



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJA)

CRIMINAL APPEAL NO. 32 OF 2013 (UR)

BETWEEN

ELIKANA OUMA NAMALEAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kakamega (Mr. Justice Chitembwe & Lady Justice Jaden) dated 27th February, 2013

in

H.C.CR.C. NO. 176 OF 2011)

JUDGMENT OF THE COURT

This is a second appeal and we are in law required to consider only issues of law but not matters of fact. That is the essence of Section 361(1)(a) Criminal Procedure Code and has been restated in the various decisions of this court such as **M’Riungu v Republic [1983] KLR 455** where this court stated that where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of law and should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion. See also the case of **Patrick Macharia v Republic [2010]e KLR**.

The appellant, Elkana Ouma Namale, was charged before the Senior Resident Magistrates’ Court, Butere, with one count of robbery with violence contrary to Section 296(2) of the Penal Code particulars being that on the 31st day of August, 2010 at Nyamoso village, Mutomo sub-location, Butere Township in the then Butere District jointly with others not before court while armed with dangerous weapons namely pangas robbed Jackson Anzaya of his motor cycle registration number KMCH 635H make TVS Star blue in colour valued at Kshs.81,500/= and immediately before the time of such robbery he wounded the said complainant. He was tried, convicted and sentenced to death by the Senior Resident Magistrate (E.S. Olwande) in the judgment delivered on 29th July, 2011. His first appeal to the High Court of Kenya, Kakamega, was heard and dismissed by S. J. Chitembwe and B. T. Jaden JJ. in the judgment delivered on 27th February, 2013. That provoked this appeal.

The facts which were established by the trial court and confirmed on the first appeal were this. Julius Omutula Waswa (PW2) (Julius) was a generous man. That was why upon purchasing a motor cycle registration mark KMCH 645H (this is the registration mark he gave to court in evidence) from Khetias supermarket in Bungoma for Kshs.82,000/= he handed it over to his nephew Jackson Anzaya Ouma (PW1) (Jackson) and told him to use it to earn a living for his (Jackson) family. Jackson deployed the motor cycle at Musanda in Butere where he ferried passengers for a fee.

At about 8.00 a.m. on 31st August, 2010 Jackson was approached by the appellant and another person who asked him to ferry them to Mutoma Catholic Church. He knew the appellant because he had carried him on a previous occasion.

On this occasion, upon reaching the said church, the appellant and the other person asked him to proceed beyond the church and upon reaching a deserted place in a cane plantation he was asked to stop and was then surprised because the appellant and his friend descended on him with pangas and they cut him so severally on the head that he lost consciousness. When he came to, he was still at the scene but the attackers had disappeared taking his motor cycle with them. A good Samaritan who was on a bicycle happened by and helped him to go to Butere Police Station and he was thereafter taken to Butere District Hospital and later Mumias St. Mary's Hospital.

At 8.30 a.m. on the said day 31st August, 2010 Mary Abuka Andati (PW3) (Mary) was on a road when she saw a motor cycle which she noted as registration mark KMCH 636 driven by a person unknown to her but the appellant who she knew before as he was her neighbour was a pillion passenger on the motor cycle. The motor cycle passed. Shortly thereafter she saw an old man who was riding a bicycle and was ferrying a bleeding man. The old man (who was not called as a witness) asked her whether she had seen a blue motor cycle pass by and she confirmed having seen it a few minutes earlier. She went home but heard noises outside and when she went to investigate she found that the appellants house had been burnt. She testified that:

“--- I know the accused well. I have known him for about 2 years. I have no grudge with him ---”

But

“--- I have a case in Butere Court with him. It is a case of assault. My case was filed prior to this case. My case has no connection with this one and do not even know the complainant herein----”

In cross examination Mary stated that there was yet another case against the appellant at the High Court of Kenya, Kakamega, where the appellant was apparently charged with the murder of her husband.

Pascal Lumbasyi Lutta (PW4) (Pascal), a village elder, testified that on the said 31st August, 2010 he was at home at 2.00 p.m. when the appellant ran to his home pleading for help as a crowd was baying for his blood. The witness called another village elder, Wilson Namayi Wamalwa (PW5) who came to his home accompanied by four police officers. Wilson visited the appellants home and found three houses including the appellants on fire. The appellant was taken away by the police.

Emily Nasimiyu Walema (PW6) (the Clinical Officer) was a clinical officer at Butere District Hospital where she received Jackson on 31st August 2010. He was unconscious with multiple wounds on the head and behind the left ear. She completed a P3 Form which she produced in court as part of the evidence. She classified the injuries as “*harm*” and was of the opinion that the weapon used in the attack was a sharp machete.

