



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 33 OF 2014

BETWEEN

STEPHEN OKETCHAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Ojwang & Ibrahim, JJ.) dated 3rd February, 2011

in

H.C.Cr.A No. 179 of 2007)

JUDGMENT OF THE COURT

The appellant, **Stephen Oketch alias Baba Boaz** was charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the charge were that:

“On the 12th day of January, 2007 at about 7.45 a.m. at Umoja area in Mombasa District within Coast Province, jointly with others not before court, while armed with dangerous weapons namely knives (sic) robbed of (sic) Everlyne Ahata Shihemi of cash Kshs.700/= a mobile phone make Nokia 1110 and a handbag all valued at Kshs.6,300/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Everlyne Ahata Shihemi.”

The appellant pleaded not guilty to the charge and his trial commenced before **T. Mwangi**, the then Senior Resident Magistrate Mombasa. On 22nd October, 2007 the appellant was convicted and sentenced to death as per the law prescribed. The appellant was dissatisfied with the conviction and sentence and filed Mombasa **High Court Criminal Appeal No. 179 of 2007**. On 8th February, 2011 **Ojwang & Ibrahim, JJ** (as they were then) dismissed the appellant’s appeal thus provoking this appeal.

The appellant filed his undated grounds of appeal in person. However, **Mr. Ole Kina**, learned counsel who represented the appellant filed supplementary grounds of appeal on 8th May, 2014 which he urged before us. These were:

“1. THAT the learned Hon. Judges erred in law by convicting the appellant on evidence that did not meet the required threshold of proof beyond reasonable doubt.

2. THAT the learned Hon. Judges erred in law by failing to re-evaluate and consider the evidence on record.

3. THAT the learned Hon. Judges erred in law by discounting the necessity for a proper identification of the appellant to have been done and thereby arrived at an erroneous verdict of guilt.

4. THAT the learned Hon. Judges erred in law by rejecting the Alibi by the Defense and therefore arrived at a wrong verdict of guilty.

5. THAT the sentence was too harsh in the circumstance.”

In his address during the plenary hearing, Mr. Ole Kina invited us to find that the learned Judges of the High Court failed to re-analyse and re-evaluate the evidence. He submitted that contrary to the finding of the trial court and the first appellate court, there were no knives used at the time of the alleged robbery and that there were contradictions as to whether there was more than one culprit during the commission of the robbery and further that the complainant suffered no injuries as the doctor’s testimony was that he had not treated the complainant. Finally, the learned counsel’s submission was that the appellant had given a defence of alibi which was not considered. He relied on the following authorities:

1. Criminal Appeal No. 350 of 2011

Ernest Shiemi & Another vs Republic

2. Criminal Appeal No. 100 of 2004

Jamin Wafula Wabululu vs Republic

3. Criminal Appeal No. 93 of 1983

Kiarie vs Republic

Responding, **Mr. Wohoro**, learned Assistant Director of Public Prosecutions opposed the appeal and invited us to find that the robbery was committed in broad daylight; that the appellant was arrested not far from the locus in quo and that contrary to the assertion that the complainant suffered no injuries, the Doctor had actually confirmed that she suffered harm.

This being a second appeal our mandate is as provided in **section 361** of the Criminal Procedure Code that states as follows:

“361(1) A party to an appeal from a subordinate court may, subject to subsection (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 under this section:-

a. On a matter of fact, and severity of sentence is a matter of fact: or

b. Against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”

The above provision of the law was amplified in the case of ***Hamisi Mbela & Another v. Republic*** (unreported) Mombasa Court of Appeal **Criminal Appeal No. 319 of 2009** wherein this Court held:-

“8. This being a second appeal, this court is mandated under section 361(1) of the Criminal

Procedure Code to consider only issues of law. As was held in M'Riungu vs Republic [1983] KLR 445.

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 that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin v Glyneed Distributors Ltd (t/a MBS Fastenings)).

This position was further reiterated by this Court in ***Nakuru Criminal Appeal No. 242 of 2008 John Sadera v R.*** where it was held *inter alia* that only issues of law may be raised and considered in a second appeal to this Court and in ***Boniface Kamande & 2 Others vs Republic*** [2010] eKLR it was reiterated that:

“On a second appeal to the court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if we are satisfied that there was no evidence at all upon which such findings were based or if there was evidence that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it.”

As stated above, severity of sentence is a matter of fact and **section 361(1)(a)** precludes us from entertaining a complaint based on severity of sentence. As to the failure of the trial and the first appellate court to re-analyze and re-evaluate the evidence, we have considered the evidence on record, submissions of the rival parties as well as the authorities cited but do not discern such misgivings on the part of the two lower courts. It is clear from the record that PW1 ***Everlyn Ahata Shihemi***, a house help was on her way to her place of work in Nyali. The time was about 8 a.m. and therefore daylight. She was accosted by the appellant who inflicted injuries on her head using a hammer. The incident was witnessed by PW2 ***Mwanaisha Ali*** who happened to be walking along the same route as PW1, although they were going different directions. She saw the appellant who was behind PW1 hit her. The assailant took off with her pouch. Unfortunately for him, the assailant was apprehended by members of the public who wanted to set him ablaze. This was about 100 metres from the locus in quo. The appellant was thus arrested near where he committed the offence. Given all these circumstances, the possibility that the appellant could have been a victim of mistaken identity does not lie. Further having been arrested by members of public and PW1 having found him under such arrest there was no need for an identification parade. We also find and contrary to the appellant's assertion, nowhere did PW1 indicate that she was accosted by more than one person. PW2 also saw one person and the fact that the charge indicated that the appellant committed the offence jointly with others though inconsistent with the evidence did not occasion prejudice to the appellant. This is because **section 296(2)** of the Penal Code provides that:

“If the offender is armed with any dangerous or offensive weapon or instrument, that could be sufficient to constitute the offence. Secondly, if one is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

Thus there are three (3) ingredients any of which is sufficient to graduate the offence from one of simple robbery to capital robbery. This position was reiterated in ***David Githui Weru vs Republic Criminal Appeal No. 227 of 2008*** where this Court differently constituted stated as follows:

“As already stated there are three ingredients, any one of which is sufficient to constitute the offence of robbery with violence under section 296(2) of the Penal Code. If the offender is armed with any dangerous or offensive weapon or instrument that would be sufficient to constitute the offence. Secondly, if one is in company with one or

more other person or persons that would constitute the offence too. And lastly if at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person that would be yet another set to constitute the offence.”

The other argument raised by the appellant’s counsel was that the complainant suffered no injuries as she received no treatment. On our part, we take note that the doctor (PW4) ***Dr. Lawrence Ngone*** who filled PW1’s P3 form told the trial court that PW1 had been treated at Jocham Hospital. Nothing much turns on the fact that the P3 form indicated that PW1 had not received any treatment. The P3 form showed that she was hit using a sharp and blunt object and at the time the P3 form was filled, the injuries were 14 days old. We reject the proposition that PW1 suffered no harm and find that in accordance with the evidence of PW4 and PW1 she was indeed harmed at the time of the robbery. PW4 classified the degree of injury as ‘*harm*’. According to the appellant, there was contradiction as the P3 form indicated that PW1 was attacked by a gang of men yet she herself said the appellant was alone. On our part, we note that this is the part of the P3 form that deals with the history and is usually recorded by the police. As to whether the weapon used was a knife or not, again we do not think much turns on this. Suffice to state that PW1 was hit by a blunt and sharp object. PW1 said the assailant hit her several times using an axe and a hammer, a weapon that is both sharp and blunt. Therefore personal violence was used on the complainant.

As regards the appellant’s contention that his defence was not considered, we note that in his unsworn statement of defence the appellant stated that he gave PW1 change of Kshs.500/= but she alleged it was a fake note. He stated that the relationship between him and PW1 was that of a tailor and customer. He told the trial court that it was during the altercation with this customer that members of the public surrounded him and handed him over to police. He denied having robbed the complainant. It is our view that this defence was a sham. The issue of the appellant being a tailor was an afterthought. No such question was ever put to the appellant at any stage of the trial and in any event, and as stated above, this is a matter of fact, a domain we are precluded from venturing into. We find that the appeal has no merit and is hereby dismissed.

Dated and delivered at Malindi 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