REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 59 OF 2014

BETWEEN

JOASH JUMA BONYO ….....APPELLANT

JOHN DAVID OTIENO ….....APPELLANT

JOHN OTIENO NYAMWANGA ….....APPELLANT

AND

REPUBLIC ….....RESPONDENT

*(An appeal from a Judgment, of the High Court of Kenya at Kisii (**Sitati & Muriithi, JJ.**) dated 23rd May, 2013*

in

H.C.CR.A. NO.261 & 261B/2010 & 275 OF 2011

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JUDGEMENT OF THE COURT

In this second appeal, the three appellants ***Joash Juma Bonyo,*** (1st appellant) ***John David Otieno*** (2nd appellant), and ***Joshua Otieno Nyawanga*** (3rd appellant) challenge their convictions and sentences by ***Kibet Sambu,*** Senior Resident Magistrate, Migori for the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code and confirmation of the same by the High Court (***Sitati and Muriithi, JJ.***).

It was alleged in the particulars of the offence that the appellants on the 9th day of July, 2010 at Kopanga sub-location in Migori District within Nyanza Province, jointly and while armed with offensive weapons namely a sword, a panga and a hammer robbed ***Francis Susa Wasonga*** of his motorcycle Reg.

No. KMCH 387T – make TVS valued at Kshs.86,500/= and at or immediately before or immediately after the time of such robbery wounded the said Francis Susa Wasonga.

The appellants pleaded not guilty but after a full trial in which seven witnesses testified and the 1st appellant made an unsworn statement while the 2nd and 3rd appellants made sworn statements in their defences, they were convicted and each sentenced to death.

The appellants were aggrieved and therefore appealed to the High Court but their appeals were dismissed as already stated hence this second appeal. Learned counsel ***Mr. Kirenga,*** represented the 1st and 3rd appellants. He abandoned the memoranda of appeal lodged by the appellants in person and relied upon the supplementary memorandum of appeal he filed on 20th August, 2014. Learned counsel ***Mr. Onsongo,*** represented the 2nd appellant and he too abandoned the memorandum of appeal lodged by the appellant in person and relied upon the supplementary memorandum of appeal he lodged on 10th July, 2014.

This being a second appeal only matters of law fall for consideration. (See ***Section 361 (1)*** of the Criminal Procedure Code). As we have stated, time without number before, this Court will not normally interfere with concurrent findings of fact by the two courts below unless those findings were based on no evidence or are based on a misapprehension of the evidence or the courts below are shown demonstrably to have acted on wrong principles in making those findings (See ***Chemogong -Vs – Republic [1984] KLR 611***).

In our view these two memoranda of appeals raise the following broad issues.

1. ***Failure of the High Court to re-evaluate the evidence.***
2. ***Confirming the appellants' conviction which was based on inadmissible evidence and on evidence of identification which was not positive.***
3. ***Confirming the conviction when the case was not proved beyond reasonable doubt***
4. ***Failure to call essential witnesses.***

Both counsel for the appellants addressed us at length and cited various authorities to buttress their submissions. Mr. Onsongo, who, with the agreement of Mr. Kirenga, was the first to address us, submitted that the judges of the High Court failed to appreciate that the evidence of a co-accused was inadmissible. Counsel made that submission because the 1st and 3rd appellants were arrested on information given by the 2nd appellant to the Administration Police officers who arrested them. Counsel further submitted that an Administration Police officer by name ***Kamau*** who the 2nd appellant blamed for his arrest was not called as a witness and no reason was advanced by the prosecution for that failure.

On identification, learned counsel argued that the conditions for the same were difficult as it was at night and the only source of light at the scene came from the motorcycle head lump which motorcycle stopped on reaching the barrier mounted by the Administration Police officers who recovered the same. According to counsel, a motionless motorcycle would not emit adequate light for purposes of identification.

Mr. Kirenga associated himself with the submissions of Mr. Onsongo but added that the complainant allegedly lost consciousness on being attacked and was not in a position to positively identify any of his attackers. Learned counsel emphasized that the information which the 2nd appellant purportedly gave the arresting officers amounted to a confession which was inadmissible and should have been corroborated but was not.

Mr. ***Abele,*** the learned Assistant Director of Public Prosecutions, represented the Respondent State and conceded the appeal on the grounds that the 1st and 3rd appellants were arrested on inadmissible evidence and that the evidence of the complainant was not sufficient to support the conviction of the appellants given the difficult circumstances prevailing at the scene. In his view, the doctrine of recent

possession could not apply as the 2nd appellant was, on the available evidence, a pillion passenger on the stolen motorcycle.

Before considering the legal issues raised in this appeal and learned counsel's submissions, we think a brief account of the background facts will suffice.

On the 9th of July, 2010 at about 8.00 p.m., ***Francis Susa Wasonga*** (PW1) (Wasonga), in the course of his employment as a boda boda motorcyclist, was riding motorcycle registration number KMCH 387T – make TVS along Migori – Giribe road when, near Kopanga area, he was attacked by four thugs who were armed with, among other things, a panga and a rungu. Wasonga claimed that he recognized the 1st and 3rd appellants using light from the head lamp of his motorcycle. According to him, the 1st appellant is his village mate and the 2nd appellant was known to him since childhood.

Upon being attacked, Wasonga screamed which screams attracted neighbours among them, ***Erick Onyango Odera*** (PW2) (Odera). Odera's home is about 500 metres from where Wasonga was attacked. He telephoned Administration Police Officer, ***Benson Wakaba*** (PW4) (APC Wakaba), of Giribe Administration Police Post alerting him that someone had been robbed of a motorcycle and the robber was riding in the direction of Giribe.

APC Wakaba whilst accompanied by his colleague APC ***Benjamin Abambo*** (PW4) (APC Abambo) of the same APC post, mounted a roadblock on the road between Giribe and Maembe Saba and within a short time a motorcyclist with a pillion passenger approached. The motorcyclist did not stop at the road block but drove into a side road but fortunately fell into a ditch. When APC Wakaba and APC Abambo rushed there, the rider had escaped and they alleged they arrested the 2nd appellant who on being interrogated led them to the home of the 1st appellant who was arrested and taken to the AP post. The 3rd appellant was allegedly also mentioned by the 2nd appellant and when he appeared at the AP post with members of the public the next morning, he was arrested and placed in cells.

In the meantime after the attack, Wasonga was taken to Okedo Dispensary by Good Samaritans and the following day was taken to Migori District Hospital where he was admitted for one day and was discharged. He was sub-subsequently issued with a P3 form which was duly completed and signed by ***Justus Makati*** (PW6) then a clinical officer stationed at Migori District Hospital. He classified the injuries sustained by Wasonga as harm.

The day after the incident, police officers at Migori Police Station were informed of the robbery and the arrest of the appellants, and PC ***Stephen Chebon*** (PW7) was dispatched to Giribe AP post to pick the appellants who were then charged as already stated.

The 1st appellant in a sworn statement denied committing the offence contending that at the material time he was at home with his father, ***John Bonyo Andeso*** (DW4) (Andeso), entertaining Andeso's visitor. The next day at about 9.00 a.m. he escorted the visitor to Kopanga bus stage and on his way back home was met by APC Kamau who invited him to the AP post to explain his relationship with certain suspects already in custody at the AP post. At the post, he was taken to Migori police station where he was charged with an offence he knew nothing about.

The 1st appellant in his defence also related an earlier incident when he witnessed the said APC Kamau with his colleague bargain with suspects who were found transporting bhang. He therefore believed APC Kamau framed him to divert attension from the bhang incident.

The 1st appellant called Andeso who testified that at the material time he was indeed with his son, the 1st appellant, and a visitor who spent the night. The next day, according to Andeso, the 1st appellant escorted the visitor to Kopanga bus stage but did not return home as he *(Andeso)* was told he had been taken to Giribe AP post and later to Migori police station where he was charged as already stated.

The 2nd appellant also denied committing the offence in a sworn statement. He contended that on his way to bury his deceased brother in Tanzania, night fell and he sought refuge at Giribe AP post where he met APC Kamau. He was given accommodation but before retiring for the night he handed over to the said APC Kamau his two mobile phones and a cash sum of Kshs.2000/=. When he requested for the same the next morning he was instead ordered to join suspects who were being ferried to Migori Police station where he was charged as already stated.

The 3rd appellant, in an unsworn statement, also denied committing the offence. He narrated the events of the day of his arrest on 10th July, 2010 and contended that he was consuming changaa (an illicit brew) at Kopanga Trading Centre when he was arrested by Giribe APCs who demanded Kshs.1000/= as the price for his freedom which sum he did not have. He was therefore handed over to Migori Police station and charged together with two people he did not know.