The last witness for the prosecution was No. 62210 Corporal Benjamin Kibet (PW7) (Corporal Kibet) of Butere Police Station who was the investigating officer. He testified that Jackson had made a robbery report on the morning of 31st August, 2010. At 3.20 p.m. of that day in the company of the officer

commanding station and 2 other police officers they proceeded to the scene of robbery and found houses burning. He restated the facts he had collected while at the scene and said:

“--- I booked the accused in the cells then went to see the complainant. He had been transferred to St. Mary’s hospital. Later after his condition improved, I recorded his statement. He told me he knew the accused by the name Ouma and that it was not the first time he had carried the accused ---”

And in cross-examination:

“--- He did not indicate the names of those who attacked him ---”

And in respect of PW3 Mary said:

“--- the eye witness has an assault case with you. I am the investigating officer in that case. It is a different case. It is not true that we are framing you because of that case. It is a 2009 case ---”

That was the case for the prosecution which the learned trial magistrate considered and found that a prima facie case had been established requiring the appellant to answer. The appellant elected to give sworn testimony where he stated in essence that he was a businessman in Butere where he sold diesel and also had a phone charging shop. On 31st August, 2010 he reported to his work place only to realize that the inverter which he used in the phone charging business was faulty. He took it for repairs and left it at a certain shop. He then boarded a motor cycle and headed back to his place of work but they came upon a large crowd of people and motor cyclists and learnt that a motor cyclist had been attacked and robbed of his motor cycle near the place where he (the appellant) had a business. The group proceeded towards Musanda and others to Sigalame presumably looking for the robbers. He was later ferried by a certain Joyce who also plied the motor cycle trade and on the way they met PW3 Mary, who he called Maureen, and collected the inverter which had been repaired in Sabatia. He later saw Mary who was now in a motor vehicle which had 3 other people. The vehicle stopped and Mary pointed at him and said:

“--- He is the one ---”

Whereupon the men who were armed with clubs alighted from the vehicle and approached him menacingly forcing him to flee all the way to the home of either PW4 Pascal or PW5 Wilson where he sought refuge. He was later collected by the police and taken to Butere Police Station where he was advised that because of the hostile atmosphere it was better for him to be kept in custody. He was in the cells for 1 week and was surprised when he was arraigned in court and charged with the offence referred to. In cross-examination he stated:

“--- it is not true that Maureen saw me on the stolen motor cycle. She saw me on a blue bajaj. That lady has a grudge with me that is why she had me arrest (sic). She alleges that I caused her husband’s death and that I beat her ---”

That was the defence case that was dismissed by the trial magistrate and the appellant was convicted. The first appeal was dismissed.

When this appeal came for hearing before us, learned counsel for the appellant Mr. G. Lore abandoned the homemade Memorandum of Appeal drawn by the appellant and relied on the Supplementary Memorandum of Appeal drawn by advocates filed in court on 24th June, 2014 where four grounds of appeal are taken. In the first ground the learned judges are faulted for failing to scrutinize evidence of identification with circumspection thus misdirecting themselves on evidence of recognition which is said not to have been cogent and credible enough to sustain a conviction. In the second ground it is stated that the judges erred in law by upholding the prosecution evidence as presented which is said to have lacked a linkage between the appellant, the offence and the scene of crime and did not directly point at the appellant as the assailant. It is stated in the third ground that the judges erred in law by ignoring and

failing to find that the trial court admitted prejudicial evidence and that visual identification, even of close relatives, is often mistaken and there was a possibility of error in the circumstances of the alleged identification.

In the last ground it is stated that the conviction was against the weight of evidence.

When the appeal came up for hearing, learned counsel for the appellant took the first ground of appeal on its own but urged the other grounds together. On the first ground learned counsel submitted that the first appellate court failed to re-evaluate the evidence to come to its own conclusion. Counsel cited as an illustration a variance in the description of the motor cycle where the registration particulars given in evidence differed from the description in the charge sheet which, according to counsel, created a doubt which should have been resolved in favour of the appellant.

On the other grounds learned counsel faulted the evidence of recognition submitting that it was not free from error.

Mr. C.A. Abele, the learned Assistant Director of Public Prosecutions, conceded the appeal submitting that the evidence of recognition was shaky and should not have been relied on. Counsel cited the fact that there existed a bad relationship between Mary and the appellant who had cases in other courts as a possible reason why Mary could wish to implicate the appellant.

We have considered the record of appeal, the supplementary Memorandum of Appeal, the submissions of counsel and the law.

The only point of law that appears to emerge for our consideration relates to whether there was proper identification by recognition that would make the conviction of the appellant safe.

