



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: OKWENGU, MAKHANDIA & SICHALE, J.J.A)**

**CRIMINAL APPEAL NO. 74 OF 2012**

**BETWEEN**

**RAI GOFA RAI.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from the judgment of High Court of Kenya at Mombasa (Odero & Nzioka, JJ.) dated 27<sup>th</sup> April, 2012*

in

H.C.Cr.A. No. 127 of 2009)

\*\*\*\*\*

**JUDGMENT OF THE COURT**

[1] **Rai Gofa Rai** who is the appellant before us was tried and convicted by the Senior Resident Magistrate Mombasa, for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. He was sentenced to death as provided by law. Being dissatisfied, he appealed against his conviction and sentence to the High Court. The High Court (**Odero & Nzioka, JJ.**) dismissed his appeal and confirmed the conviction and sentence. The appellant has now moved to this Court in a further bid to have his conviction quashed and sentence set aside.

[2] In an amended memorandum of appeal filed on 25<sup>th</sup> June 2014, the appellant through his advocates, **Muli & Ole Kina** Advocates, challenged his conviction and sentence on the grounds that the learned judge erred in law by: failing to re-evaluate and consider the evidence on record; discounting the necessity of a proper identification of the appellant and arriving at an erroneous verdict of guilt; treating the evidence of the appellant casually and rejecting it and imposing the sentence of death upon the appellant although there were extenuating circumstances that would have militated against such a sentence.

[3] In arguing the appeal, **Mr. Ole Kina** of Muli & Ole Kina Advocates, argued that although all the witnesses, that is, the complainant, **Morris Mwayama Munani** (PW1), his wife **Everline Wakesho Mwayama**(PW2), **Paul Njoroge** (PW3) and the complainant’s niece **Norah Chao Kinamu** (PW4), confirmed that they were in the house where the offence was allegedly committed, and that the house was

well lit, the evidence of the identification of the appellant in both lower Courts was wanting. For instance; the evidence of PW3 was doubtful as Omar who according to PW3 chased the appellant until the appellant fell into a hole, was not called as a witness; the evidence of PW1 and PW2 was also not reliable as they identified the appellant at the police station without any proper identification parade having been conducted. Mr Ole Kina faulted the trial magistrate and the learned judges in the lower courts for failing to properly analyze or evaluate the evidence of identification, and in rejecting the appellant's explanation that he was only a passer-by in the area.

[4] **Mr. Wohoro**, Assistant Deputy Public Prosecutor who appeared for the state opposed the appeal, maintaining that the conviction was well founded and that two lower courts did not err. He submitted that the evidence of PW3 was that he did not lose sight of the person who fled from the house, until the person was apprehended; that the robbers calmly walked into the victim's house which was well lit and took thirty minutes to commit the nefarious act, thereby giving the victims time to see them; that PW1 and PW2 were clear in their minds as to who the robbers were; that the issue of identification was properly evaluated, and the evidence of PW1, PW2 and PW3 was consistent, and that the failure to call Omar as a witness was not fatal.

[5] We have considered this appeal and the submissions made before us. As a second appellate court, we are alive to **section 361(1)** of the Criminal Procedure Code which limits our jurisdiction in such an appeal to considering matters of law only. We also take note of the fact that we are obligated to accept the findings of fact made by the lower court unless the findings are not based on evidence or the trial court or the learned Judges are shown to have misdirected themselves or acted on wrong principles.

[6] The particulars of the charge against the appellant stated as follows:

*“On the 15<sup>th</sup> day of September 2007, at about 8.35p.m. at Samburu Trading Centre, Samburu Location in Kwale District within Coast province jointly with others not before Court, being armed with dangerous weapons namely, firearms robbed Morris Mwayama Munani cash Kshs.300,000/- three mobile phones all make Nokia and five scratch cards all to the total value of Kshs.316,000/- and at o immediately before or immediately at the time of such robbery threatened to shoot the said Morris Mwayama Munani.”*

[7] In this case, the two lower courts made concurrent findings that the complainant was robbed by six people who casually walked into his house posing as visitors, and that the appellant was apprehended a few metres away from the complainant's house immediately after the robbery when PW2 raised an alarm. It was also not disputed that the appellant was subjected to mob justice as members of the public believed that he was one of the persons who robbed the complainant and his family.

[8] In his defence, the appellant maintained that he was an innocent passer-by. This defence was rejected by the lower courts as they believed the complainant and other prosecution witnesses who identified the appellant as having participated in the robbery. Therefore the main issue for consideration in this appeal is whether the two lower courts properly analyzed and evaluated the evidence, and whether they came to a correct finding in concluding that the appellant was properly identified as one of the robbers.

[9] From the record of appeal, it is clear that both courts addressed the issue of identification of the robbers and the nature and adequacy of the lighting and noted that the prosecution witnesses were consistent that there was sufficient lighting through solar and electricity which enabled them to clearly see the robbers. The evidence regarding the identification of the appellant by the complainant and PW2 is of concern to us as there appeared to have been a break in the chain of events between the robbery at the complainant's house and the identification of the appellant by the complainant and PW2 at the police station, where they found the appellant already under arrest. The appellant who had been subjected to mob justice was lying outside the report office, where the complainant and PW2 were able to see him.

[10] The identification made by the complainant and his wife at the police station was therefore not one that could be relied on, on its own. However this evidence does not stand alone but is supported

by the evidence of PW3 who heard PW2 scream, saw the appellant running from the complainant's house, gave chase and participated in the appellant's arrest. We note that PW3 made reference to one Omar who appears to have been the person who first got hold of the appellant and that this Omar was not called to testify. Nonetheless, the evidence of PW3 was quite clear that Omar joined him as he continued to chase the appellant who fell into a hole. Thus although Omar reached the appellant first, PW3 did not lose sight of the appellant, and his evidence was consistent and provided a link to the break in the chain of events regarding the identification of the appellant, thereby linking the appellant to the house of the complainant and the robbery that had just occurred there.

[11] Given the fact that the identification by the complainant and PW2 was made just a few minutes after the incident, and the evidence of PW3, we are satisfied that the identification of the appellant was accurate and free from any mistake. The learned Judges cannot be faulted for rejecting the appellant's defence. We are satisfied that the learned Judges properly re-evaluated and analyzed the evidence and that there was sufficient evidence to support the appellant's conviction. The sentence imposed upon the appellant being the mandatory sentence provided by law for the offence of which he was convicted, the same was lawful and no issue of law arises in this regard.

Accordingly, we find no merit in this appeal and do therefore dismiss it in its entirety.

*Dated and delivered at Mombasa on 17<sup>th</sup> day of October 2014*

**H. M. OKWENGU**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**