The learned Senior Resident Magistrate, in a judgment dated 22nd December, 2010 found the appellants guilty as charged and sentenced them to death. The learned Senior Resident Magistrate set out the evidence which had been presented before him and having done so, concluded as follows:-

> *"PW1's evidence that he had recognized the 1st accused person by his voice was not challenged in evidence. There is no evidence on record to show that the 1st accused and 3rd accused persons had masked themselves to disguise and/or to conceal their identities and I have no doubt that the motorcycle headlights had shone and was bright enough for the complainant (PW1) to have positively seen the 1st and 3rd accused persons. It also emerged in evidence that although the 1st and 3rd accused persons in their respective testimonies denied knowing each other it is crystal clear that they both hail from Kopanga sub-location. It follows therefore that they hail from the same village as the complainant herein (PW1). There is also overwhelming evidence that the 2nd accused person was arrested red-handed riding on the robbed motorcycle immediately after the commission, of the robbery. The 2nd accused's raised alibi in this regard in my respectful finding was a mere denial and an afterthought and more particularly in the right (sic) of the fact that he upon his arrest had implicated his co-accomplices in the robbery leading to the arresting of the 1st and 3rd accused persons."*

In the end the learned Senior Resident Magistrate found the appellants guilty as charged and sentenced them as aforesaid.

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

> *"Taking all the above evidence together and while appreciating that the attack was sudden, we have reached the conclusion that Wasonga still maintained his presence of mind to the extent of noticing what the 3rd and 1st appellants were armed with and the clothes they wore. We are satisfied that Wasonga was able to see these two appellants with the help of the light from the headlamps of the motorcycle.....*
>
> *So whether or not the trial court relied on the implication of these two appellants by the 2nd appellant we are satisfied that the identification question concerning the 3rd and 1st appellant did not depend on the confession of the 2nd appellant."*

On the issue of visual identification by Wasonga, the learned Judges of the High Court stated:-

> *"35. In the instant case, Wasonga said wherever he went after the attack he knew two of his attackers not just by facial appearance but also by name. He gave out those names and when he went to the AP camp at Giribe on 10th July, 2010 he had no difficulty picking out the 3rd*

and 1st appellants as being among his assailants the previous right."

With respect to the 2nd appellant the learned Judges of the High Court stated:-

> *"We are satisfied that the doctrine of recent possession is applicable in the case against the 2nd appellant. Wasonga stated that he did not identify the 2nd appellant at the scene but these (sic) clear evidence that hardly 30 minutes after the incident, the 2nd appellant was caught and arrested when he fell off the stolen motorcycle at the road block. The motorcycle was positively identified by both Wasonga and Odhiambo. It can therefore be safely inferred that the 2nd appellant was indeed the robber who stole the motorcycle from Wasonga."*

We have anxiously considered the record, the grounds of appeal argued before us and counsel's submissions, a summary of which, we have set out above. The 1st and 3rd appellants were convicted and their convictions confirmed by the High Court on the alleged evidence of identification by recognition. That evidence was given by Wasonga. Ordinarily, such evidence 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."***

See the case of ***Anjononi -Vs – Republic [1980] KLR 59*** as per Madam JA (as he then was). What however, puzzles us in the case before us is Wasonga's conduct during the attack and immediately thereafter. Although he testified in his evidence in chief that he knew two of his assailants as the 1st and 3rd appellants from childhood, yet in cross-examination by the 3rd appellant, he stated:-

> ***"You had worn a red jacket.I screamed.Some neighbours arrived at the scene.I had lost consciousness and was unable to inform my neighbours who my attackers were." (underlining ours).***

And in answer to questions put to him by the 1st appellant, he stated, ***inter alia:-***

> ***"I had lost consciousness and was unable to call out your names to the neighbours." (underlining ours)***

One of the neighbours who heard Wasonga's screams was Odera. He indeed heard those screams while at his home which was about 500 metres from the scene. He said, *inter alia:-*

> ***"I heard some distress calls from a person calling out for assistance as he was being killed ….....***
>
> ***I had not reached the scene. I heard the complainant in this case crying on (sic) that he had been robbed of his motorcycle and then made me to call the AP at Giribe....."***

If Wasonga could scream loud enough that he had been robbed of his motorcycle, to be heard 500 metres away, then his statement that he could not give the names of his attackers to his neighbours immediately he was attacked because he was unconscious becomes suspect. 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. In the case before us the failure of Wasonga to give the names of his attackers to his neighbours immediately after he was attacked puzzles us and has given rise to a definite inference that he may not have known his real attackers.

In our view he may have had difficulty in identifying his attackers given the difficult circumstances obtaining then. The incident allegedly happened at about 8.00 p.m. when it was dark. APC Wakaba stated, inter alia:-

"My colleague tried to stop the motorcycle but the riders did not stop but instead attempted to negotiate into some diversion but fell into a ditch. We rushed and struggled to arrest the two persons who were on the motorcycle but one managed to escape into the darkness."

So, that night was dark and the only source of light was that of the motorcycle head lamp. The scene was at a corner of the road. Wasonga said:-

"After one kilometre from Kopanga and while negotiating a corner, I found the road blocked by use of a rope which was placed across the road and upon seeing the rope I braked and some two people emerged from behind me and attacked me."

It is plain therefore that the attack happened at a corner and after Wasonga had stopped. It is, in the circumstances, doubtful whether the light from the motorcycle head lamp was intense or bright as it would have been if Wasonga was in motion. Besides, being at a corner, he only had a fleeting moment of his attackers before the attack. He could therefore be mistaken. Recognition is not accepted from the mere, say so, of a witness. The circumstances surrounding recognition should be scrutinised to the satisfaction of the court. That caution is essential because human beings are not infallible. In the case of ***Joseph Ngumbao Nzoro -Vs – Republic [1982] 2 KAR 212,*** this Court, said:-

"It is possible for a witness to believe genuinely that he had been attacked by someone he knows very well and yet be mistaken. So the possibility of error or mistake is always there whether the case be of recognition or identification …....."

Wasonga, the only identifying witness, had only a fleeting moment to observe his assailants using light whose intensity and brightness he did not give. He did not testify on the length of time he observed his attackers or the distance at which he first saw them and how long it took before he allegedly fell unconscious. He was a single identifying witness and the need for testing his evidence with greatest care was obvious. In the case of ***Maitanyi -Vs - Republic [1986] KLR 198*** at page ***201,*** the Court said:-

"It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improves. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of light available. What sort of light its size and its position with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into."

We are afraid, in the case before us, those matters were not inquired into as they should have been particularly as Wasonga was the only single identifying witness. As was stated in ***Roria -Vs – Republic [1967] EA 583***, a witness may be honest but mistaken. And in ***Republic – Vs – Turnbull & Others [1976] 3 ALL ER 549,*** the court said a number of witnesses could all be mistaken.

We have said enough to show that, in our view, in the circumstances of this case, there was a possibility of a mistake on the part of Wasonga. So, although the two courts below believed him, in our view, it was erroneous to base the 1st and 3rd appellants' convictions on the alleged recognition by him.

Furthermore the 1st and 3rd appellants were arrested on the alleged statement given to APC Wakaba and APC Abambo by the 2nd appellant. In our view, that was most unfortunate as such statement or evidence was not admissible by dint of ***Act No. 5*** of ***2003*** which repealed ***section 31*** of the Evidence Act. Without the purported statement of the 2nd appellant the 1st and 3rd appellants could not have been arrested.

We turn now to the case of the prosecution against the 2nd appellant. The learned Senior Resident Magistrate found that there was overwhelming evidence that the 2nd appellant was found red-handed on

the stolen motorcycle immediately after the robbery and that his defence of alibi was a mere denial and an afterthought given that on his arrest, he implicated the 1st and 3rd appellants in the commission of the robbery. The learned Judges of the High Court, in confirming the conviction of the 2nd appellant, concluded that he was found in recent possession of the stolen motorcycle which event displaced his alibi defence.

Mr. Abele doubted whether the doctrine of recent possession applied since the 2nd appellant was a pillion passenger.

In ***Maina – Vs – Republic*** ***[CA Cr. Appeal No. 11 of 2003] (UR)***, this Court stated:-

> *"Where there is evidence that the accused person is found in actual possession or has shortly after a robbery, sold one of the items stolen during the robbery he is deemed to be in recent possession of stolen items.*
>
> *Evidence of recent possession of a stolen item alone is sufficient to found a conviction for the offence of robbery with violence."*

In this case, the 2nd appellant denied being found in possession of the stolen motorcycle. In his sworn statement, he claimed that he was at Giribe AP post at the time the robbery was taking place. However, even assuming that APC Wakaba and APC Abambo arrested the 2nd appellant after the robbery, their own evidence was that the rider of the motorcycle escaped in the darkness of night. The arrest took place about 30 minutes after the robbery. So, for 30 minutes the motorcycle must have covered quite some distance from the scene of robbery thereby giving the rider an opportunity to pick any pillion passenger who had no knowledge of the robbery. For the doctrine of recent possession to apply the following prerequisites must be demonstrated:-

> ***(a) The property must have been found with the suspect;***
>
> ***(b) The property must be positively identified as the property of the complainant;***
>
> ***(c)The property must be proved to have been recently stolen from the complainant.***

See the case of ***Andrea Ombonyo -Vs – Republic*** ***[1962] EA 542*** and that of ***Arum -Vs – Republic*** ***[2006] 2 EA 10.*** In the latter case this Court, stated as follows:-

> *"Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case the possession must be positively proved, that is there must be positive proof; first that the property was found with the suspect second that the property is positively identified as the property of the complainant; thirdly that the property was recently stolen from the complainant."*

All the three ingredients must be demonstrated for the doctrine of recent possession to apply. In the case before us, there is doubt as to whether it could be said that the motorcycle was positively found to be in possession of the 2nd appellant in the light of the evidence of APC Wakaba and APC Abambo that he was a pillion passenger on the said motorcycle. The doubt should have been resolved in favour of the 2nd appellant.

Given our above analysis our conclusion is that the High Court may not have appreciated its duty as the first appellate court. That duty was spelt out in the often cited case of ***Okeno -Vs – Republic*** ***[1972] EA 32.*** There, the predecessor of this Court stated:-

> *"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination* ***(Pandya -Vs – Republic*** ***[1957] E.A. 336)*** *and to the appellate court's own decision on the evidence. The first appellate court must itself weigh*

conflicting evidence and draw its own conclusions. ***(Shantilal .M. Ruwala -Vs – Republic [1957] E.A. 570).*** *It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see* ***Peters -Vs – Sunday Post, [1958] E.A. 424.****"*

In our view, if the High Court had complied with the foregoing, it would, we think, have found that the information upon which the arrest of the 1st and 3rd appellants was made was unlawfully obtained; that the conditions of identification at the scene of the robbery were difficult; that Wasonga's failure to mention the 1st and 3rd appellants to the villagers who were the first to visit the scene, discredited his testimony and that the status of the 2nd appellant as a pillion passenger was not positive proof that he was found in recent possession of the motorcycle.

What we have discussed above is sufficient to dispose of this appeal and we find it unnecessary to consider the other complaints made by the appellants. We have however, noted some flaws on the record which we feel should not be left unattended to though not raised by either side. The record shows that the learned Senior Resident Magistrate concluded his judgment as follows:-

"That the prosecutions' case to this extent to me has been consistent and well corroborated and ultimately find the three accused persons guilty as charged for the offence of Robbery with violence contrary to ***section 296 (2)*** *of the Penal Code and hereby proceed to sentence the three accused persons to suffer death in the manner prescribed by law."*

Our perusal of the record shows that no where, in the judgment, did the learned trial Magistrate record that the prosecution had proved the case against any of the appellants beyond reasonable doubt. We do not think a ***"consistent and well corroborated"*** case is the same as a case proved beyond any reasonable doubt. Given our analysis above, we doubt whether the learned trial magistrate had the correct standard of proof in mind. The above passage further reveals commission of two other errors by the learned trial Magistrate. First, he did not record a conviction of the appellants and second, he sentenced the appellants even before he considered their mitigation and the prosecutor's comments on sentence. In our view, those errors were substantial and have consequences but as we have decided to allow the appeal on issues discussed above, we need not discuss the errors here.

The upshot is that this appeal is allowed, the implied convictions are quashed and the sentences are set aside. We order that the appellants be set free forthwith unless they are otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF OCTOBER 2014

D.K. MARAGA

….....

JUDGE OF APPEAL

F. AZANGALALA

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL