



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: OKWENGU, MAKHANDIA SICHALE JJA)

CRIMINAL APPEAL NO. 29 OF 2012

BETWEEN

JULIUS NYAMAO ISAKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of the High Court of Kenya at

Malindi (Meoli) dated 12th March, 2012

in

H.C.CRr.C.No.152 of 2009)

JUDGMENT OF THE COURT

John Sirengo Masenge "Masenge" rides a motor cycle for hire, a business commonly referred to as "Boda Boda." On 11th December, 2008 he lodged a complaint with Malindi Police station regarding an incident involving himself and two pillion passengers whom he had ferried on his motor cycle then registered as KBD 553H. The incident amounted to attempt by the said passengers to forcefully snatch the motor cycle from him. On the material day at about 9.30 a.m. whilst at Kisumu Ndogo stage in Malindi town, he was approached by two people who requested to be ferried to a place known as Kijiwe Tanga a long Malindi-Mombasa road. They negotiated the fare and settled on ksh 1000/- . As they rode along and just past Malindi airport, Masenge received a telephone call on his mobile phone. As he answered, one of the passengers suddenly grabbed it from him. After a while the two passengers asked him to drop them at a place beyond Kijiwe Tanga. Upon reaching the stage which was secluded with no houses nearby, in the middle of a bush considering further that his mobile phone had been grabbed from him and from the way the two passengers were talking, it dawned on Masenge that they were upto no good. He took the risk, ignored the demands of the duo and simply rode on until he got to a place he considered safe with a house nearby. This act of defiance so incensed the passengers that they started raining blows on Masenge as he rode on. When he eventually stopped, one of the passengers immediately jumped off the motor cycle and launched an attack on him with a knife, whilst the other slapped him on the face. As a result he fell down leaving the motor cycle running whilst on the ground as well. One of the passengers raised the knife in a bid to stab him but he screamed. The screams attracted the attention of

John Sanga Mwangaza (PW3) "*Mwangaza*", the owner of the house nearby. Besides being a farmer as well as a security guard, he was also a member of the local community policing unit. Earlier on as he was relaxing on the veranda of his house which abounds the road, he had heard the sound of a motor cycle approaching. Shortly thereafter it stopped at the stage and the next thing he heard were exchanges and noises with one of the people demanding keys fearing that there could be a problem, he took his torch and a piece of iron bar and stealthily approached the scene. He then saw three men in a combat mood. One was already on the ground. As he approached the combatants, two of them noticed him and opted to take off on the motor cycle that was lying nearby. The two turned the motor cycle towards Malindi direction and as they accelerated in a bid to escape, they lost control of the motor cycle and they fell down. Mwangaza confronted them and asked them what the problem was. Instead of responding the two people ran in different directions leaving the motor cycle behind. Whereas one ran into the bush, nearby, the other ran along Mombasa Malindi road. Mwangaza pursued the former. He got up with him and hit him severally on the back telling him to stop to no avail. He pursued him and hit him again. This time round he fell down. Though down he was not yet out. He removed a knife from his waist and attempted to attack Mwangaza. However, Mwangaza was too smart for him for he immediately flashed his torch directly into his eyes and in the process blinded him. He then hit the hand that had the knife and it fell down which he then recovered. As he did so, this person got another chance and took off. Mwangaza screamed for help from members of the public to assist him foil the escape. As he did so he was still in hot pursuit of the person. He got u with him, hit him once again and he fell down. He was then joined by members of the public who had responded to his screams. They decided to administer what they perceived to be instant justice by way of mob justice or is it injustice? They then frog marched him back to where the abandoned motor cycle was. One of them telephoned the registered owner of the motor cycle, **Benjamin Ekaroti "Ekaroti"** (PW2), and informed him of the incident. Ekaroti rushed to Malindi Police Station and reported the occurrence. Accompanied by **PC Abel Mokaya "Mokaya"** (PW4) they proceeded to the scene and found a big crowd baying for the person's blood. Mokaya immediately swung into action, re-arrested the person from the crowd and spirited him to safety. Later he bundled the motor cycle, Masenge and the suspect in a police motor vehicle and took them to Malindi Police station and thereafter handed them over to **PC Sammy Ndwiga "Ndwiga"** (PWS) the investigating officer. The person so re arrested was none other than the appellant. Upon concluding his investigations, Ndwiga preferred against the appellant a capital charge of attempted robbery with violence contrary to **section 297(2)** of the Penal Code. The particulars attendant to the charge were that the appellant on 11th December, 2008 at Kijiwe Tanga village in Ganda Location within Malindi District of the then Coast Province jointly with another not before the court while armed with an offensive weapon namely a knife, attempted to rob Masenge of a motor cycle registration No. KBD 553H valued at Kshs.79,550/and at the time of the attempt threatened to use personal violence to the said Masenge.

The appellant as expected denied the charge and was subsequently tied in the Senior Principal Magistrate's court at Malindi. In denying the offence, the appellant in his sworn statement of defence (contrary to what the High Court observed in its judgment that it was unsworn) stated that on the material day he hired the appellant to ferry him on a motor cycle to Kijiwe Tanga where he was meant to meet the driver of a lorry in which he was employed as a loader. On the way and as they approached the Malindi Airport area, in a bid to avoid an oncoming vehicle the appellant swerved and in the process lost control of the motor cycle. They both fell off and he was injured. They started exchanging bitter words regarding whether or not he should pay the fare the accident notwithstanding. The exchange attracted members of the public nearby who proceeded to rough him up. Soon thereafter, police officers were summoned and they arrested him. He was then taken to Malindi Police Station. He was subsequently taken to hospital for treatment and when he recovered he was charged for an offence which he knew nothing about.

In her judgment the learned Chief Magistrate (Hon L. Gitari) as required of her, set out the evidence which was adduced before her and concluded that it was sufficient to sustain the charge preferred. Accordingly, she convicted the appellant and sentenced him to the mandatory death sentence. That was the decision which was the subject of the first appeal before the High Court which re considered and re analysed the entire evidence and in dismissing the appeal held thus:

"... from the evidence, as re evaluated by us, the trial magistrate correctly reached the above

conclusion. The result is that the conviction returned by the trial court was safe and is hereby upheld. Consequently the appeal is dismissed."

The appellant now appeals to this Court against that decision, and of course, the decision of the trial court. Five grounds in support thereof were advanced by the appellant in his home made memorandum of appeal. In summary he complained that the High Court did not appreciate that the charge preferred was defective; that the motor cycle's registration number was unknown; that no complaint had been laid with the police regarding the alleged attempted robbery incident; that the prosecution evidence was contradictory and lastly; that essential witnesses were not summoned to testify contrary to section 150 of the Criminal Procedure Code.

At the hearing of the appeal on 16th July, 2014, Mr Ogero Ogeto, learned counsel who appeared for the appellant adopted the grounds of appeal as lodged by the appellant. Counsel, however, condensed those grounds and only ventilated grounds 1 and 2 together which dealt with the registration details of the subject motor cycle. Essentially, he submitted that the particulars of the motor cycle in the charge sheet were at variance with the particulars led in the evidence. Whereas in the charge sheet the motor cycle registration number is indicted as KBD 553H, in the evidence and in particular that of Ekaroti, the subject motor cycle registration number is given as KMCA OIOQ. Counsel submitted that because of this variance, and the doubt created, the appellant should have been a beneficiary of the doubt so created. Counsel submitted further that it may well be that the motor cycle allegedly involved in the incident was not the one produced in court as an exhibit. As a parting shot, counsel submitted that the law required that the substance of the charge be clear and specific so that an accused knows what he charged with. That was not the case here and for that reason the appeal ought to be allowed.

Responding, Mr Wohoro, learned Senior Assistant Director of Public Prosecutions submitted that the evidence was overwhelming to sustain the conviction. That the appellant and the motor cycle in issue were found at same *locus in quo*. That is the same motor cycle that was introduced in evidence. Accordingly, there were no variances in the charge sheet and the evidence led. The issue regarding different registration numbers for the motor cycle was explained and the explanation was accepted by the two courts below. Accordingly, the argument advanced in this Court over the same could not be of any assistance to the appellant. On that basis he urged us to dismiss the appeal.

We have carefully considered the rival submissions by counsel. We have examined the record of appeal and the judgment of the High Court as well as that of the trial court. This is a second appeal whose determination must be confined to points of law only. Again and as was stated in **Kaingo v Republic [1982] KLR 213**, a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. See also **Chemagong v Republic [1984] KLR 213**.

The only issue identified by counsel for the appellant that fall within our mandate aforesaid is the defective charge sheet. The defect is all about the registration number of the motor cycle that the appellant is alleged to have attempted to rob from Masenge. Whereas the charge sheet gave such registration as KBD 553H, the evidence had suggested that infact the registration number was KMCA 010Q. In our view, that difference cannot be a matter of law. It is a matter of fact. But again even if it was a matter of law, it is easily curable under section 382 of the Criminal Procedure Code. Did that variance occasion a failure of justice to the appellant? Certainly not. As correctly observed by Mr Wohoro, the appellant and the subject motor cycle were found at the same *locus in quo*. There was no suggestion that the motor cycle recovered at the locus in quo was different from the one whose details are in the charge sheet and which was tendered as an exhibit during the trial. The undisputed evidence on record is that when the appellant was immobilized, he was brought to the scene where he and his accomplice who had managed to make good his escape, had attempted to rob Masenge of the motor cycle. Together with Masenge and the motor cycle, they were bundled into a police motor vehicle and ferried to the police station where the motor cycle was detained before it was released to Ekaroti, photographs having been taken by scenes of crime personnel. At the hearing, the motor cycle as well as the photographs were availed and tendered in evidence, without as much as the appellant raising an objection.

The appellant only raised the issue in the first appellate court. Nonetheless, this is how the High Court dealt with the issue;

"... Another issue raised by the appellant was the apparent differences in the registration number of the motor bike. This was easily explained away. At the time of the incident the number was KBD 553H. This is what appears on the charge sheet. When PW3 gave evidence on 10th November 2009 the registration had changed to KMCA 010Q a copy of a log book bearing this number was produced as an exhibit.

The appellant cannot get any benefit from this argument as the change to the new generation registration for motor bikes did not change the subject of the attempted robbery ..."

On the evidence on record the High Court was right in coming to this conclusion. Ekaroti explained at length what necessitated the changes in the registration numbers of the motor cycle. It was in compliance with the registration of motor cycles regime introduced by the government. That regime had come into force long after the incident that culminated in the appellant being charged had occurred. There was no denying that indeed the Government had implemented the changes in registration regime for the motor cycles.

Besides what prejudice did the appellant suffer with those changes in the registration numbers of the motor cycle? We cannot fathom any. That change in the registration numbers did not turn the motor cycle into a vehicle or any other vessel, so that the appellant could claim that it was not the motor cycle he had been accused of attempting to rob from the complainant but rather something else.

In any event, in his own defence, the appellant concedes to having hired the appellant to ferry him to Kijiwe Tanga on a motor cycle. Indeed it is him who approached the complainant and hired him for the ride. It is this same motor cycle which according to the appellant was soon thereafter involved in an accident heralding his current problems but which according to the complainant, the appellant and his accomplice attempted to rob from him. For all the foregoing reasons, it is apparent that this ground of appeal is not merited at all.

We would have been content to determine this appeal at this stage. However, since we deem that the appellant's representation in this appeal was below par, wanting, deficient and inadequate, we feel that we owe it to the appellant to explore other possible grounds of appeal which raises issues of law from the proceedings thus far. It is obvious that identification of the appellant stands out. Masenge claims to have identified the appellant when he approached him to ferry them to Kijiwe Tanga and as he rode with them. The encounter between the appellant and Masenge, occurred at night. The complainant in the course of his boda boda business was hired by the appellant and his accomplice on 11th December, 2008 at about 9.30 p.m. to transport them to Kijiwe Tanga. According to the complainant, he was able to identify the appellant as he accepted his request. He also claims to have identified the appellant as he ferried them courtesy of lights from passing motor vehicles. Masenge suggested that where he had parked the motorcycle before he was approached by the appellant and his accomplice, there was light. However, there was no evidence as to the nature of the light and its intensity. There was no evidence of its brightness and its position in relation to Masenge and the appellant, nor was there evidence as to the time taken by Masenge to observe the appellant so as to identify him. As for the identification of the appellant whilst a top the motor cycle as they rode along, this is simply incredible. If the appellant was sitting at the back of the motor cycle, how is it possible that the complainant could have been able to see him with the lights of passing vehicles? Unless of course he was riding the motorcycle with his head turned in the opposite direction and facing the appellant.

We are of course alive to the duty of courts when considering a case such as this whose conviction turns in part on the identification of the appellant. The court in such a case has a duty to ensure that the evidence of identification is watertight before convicting and accused. It is therefore important that the evidence of identification be examined carefully before a court can enter conviction based on it. We have on numerous occasions given guidance on the way to treat such evidence.

See for instance **Cleophas Otieno Wamungu v Republic [1989]KLR**

In the instant appeal, there is no doubt at all that the evidence of identification fell far too short of the standard expected. Had that been the only evidence used to nail the appellant, we would have had no hesitation whatsoever in rejecting the same.

However, there was the other evidence tendered by Mwangaza. That was about the chase and eventual arrest of the appellant. Therein also lies the other issue of law not canvassed before us by counsel for the appellant. Was the case and subsequent arrest of the appellant link him to the crime as understood in law? On this question, the law as we understand it is that if a suspect is pursued and arrested without the pursuer losing sight of the suspect and there being no break in the link, then that is strong evidence upon which a conviction may comfortably rest. See **Ramadhani Ali v Republic**. In this appeal, there are concurrent findings by the courts before that the appellant on suspicion of having committed an offence was pursued by Mwangaza until he was arrested and brought to the scene of crime. That in that pursuit, Mwangaza never lost sight of the appellant. Indeed this is how Mwangaza himself put it in his evidence:

"I chased the man and reached him. I hit him on the back with the iron bar and he fell down. I was alone. The man was strong. He stood up and started going into the bush. I used a torch and followed him. I hit him again. He fell down but he stood and ran again. I was telling him to stop but he could not. When i hit him the second time and he stood and went on. I hit him the third time. He stopped and i though. He had surrendered. That was not to be. He removed a knife from waist. I saw the knife as I had a torch and he aimed at me. He told me to go near if I am a man. I slashed the touch on his eyes directly so he could not see me. I hit the hand which had the knife and it fell and I took it. If I see the knife I can identify it. This is the knife MF12 identified. When I took the knife the man started running away again. I was annoyed. I decided to scream for people to come and assist me. I was following him and I hit him and he fell down. Many people came and they knew me. I told them the man was a thief and had stolen a motorbike. The members of public started beating him. They asked me to come and confirm. I found the one who had the motor bike was where I left him. I told him I had arrested the thief. The mob brought the suspect to where the motor bike was."

The trial court accepted this narrative, so did the first appellate court. As this Court has stated times without number, it will pay homage to concurrent findings of fact by the two courts below unless such findings are made on no evidence at all, or on a misapprehension or perversion of the evidence, or it is apparent on the evidence that no tribunal, properly directing itself, could have made such findings- **see M'Riungu v Republic [1983] KLR 455 and Kaingu (supra)**. We entertain no such misgivings in the circumstances of this appeal. In view of the concurrent findings above the conviction of the appellant on the basis of chase and arrest cannot be faulted nor disturbed.

The appeal is accordingly dismissed in its entirety.

Dated and delivered at Mombasa this 2nd day of October, 2014

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR