



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)**

**CRIMINAL APPEAL NO. 43 OF 2013**

**BETWEEN**

**VITALIS SHIANGALA.....1<sup>ST</sup> APPELLANT**

**SILAS IMBATI.....2<sup>ND</sup> APPELLANT**

**ABINAYO AMBOSO.....3<sup>RD</sup> APPELLANT**

**OSCAR ASHIVAKA.....4<sup>TH</sup> APPELLANT**

**ERICK ILUSA SHIANI.....5<sup>TH</sup> APPELLANT**

**ADRIAN VEMBO.....6<sup>TH</sup> APPELLANT**

**MICHAEL MULAMA ALIAS BALLATI.....7<sup>TH</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

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

*(Chitembwe & Thurania, JJ.) dated 19<sup>th</sup> February, 2012*

**in**

**HCCRA NO. 245 OF 2010**

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**JUDGMENT OF THE COURT**

In this second appeal, the seven appellants: *Vitalis Shiangala* (1<sup>st</sup> appellant), *Silas Imbati* (2<sup>nd</sup> appellant), *Abinayo Amboso* (3<sup>rd</sup> appellant), *Oscar Ashivaka* (4<sup>th</sup> appellant), *Erick Ilusa Shiani* (5<sup>th</sup> appellant), *Adrian Vembo* (6<sup>th</sup> appellant) and *Michael Mulama* (7<sup>th</sup> appellant) challenge their convictions and sentences by *J.M. Githaiga, Principal Magistrate*, Kakamega, for two offences of robbery with violence contrary to *section 296 (2)* of the Penal Code and confirmation of the same by the High Court

**(Chitembwe and Thurania, JJ.).**

The particulars of the first count were that the appellants on the night of 13<sup>th</sup> July, 2009 at Mulundu area, Shitochi sub-location in Kakamega East District within Western Province, jointly with others not before the court, while armed with dangerous weapons, namely: gun, pangas and rungus robbed **Emmanuel Makomere** of Kshs.2,300/= and a Nokia mobile phone-make 1110 – all valued at Kshs.4,880/= and immediately before the time of such robbery used actual violence against the said Emmanuel Makomere.

The second count carried the following particulars namely, that the appellants, in consort with others not before the court, on the same date, at the same place and while similarly armed, robbed **David Maunda** of Kshs.5,560/= and immediately before the time of such robbery used actual violence against the said David Maunda.

The appellants pleaded not guilty but after a full hearing in which seven witnesses testified and the 1<sup>st</sup> and 7<sup>th</sup> appellants made sworn statements while the 2<sup>nd</sup> 3<sup>rd</sup> 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> appellants made unsworn statements in their defence, they were convicted and each sentenced to death on both counts although the sentence on the second count was left in abeyance.

The appellants were aggrieved and therefore appealed to the High Court (**Chitembwe and Thurania Jaden, JJ.**) but their appeals were dismissed and hence this second appeal.

**Section 361(1)(a)** of the Criminal Procedure Code provides that this Court's jurisdiction is confined to matters of law only. See also the case of **Omboko -Vs- Republic [1983] KLR 191** 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 unless such findings are based on no evidence. Looking through the appellants' respective supplementary memorandum of appeal which **M/s Gichaba** and **Onsongo**, learned counsel for the appellants, relied upon after abandoning the memoranda of appeals lodged by the appellants in person, the following broad issues of law have been raised:-

- 1. Failure of the High Court to re-evaluate the evidence;**
- 2. Weak evidence of identification or identification which was not positive;**
- 3. Failure to call essential witnesses;**
- 4. Failure to prove the case beyond reasonable doubt.**
- 5. Shifting the burden of proof.**

The background facts were as follows. David Maunda (PW1) (Maunda) and Emmanuel Makomere (PW2) (Makomere) were, at the material time, making Mandazis at Mulundu near Sigalagala area for their following day's customers when, at about 3.00 a.m., they heard people talk outside. They thought they were their customers but revised their assessment of them because of what followed. Maunda and Makomere claimed they recognised the appellants as being among the people. The 1<sup>st</sup> appellant had a gun and seemed to be in command of the proceedings. Maunda claimed he was cut by the 5<sup>th</sup> appellant and the 7<sup>th</sup> appellant who were armed with pangas and the 7<sup>th</sup> appellant stole Kshs.5,650/= from him while the 4<sup>th</sup> appellant took hot oil and poured it on his arm. Makomere claimed the 2<sup>nd</sup> and 3<sup>rd</sup> appellants cut him on the head. The 4<sup>th</sup> appellant poured hot oil on his right leg. He also stole his Kshs.2,300/= and a Nokia mobile phone-make 1110. Besides the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> appellants, Makomere claimed he also saw the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> appellants. According to him the 5<sup>th</sup> and 7<sup>th</sup> appellants were armed with pangas, and the 1<sup>st</sup> appellant had a gun.

