



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI JJA)

CRIMINAL APPEAL NO. 454 OF 2010

BETWEEN

OBED CHIVEYIA AMUTALA.....APPELLANT

AND

REPUBLICRESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kakamega (Ombija & Kariuki, JJ.) Dated 28th April, 2008 In H.C.CR.A. NO. 94 OF 2005)

JUDGMENT OF THE COURT

Obed Chiveyia Amutala ("the appellant"), was charged before Kakamega Chief Magistrate's Court with one count of robbery with violence contrary to **Section 296 (2)** of the Penal Code and one count of attempted robbery with violence contrary to **Section 297 (2)** of the same code. He was convicted on both counts and sentenced to death. He appealed to the High Court of Kenya (*N. Ombija, J. and G.B. Kariuki, J. as he then was*) but his appeal was dismissed thus provoking the appeal before us.

It was alleged, in the first count, that the appellant in the night of 2nd/3rd April, 2003 at Mwiritsa village, Shingoto Sub-location, Shibuye Location in Kakamega District within Western Province, jointly, with others not before the court, while armed with dangerous weapon, namely pangas, robbed Erick Lijodi Murenga of Kshs.6,000/- and a radio cassette - make National Panasonic valued at Kshs.14,000/= all totaling to Kshs.20,000/= and at or immediately before or immediately after the robbery chopped off the right hand thumb of the said Erick Lijodi Murenga.

The second count carried the following particulars namely, that the appellant, in consort with others not before the court, on the same date, at precisely the same place and while similarly armed, attempted to robe Irene Imbuyira of money and at or immediately before or immediately after the attempted robbery wounded the said Irene Imbuyira.

Learned counsel, **Mr. Abande**, represented the appellant at the hearing of the appeal and cited two (2) grounds of appeal contained in the Memorandum of Appeal filed by his firm on 22nd September 2014, after he abandoned the Memorandum of Appeal lodged by the appellant in person.

Those grounds raise two issues of law namely: failure of the learned Judges of the High Court to re-evaluate the evidence presented before the trial court and secondly, confirming the conviction of the appellant on evidence of identification which identification was not positive.

In his oral submissions before us, learned counsel for the appellant contended that the only source of light which the complainants had to aid their identification of the attackers was from torches whose intensity or brightness was not given. Learned counsel pointed out that there was no evidence that the torches were flashed throughout the attack. In those circumstances, according to counsel, identification was not possible especially as the complainants were seriously injured immediately after their house was invaded. In counsel's view, the fact that it was in the middle of the night compounded matters. All these factors, according to counsel, were not considered by the High Court which therefore failed in its duty to re-evaluate the evidence and reach its own independent conclusion thus rendering the appellant's conviction unsafe.

Mr. Abele, the learned Assistant Director of Public Prosecutions, who represented the State, supported the appellant's conviction contending, in the main, that the appellant was positively identified by both complainants despite the difficult conditions obtaining at the time of the attack. In Mr. Abele's view, there was no possibility of mistaken identification as the appellant was known to the complainants prior to the attack and they gave the appellant's name to the village elder and to the police at the earliest opportunity. In counsel's view, the evidence against the appellant was overwhelming and both courts below were loyal to their duty to analyse and re-analyse the evidence which the prosecution presented and reached the correct conclusion on the same.

As this is a second appeal, only matters of law fall for our consideration by dint of the provisions of **Section 361 (1) (a)** of the Criminal Procedure Code, Chapter 75, Laws of Kenya. The section reads as follows:-

"361 (1)

A party to an appeal from a subordinate court may, subject to sub-section (8) appeal against a decision of the High Court in its appellate jurisdiction on a matter of law and the Court of Appeal shall not hear an appeal

(a) on a matter of fact, and severity of sentence is a matter of fact;

or

(b) against sentence, except where the sentence has been enhanced by the High Court unless the subordinate court had no power under section 7, to pass the sentence.

The provisions of **Section 361 (1)** of the Criminal Procedure Code have received judicial interpretation in numerous decisions of this Court such as **Chemogong - V - R [1984] KLR 611**, **Ogeto - V - R [2004] KLR 14** and **Koingo - V - R (1982) KLR 213**, among many others. In the latter case, this Court stated as follows, at page 219:

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari S/o Karanja - V - R [1956] 1 E.A.C.A. 146)"

The prosecution case, in summary, was that on the material night, **Eric Lijodi Murenga (PW1)** (*Murenga*), and **Irene Imbuyira (PW3)** (*Irene*), were asleep in their house at Mwiritisa, a village in Shingoto sub-location in Shibuye Location within Kakamega District (now Kakamega County), when, at about midnight they heard a bang and woke up. Murenga had a torch which he flashed and claimed he saw the appellant among many people who had broken into the house. The appellant also flashed a torch at him and, together with the other raiders, attacked Murenga and his wife, Irene. Murenga's left thumb was chopped off and the fingers of the left hand cut as he resisted the attackers. Irene was cut on the right hand, right leg, upper lip and abdomen. The thugs then stole Kshs.6,000/= which was hidden under a

mattress and a Panasonic radio cassette. They (*thugs*) then left.

Irene got out of the house and screamed thereby attracting their neighbours who included **Joseph Kimoso Ashitakha (PW5) (Kimoso)**. Murenga and Irene told Kimoso that they had recognised the appellant as one of their attackers. Kimoso administered first aid to them and took them to Mukumu Mission Hospital. When he returned from the hospital, he reported the robbery to the village elder, **Silas Madasia Hamisi (PW4) (Madasia)** and both went back to the hospital with the thumb which had been chopped off the left hand of Murenga and which they found hanging on the wall in his house. Unfortunately, the thumb could not be stitched back. Murenga informed Madasia that they had been attacked by the appellant. He then reported the robbery to Kakamega Police Station but was referred to Shinyalu Administration Police Post (AP).

When Murenga and Irene left hospital, they went to Kakamega Police Station where their statements were recorded. Later, **Benard Ochanji (PW2)**, a clinical officer then stationed at Kakamega General Hospital, completed and signed P3 forms in respect of the injuries sustained by both Murenga and Irene. He classified their injuries as grievous harm and maim respectively.

The appellant was arrested by Shinyalu APCs and taken to Kakamega Police Station where he was re-arrested by IP Patrick Makokha (PW6) and charged as already stated. The appellant in an unsworn statement denied committing the offences. He narrated the events leading to his arrest and submitted that if he was involved, he would have been arrested immediately.

In his judgment, the learned Senior Principal Magistrate (*M.N. Gicheru*) set out the evidence which had been presented before him and having done so, believed that the appellant had been positively identified by recognition by Murenga and Irene who knew him well prior to the robbery. The learned Senior Principal Magistrate delivered himself as follows:-

"I find that the accused person was positively identified by the two complainants. I found them truthful. They were very convincing. They had no reason to lie against the accused person. They had no reason for saying they saw him if they did not. They were also very consistent from the word go.

Immediately after the attack, they told the neighbours that they identified the accused. They told the police the same. They were consistent on this throughout.

The fact that the two complainants knew the accused person well made their identification all the more (sic) easier. Theirs was infact recognition of a person they well knew"

With those findings, the end result was inevitable. The learned Senior Principal Magistrate found the appellant guilty as charged, convicted him and sentenced him to death as already stated.

Those findings and conclusion became the subject of complaint before the High Court which considered the entire evidence and in the end dismissed the appeal. In doing so, the learned Judges stated:-

"The attack took sometime and the attackers were exposed to PW1 and PW3 for sometime. PW1 had at the outset flashed his torch and seen the appellant and as the ransacking of the house went on PW1 had time to confirm whether it was the appellant he had seen. His wife too, (PW3) saw the appellant and both PW1 and PW3 did not hesitate to give the name of the appellant to the village elder (PW4) and the police officer (PW6) at the earliest available opportunity."