The learned trial magistrate on the aspect of identification by recognition stated in the judgment:

“However I am convinced that the circumstances under which the accused was seen and recognized were quite favourable and leaves no room for doubt.

The accused approached the complainant during the day and they spoke as he requested to be taken to Mutoma. The accused was not a stranger to the complainant and the complainant stated that he recognized the accused when he approached him.

The complainant stated it is on this date that he learnt of the name Ouma and he gave that name as he recorded his statement.

It came out in the evidence of the investigating officer that the complainant did not give the name of the accused when he made, the initial report. However, one must consider the state the complainant was in when he went to make his report. He was bleeding profusely and as he himself stated, he was not fully conscious. Infact he lost consciousness completely in the short ride between the police station and Butere District Hospital.

It is my view that in such a state, one cannot be in a position to give full details of any incident. See the case of RAMA ABDALLAH Vs R Criminal Appeal No. 104 of 2001 (MSA).

In my view the complainant did give the name of the accused at the earliest opportunity. Be that as it may, the evidence of the complainant is further supported by the evidence of PW3 who testified that at around the same time, she saw the accused and another man riding on a blue motor cycle and she saw the registration number KMCH 636. She stated that the man was riding the motor cycle had a blue shirt and the accused was wearing a yellow shirt with black flowers.

This description fitted the one given by the complainant in as far as the colours are concerned.”

The learned judges on first appeal reviewed that evidence and concluded that the evidence of Jackson was cogent and credible and was corroborated by the evidence of Mary.

The record shows that Julius, who had bought and owned the motor cycle which he donated to his nephew Jackson, called his nephew on 31st August, 2010 at 9.00 a.m. on telephone and Jackson:

“--- picked the phone and only told me that he had been robbed of the motor cycle ---”

And that:

“--- I got an opportunity to talk to Jackson on 2nd September, 2010 he told me that he was robbed. He told me he knew one of those who robbed him. At the police station I had been told that one of the robbers was known by the name Ouma ---”

Jackson in his evidence although claiming to have known the appellant by the name Ouma admitted that he only came to know that name on the day of the attack when he heard the second attacker call that name.

Corporal Kibet, who recorded Jacksons’ statement, testified that:

“--- He did not indicate the names of those who attacked him ---”

This was contrary to what Jackson had stated when he testified that he reported the matter to police on the morning of 31st August, 2010 when he gave the appellants name to police. How could this be possible when he was unconscious?

The trial and the first appellate court relied heavily on the evidence of Mary which they found corroborative of the evidence of Jackson. This is the witness who allegedly saw a motor cycle where the appellant was a pillion passenger and she noted its registration number. The registration number that she noted was a wrong one and was different from the description in the charge sheet and the evidence given by Julius. We pause to ask: *why would an ordinary person on a road go into the trouble of noting the registration particulars of a motor cycle where no negative report or incident has been received involving such motor cycle?* As we ask this question which has grave implications we wonder whether the trial court and the first appellate court considered that amongst other questions arising from the evidence that was recorded at the trial.

It was readily admitted by Mary and by Corporal Kibet that there were cases in other courts involving the appellant and Mary who was complainant. Corporal Kibet happened to be the investigations officer in all the cases which was probably a mere coincidence.

The appellants defence comprised the allegation that because of the other cases he had with Mary she had instigated his arrest and burning of his house. Corporal Kibet did not give any reasonable explanation why no investigations had been carried out to establish the arsonist or the reason for the arson against the appellants house.

There was also evidence before the two courts that when Jackson was robbed of the motor cycle a fight erupted amongst the motor cycle riders the basis of which is not clear from the record.

The good Samaritan who rescued Jackson at the scene of robbery and who took him to Butere Police Station and probably made a report was not called as a witness. The conversation he allegedly had with Mary concerning her seeing the stolen motor cycle with the appellant on it was readily admitted by the two courts when it should have been obvious to them that it was inadmissible hearsay evidence.

On our own analysis of the material placed before the two courts we are of the considered opinion that sufficient evidence existed to show that there was bad blood between Mary and the appellant. She had other cases in court against the appellant and it so happened that they were all investigated by Corporal

Kibet, the arresting and investigations officer in the case before the trial court. In addition Jackson did not give the appellants name to the police at the first opportunity and this should have alarmed the first appellate court when it was its duty to analyse the evidence and come to its own conclusions.

We agree with the Assistant Director of Public Prosecutions that the conviction against the appellant was not safe and we therefore allow the appeal, quash the conviction and set aside the sentence. The appellant shall be released forthwith unless otherwise lawfully held.

Dated and Delivered at Kisumu this 19th day of September, 2014.

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR