IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 188 OF 2012

BETWEEN

PAUL LITUNYA TUNDO….. APPELLANT

AND

REPUBLIC ….. RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kakamega (Lenaola & Onyancha, JJ.) dated 23rd February, 2012

in

H.C.CR.A. NO. 82 OF 2009)

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JUDGMENT OF THE COURT

The appellant, ***Paul Litunya Tundo,*** was convicted of robbery with violence contray to ***Section 296 (2)*** of the Penal Code by the Senior Resident Magistrate's Court Mumias *(E.K. Makori, SRM)* on 4th October, 2007 and sentenced to death the following day. The particulars of the offence were that on the 3rd day of March, 2006 at Emaholia village, Mundobelwa Sub-location, Kisa North Location, in Butere/Mumias District within former Western Province, the appellant jointly with others not before court, while armed with rungus and pangas, robbed ***Everlyne Obonya Tundo*** *("the complainant")* of one sufuria, two pangas and four plates all valued at Kshs.780/= and at or immediately before or immediately after the time of such robbery wounded the said complainant. His appeal to the High Court was dismissed, hence this appeal.

This is a second appeal and only issues of law may be raised by dint of the provisions of ***Section 361*** of the Criminal Procedure Code. See also the case of **Mriungi - V – Republic [1983] KLR 45**. The issues of law raised in the Memorandum of Appeal drawn by counsel for the appellants and argued by learned counsel for him, MS Onyango, are fourfold:-

1. *That the case was not proved beyond reasonable doubt.*

2. *That the High Court failed to re-evaluate the evidence as by law required.*

3. *That there was no positive identification.*

4. *That the provisions of Section 200 of the Criminal Procedure Code were not complied with by the trial court.*

We shall examine those grounds and counsels' submissions thereon shortly but first the concurrent findings of fact made by the two courts below.

At about midnight on 3rd February, 2006, the complainant was going outside her house in Kisa North to relieve herself when she was accosted by three people who were armed with pangas. She had a torch which she flashed at the attackers and she claimed she recognized the appellant who is her step-son. The people cut her and hit her on the head and back. They entered her house and stole her sufurias, pangas and plates. She screamed, which screams attracted her neighbours including ***Peter Bulimoi (PW2) ("Bulimoi")***, the village elder. Her husband, **Jonathan Tundo *Sichonja (PW5) ("Sichonja")*** also heard her screams and recognized the voice of the appellant. He jointed her and she informed him that she had been cut by the appellant. She made the same report to Bulimoi when he arrived at the scene.

The attackers escaped when the complainant screamed. As they escaped they accosted ***Samuel Okoko Alubala (PW4) ("Alubala")*** who was guarding his cattle at his home. He too heard the complainants screams and when he flashed his torch he saw three people one of whom he said he recognized as the appellant. Alubala even claimed he hit him with a rungu as he screamed.

The rescue team recovered a sufuria which the complainant identified as hers and a bag containing shoes which the attackers left behind as they escaped. The rescue team went to the appellant's house and arrested him the same night. They handed him over to ***PC Gilbert Chebii (PW7) ("PC Chebii")*** of Khwisero Police Station who re-arrested him. PC Chebii also gave the complainant a P3 form which was completed after her treatment but unfortunately the maker thereof failed attend the court to produce it.

The appellant was then charged as already stated.

In his unsworn statement, which was heard by E.K. Makori, SRM after the trial Magistrate *(P.K. Sultani SRM)* passed on, the appellant stated that on 3rd March, 2006, he was in his house sleeping when he was awakened by people who were lead by Bulimoi the clan elder. He was informed that his father was sick. Despite being so informed, he was tied with ropes and taken to Khwisero Police Station where he was charged as already stated.

Turning now to the grounds of appeal, which were condensed into two by learned counsel when he argued the appeal, the first issue raised was the failure of the trial magistrate, who took over the trial from the initial trial magistrate, to comply with the provisions of **Section 200** of the Criminal Procedure Code. Unfortunately that was not alive issue before the High Court. In any event, our perusal of the record shows that on 8th February, 2007 the appellant informed the court that *"he would proceed from where the Senior Resident Magistrate left."* Again on 3rd September, 2007 the record appears thus:-

> ***"COURT***
>
> ***Section 200 CPC complied with.***
>
> ***ACCUSED***
>
> ***We will proceed from where the late SRM left"***

It may have been prudent for the succeeding magistrate to record that he had explained to the appellant that he had a right to recall any witness or witnesses who had previously testified but in our view the response of the appellant as recorded by the succeeding magistrate, clearly demonstrated that the learned magistrate adequately complied with the provisions of ***Section 200*** of the Criminal Procedure Code. That may have been the reason why the appellant who, was represented by counsel at the High Court, never complained of failure to comply with the said provisions.

The rest of the grounds were argued together by counsel for the appellant under the complaint that the High Court failed in its duty, as a first appellate court, to re-evaluate and re-analyze the evidence afresh and reach its independent conclusion, of course, bearing in mind that it did not have the advantage of the trial court of hearing and seeing the witnesses testify and give allowance for the same. Counsel contended that there was conflict of evidence which the High Court did not appreciate and further that the appellant, among other things, contended that the complainant and Alubala had an illicit relationship which he knew about and for which the two witnesses held a grudge against him which contention was altogether ignored by both courts below.

Learned counsel finally submitted that the witch-hunt against the appellant was demonstrated when no recovery was made at his house which was visited immediately after the said robbery. In counsel's view, if indeed the appellant was involved in the attack against the complainant, some of the alleged stolen items would have been found in his house.

Mr. Sirtuy, learned Principal Prosecution Counsel, supported the conviction of the appellant who, according to learned counsel, was positively identified by recognition and who then dropped one of the stolen items and his own personal items as he escaped.

We have carefully considered the record, the grounds of appeal argued before us and counsels' submissions. With respect, we cannot accept that the two courts below committed any error of law or principle in considering the evidence which was presented at the trial. We observe that the attack on the complainant occurred in the middle of the night when conditions for identification were less than perfect. Yet, despite the stressful circumstances, the complainant had no doubt that the appellant was one of the three men who attacked her. The appellant was known to her since his youth as she was his step mother. His father, Sichonja also heard his voice when the attack was in progress and when he joined the complainant, she did not hesitate to inform him that one of the robbers was the appellant. Furthermore, when those who went to her rescue arrived, including Bulimoi, the clan elder, she immediately reported to them that the appellant was one of the robbers.

And further when the appellant and his companions were making their escape with members of the public in hot pursuit, Alubala saw him and he too became a victim of their attack.

The above evidence was buttressed by the finding of the complainant's sufuria which the appellant and his companions dropped as they escaped. Also significant was the finding of the appellant's personal items as he was being chased.

Both courts below were alive to the gravity of the matter and stated so before subjecting the evidence to careful scrutiny. The trial court especially had the advantage of hearing and seeing the complainant, Sichonja, Bulimoi and Alubala testify and there was nothing in their demeanor as per the record, that created reasonable doubts in their evidence. The appellant was well known to the witnesses and was undisguised during the attack. His name was given to all who arrived at the scene within minutes of the robbery. He was indeed arrested and taken to the police station on same night.

We are not at liberty to upset those findings of facts by the two courts below as we have detected no misdirection on their part – See **Kiarie - V - Republic [1984] KLR 739.**

We cannot also say that those findings of facts by the two lower courts were not based on evidence nor is it apparent on the evidence adduced at the trial that no tribunal could have reached the conclusions the two courts below reached **(See Mriungi - V – Republic). (Supra).**

In **Anjononi & Others - V – Republic [1980] KLR 59** at page 60, this Court stated:

> **"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers were not favourable. This was however a case of recognition, not identification of**

> **the assailants; recognition of an assailant 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. We drew attention to the distinction between recognition and identification in Siro Ole Gitay -V- Republic (unreported)."**

We think we have said enough to underscore our finding that the two courts below came to the right conclusion on the identification of the appellant. They also properly analyzed and evaluated the evidence.

With regard to the defence put forward by the appellant, our conclusion is that the same was considered by both courts below and was properly rejected. The learned trial magistrate stated:

> ***"Considering his alibi and the above evidence. I will find prosecution has shouldered its burden."***

And the High Court stated:

> **"It has not been suggested in the defence that PW1 or even PW5 had any reason to frame a member of their family and why PW2 a neighbour would similarly frame him. Recognition is credible if done in proper circumstances and in this case we do not see that either of the witnesses may have been mistaken in that recognition – See Kingori - VS – Republic [KLR] 2003 at page 289 where the recognition of a robber by a close relative using torching was upheld."**

Our own analysis of the evidence shows that the prosecution adduced evidence which placed the appellant at the scene of robbery and obviously his assertion that he was sleeping was displaced.

The upshot is that the appeal is not meritorious and must be dismissed. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF NOVEMBER, 2014.

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL