



IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 250 OF 2012

BETWEEN

JARED OTIENO ODUNDO .....APPELLANT

AND

REPUBLIC .....RESPONDENT

*(Appeal from a Judgment of the High Court of Kenya at Kakamega,*

*(S. Chitembwe & B. Thurania, JJ) dated 28<sup>th</sup> June, 2012*

*in*

HCCRA NO. 50 OF 2010)

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JUDGEMENT OF THE COURT

This is a second appeal. As has been stated in many of the decisions that have come forth from this Court our duty is to consider only issues of law but not matters of fact which have been tried and re-evaluated by the two courts unless it can be shown that those courts reached findings not based on the evidence or where there has been a misdirection on the treatment of facts. This position in law has statutory underpinning in Section 361 (1) (a) Criminal Procedure Code. Relevant past decisions on this issue are cases like Thiongo v Republic [2004] IEA 333 and Aggrey Chieng Aguch & Anor v Republic (Kisumu) Criminal Appeal No. 367 of 2008 (ur)

What, then, are the issues of law raised in this appeal that may call for our consideration?

The appellant, **Jared Otieno Odundo**, was charged and tried before the Senior Resident Magistrate, Butere, of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. Particulars of the offence being that on the night of 29<sup>th</sup> and 30<sup>th</sup> April, 2008 at Shirotso Village in Butere jointly with others not before the court while armed with dangerous weapons namely pangas and rungas robbed Boniface Ngota Anywolo of two bicycles and other items all valued at Kshs. 15,000/= and used actual violence against him during the robbery. He was convicted and sentenced to death in the Judgement delivered on 19<sup>th</sup> February, 2010 by B. O. Ochieng. Being dissatisfied with those findings the appellant appealed to the High Court of Kenya at Kakamega (Said J. Chitembwe and B. Thurania Jaden, JJ) but

the learned Judges did not find merit in the appeal and dismissed it. That judgement provoked this appeal.

There are eleven grounds set out in the Memorandum of Appeal drawn by the appellants lawyers Amondi & Company Advocates. In the first ground the learned Judges are said to have erred in law by giving credence to the evidence of identification of a single witness without warning themselves of the possibility of error or mistaken identity. In the second, third and fourth grounds which also relate to identification the learned Judges are said to have ignored a fact of physical description of the appellant not having been given by witnesses and that circumstances for identification were difficult; the fifth, sixth and seventh grounds attack voice identification which is said not to have been corroborated; the eighth ground attacks the evidence on weapons used by attackers - the evidence revealed weapons used as pangas and knives while the charge sheet had pangas and rungas; the ninth and tenth grounds state that the case was not proved beyond reasonable doubt and had inconsistencies, flaws, contradictions, conflicts and gaps. In the final ground the appellant has attacked the learned judges for not reconsidering the sentence which is said to be harsh and excessive.

The prosecution case presented to the trial magistrate through witnesses was that on the night of 29<sup>th</sup> and 30<sup>th</sup> April, 2008 **Boniface Ngota Anywolo (PW1) (Boniface)** was asleep in his house at Shirotso in Butere when he was rudely awoken by knocks on the door and windows. He got up and lit a kerosene lamp and also his torch but as he did so six people forced their way into the house through the broken window. Others remained outside. Those inside hit the lamp putting it off but they had torches which they used to illuminate the room. According to Boniface he saw the people quite well by the use of his torch and their torches. They were armed with pangas, sticks and knives and they threatened to kill him. Boniface recognized the appellant who had a panga and a knife and appeared to be the gang - leader. They beat him up with the weapons injuring him severely leading to loss of consciousness. Before losing consciousness Boniface called the appellant by name and even mentioned the appellants family asking why they were killing him which action infuriated the appellant so much that he ordered that Boniface be killed because he had recognized him. Several items including two bicycles were stolen and Boniface was hospitalized. He later identified bicycle parts and other items stolen from him and which were produced in court as part of the evidence.

**Alice Mukhanzi (PW2) (Alice)**, an in law to Boniface, learnt of the incident the same night and visited him in hospital finding him in serious condition and when she visited his house she found the broken window and items scattered all over the house. She and others reported the matter to their assistant chief and to the police and later the same day were summoned to the Chiefs' office where she identified several recovered items as belonging to her in law Boniface who was then hospitalized in a coma.

**No. 919436 Corporal Elphas Odhiambo PW3 (Elphas)** was at his base at Kisa West on 1<sup>st</sup> May, 2008 when local administrators of the area approached him and made a report relating to the incident at Bonifaces' home. They visited the appellant and upon entering his house they found dismantled bicycle parts and other items later identified as belonging to Boniface. They arrested the appellant and escorted him to Dudi Police Post where he was re-arrested and detained. This witness produced in court Occurrence Book for Dudi Police Patrol Post as demanded by the appellant which showed that the appellant was booked at the police post for being suspected of the offence he was finally charged with.

**Simon Achero (PW4) (Simon)**, an assistant chief of the relevant area, received a report from an informer on 2<sup>nd</sup> May, 2008 and visited the appellants house with Elphas and others and recovered dismantled bicycle parts and other items belonging to Boniface. He arrested the appellant.

**Julius Masheti (PW5) (Julius)**, the Clinical Officer at Butere District Hospital examined Boniface on 14<sup>th</sup> May, 2008 and found a man with a bruised and swollen face, the chest had tenderness on the anterior, the lower limbs had bruises and he was unable to walk. The degree of injury was "maim" and this witness produced P3 Form completed and signed by him.

**No. 78735 P. C. John Nyasoko** of Butere Police Station investigated the case after receiving a report

from Alice and others. When he eventually interviewed and recorded a statement from Boniface the latter gave him the appellants name as one of the attackers he had recognized. The witness produced the various recovered items as part of the evidence.

The trial magistrate reviewed that evidence produced by the prosecution and finding that a prima facie case had been made out ordered that the appellant be put on his defence. The appellant elected to give sworn testimony and after his demand for the Occurrence Book of Dudi Police Post to be produced was met the appellant stated that on 2<sup>nd</sup> May, 2005 he confronted his nephew who had taken tomatoes from the shamba without permission. The nephew ran away and the appellant went to the boys mother who did not take the report kindly leading the appellant to go back to his shamba and later home where he met the assistant chief and police who arrested him on allegations that he was a bhang smoker. He was escorted to Dudi Police Post and later to Yala Police Station where he was charged with an offence he knew nothing about.

The trial magistrate considered the prosecution case and the defence and was satisfied that the case against the appellant had been proved to the required standard and convicted the appellant as already stated. The first appeal failed.

When the appeal came for hearing before us learned counsel for the appellant Mr. K. Amondi combined grounds 1-8 (inclusive) and 10 as the first ground while grounds 9 and 11 were also taken as one ground. Counsel argued that the first appellate court had erred by not finding that circumstances obtaining at the scene of robbery could not allow for identification through recognition. This was because the robbery took place at night and identification was by torch-light and a kerosene lamp which lamp was smashed by the robbers while the intensity of light from torches was not given. Counsel faulted the learned judges for not finding that there could not be recovered items in the absence of an inventory for the same. For these the conviction was unsafe and the appeal should succeed.

Mr. Abele, the learned Assistant Director of Public Prosecutions, did not agree. According to counsel the appellant was not only identified by Boniface but was recognized in circumstances that were free from error. Counsel posited that Boniface had a torch which he flashed at the appellant and the other robbers and could not be mistaken because he not only knew the appellant but also knew his family and recognized the appellants voice. Counsel further submitted that the appellant was found on 2<sup>nd</sup> May, 2008 in possession of recently stolen items and did not give any explanation how he came to have the items.

We have considered the whole record, the Memorandum of Appeal, submissions by learned counsel and the law.

The learned trial magistrate after identifying the issues that called for his consideration addressed the issue of identification as follows in the course of the judgement:

**"... The second issue is issue of identification whether the accused was one of the robbers. Complainant PW1 gave account how he managed to identify the accused whom (sic) was from the area. He saw accused by torch lights and he even knew the voice...**

**This fact was corroborated by the recovery of items stolen...."**

The first appellate court reviewed evidence presented on the issue of identification and came to the following conclusions:

**"The next issue is whether the complainant was able to identify the appellant. PW1 testified that he called the appellant by his name and he ordered that PW1 be killed as he had identified him. PW1 indeed sustained very serious injuries. According to PW1 not all the robbers entered the house. He did not indicate how long the robbery took place. However, taking into account the number of items stolen and the injuries sustained by the complainant, it can be deduced that the robbery was not a one minute**

**affair. Although PW1 sustained serious injuries and was in a coma later and had to be hospitalized for over 3 ½ months, we do find that he was able to identify the appellant before the injuries incapacitated him. It is his evidence that he called the appellant by his name including that of the appellant's father. There were torches in the house and PW1's evidence is that he saw the appellant from the light coming from the torches of the other robbers. It is our finding that PW1 identified the appellant. PW1 was in a coma for about one week and the issue of first report to the police does not arise. The appellant was arrested on 2<sup>nd</sup> May, 2008 while the robbery had taken place on the nights of 29<sup>th</sup> / 30<sup>th</sup> April, 2008. By the time the appellant was arrested, PW1 was still in a coma. There was no need for an identification parade as PW1 knew the appellant before the robbery....."**

The findings of the trial court on identification and which issues were reviewed on first appeal were that the appellant was well known to Boniface as they came from the same area. There was adequate light during the robbery through torches and a kerosene lamp which was later put off by the robbers. Boniface recognized the appellant and called his name and that of his father, obviously wondering why a neighbour was attacking a fellow neighbour. This recognition led to injuries suffered to be even more severe as the appellant, who was the leader of the gang, ordered him to be killed because he had recognized him. As has been said before, recognition is better than identification as it is more reliable as it is by two persons who know each other very well.

Added to this, if it were necessary, is the evidence of recovery of items stolen three days before from Boniface found in the appellant's house. The appellant did not offer any explanation for being in possession of these recently stolen items and the bhang story he gave in defence did not assist him at all as it did not displace the evidence of Boniface, Alice, the Chief and the police who found the said items in the appellants house. These items were produced in court as part of the evidence and failure to produce an inventory for the same when the very items were before the trial court had no negative effect at all to the prosecutions' case.

We are satisfied that the case against the appellant was proved to the required standard and the first appellate court carried out its duty as required and was entitled to reach the findings that they did. The sum total of this is that this appeal has no merit and is accordingly dismissed in its entirety.

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

**R. N. NAMBUYE**

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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**