



**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 567 OF 2010

BETWEEN

BONFACE INDECHE MUNASIO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kakamega (Onyancha & I.

Lenaola, J) dated 30th November, 2011

in

KAKAMEGA HCCRA NO. 52 OF 2008)

JUDGMENT OF THE COURT

The evening of 4th April, 2007 turned out to be very eventful for **Samson Okusala Muganda (PW1) (Muganda)**, a retired teacher who resided at Malimali village, Shambere in South Kabras location. At about 6:30p.m he was at Lubao bus stage awaiting public transport to take him home when he was surprised by the presence of the appellant, his neighbour and a former pupil who he had taught at Malimali Primary School. The appellant demanded for money from Muganda stating that he wanted to share proceeds Muganda had obtained from sale of sugarcane. Muganda told him that could not be because the money was for use at Mugandas' business. This did not please the appellant at all. He left the scene threatening:

"...ngoja tu utaniona, utanipatia hiyo pesa...." which translates to: "Just wait you will see me, you will give me that money..."

Shortly, thereafter the appellant re-appeared accompanied by two others who were not known to Muganda. The appellant had a knife while the other two carried rungs. They all attacked Muganda where the appellant stabbed him several times and took money Kshs. 5,000/= which was in Mugandas' shirt pocket. Muganda managed to hold onto the appellant as the other two attackers fled but as he was loosing blood fast he lost his grip and let go of the appellant who fled but not fast enough as other neighbours - **Jackson Machanja (PW2) (Machanja)** and **Alphonse Ben Kasomba (PW3) (Kasomba)** happened at the scene and witnessed the struggle between the appellant and Muganda. Machanja and Kasomba were equally surprised to see that it was the appellant, their neighbour, who was attacking

Muganda, their other neighbour and an older man.

These were the facts which were established by the trial court and confirmed by the first appellate court on the first appeal. It was also established that Machanja and Kasomba took Muganda to Shikutsa Health Centre where he was received by **Francis Wasike (PW6) (the Clinical Officer)** who treated him and completed a P3 Form produced in evidence as part of the prosecution case.

Muganda made a report to Kakamega Police Station where he gave the name of the appellant as one of the assailants who attacked him and robbed him of money. The appellant was arrested through the efforts of **Julius Ndalú Chibuyi (the assistant Chief)** who had been instructed to apprehend him by Kakamega Police Station through **No. 85166 P. C. Mark Owili (PW5) (the police officer)**.

The appellants defence comprised a denial where he stated in an unsworn statement that he had visited his brother and had then gone home.

When the appellant was presented before the Chief Magistrate, Kakamega, he was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. Particulars were that on the 4th day of April, 2007 at Malimali village jointly with others not before court while armed with dangerous weapons namely a knife robbed Muganda of Kshs. 5,000/= and that at or immediately before or immediately after the time of such robbery he used actual violence to the said complainant. The appellant denied the charge but after a trial commenced by the learned Senior Principal Magistrate (Kathoka Ngomo) but which was taken over by the learned Chief Magistrate (H. I. Ongundi) was convicted in the judgement delivered on 11th July, 2008. His first appeal to the High Court of Kenya at Kakamega (D. A. Onyancha and I. Lenaola, JJ) was dismissed in a judgement delivered on 30th November, 2011 and the appellant then preferred this appeal.

Being a second appeal we 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 judicial pronouncements of this court in such cases 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 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 **Njoroge v Republic [1982] KLR 388** and **Thiongo v Republic [2004] 1 EA 333** amongst many other decisions where that point is emphasized.

In the Memorandum of Appeal drawn by Mrs. Marcella Onyango, learned counsel for the appellant, four grounds of appeal are taken which are in summary that the learned judges on first appeal erred in law and fact in upholding the conviction of the appellant when the evidence could not prove the charge, secondly; that the judges erred in law and fact in finding that the identification of the appellant was proper; thirdly that the learned judges did not re-evaluate the evidence and finally that the learned Judges erred in both law and fact by failing to put weight to the testimony or evidence of the appellant.

The points of law that call for our consideration are firstly whether identification of the appellant was proper in law; secondly whether the learned judges carried out their duty of re-evaluating the evidence and thirdly whether the appellants defence was considered.

When the appeal came for hearing before us learned counsel for the appellant took the first three grounds together and submitted that the prosecution evidence was contradictory as prosecution witnesses gave different names from those of the appellant.

On the last ground learned counsel was of the view that the prosecution had not controverted the appellants alibi defence .

Mr. C. A. Abele, the learned Assistant Director of Public Prosecutions in supporting conviction and sentence submitted that the High Court had properly conducted its roles as a first appellate court without

misdirecting itself. Counsel submitted that the appellant was recognized by the complainant and two other witnesses, all neighbours, in broad daylight and the ingredients for a robbery with violence had been established.

We have considered the record of appeal, the grounds of appeal, the submissions by counsel and the law.

On identification the learned trial magistrate was satisfied that the complainant was attacked by the appellant who was his neighbour and former pupil at a school where the complainant had been his teacher. The trial magistrate was also satisfied that the other two witnesses- Machanja and Kasomba- happened at the scene before the appellant fled and were able to recognize the appellant who was their neighbour.

As the first appellate court stated in the judgement appealed from:

"... this is a simple straight forward story supported by concrete evidence. We as the appeal court believe the prosecution evidence. We find no logical reason why complainant should make a story of robbery against his neighbour the appellant. In any case he did not make up the injury evidence. PW2 and PW3 support and corroborate the complainants evidence. We believe the evidence independently..."

On the allegation that the first appellate court did not re-evaluate the evidence to come to its own conclusion we have perused the judgement of that court and are satisfied that the learned judges carried out their duty and arrived at their own conclusion based on the record before them.

The appellants' defence which was a mere denial was properly dismissed as the alibi alleged was totally displaced by the prosecution evidence. This appeal has no merit and is accordingly dismissed.

Dated and Delivered at Kisumu this 23rd day of October, 2014

D. K.MARAGA

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