mere afterthought. On the basis of the above reasoning, the Court dismissed the appellants' appeal in its entirety.

6. The appellant was aggrieved by that decision and has appealed to this Court firstly in a home made memorandum of appeal lodged on the 11th June, 2012 citing three grounds of appeal. These were subsequently supplemented by a supplementary memorandum of appeal filed on 9<sup>th</sup> June, 2012. A total of six (6) grounds have been fronted for our interrogation. These can be summarized into the following:-

That the High Court:-

***1. Failed to exercise its jurisdiction as the first Appellate Court to hold that the evidence of PW4 Francis Wasike was in admissible.***

***2. Failed to appreciate that the evidence of recognition was not sufficient and beyond error given the circumstances of this case, the modus Operandi of the attackers, the lighting at the scene, the period of time of the attack, the time the attack being at night as well as the status of mind of the victim.***

***3. Failing to subject the entire evidence to a fresh and independent scrutiny as to efficacy of the evidence adduced in support of particulars of the charge which was wholly contradictory and as a result has occasioned a failure of justice.***

***4. Failed to appreciate the totality of the evidence adduced did not beyond reasonable doubt prove that the appellant was guilty of the offence.***

***5. Failed to appreciate that the contradictory evidence adduced by crucial witnesses exonerated the appellant from the charge against him.***

***6. By basing findings on no evidence, total misdirection on record of law which no reasonable tribunal could, on the evidence adduced could have made such findings.***

7. In his oral submissions to Court, **Mr. Maranga Gichaba**, for the appellant argued that the medical evidence relied upon by the prosecution stood misplaced as it contradicted the evidence of PW 1, 2 and 5 with regard to the hospital where PW1 was admitted after the attack; that the subordinate court after discrediting the evidence of PW4, the Appellate Judges should not have qualified that discrediting and then placed any reliance on it in support of the appellants conviction, in the absence of justification as to why they found it credible.

8. On recognition of the appellant in connection with the commission offence **Mr. Gichaba** argued that the offence took place at night, after 10.00 pm; the only lighting was from a torch light, which the complainant does not say for how long he directed it at the assailants, before he was hit with a panga and started bleeding; that the attack occurred suddenly, and was therefore not conclusive to positive recognition sufficient enough to sustain a conviction. Lastly that the first appellate Court failed in its duty in failing to arrive at the conclusion that the prosecutions' evidence was not conclusive as to the appellants participation in the commission of the offence charged.

9. In response to **Mr. Gichaba's** submission, **Mr. Abele**, the Assistant Director of Public Prosecutions agreed that the medical evidence of PW4 was indeed misplaced, but that notwithstanding, there was sufficient evidence to support the charge appellant faced. That witnesses saw injuries on PW1, and blood in the complainants compound which PW2, his wife confirmed was PW1s blood; PW1 and PW2 were categorical, that the attackers were more than one; that though the attack was in the dark, PW1 had a torch which he flashed on the assailants before he was attacked; that the complainant and the assailants were local residents and therefore knew each other very well; that

although the intensity of the light and the distance between the complainant and the assailants were not given, the very fact that the complainant described vividly what each assailant did to him is sufficient proof that both the intensity and proximity of the light were conclusive to positive identification of the assailants. Lastly that when PW2 heard PW1s' screams, and came out with an optimus lamp, whose light is more intense than that from a lantern or chimney lamp, she was close enough to the assailants and that is why she too (PW2) described what the assailants did to her husband (PW1). The appellants case was therefore one of recognition and issue of mistaken identity did not arise.

10. Being a second appeal, our mandate is as donated by the provision in Section 361 of the Criminal Procedure Code Cap 75 Laws of Kenya namely to deal with issues of law only. See also the case of **Omboko versus Republic (1983] KLR191** for the proposition that as a general rule, the court of appeal sitting on a second appeal will not disturb the concurrent findings of fact of the two courts below.

11. The grievances that the appellant has fronted before us can be clustered into the following:-

- (1) Whether the medical evidence adduced herein met the threshold.
- (2) Whether the offence charged of robbery with violence is sustainable if medical evidence is excluded.
- (3) Whether the evidence of identification or recognition of the appellant in connection with the commission of the offence meets the threshold.
- (4) Whether the first Appellate Court Judges exercised their mandate properly.

12. With regard to medical evidence, PW1, PW2 and PW5 gave concurrent testimony that PW1, the complainant was injured during the robbery; that he was rushed to Mukumu. mission hospital where he was admitted for a total of five (5) to seven (7) days. PW4 Francis Wasike's evidence on the other hand ran inter alia thus:-

"The patient came complaining that he was at his home on 28<sup>th</sup> January, 2004 at around 10.00 pm when he was attacked by thugs whom he was able to identify when he came he was very ill and was unconscious. I examined him and I established that he had swelling and had also been cut on the back and both hands. The injury had taken about one and half hours before he would reach hospital and were caused by sharp objects. I admitted the patient in hospital for one week..."

13. The learned trial magistrate made the following observations on that evidence.

***"One disturbing aspect of PW4s testimony was that while all the other four prosecution witnesses were consistent that the complainant after the incident was rushed to Mukumu hospital, PW4 stated that he admitted the complainant at Vihiga district hospital - one and a half hours after the incident. How could the complainant have been admitted at both Mukumu hospital and Vihiga district hospital at the same time. The witness who testified as PW4 seems to me to have thought that his testimony was a matter of formality. I found PW4s testimony lacking in credence. He did not even state his qualifications so the court cannot tell whether he was a qualified -medical practitioner".***

The learned Judges on the other hand had this to say:-

***"We have perused the P3 form and those injuries were authenticated by PW4 a medical officer".***

14. From the above, it is clear that while the learned trial Magistrate discredited PW4's evidence, the learned Judges accepted it but failed to resolve the doubt created on that evidence.

15. Realizing the importance of medical evidence to prove the offence charged, the learned trial magistrate found a way around this thus:-

***"But, all the same the complainant testified that he was cut during the incident. PW2 who is his wife saw him bleeding. PW3 saw blood at the home of the complainant, and PW5 visited the complainant at Mukumu hospital where the complainant was admitted. It is my finding that the evidence of PW1, PW2, PW3 and PW5 shows that the complainant was assaulted as he was cut and wounded. Personal violence was used by the thugs to the complainant I so find."***

16. The learned Judges on the other hand observed thus:-

***"Firstly from the evidence of PW1, PW2 and PW4 a violent incident occurred at PW1s home on the night of 25<sup>th</sup> January 2004 and PW1s was seriously injured."*** Both Courts were thus satisfied that medical evidence is crucial to prove the offence of robbery with violence, but that notwithstanding, where elements or ingredients comprising the offence charged of robbery with violence are proven, a conviction is sustainable notwithstanding absence of medical evidence proving the extent of the injuries suffered.

17. In the case of *Ganzi and 2 others versus Republic [2005]1KLR 52*, this court set out the elements of the offence of robbery with violence as:-

***(a) The offender is armed with any dangerous or offensive weapon or instrument; or***

***(b) The offender is in the company with one or more other persons; or***

***(c) At or immediately before or immediately after the offender wounds, beats, strikes, or uses other personal violence to any other person.***

In *Ajode versus Republic [2004]2KLR81*, this Court went on to hold inter alia that, ***"injury of the victim itself is not the only ingredient of the offence under Section 296(2) of the penal code"***. In *Opoya versus Uganda [1967] EA752* as approved by this Court in the case of *Maneningu Mbao Mangi versus Republic [2006] eKLR* It was held inter thus:-

***"It will be noticed that the particulars of the indictment contain the word "robbed." That word is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use or threats of use of actual violence to any person or property"***

18. Applying the above principles to the totality of the evidence on the record and the rival arguments on proof or otherwise of the offence charged, we find nothing to suggest that it is only medical evidence which can prove existence of injury on the body of a victim of robbery with violence. To us, testimony of eye witnesses who can testify that they either witnessed the infliction of the injury or saw the injuries inflicted on the body of the victim after their infliction or even a mere threat of violence will suffice to satisfy the element of infliction of violence or threat of violence to the person a victim of a robbery with violence offence.

19. The uncontroverted evidence of PW1 and PW2 demonstrates that the assailants were armed with pangas, axes and rungu. We appreciate that in their normal daily usages, a panga, a rungu and or an axe would not be classified as dangerous or offensive weapons as they are domestic tools. It is their negative use as instruments of threat, violence and infliction of injury to the person of a victim of robbery with violence or any other offence that converts such instruments into dangerous and or offensive weapons. In the circumstances of this case, the assailants were so armed not to use such weapons as domestic tools but as objects for inflicting injury and pain in the execution of the robbery subject of this appeal. This was the position taken by this Court in the case of *Kimemia and another versus Republic [2005] 2K LR46*, page 50 line 37 to 43-page 51 line 1-29.

***"The phrase: "dangerous or offensive weapon" is not defined in Section 296 of the Penal Code or in Section 4- the interpretation Section of the Penal Code. Section 89(1) of the Penal Code creates the offence of possession of a firearm or other "offensive weapon" etc and Section 89(4) of the Penal Code defines "offensive weapon" for purposes of Section 89 as meaning:***

***"Any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use."***

***In Mwaura and others versus Republic [1973] EA 373 the High Court in dealing with the question whether a panga, an iron bar, a wheel spanner, a king shaft, screw driver, a stone and a chisel were "dangerous or offensive weapon" for the purposes of the offence of preparation to commit a felony under Section 308(1) of the Penal Code held at page 375 letter F:***

***"In our view "dangerous or offensive weapons" means any articles made or adapted for use for causing injury to the person such as a cosh knuckleduster or revolver or any article intended, by the persons found with them for use in causing injury to the person."***

***The High Court followed that interpretation in Muthiori versus Republic [1981] KLR 46 at page 473 paragraphs 1-5.***

***In our view the words "dangerous or offensive weapon" in Section 296(2) of the Penal Code bear the same meaning as Section 89(4) of the Penal Code and as construed in the case of Mwaura & others versus Republic (supra) for the purpose of Section 308(1) of the Penal Code.***

***There cannot be any doubt that although a knife is not made or adapted for use for causing injury to a person, it would nevertheless be a dangerous or offensive weapon for purposes of Section 296(2) of the penal Code if the robbers in wielding it in the cause of robbery intend to use it for causing injury to any person."***

20. As for the element of theft, the uncontroverted evidence of PW1 and PW2 was that the assailants roughed PW1 up and forcefully extracted the named items from him. This satisfied the ingredient in the case of Opoya versus Uganda (supra) as approved by this Court in the case of Maneningu Mbaomengi versus Republic (supra). On the basis of the above, we are satisfied that, from the totality of the evidence adduced on the record all the elements of the offence of robbery with violence as charged were present.

21. Turning to the identification and or recognition of the appellant in connection with the commission of the offence charged, the learned trial magistrate had this to say:

***"PW1 stated that he had a torch- with three batteries that night. When he came out of the toilet, he flashed the torch on the faces of six, people whom he identified as Boniface Agolombo A.K.A. Nandwa, Kennedy Imbuga, Mulhehe, Watu, Kevolwe and another sixth person whose name he later ....in his testimony - gave as Mwambuki. He stated that Nandwa was the one who cut him on the head, Imbuga cut him on the hand, while Kevolwe took items and money from him (the complainants) shirt - pocket. PW2 stated that she came out of the house with the optimus lamp on, when she heard her husband (the complainant) scream. PW2 stated that she saw many young men whom she could not count. She stated that she identified Mwambuki, Imbuga, Kevolwe and a person commonly known as Nandwa who came from behind raising a panga. PW1 and PW2 testified that, PW2 threw the lamp she had at the thugs. The person called Nandwa, from the evidence on record, is the accused person herein. The accused, the complainant and PW2 were from the same village called Matsigulu. That is clear from the testimony of PW1, PW2 and the accused himself. I find that the accused was a person known to the complainant and PW2, even prior to the time of the incident. The two recognized the accused on the material night..."***

22. The learned Judges on the other hand had this to say:-

**"4. According to PW1, he recognized some of the men as people he had previously known and that the torch light assisted in the identification. He said that the one who cut him on the head was Boniface Akolomba alias Nandwa. The one who cut his hand was Kevolwe and the one who removed money from his pocket was Kennedy Imbuga.**

**5. In any event, PW1 further stated that as he screamed, his wife came out and she was listed as PW2, Zeraphaya Musimbi Kabaka. Her evidence was that when she heard her husband screaming, she came out of the house carrying a lamp and she recognized the appellant and two other robbers whom she had previously known"**

**6.....The robbers that she allegedly recognized were named Kevolwe, Mwambuki, Ananda, Bonface, Nandwa and Imbuga**

**7. During cross-examination, PW2 stated that she had known the appellant since he was seven years old and that he lived one kilometer away from her home.**

**8. According to PW1, when he made his initial statement to the police (which he did while still at Mukumu Hospital he named his attackers and Kevolwe and Mwambuki were the first to be arrested, while the appellant who had been on the run, was arrested at Mbale Township."**

23. On case law, the learned trial Magistrate cited the case of Anjononi versus Republic [1980] KLR59. Wherein at page 60 paragraph G-H *Madan JA* (as he then was) made observation that:-

**"Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the person and knowledge of the assailant same form or other."**

24. While the learned Judges on the other hand cited the case of Solomon Mungai and others versus Republic [1965] EA 782, for the proposition that where the conviction of more than two accused are based on a common design, the acquittal of one will not affect the convictions of the others if the evidence established that the others shared a common design; and the Republic versus Turnbull and others [1976] 3ALL ER549 for the proposition that, whenever the case of an accused person depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification.

25. The principle in Republic versus Turnbull (supra) has been followed time and again in numerous decisions of both this Court and its predecessor, the Court of Appeal for Eastern Africa. In the case of Waithaka Chege versus Republic [1979] KLR271 the Court held inter alia that:-

**"Although an issue of visual identification should always be approached with great caution where the case against an accused depended entirely on visual identification at night; by torch light; his conviction could be upheld where the trial Magistrate had kept the matters in mind"**

26. In Simiyu and another versus [2005] KLR192, the Court emphasized that evidence of description of the attackers either by appearance or name given to police or any other person at the earliest opportunity is a matter of great importance as failure to do so may give rise to an inference that the complainant or the victim either did not or may not have known who their real attackers were. Secondly that, where recognition is dependent on the nature of the light, it is imperative on the Court to inquire as to the nature of the alleged light, its brightness or otherwise or its intensity, as failure to make such an inquiry may render the evidence of recognition to be held not to be free from error. In Sasi versus Republic [2009] KLR 353, this Court accepted evidence of identification by recognition of

an assailant whom the appellant had known for over twenty (20) years.

27. In the circumstances of the appeal before us, the two Courts below reached concurrent findings that the appellant, PW1 and PW2 were local residents and they knew each other very well; that the source of light was a three battery torch whose light was described as very bright; that this was boosted by the light from an optimus lamp which gave out superior light until it was hurled at the attackers by PW2 when the attackers started charging at her, by which time PW1 and PW2 had already recognized the assailants, whom they not only named to PW5 a police officer at the earliest opportunity but also gave PW5 the direction to the appellant's home. PW5's evidence that he indeed went to the appellant's home following that direction but missed him was not controverted. We find nothing on the record that would compel us to depart from that concurrent finding. We affirm the appellant was properly recognized by PW1 and PW2 as one of the assailants. His conduct of disappearing from the home soon after the incident until a year later when he was arrested by the complainant adds weight to the above affirmation.

28. Turning to the exercise of the mandate of the first Appellate Court, we have had occasion to revisit its judgment on the record. We find that the approach employed by the learned Judges was first of all to state the offence; review the evidence tendered before the trial Court inclusive of responses given by the witnesses to the appellant's cross-examination questions; addressed their minds to the central issues in controversy namely identification and or recognition of the appellant in connection with the offence charged; applied the guiding principles on acceptance or otherwise of evidence of identification or recognition as enunciated in the case of ***Republic versus Turnbull (supra)*** and arrived at their conclusions. We find nothing wrong with the approach taken by the learned Judges in their reevaluation, reassessing and reanalyzing the evidence before them. That approach was in line with the guiding principle that "***it is the duty of the first Appellate Court to reconsider the evidence, evaluate it and draw its own conclusion in order to satisfy itself that there is no failure of justice but not merely to scrutinize the evidence to see if there was some evidence to support the trial Courts findings and conclusion*** (See ***Simiyu & Another Versus Republic (Supra)***).

29. The upshot of the foregoing is that, we find no merit in this appeal. We hereby dismiss it in its entirety.

**Dated and delivered at Kisumu this 18<sup>th</sup> day of July 2014.**

**R.N. NAMBUVE**

.....

**JUDGE OF APPEAL**

**F.AZANGALALA**

.....

**JUDGE OF APPEAL**

**SANKALE ole KANTAI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**