



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. GITHINJI, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 35 OF 2013

BETWEEN

CHARLES ESHITEMI BULIMO APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kakamega (J. Chitembwe , B.

Thuranira, JJ) dated 8th November, 2010

in

KAKAMEGA HCCRA NO. 225 OF 2010)

JUDGMENT OF THE COURT

This is a second appeal to this Court and the provisions of Section 361 (1) (a) Criminal Procedure Code limit our jurisdiction on such an appeal to a consideration of only issues of law but not matters of fact which the two courts below have made findings upon unless it can be shown that there has been a misdirection in the treatment of facts or the findings are based on no evidence or that they are perverse. This position has been stated and restated in many of the decisions that have come forth from this court such as **Njoroge v Republic [19821 KLR 388: Thiongo v Republic [2004] 1EA333 and Daniel Wycliff Namai v Republic (Kisumu) Criminal Appeal No. 35 of 2010 (ur)** amongst others.

We shall therefore examine the facts as found by the two courts below only for purposes of establishing whether there are points of law raised in this appeal calling for our consideration.

The charge against the appellant was that of robbery with violence contrary to Section 296 (2) of the Penal Code particulars being that on 27th June, 2010 at Emungweso area, Eshirali sub - location, Mulwanda location of Khwisero District jointly with another not before the court while armed with dangerous weapons namely pangas they robbed Wilfred Amwayi cash Kshs. 500/= and at the time of such robbery used personal violence against the said complainant. The prosecution case was that at about midnight on 27th June, 2010 **Wilfred Amwayi Bweya (PW1) (Wilfred)**, a teacher, was

walking home at Emungweso after watching a soccer match at Khwisero. He was alone. Some 200 metres to his house he was suddenly attacked by two men who he did not recognize because it was dark. They cut him with a panga on both hands, the forehead and the back of the left ear. They grabbed cash Kshs. 500/= which was in his jacket pocket. Wilfred had a small knife in another pocket which he now produced and proceeded to stab one of the attackers on the left hand towards the shoulder and also below the right eye. As he did this he shouted for help which action made the men flee the scene. He was able to reach home where he informed his brother **Arthur Ochango Bweya (PW2) (Arthur)** of the events of the night.

Early the next morning after making a report at Khwisero Police Post Wilfred, Arthur and another of their brothers **Peter Amwayi Okutoyi (PW3) (Peter)** visited the scene of attack and made some interesting observations. There were two trails of blood, one leading to Wilfreds' home while a different set led to the appellants home. A report was promptly made to police and **No. 88499 P. C. Allan Njagi (PW4) (PC Njagi)** in the company of another police officer visited the scene and made the same observations. The whole matter had by then attracted many villagers who visited the scene. The appellant was not at home. Reports were received that the appellant was instead in a different district - he was seeking treatment at Eshiraha Health Centre in Butere. He was arrested and it was found that he had fresh wounds on the left hand and the right eye. Upon being escorted home the police recovered a blood stained panga and blood stained clothes that had been dumped into a pit latrine. The panga and clothes were some of the exhibits produced in court as part of the evidence. Wilfred was examined by PW5 Belinda Mulunga, a Clinical Officer, some 3 days after the incident who classified injuries as "**harm**" and completed P3 Form which was produced in court as part of the evidence. The police also introduced into the evidence a sketch plan drawn by PC Njagi which showed the positions and distances of the scene of attack in relation to the respective homes of the appellant and Wilfred. This sketch plan showed that the appellants' home was 100 metres from the scene of attack while Wilfreds' home was 200 metres away. That was the case which the prosecution made and upon which the appellant was called upon to answer after the trial magistrate found that he had a case to answer.

In a sworn statement the appellant, who described himself as a farmer and mason in Khwisero, denied the offence stating that on the date of the alleged offence he was at home but was arrested the next day by a crowd that did not even bother to inform him why he was being arrested.

The learned trial magistrate (D. O. Ogembo) reviewed the prosecution case and the defence and having found that the prosecution evidence displaced the appellants defence convicted him and sentenced him to death.

The appellant appealed to the High Court of Kenya at Kakamega but in the judgment delivered by Said J. Chitembwe and B. Thurania Jaden, JJ, on 8th November 2012, the learned Judges found no merit in the appeal which was accordingly dismissed. Those findings provoked this appeal premised on six grounds of appeal set out in the Supplementary Memorandum of Appeal drawn by the appellants lawyers Gichaba and Company Advocates.

In the first ground the appellant has complained that the first appellate court failed in its duty because it should have held that evidence of PW2 to PW4 was circumstantial evidence needing corroboration in the absence of which it was inadmissible. In the second ground the appellant says that the first appellate court failed to appreciate that evidence of blood stains alleged to belong to the appellant was inconclusive without medical examination. In the third ground the appellant says that the first appellate court erred in law for not subjecting the entire evidence to a fresh and independent scrutiny which therefore led to a failure of justice. The appellant states in the fourth ground that the first appellate court erred in law for not finding that the charge was not proved beyond reasonable doubt while in the fifth ground the learned judges are faulted for not finding that the evidence was contradictory. The final ground attacks the learned judges for making findings based on no evidence, total misdirection or errors of law which no reasonable tribunal could on the evidence adduced have made such findings.

The appeal came for hearing before us on 23rd June, 2014 when learned counsel for the appellant Mr.