Having believed the evidence of identification by recognition of Murenga and Irene, the learned Judges concluded thus:-

"We are satisfied that there was evidence beyond any reasonable doubt proving the guilt of the appellant on both counts. We find no merit in the entire appeal."

The passages quoted from the judgments of both the learned Senior Principal Magistrate and the learned Judges of the High Court show that the two courts below were unanimous on their finding that the evidence of identification by recognition was positive. That finding was based on the evidence given by Murenga and Irene. The two witnesses were clear in their minds about who attacked them. Murenga testified that after the robbers entered their house and even before they flashed their torches he flashed his and saw the appellant before he attacked him. The appellant was well known to him prior to the robbery. The appellant then cut off Murenga's left hand thumb; he further cut the fingers of the same hand and the left shoulder. Irene confirmed the attack on her husband, Murenga, and testified that she too was cut on the right leg, right hand and abdomen. The thugs stole Kshs.6000/= and a radio cassette.

The learned Judges of the High Court considered the same evidence and after re-evaluating it, also accepted the testimonies of Murenga and Irene. So, the two courts below reached concurrent findings on matters of fact as regards the identification of the appellant. It is the law that we cannot interfere with a finding of fact unless we are satisfied that there was no evidence at all to support the same or that there was a serious misdirection which led to mis-justice. In the case of *M'ruingi -V- Republic* [1983] KLR 455, we said:-

"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 court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent on the evidence that no reasonable tribunal could have reached that conclusion, which would be the same thing as holding that the decision is bad in law."

In our view, the evidence of identification by recognition given by Murenga and Irene fell in the category, Madan, JA (as he then was) said to be

"more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in one form or other" (See *Anjononi & Others -Vs- Republic* [1980] KLR 59).

We are more assured that the two complainants recognized the appellant at the scene because they gave his name at the earliest opportunity. Kimoso was the first neighbour who responded to Irene's screams. He testified that he was given the name of the appellant as one of the attackers by Murenga and Irene. Madasia, the village elder, visited Murenga at the hospital the next day and he was told the appellant was one of the attackers. IP Patrick Makokho also visited Murenga and Irene at the same hospital the day after the robbery and they told him that the appellant was one of the robbers who had attacked them the previous night.

In the premises we are unable to agree with Mr. Abande that the evidence of identification was not positive. The ground of appeal challenging the appellant's conviction on account of improper or mistaken identification cannot therefore be sustained. Our above analysis further demonstrates that the learned Judges of the High Court admirably reanalyzed and re-evaluated the entire evidence and came to their own independent conclusion. They considered the entire evidence on record and then reviewed the testimonies of all the witnesses. They then considered whether the evidence proved, to the required standard, the offences which were preferred against the appellant which exercise included a consideration of the ingredients of the offences preferred and independently arrived at their conclusion that the appellant's appeal lacked merit. The approach adopted by the learned Judges fully complied with the guiding principles in the case of *Okeno -Vs - Republic* [1972] EA 32 on the mandate of a first appellate court. They did not merely adopt the findings of the trial court.

In the premises the complaint that the learned Judges of the High Court failed in their duty as a first appellate court is without merit and is accordingly rejected.

Before penning off, we have noted something on the record which we feel should not be left unattended to though it was not raised by either side. The learned Senior Principal Magistrate after convicting the

appellant on both counts of robbery with violence and attempted robbery with violence and after considering the appellant's mitigation, sentenced him to death on both counts without saying more. The learned Judges of the High Court merely dismissed the appeal against sentence. We have said before, time without number, that a person cannot hang twice, yet in this case the appellant was sentenced to death on both counts. That was improper.

The upshot of all the above is that this appeal cannot succeed. It is dismissed, but as to sentence, we suspend the death sentence imposed on the second count. Judgment accordingly.

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