IN THE COURT OF APPEAL AT NAIROBI

CORAM: GITHINJI, KARANJA & MURGOR, JJ.A

CRIMINAL APPEAL NO. 80 OF 2014

BETWEEN

BONIFACE KHAYUMBA KATUMANGA.....APPELLANT AND REPUBLIC.....RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Nairobi (Mbogholi & Achode, JJ.) dated 1st July, 2013

in

H.C. CR. A. NO. 713 OF 2006)

****

JUDGMENT OF THE COURT

Boniface Khayumba Katumanga (appellant) was charged before the Kikuyu Senior Resident Magistrate's Court with robbery with violence contrary to Section 296(2) of the Penal Code.

The particulars of the charge were that on the 2nd day of November 2005 at Gikuni Village in Kiambu District within Central Province, jointly with another not before court while armed with offensive weapons, namely rungus and pangas robbed **Samuel Bett Rotich** of one mobile phone make Sagem MC 939, one pair of shoes, one pair of trousers, one jacket, ½ Kg of meat, ½ Kg onions, ½ Kg tomatoes, one loaf of bread and cash Kshs 200/= all valued at Kshs 10,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Samuel Bett Rotich.

In the alternative, he was charged with handling stolen property contrary to **Section 322(2)** of the **Penal Code.**

He pleaded not guilty on both counts but after a trial in which the prosecution called three witnesses and the appellant tendered a sworn defence, the learned trial magistrate found the charge of robbery proved to the required standard, convicted the appellant and sentenced him to death.

As would be expected in such circumstances, the appellant moved to the High Court on appeal. The High Court (Mbogholi & Achode, JJ) heard the appeal and after subjecting the evidence to a critical evaluation afresh found the appeal devoid of merit and dismissed it.

Undeterred, the appellant moved to this Court on second appeal. He has proffered the following grounds:-

> (1) ***That the learned judges erred in law when they upheld the decision by the trial court failing to find that the purported identification wasn't supported by the provisions of Section***
>
> ***137(d) C.P.C.***
>
> (2) ***That the learned judges made an error in both law and facts when they upheld the conviction and affirmed sentence failing to find it necessary to warn itself on the inherent dangers of convicting on a single witness.***
>
> (3) ***That the learned appellate judges of the High Court erred in matters of law and fact when they relied on circumstantial evidence of exhibit failing to hid the same wasn't affirmatively proved by inventory or recovery forms.***
>
> (4) ***That the learned appellate judges erred in law when they upheld the trial court's decision failing to find that my fundamental rights were infringed***
>
> (5) ***That their lordship erred in law when they rejected my defense illustrating a grudge between me and he complainant on weak reasons.***
>
> (6) ***That I urge the court to avail the court proceedings to enable me raise more firm grounds as I wish to be present during the hearing of this appeal.***

This being a second appeal, by dint of **Section 361(1)** of the **Criminal Procedure**

Code, only matters of law fall for our determination.

It is trite however, that conclusions drawn from analysis of facts are themselves points of law. That being so, it is imperative for us to recapitulate the evidence adduced before the trial court to enable us make our findings as to whether both courts below arrived at the proper conclusions. The evidence before the trial court was to the effect that the complainant (**Samuel Rotich**) was walking home from the nearby shopping centre at about 7:30 pm on the material date. He was accosted by two men one of who he recognised as the appellant, who he said he knew well before then. The appellant is said to have hit him on his back, causing him to fall on the ground. They then stripped him and stole from him all the items listed in the charge sheet.

After they left, Rotich went to the nearby A.P. Post where he reported the

matter to **PW1, Cpl. Philemon Ndirangu**. According to Cpl Ndirangu, Rotich reported to him that he knew one of his attackers. It was the complainant's evidence that although he knew the appellant well, he did not know where his residence was. Following the robbery incident, he carried out investigations and found out where the appellant used to live. Armed with that information, he reported back to **Cpl Ndirangu** who accompanied him to the appellant's house. A search conducted therein yielded the Sagem MC 939 cell phone which was identified by **Rotich** as one of his stolen items and which was the subject of the alternative charge. The appellant was consequently arrested and taken to the police station where he was charged with the offences in question.

In his sworn defence, the appellant denied robbing the complainant. He nonetheless admitted having known him well before, but said that he owed the complainant money and that is why he had fabricated the case against him. After re-scrutinizing this evidence, the High Court was satisfied that the appellant was properly identified by the complainant. Further, after warning itself of the danger inherent in basing a conviction on the evidence of a single identifying witness, the Court found the conviction safe and upheld it.

The High Court found that the appellant was well known to the complainant before; that the appellant and his accomplice had taken time while undressing the complainant in the course of the robbery; and further that the complainant had given the appellant's name to **Cpl Ndirangu** during the first report. The court was also

satisfied that the complainant's stolen cell phone was recovered from the appellant. The High Court found the appellant's defence an afterthought made to exculpate him of blame. The court found the appellant's defence untenable and dismissed it as such.

We wish to point out at this stage that while going through the judgment of the High Court, we have noted that the learned Judges at paragraph 12 of the said judgment fell into a factual error when they stated that the appellant's testimony was made 'without oath'. The record clearly shows that the appellant testified on oath and was even cross-examined after his testimony. We have nonetheless observed from the contents of the rest of the judgment that the said error or misdirection did not in any way impact on the learned Judges' reasoning or on their conclusion and ultimate findings. It was nonetheless important for us to set the record straight.

At the hearing of the appeal before us, the appellant was represented by learned counsel Ms Judith Ekiru while the state was represented by Ms Mary Oundo, a Senior Assistant Deputy Public Prosecutor. Miss Ekiru relied on the homemade grounds of appeal filed by the appellant. Her thrust was basically on the issue of identification. She urged that identification was by a single witness and so the same could not be said to have been free from error; she urged that there was no proof of violence having been visited on the complainant and so the charge of robbery with violence was not sustainable; and ultimately that the High Court had not re-evaluated the evidence of the trial court properly.

On her part, Ms Oundo opposed the appeal. She urged that the High Court had properly re-examined the evidence adduced by the trial court. She submitted that identification herein was based on recognition and was therefore foolproof. She reiterated that although the appellant had not given his attackers' names to the police, he had said he knew him well and even led the police to the appellant's house. It was her submission that the High Court had re-evaluated the evidence properly. She urged us not to interfere with the concurrent findings of the two courts below and thus dismiss this appeal.

As stated earlier on, our mandate in this appeal is confined to matters of law only. Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower courts and must resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law (See **M' Riungu v Republic [1983] KLR 455)**

This court in the case of **Thiaka v Republic [2006] 2 EA 326** reiterated this principle and expressed itself in the following terms:-

> ***"… [this court] will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings."***

Let us now consider the grounds of appeal raised and see if there is cause for us to depart from the findings of the two courts below.

On the issue of identification, we note from the evidence that the complainant

knew the appellant before the date in question. He may not have known him by name or where he used to live, but he knew him well. He told the police officer who received the first report that he knew his attackers. He even went a step further and did his personal investigation to find out where the appellant's residence was. When he identified the residence, he led the police there. They not only arrested the appellant but they also recovered the complainant's stolen cell phone.

Indeed, we note that the appellant himself in his defence acknowledged that he and the complainant

knew each other before that date. We observe that the two courts below considered all these facts and arrived at the concurrent finding that indeed the appellant was properly identified by the complainant.

The learned Judges of the High Court did in fact caution themselves against basing the conviction on the evidence of a single witness but nonetheless made the following finding:-

> ***"We are however persuaded that there was no error in the identification of the appellant in the case before us. Although this was a case of a single identifying witness, the complainant knew both his assailants prior to the attack and there was moonlight by which, according to his testimony, he could see clearly and identify them."***

We find no reason to interfere with these concurrent findings of the two courts below. On the issue of identification we are satisfied that the appellant was properly identified by the complainant. We also note that, that evidence was corroborated by the recovery of the complainant's cell phone from the appellant's house.

We are also satisfied that the High Court evaluated the evidence adduced before the trial court, and the same passed the scrutiny test. That ground therefore fails. As regards the issue as to whether there was violence used on the complainant or not, this Court has in several of its decisions ruled that an offence of robbery is proved as long as any one of the three ingredients of robbery set out in **Section 296(2)** of the **Penal Code** is proved. (See **Johana Ndungu v Republic, Criminal Appeal No. 116 of**

1995)

In this case, the appellant was in the company of another person who escaped; and he was also armed with a panga which is a dangerous weapon. It matters not that the complainant did not sustain any serious injuries in the course of the robbery. We are satisfied therefore that the evidence on record was capable of sustaining a charge of robbery with violence.

On the issue of the inconsistencies in the dates, we find that the inconsistencies were minor ones which were curable under **Section 214** and **382** of the **Criminal Procedure Code.**

In all, we are satisfied that the appellant's conviction was solidly anchored in the law and we have no basis of interfering with it. We find this appeal devoid of merit and dismiss the same accordingly.

Dated and Delivered at Nairobi this 10th day of October, 2014.

E. M. GITHINJI

……..……...…… JUDGE OF APPEAL

W. KARANJA

……..……..…….. JUDGE OF APPEAL

A. K. MURGOR

……..…..……. JUDGE OF APPEAL

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

DEPUTY REGISTRAR