W. M. Gichaba submitted that the evidence in support of the charge failed to meet the threshold of admissible evidence because it was circumstantial evidence which was not corroborated. Counsel contended that blood stains traced to the house of the appellant and which blood stains were not subjected to medical examination could not be relied upon to found a conviction. Counsel also submitted that evidence of the Clinical Officer could not be used at all because in counsels' view a Clinical Officer is not qualified and could not testify on behalf of the prosecution as an expert.

Mr. C. A. Abele, the Assistant Director of Public Prosecutions, did not agree. He supported conviction and sentence arguing that the first appellate court carried out its duty as required reaching concurrent findings with the trial court. Counsel submitted that the trail of blood was important because it led from the scene of the attack to the appellants house while the other trail led to the complainants house.

We have carefully considered the whole record of appeal, the Memorandum of Appeal and the able submissions made before us by counsel on both sides.

The appellant has submitted that the evidence of PW2 to PW4 was circumstantial evidence requiring corroboration to be admissible in law.

Wilfred's evidence was that he was attacked and injured by two persons and in the course of a struggle he was able to stab one of the attackers using a knife he had in his pocket. He even described the nature of injuries he inflicted upon one of the attackers as a stab on the left hand and another on the right eye. He reported the attack to his brothers Arthur and Peter and the next morning he reported the matter to the police. Arthur and Peter, and later the police including PC Njagi visited the scene of the attack and were able to follow two trails of blood, one which led to the appellant's house and the other to Wilfred's house. The appellant was not at home but was found that very morning attempting to get treatment in Butere, far away from his home. Injuries on him were consistent with the injuries inflicted by Wilfred during the attack. The learned *Judges* of the first appellate court analysed the evidence as found by the trial magistrate and formed their own independent opinion, as they were required to do. They stated in respect of corroboration and sufficiency of evidence:-

" Apart from the evidence of blood drops leading to the appellant's house it is the evidence of PW4 that he retrieved clothes from a pit latrine at the appellant's home. The said clothes had blood stains. It is the evidence of PW1 that he stabbed one of the robbers on his hand and near the eye. PW2, PW3 and PW4 saw the appellant with fresh wounds on the hand and eye. The record of the trial court at page 8 show that the trial magistrate noted that he saw the scars on the appellant's left hand.

The appellant contends that the trial court relied on hearsay and rumours and that the burden of proof was shifted to him. He also contends that the prosecution case was not proved beyond reasonable doubt and the complainant did not identify his attackers. Although PW1 did not identify his attackers, we are satisfied that the prosecution did prove its case beyond reasonable doubt. PW1 testified that he stabbed one of the robbers with his small knife. Blood drops were traced from the scene of the robbery up to the appellant's home. We are also satisfied that the appellant was arrested while seeking treatment. The appellant's defence did not disprove the prosecution evidence. The sketch plan drawn by PW4 was produced in court and it shows how the witnesses followed the blood drops up to the appellant's home. PW4 also recovered some blood stained clothes in a pit latrine at the appellant's home and the same were produced as exhibits. When the appellant was arrested he was found to be having fresh wounds on his hand and eye. Some treatment notes were produced as exhibit 7 showing that the appellant was treated at Khwisero Health Centre. The treatment notes show that the appellant had a wound on the left arm and right eye. It is PW4's evidence that he escorted the appellant for treatment at Khwisero Health Centre."

We may add that the evidence of trail of blood was relevant as it formed part of the same transaction in that the complainant was injured, he himself caused an injury to one of the attackers and the following day witnesses were able to follow the trail of blood one to the appellants house and the other to the complainants house. Section 6 of the Evidence Act states that:

"Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places."

Blood stains led to the appellants house and when he was found the same morning in a different district he had injuries consistent with injuries described by the complainant and was in the process of attempting to get treatment for the injuries. All these were relevant facts forming the same transaction and the first appellate court was entitled as it did to rely on them.

The offence of robbery with violence under Section 296 (2) Penal Code Is committed if:

- (a) the offender is armed with a dangerous or offensive weapon or instrument;**
- or**
- (b) the offender is in company with one or more other person or persons;**
- or**
- (c) at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person.**

In the instant case the evidence showed that Wilfred was attacked by two people who were armed with inter alia pangas and they used actual violence upon him. The prosecution established more than one of the ingredients forming the offence when they were only required to prove one ingredient.

The other complaint related to the fact that medical evidence was led by a Clinical Officer, a person unqualified to do so according to counsel for the appellant. This submission must fail for two reasons.

On the one hand because, as we have shown, the offence the appellant was charged with could be established even in the absence of medical evidence. The three ingredients to the offence of robbery with violence are exclusive, not inclusive.

The submission fails on the other hand because there is no law in Kenya that bars a Clinical Officer from testifying in court as the witness in the case before the trial magistrate did. The challenge taken as a ground of appeal in **Raphael Kavoi Kiilu v Republic [2010] e KLR** was, as in this appeal, that the clinical officer who did the examination and testing was not qualified to do so. This court differently constituted quoted Section 2 of the Clinical Officers (Training, Registration and Licensing) Act Cap 260 Laws of Kenya where a clinical officer is said to mean:-

"a person who, having successfully undergone a prescribed course of training in an approved training institution, is a holder of a certificate issued by that institution and is registered under the Act..."

Section 7 (4) of the Act states:-

"A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Gazette."

The Act goes further to authorize such officers to engage in private practice... **"in the practice of**

medicine, dentistry or health work for a fee....."

See also **Mark Wanjala Wanyama v Republic [2008] e KLR**. The Clinical Officer who testified in the trial was entitled to do so and the challenge to his competence taken in this appeal is without substance at all.

The upshot of our findings is that the appeal has no merit and we dismiss it in its entirety.

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