



**IN THE COURT OF APPEAL
AT KISUMU**

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

CRIMINAL APPEAL NO. 367 OF 2008

BETWEEN

AGGREY OCHIENG AGUCH 1st APPELLANT

ROBERT OUKO AKOKO.....2nd APPELLANT

AND

REPUBLICRESPONDENT

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

Kisumu, (J.Mwera & J. R. Karanja, JJ) dated 9th December, 2008

in

HCCRA NO. 74 & 75 OF 2008)

JUDGEMENT OF THE COURT

The two appellants **Aggrey Ochleng Aguch** (the first appellant) and **Robert Ouko Okoko** (the second appellant) were charged before the Senior Resident Magistrate's Court, Winam, with various offences - the first count was that of robbery with violence contrary to Section 296 (2) of the Penal Code in that on 5th March, 2007 at Nyamasaria area of Kisumu, jointly with others not before court while armed with crude weapons namely rungun and pangas robbed Nancy Sauma Anditi of a sony radio, CD charger, two bicycles, two mattresses, a Nokia 6020 mobile phone, ten cushions, assorted house hold utensils, clothes and a solar battery all valued at Kshs. 175,000/= and at the time of such robbery threatened to use actual violence against the said complainant.

The 2nd appellant was alternatively charged with the offence of handling stolen property contrary to Section 322 (2) of the Penal Code in that on 13th March 2007 at Nyamasaria area otherwise than in the course of stealing dishonestly retained three dinner plates and one sufuria knowing or having reasons to believe them to be stolen properties.

The first appellant similarly faced an alternative charge of handling stolen property in that on 13th March 2007 at Manyatta otherwise than in the course of stealing he dishonestly retained assorted clothes, a mattress and a bag knowing or having reasons to believe them to be stolen properties.

Both appellants faced a 2nd robbery with violence charge particulars being that on 20th February, 2007 at Nyamasaria jointly with others not before court while armed with same weapons robbed Mary Anyango Nyagol of a Natasha coloured television set, a sony DVD, an iron box, three brief cases containing assorted clothes and shoes, a Samsung mobile phone and a sewing machine all valued at K.shs. 161, 000/= and at the time of such robbery threatened to use actual violence against the said complainant. This charge was withdrawn during trial.

The first appellant faced an alternative charge of handling stolen property where it was alleged that on 15th February 2007 at Manyatta otherwise than in the course of stealing he retained two full dresses, two tops, three skirts and a man's suit knowing or having reasons to believe them to be stolen goods.

On count 3 the appellants with a 3rd accused who was acquitted faced a robbery with violence charge particulars being that on 15th February, 2007 at Nyamasaria with others not before court while armed with the said weapons robbed Mwajuma Saidi Ali of a Nokia 3310 mobile phone, an iron box, a Sony television set, a meat mincer, two bicycles, a sony radio cassette, assorted CD disks and compact cassettes all valued at Kshs. 50,000/= and at the time of such robbery threatened to use actual violence against the said complainant. There was an alternative Charge related to the above charge - handling stolen property where it was alleged that the first appellant on 13th February, 2007 otherwise than in the course of stealing retained assorted clothes, two bicycle rims, assorted compact discs, a CD disk and a meat mincer knowing or having reasons to believe them to be stolen goods.

On count 4 both appellants and another accused who was acquitted at the trial were charged with the offence of burglary and stealing contrary to Section 304 (2) and 279 (b) of the said Code particulars being that on the night of 13th and 14th February 2007 at Nyamasaria with others not before court they broke and entered the dwelling house of Eunice Anyango with intent to steal and stole six sets of table clothes, one Acuma television set, a motor vehicle battery, one Simba bicycle, a wooden bed, one sofa set, ten cushions, a coffee table, a mattress, assorted clothes and utensils all valued at Kshs. 45,800/= belonging to Eunice Anyango. This charge was not pursued by the prosecution and was withdrawn in the course of the hearing.

The first appellant faced an alternative charge related to count 4 of handling stolen property in that on 13th February, 2007 at Manyatta he was found with Acuma television set, a coffee table, ten cushions and assorted clothe knowing or having reasons to believe them to be stolen goods.

