



**IN THE COURT OF APPEAL**

**AT KISUMU**

**CORAM: AZANGALALA, GATEMBU & KANTAI, JJ.A)**

**CRIMINAL APPEAL NO. 393 OF 2012**

**BETWEEN**

**JOHN AMARERE SWATI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from a conviction and or Judgment of the High Court of Kenya*

*at Kakamega (Chitembwe & Thurania, JJ) dated 28<sup>th</sup> June, 2012*

*in*

**HCCRA NO. 19 OF 2005)**

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**JUDGMENT OF THE COURT**

1. John Amarere Swati, the appellant, was on 26th January, 2005 convicted by the Chief Magistrate's Court at Kakamega for three offences and sentenced. The first offence was robbery with violence contrary to section 296(2) of the Penal Code for which he was sentenced to death. The second and third offences were assault causing actual bodily harm contrary to section 251 of the Penal Code. For that he was sentenced to prison terms of one year each.

2. The appellant appealed against the convictions and sentences to the High Court. In that appeal he asserted that the evidence presented before the trial magistrate was unreliable as practically all the prosecution witnesses are related; that the evidence was insufficient to sustain the (convictions; that the appellant was not positively identified as the perpetrator of the offences; and that the charges were not proved to the required standard.

3. After hearing the parties, the High Court was not persuaded that there was any merit in those complaints and dismissed the appeal in a judgment delivered on 28<sup>th</sup> June, 2012.

4. The appellant was not satisfied with the judgment of the High Court. He filed the present appeal. He says that the High Court should not have upheld the convictions by the trial court as the prosecution did not prove its case beyond reasonable doubt; that the learned judges should have held

that identification of the appellant was not safe; that the learned judges did not carefully and properly re-evaluate the evidence; that no weight was attached to the appellant's own testimony and that his rights under section 200 of the Criminal Procedure Code were violated.

### **Submissions by counsel**

5. At the hearing of the appeal, the parties were represented by learned counsel. Mr. Onyango Jamsubah for the appellant reiterated the complaints in the grounds of appeal and submitted that the prosecution failed to prove its case to the required standard; that all the witnesses who testified for the prosecution are relatives save for the police officer and the doctor; that the appellant was arrested after one year after the alleged incident and no evidence, whether by way of a warrant of arrest or other documentary evidence was produced to show that the appellant was hiding to avoid arrest; that the lower courts erred in finding that the appellant was recognized amongst the attackers; that in relation to the evidence of PW1, one is at a loss to understand why he failed to disclose to the police that the attacker was a fellow village mate if indeed he identified him.

6. Counsel for the appellant further submitted that witnesses said that youth wingers went to the appellant's home after the incident but it is not clear why, if that was indeed the case, the youth wingers did not arrest him; that the youth wingers would have been important witnesses and yet they were not called to testify and an inference should therefore be drawn that their evidence would have been adverse to the prosecution; that the witnesses contradicted themselves and that the circumstances were generally not conducive to safe identification of the assailants.

7. Mr. Jamsubah concluded his address by submitting that section 200 of the Criminal Procedure Code was not complied with; that when a new judicial officer takes over the conduct of a case from another officer, the accused should be given an opportunity to recall earlier witnesses so that the new officer can assess the demeanour of the witnesses; that that was not done in this case and that the appellant was thereby prejudiced as it was important for the court to hear the witness.

8. Opposing the appeal Mr. Abele, the learned Assistant Director Public Prosecutions submitted that identification of the appellant was beyond error; that the appellant was identified by recognition at the scene by five witnesses, namely PW1,2,3,4 and 5 and subsequently by PW7 at a neighboring dispensary; that torch light aided the witnesses in identifying the appellant who was also seen carrying a club and a radio; that the appellant's voice was also recognized by PW5 when the appellant was commanding other gang members to cut and kill PW5; that the appellant was the most prominent and most vicious member of the gang as he was the one giving commands; that the appellant was mentioned by the witnesses the same night the incident occurred and youth wingers went to his house but did not arrest him; and that the police also went to the appellant's house but did not find him; that recognition is a reliable and assuring form of identification and there is no basis in the claim by the appellant that the witnesses made up a story to fix him.

9. While conceding that section 200 of the Criminal Procedure Code was not complied with when Mr. S. M. Kibunja Principal Magistrate took over the conduct of the trial proceedings from Ms.J Thuita, Principal Magistrate, Mr. Abele submitted that at the time of the take over, only one witness had testified; that the appellant had had an opportunity to cross examine and did cross examine that witness; that there was no material prejudice occasioned to the appellant and that there was no basis for ordering a new trial.

10. Mr. Abele concluded his arguments by submitting that the complaints by the appellant against the lower courts have no basis and urged us to dismiss the appeal.

11. In his brief reply, Mr. Jamsubah submitted that it is mandatory under section 200(3) of the Criminal Procedure Code for an accused to be informed of his rights under that provision; that there was material prejudice to the appellant by reason of non compliance with that provision and that it was important for the court to see and hear the witness.

## **Our determination**

12. This is a second appeal. As a second appellate court, our role in this appeal is limited by section 361(1)(a) of the Criminal Procedure Code to matters of law. We are bound by the concurrent findings of fact by the lower courts unless those findings have no basis in evidence. The position has been stressed in many decisions of this Court. See for instance **Peter Sabem Leitu -vs.- Republic [2013] eKLR; Nioroge -vs.- Republic [1982] KLR 388; M'Riungu -vs. Republic [1983] KLR 455.**

13. The legal questions for our determination in this appeal are whether the offences for which the appellant was convicted were proved to the required legal standard; whether the evidence of identification met the legal test of safety; whether the 1<sup>st</sup> appellate court discharged its obligation to re-evaluate the evidence and draw its own conclusions; whether the evidence of the appellant was considered and whether the High Court was obliged to order a re-trial on account of non compliance with the section 200 of the Criminal Procedure Code.

14. We begin with the overriding question whether the evidence of identification met the legal test of safety. We will consider that together with the issue whether the High Court as the first appellate court discharged its obligation of re-evaluating the evidence and drawing its own conclusions.

15. **In Cleophas Otieno Wamunga V R Criminal Appeal 20 of 1982 Kisumu**, this Court had to decide whether evidence of identification in that case formed a secure basis for a conviction. In doing so, the Court stated:

***"...Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification..."***

And in **R vs. Eria Sebwato [1960] EA 174**, the High Court of Uganda held that:

***"Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely water tight to justify a conviction."***

16. What then was the evidence before the trial court regarding the appellant's identification and did it meet that test?

17. The evidence by the prosecution was that on the night of 2<sup>nd</sup> May, 2003 at about 10.30 pm, Geoffrey Machachu, PW 1, and his wife were asleep when they were woken up by noise. A gang of over 10 people broke into their house. The assailants broke their television screen, took mobile telephones and cash before leaving the house. According to PW 1, he was *"through use of torch lights from the other thugs"* able to identify the appellant as one of the attackers. When cross-examined by the appellant, he stated, *"I saw you very clearly through the use of the people torch light."* PW1 went on to say that the appellant was carrying a stick and that he knew the appellant's brother and his father.

18. PW1's father, Joash Licheni Musiomi (PW 2) was asleep in his house in the night of 2<sup>nd</sup> May, 2003 when he saw torch light at the window; he then heard his son, PW1, raise alarm; he went out with a torch and saw two people one of whom he recognized as the appellant carrying a club and a radio; the other person cut him on the left cheek. Cross-examined by the appellant, PW2 was categorical that he *"...personally saw [the appellant] through the torch light...[who] had a long black trouser and pullover."*

19. Wafula Nekati Malinyi (PW 3) and his wife Julia Kasika (PW5) were also asleep on the night of 2<sup>nd</sup> and 3<sup>rd</sup> May, 2003 when they were woken up by an alarm from the home of PW2; they

proceeded to PW2's home where, on reaching the gate, they met assailants carrying pangas and rungas; some of the assailants apprehended them and started cutting and beating them up; one of the assailants lit a torch and PW3 was then able to recognize the appellant, a village mate. According to PW5, the appellant shone a torch at her and she was able to recognize him. She also recognized his voice. Under cross-examination by the appellant, PW3 was confident that he was not mistaken as to the appellant's identity.

20. Daniel Machika (PW4), a brother to PW1, was also asleep at his home during the night of 2<sup>nd</sup> and 3<sup>rd</sup> May, 2003 when he was woken up by dogs barking; on attempting to open the door to his house, he discovered that it was locked from the outside; he looked through the window and saw people outside his brother's house demanding that his brother should open his house; that he got out through the window and went to check on a neighbour's watchman who he found had been cut; upon his return he was attacked, beaten up and cut; he recognized one of the robbers as the appellant "through the light from the torch"; he also recognized the appellant's voice; that later that night along with others they went to the appellant's house but did not find him; that youth wingers had also gone to the appellant's house but could not arrest him as his father was a village elder.

21. Joshua Musiyi (PW 6) also a brother to PW1 was asleep during the night of 2<sup>nd</sup> and 3<sup>rd</sup> May 2003. He was woken up by noise outside his house; on checking his door he found it locked from the outside; he got out of his house through a window and found an assailant directing a torch at PW 2; he hit the assailant with a piece of timber but the assailant cut him; he was not able to recognize any of the robbers.

22. Josephat Eyeswa Malinyi (PW7), a watchman, was guarding a clinic in North Butso location on the night of 2<sup>nd</sup> and 3<sup>rd</sup> May, 2003 when he heard a knock at the gate; on opening the gate he flashed his torch and saw the appellant and other persons carrying somebody who, according to the appellant was unwell and required medical attention; on opening the gate the appellant and his group attacked PW7 and cut him injuring him. Under cross-examination by the appellant it emerged that the appellant and PW 7 were known to each other for a long time having been schoolmates.

23. Police constable James Kiogora of CID Kakamega accompanied another officer to the scene of crime on 3<sup>rd</sup> May, 2003 on receiving a report that PW 1 had been attacked; he stated that PW1 informed him that he had identified the appellant as one of the robbers.

24. Upon considering the evidence of PW1,2,3,5 and 7 the trial court found as a fact that *"the accused was among the group of people who attacked them on the night of 2nd and 3rd May 2003."*

25. On its part, the High Court referred to the decision of this Court in **Okeno v R [1972] E A 32** regarding the duty of the first appellate court; re-evaluated the evidence and concluded, correctly in our view, that:

***"What comes out through the evidence of the witnesses from the scene is that they saw the appellant who was known to them and they recognized him. Only PW6 who fell unconscious did not identify the appellant. The witnesses from the scene who stated that they saw the appellant are six in total. Each described how the torch lights assisted them to see."***

26. For our part, we are satisfied that the decision reached by the lower courts on identification was the correct one. In our view, the evidence on identification was overwhelming. The appellant is well known to the witnesses. His identification is without any possibility of error.

27. We are also satisfied that the lower courts proceeded on the correct legal principle and arrived at the correct decision. Clearly the High Court was alive to its duty to re-evaluate the evidence. It did so. It reconsidered the evidence on record as a whole. It reviewed the testimonies of all the witnesses. It subjected it to a fresh examination. It formed its own conclusions. The High Court did not simply adopt the findings of the trial court. The High Court evaluated the evidence

and came to its own conclusions.

28. The complaint by the appellant that his evidence was not considered has no merit. The total sum of his evidence was that he was found at his place of work in April 2004 by an assistant chief with three other persons; that he accompanied them to Kakamega Police Station where he was later charged with an offence he did not know anything about. The trial court considered and correctly found that the appellant's evidence was in relation to his arrest and that the appellant did not challenge or shake the prosecution evidence.

29. The last issue for our consideration is in relation to the complaint by the appellant that section 200(3) of the Criminal Procedure Code which provides that "***Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall inform the accused person of that right***" was not complied with.

30. The record shows that the trial commenced before the Honourable Principal Magistrate J. Thuita who took the evidence of PW 1 on 21<sup>st</sup> June, 2004. On 14<sup>th</sup> September, 2004 the record indicates that the matter was before the Honourable Senior Principal Magistrate when in the presence of the appellant, the court recorded that "*case is partly heard. Proceedings to be typed.*"

31. When the hearing resumed on 21<sup>st</sup> October 2004 before the Honourable Principal Magistrate S. M. Kibunja, there is no indication that the appellant was informed of his rights under section 200 of the Criminal Procedure Code. In effect there is no record that the right of the appellant under section 200(3) was ever explained to him. The Honourable S. M. Kibunja carried on with the trial from where the Honourable Principal Magistrate J. Thuita left off to the conclusion of the trial.

32. This Court dealt with a similar situation in **Evans Kiratu Mwangi v R [2011] eKLR** where the appellant complained that there was a procedural irregularity in that the trial magistrate failed to comply with **section 200 (3) of the CPC** which gives an accused person a right to demand that witnesses who had given evidence before a magistrate who has ceased to exercise jurisdiction be re-summoned and reheard by the succeeding magistrate, and, further that such right be explained to him.

33. After reviewing the circumstances in that case the Court took the view that it was not apparent from the record that the appellant would have been materially prejudiced, as only 4 out of 11 witnesses had testified before the magistrate who had ceased to exercise jurisdiction. The Court also considered that the appellant had the typed proceedings and that at the close of both the prosecution and defence case the appellant ably submitted before the trial magistrate on the entire evidence relied on by the prosecution.

34. Under **Section 200 (4) of the Criminal Procedure Code** the Court has discretion to set aside a conviction based upon evidence not wholly recorded by the convicting magistrate and order a retrial, if it is of the opinion, that the accused person was materially prejudiced.

35. In the present case, only 1 of the 9 witnesses had testified before the Honourable Principal Magistrate J. Thuita. The appellant cross-examined that witness as he did the eight other witnesses who testified before the Honourable Principal Magistrate S. M. Kibunja. Typed proceedings with respect to the testimony of the first witness were ordered and would have been available for reference.

36. In our view, it is not apparent and neither did the appellant demonstrate that he was prejudiced so as to require the setting aside the conviction under section 200(4) of the Criminal Procedure Code and order a trial.

37. For the above reasons, there is no merit in the appeal. It is dismissed.

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

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**