When the attack upon the complainants was in progress, **Grace Angecha Otiato** (PW3) (*Grace*) was awakened. She claimed she saw nine people of whom she recognized the 1<sup>st</sup> appellant who had a gun and

the 2<sup>nd</sup> and 3<sup>rd</sup> appellants who cut Makomere. She also recognized the 7<sup>th</sup> appellant who was armed with a panga and who cut Maunda. She alleged she also recognized the 4<sup>th</sup> appellant who was together with his brother who was not charged.

In the morning, when she opened her salon and barber businesses at Sigalagala, the 3<sup>rd</sup> appellant who was her employee reported on duty with a blood stained shirt. The 2<sup>nd</sup> appellant who also happened to be around alerted the 3<sup>rd</sup> appellant of the bloodstained shirt and they both left her premises only for the 3<sup>rd</sup> appellant to reappear in the evening in a different shirt.

**Christopher Sore Shihaji** (PW4) (Sore) was also on the material night on the premises having retired earlier and had been relieved by Makomere and Maunda. While in his house he heard his colleagues, Makomere and Maunda raise alarm that they were being attacked. He armed himself with an axe and recognized four people at the scene including the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants.

All the four witnesses, Maunda, Makomere, Grace and Sore gave concurrent testimony that the scene was lit by electric light both inside and outside and had no difficulty in recognizing the appellants as specifically stated above. Grace and Sore assisted Maunda and Makomere report to police and seek treatment at Kakamega General Hospital. Maunda was admitted for 2 days whilst Makomere was admitted for two weeks.

At Kakamega Provincial General Hospital, Maunda and Makomere were attended to by **Francis Wasike** (PW6) (the clinical officer) who produced P3 forms in respect of injuries they suffered during the robbery. He classified the injuries as grievous harm.

The appellants were arrested and charged as already stated. The 1<sup>st</sup> appellant, in a sworn statement, denied committing the offences. He testified of his arrest for being in possession of timber without a licence and failing to raise Kshs.2,000/= to buy his freedom. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> appellants gave unsworn statements on how they were arrested and denied committing the offences. The 7<sup>th</sup> appellant, on his part, also denied committing the offences in a sworn statement. He too testified about his arrest.

In his judgment, the learned Principal Magistrate set out the evidence which had been presented before him and having done so, believed the testimonies of the complainants and their witnesses concluding as follows:-

*“The complainants knew the accused very well prior to the robbery. It was therefore a case of recognition when they saw the robbers they knew. For instance PW1 testified he used to give the 2<sup>nd</sup> accused free mandazi and he knew his street name **MUSEVENI**. PW1 indicated he had been with the 3<sup>rd</sup> accused at 8.00 p.m. The same night of the robbery. PW1 was quite clear he used to give the 4<sup>th</sup> accused casual jobs like splitting firewood. There was enough light inside and outside the premises and the robbers were seen quite well by the complainants and PW3 and PW4*

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*In addition it was consistently the prosecution case that the 1<sup>st</sup> accused had a gun while the other robbers had pangas.*

*In these circumstances the court finds the accused were among the robbers.*

.....