In a judgment delivered on 13th June, 2008 the learned Senior Resident Magistrate (P. C. Biwottt) convicted the appellants and sentenced them to death on count 1 and imposed a further death sentence against the first appellant in respect of the second count. The appellants appealed to the High Court of Kenya, Kisumu, but the appeals were dismissed by J. W. Mwera, J (as he then was) and J. R. Karanja, J in the judgement delivered on 9th December, 2008. The learned judges however ordered that the 2nd sentence against the first appellant be held in abeyance because a sentence of death could not be suffered twice.

It is those findings that provoked this 2nd appeal which is premised on 5 grounds of appeal contained in the Supplementary Memorandum of Appeal filed on 19th February, 2014. The appellants complain in the Memorandum of Appeal that the first appellate court did not discharge its duty of re-evaluating the evidence; that evidence of identification was insufficient and was not airtight, that the first appellate court erred in law in not evaluating an alibi defence raised by the appellants; that the trial court relied on inadmissible evidence and finally that the appellants constitutional rights as regards being taken to court as soon as possible had been breached.

Being a second appeal our duty is to consider points of law and we are bound by the concurrent findings of fact of the lower courts unless those findings are shown not to be based on evidence - See **Thiongo v R [2004] IEA 333** and **Njoroge v R [1982] KLR 388**.

The facts of the case as presented by the prosecution and which were accepted by the trial court and confirmed by the first appellate court were that on 5th March, 2007 **Nancy Sauma Anditi (PW1)**

(Nancy) and her husband **John Onyango Anditi (PW2) (John)** were asleep in their home when they were rudely awoken by strangers in their room at 1:00 a.m. The strangers had powerful torches and were armed with pangas and rungs. They were ordered to remain silent. Electric lights were on. The first appellant stripped Nancy naked, ordered her to spread her legs and inspected her private parts using a panga. He made offensive remarks. Resistance led to beatings. John was also stripped naked and mocked on the size of his penis. He was strangled using a bed sheet forcing him to urinate on himself. Nancy was led to the bedroom where she was left. Meanwhile the intruders cleared the house of all belongings. Nancy saw and recognized the second appellant who was a person she knew before. She was also able to identify the first appellant because lights were on and the intruders carried powerful torches which they shone in the house including shining the torches on each other. The whole ordeal took 30 minutes after which the intruders left and Nancy called for help. She reported the incident to the police in the morning and gave the name of the second appellant to the police as one of those who had attacked them.

On 12th March, 2007- a week after the incident- Nancy was at Nyamasaria when she spotted the 2nd appellant who was taking a soda at a shop. She called police who arrested the 2nd appellant and took him to Kondele Police Station. On a visit to that station the next morning Nancy found her properties which had been stolen.

The evidence in relation to count 3 was that on 15th February, 2007 **Mwajuma Said Ali (PW3) (Ali)** was asleep in her house when at 2:00 a.m she was woken up by a loud bang on the door. Intruders who had spotlights and were armed with pangas entered her house and ordered her not to scream. She was ordered to strip naked. They searched for money after which they took various items from the house. Ali reported the matter to Nyamasaria police post and was on 13th March, 2007 called to go to Kondele Police Station where she identified various items stolen from her during the robbery.

No. 48774 P. C. Gichuki Ndambuki received a robbery report on 5th March, 2007 from Nancy. Nancy gave the name of one suspect who she knew before. On 12th March, 2007 upon receiving a telephone call from Nancy this witness and another police officer went to Nyamasaria and arrested the 2nd appellant who was pointed out by Nancy. The police visited the 2nd appellants home and recovered various items stolen from Nancy and also recovered other stolen items from Manyatta.

No. 52985 PC Peter Usiah of Kondele Police Station on 12th March 2007 went to the 2nd appellant's house and upon conducting a search recovered various stolen items. Upon information received the police also visited the home of the first appellant and recovered other stolen items.

Benard Omulo, a Clinical Officer, was the last prosecution witness. He examined John and found that he had been injured by a sharp object.

At the close of the prosecution case it was found that there was no evidence against 2 (other) accused who were therefore acquitted but both appellants were found to have a case which they were to answer.

In an unsworn statement the first appellant denied the charges facing him stating that he was arrested while innocently going about his business. He denied that stolen items were found with his wife insisting that he was single and not married at all.

The second appellant gave a sworn statement. He stated that he was arrested on his way home from work and after being beaten was locked up at Nyamasaria police patrol base where he was confronted by a lady neighbour who accused him of selling to her a battery which did not serve an intended purpose. He denied the charges facing him arguing that had he the means to pay off his neighbour on the battery issue he would not have found himself in court at all.

The trial magistrate evaluated the prosecution case and the defence and after finding the charges facing the accused persons proved to the required standard convicted the appellants. The High Court equally evaluated the evidence and agreed with the trial court hence dismissing the first appeals.

When this appeal came for hearing before us on 7th April, 2014 it was urged by learned counsel for the

appellants Mr. G. O. Oguso, who abandoned the ground of appeal relating to alleged violation of the appellant's constitutional rights. Learned counsel submitted on the other grounds that the first appellate court failed in its duty of re-evaluating the evidence to reach its own conclusion. Counsel faulted evidence of identification submitting that the testimony of Nancy was not reliable. Counsel further submitted that such evidence should have been disregarded because John stated that he did not recognize any of the attackers. Reliance was laid on the case of **Wamunga v Republic [1989] KLR 424** for the proposition that although recognition may be more reliable than identification of a stranger mistakes in recognition of close relatives and friends are sometimes made. Counsel also attacked the courts' holding that the doctrine of recent possession was applicable submitting that goods were recovered in rental premises which were not in the exclusive use of the first appellant. For these reasons the appeal should be allowed, prayed learned counsel.

Mr. C. A. Abele, the learned Assistant Director of Public Prosecutions in supporting conviction and sentence submitted that the first appellate court carried out its duty of re-evaluating the evidence and reached its own conclusions. Counsel submitted that there were several moments during the robbery allowing proper identification and cited evidence of presence of big bright torches and evidence that the robbery took about 30 minutes. Nancy was able to recognize and identify the 2nd appellant who was a neighbour, submitted the learned counsel. Counsel cited the evidence of Nancy who stated that the first appellant shone his torch on the second appellant and that this enabled her to be able to even capture the face and dressing of the second appellant. There was also evidence by Nancy that the attackers did not wear masks and that they did not attempt to conceal themselves in any way. Counsel submitted finally that stolen goods were found in the appellants' possession and the appellants did not explain how they came by the said goods.

Those were the rival submissions by counsel in this appeal which we have carefully considered, having perused the record and considered the applicable law. On the first two grounds of appeal faulting the first appellate court for not re-evaluating the evidence and the attack on evidence on identification the record shows that John and Nancy, the complainants in respect of Count 1 were attacked at night when intruders violently entered their house. According to Nancy:

"I saw Accused 2 well. I also saw this man (pointing at Accused 1). About 7 men were in my house that night each with a spotlight and a rungu. They were big spotlights. They lighted (sic) the house well. As Accused 2 was taking me round I saw Accused 1 well. He was known to me in that area. I told police about it.... Accused 2 spotlighted A1 by accident at my door....."

Nancy proceeded to describe in detail the items of clothing that the appellants were wearing during the attack.

And in cross - examination by the 2nd appellant she stated:

?".. I saw you. You were called Robert. I knew You. Your father is called Okoko..... I gave out your name as suspect ..." I knew you and even your home. I pointed you to police for arrest..'

John did not recognize any of the attackers because he was tied up, strangled and became unconscious. The first appellate court re-evaluated this evidence and was satisfied that Nancy had recognized the 2nd appellant who was not only a neighbour but was related to her husband John.

The first appellate court was also satisfied upon re-evaluating the evidence that stolen goods were recovered in the houses of the appellants and concluded:-

?"... Besides recognizing appellant 2 at the scene, there was also the aspect of being in possession of property recently stolen from the victims and with no reasonable explanation offered as to how these two appellants came by those items of property. The conclusion we arrived at was that the appellants robbed the complainants as charged...."

Then, there is the ground of appeal relating to alibi - that the first appellate court erred in not assessing or evaluating the appellants defences where alibi was raised. This ground was not argued before us. This was a correct position taken by counsel for the appellants as the defences of the appellants where they denied the charges could not amount to defence of alibi at all.

The last ground of appeal taken - that inadmissible evidence was admitted - has no basis in law at all. The appellants upon their arrest each accompanied police to their homes where stolen goods identified as belonging to complainants were recovered. The recoveries were made in the course of police investigations.

All the grounds of appeal taken by the appellants have no merit and in our own, we see no other reason to enable us interfere with the decision of the trial court and the first appellate court. We dismiss the appeal accordingly.

Dated and Delivered at Kisumu is 11th day of July 2014

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

P. KIAGE

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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