*They are found guilty and they are convicted accordingly.”*

Those findings became the subject of the first appeals before the High Court which considered the entire evidence and dismissed the appeal. In doing so the learned Judges stated:-

***“According to PW1, PW2, PW3 and PW4, there was electricity (sic) light in the room where mandazi were being cooked. There was also electricity (sic) light outside. All the four witnesses saw the 1<sup>st</sup> appellant holding a gun. PW1, PW2 and PW3 testified that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants had pangas and attacked PW2,. PW1, PW2 and PW3 saw the 4<sup>th</sup> appellant at the scene. It is the evidence of PW1 and PW2 that the 4<sup>th</sup> appellant is the one who scalded them with hot oil.***

***According to PW1 and PW2 the 5<sup>th</sup> and 6<sup>th</sup> appellants were among the robbers. The 5<sup>th</sup> appellant attacked PW1 while the 6<sup>th</sup> appellant was keeping guard at the door. PW1, PW2 and PW3 saw the 7<sup>th</sup> appellant. It is the evidence of PW1 that the 7<sup>th</sup> appellant cut him on the right hand and he took money from his trouser pocket. PW3 saw the 7<sup>th</sup> appellant attacking PW1. She had seen the 7<sup>th</sup> appellant before that night.***

***From the evidence on record we are satisfied that the 7<sup>th</sup> appellants were positively identified. The evidence does establish that the robbery took sometime to be accomplished. There was electricity (sic) light and none of the witnesses testified that the light was switched off. We find that the prosecution did prove its case beyond reasonable doubt.”***

In the end, the learned Judges of the High Court dismissed the appellants' appeals.

Mr. Gichaba, learned counsel for the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> appellants, in a nutshell, submitted that the incident occurred under difficult circumstances and identification was therefore not positive. It was learned counsel's view that the poor identification was compounded by the failure of the complainants to give clear descriptions of their attackers and failure of the prosecution to avail the relevant Occurance Book (O.B). Counsel added that essential witnesses such as the arresting officer were not called and that all the discrepancies could not be detected by the High Court because it failed in its duty to re-evaluate the evidence.

Mr. Onsongo, learned counsel for the 4<sup>th</sup>, 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> appellants, associated himself with the submissions of Mr Gichaba. For emphasis, learned counsel referred us to various pieces of evidence which demonstrated identification which was weak or not positive and a failure of the High Court to re-evaluate the evidence. Counsel further discredited the evidence on identification because of absence of 1<sup>st</sup> report of the robbery and uncertainty over the relevant O.B. in respect of the incident. Learned counsel further discredited the evidence on identification because of the delay in arresting the appellants. In counsel's view, identification parades should have been conducted to resolve the doubt with respect to who the real robbers were. All those discrepancies, according to counsel, were not considered by the High Court as it failed in its duty to re-evaluate the evidence which evidence, according to counsel, failed to prove the charges to the required standard.

Mr. **Abele**, learned Assistant Director of Public Prosecutions, supported the appellants' convictions and sentences. In his view, the appellants were recognized by the complainants PW3 Grace and PW4 Sore at the scene which was well lit by electric light. In counsel's view, the appellants were positively recognized by the complainants, PW3 Grace and PW4 Sore who knew them prior to the robbery.

We have considered the record, the grounds of appeal and counsel's submissions. We have further given due consideration to relevant case law. We shall first consider the issue of identification or recognition which issue has a direct bearing on the other issues raised by the appellants. On that issue the case of ***Anjononi -Vs- Republic [1980] KLR 59*** provides a useful guide. There, **Madan JA** (as he then was) stated:-

***“Recognition of an assailant is more satisfactory, more assuring and more reliable than***

***identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”***

There are other considerations to be made where a case depends on visual identification. In ***Simiyu & Another -Vs – Republic [2005] KLR 192***, 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 complainants either did not or may not have known who the real attackers were. Secondly, where recognition or identification is dependent on the nature of the light, it is important on the part of 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 discredit the evidence on identification or recognition.

In the appeal before us, the two courts below reached concurrent findings that the first six appellants, Maunda, Makomere, Grace and Sore were local residents and they knew each other well; that the source of light both inside and outside the premises where the attack happened, was electric light which was not switched off during the attack; that some of the appellants had worked for Maunda and Grace prior to the attack; that one of them even had dinner with Maunda early the same night of attack; that Grace had seen the 7<sup>th</sup> appellant prior to the attack; that Maunda and Makomere gave the names and/or description of the appellants to the police and led to their arrest.

Those were concurrent findings which were based on evidence and not on whim or caprice and we find nothing that would compel us to depart from them.

Heavy weather was made of the failure to avail the relevant Occurrence Book which, according to counsel, had been sought by the appellants. Our perusal of the record shows that on 9<sup>th</sup> October, 2009 the 1<sup>st</sup> appellant applied for copies of P3 and 1<sup>st</sup> report upon which application, the learned trial magistrate ordered the prosecution to provide the same on 23<sup>rd</sup> January, 2009. Come that date, the trial court directed that copies of witness statements be provided. It would appear that the statements were not supplied because on 9<sup>th</sup> February, 2010 the 1<sup>st</sup> appellant renewed his application for copies of witness statements. The same scenario was repeated on 29<sup>th</sup> March, 2010 and on 31<sup>st</sup> May, 2010. There is no evidence that the 1<sup>st</sup> appellant was not finally supplied with a copy of the 1<sup>st</sup> report as he never mentioned the matter again after the first request for the same.

The 7<sup>th</sup> appellant was then represented by counsel and made no such application. In the circumstances, the complaint regarding the failure to furnish the O.B. is without substance and we reject it.

With regard to the complaint that the High Court failed to carry out its mandate to re-evaluate the evidence, we have gone over the record with a tooth comb and find that the learned Judges of the High Court faithfully set out, in summary, the evidence of each witness who testified and then reviewed the same. They then identified the main issues for determination which were whether the offences of robbery with violence had been proved to the required standard and if so, whether the appellants committed the same. After analysing the evidence, the learned Judges concluded that indeed the offences preferred had been committed and further that the appellants were the ones who committed the same. We find nothing wrong with the approach adopted by the learned Judges in their re-evaluation and re-analysis of the evidence on record. They did not merely pay lip service to the duty imposed upon them but loyally applied the 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 court's findings and conclusion.”***

See ***Simiyu and Another -Vs – Republic [2005] KLR 192***, ***Okeno -Vs – Republic [1972] EA 32*** and ***Pandya -Vs – Republic [1957] EA 336***, among many others.

The appellants also complained about failure to call essential witnesses. The witnesses, who, counsel for the appellants stated, were not called to testify were the Administration Police Officers who arrested some of the appellants and the area Assistant Chief to whom an early report was made. Under **section 143 of the Evidence Act**, no specific number of witnesses are required to prove any fact unless the law says so. With regard to the arresting officers there is no dispute that the appellants were indeed arrested. They indeed narrated to the trial court how they were arrested. The prosecution subsequently adduced evidence before the trial court which the two courts below accepted as proving, to the required standard, the charges which faced the appellants. So, there was no doubt as to why the appellants were arrested.

We also do not think that anything turns on the failure to call the area Assistant chief. The record shows that he was informed of the robbery which information, if adduced by him, would add no value to the case presented by the prosecution. In our view, in the circumstances of this appeal, the failure to call the area Assistant Chief did not occasion, to the appellants, any failure of justice. We also do not think that the failure to call the Administration Police officers and the Assistant Chief should lead to the inference that if they had been called their evidence would have tended to be adverse to the prosecution case. We are of that view, because the case presented by the prosecution against the appellants was not a borderline case which would have been resolved in favour of the appellants. The case of the prosecution, in our view, was water-tight notwithstanding the absence of the testimony of the witnesses who were not called. See the case of ***Bukenya & Others -Vs – Uganda [1972] 549***.

The last cluster of complaints raised by the appellants was that the two courts below shifted, to the appellants, the burden of proof and further that the case against them was not proved beyond reasonable doubt. Our above analysis demonstrates that these complaints cannot be sustained. Various discrepancies were pointed out by counsel for the appellants which, according to counsel, showed that the two courts below did not have the right rules in mind regarding burden of proof and standard of proof. As already observed, we have concurrent findings of fact by the two courts below on those alleged discrepancies and we cannot interfere unless we are satisfied that there was grave misdirection which led to injustice. We have found no such misdirection. Any conflict of evidence was not, in our view, material and did not weaken the case put forward by the prosecution.

We also, with all due respect, reject the complaint that the defences of the appellants were not considered. The record is clear that the appellants' respective defences were duly considered and were rejected, in our view, properly. In any event, our own analysis of the record demonstrates, beyond any shadow of doubt, that the evidence of Maunda, Makomere, Grace and Sore completely dislodged the appellants' defences which merely narrated their arrests.

The upshot of the above assessment is that we find no merit in this consolidated appeal. The same is dismissed in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2014**

**J.W. ONYANGO OTIENO**

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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**