



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 425 OF 2009

BETWEEN

ERNEST TINEGA NYANDAROAPPELLANT

AND

REPUBLICRESPONDENT

*(Appeal from a Judgment of the High Court of Kenya at
Kisii, (Musinga & Muchelule, JJ) dated 5th November 2009*

in

HCCRA NO. 81 OF 2008)

JUDGEMENT OF THE COURT

This is a second appeal from the conviction and sentence imposed by the trial court at Keroka (Oduor, Senior Resident Magistrate) where the appellant, **Ernest Tinega Nyandaro** was found guilty on two counts of robbery with violence and sentenced to death on the first count. Sentence on the second count was left in abeyance.

The first appeal was found to have no merit by the High Court (D. K. Musinga and A. O. Muchelule, JJ) and was dismissed.

In the Memorandum of Appeal to this court five (5) grounds of appeal are taken which in essence relate to whether the charges were proved to the required standard, whether it was safe to rely on evidence of recognition, that the judges erred in not re-evaluating the evidence; that the evidence on record did not support the charge and that the sentence imposed was unlawful.

It was alleged in the two counts of robbery with violence for which the appellant was convicted that on the 27th day of January, 2008 at Birongo Trading Centre in Masaba District of Nyanza Province the appellant, while armed with dangerous weapons namely rungus and walking sticks jointly with others not before the court he robbed **Joseph Oweri Nyabuti (PW1)** and **Job Oweri Argesi (PW2)** of items and cash listed in the charge sheet, and in the course of the robbery used violence upon PW1 and PW2.

The trial court and the first appellate court accepted the evidence that on 27th January, 2008 PW1 was with his brother PW2 walking on a path from Birongo market. They were carrying food stuff. PW2 Argesi received a call on his mobile telephone. They were suddenly confronted by about ten (10) people who attacked them beating them severely. The attackers robbed them of a mobile phone, money and other items. While the attack was taking place **Winston Bundi Aminga (PW3)** came upon the scene. The attackers, save the appellant, fled the scene. PW3 tried to stop the attack in vain. PW1 fled through a maize plantation but PW2 was left at the scene as he had suffered more severe injuries.

The attack was reported at Birongo Police Station which referred the report to Keroka Police Station. A Clinical Officer – **Jackson Murauni (PW4)** - testified in court and confirmed injuries suffered by PW1 and PW2. The appellant was arrested.

In a sworn statement the appellant denied the charge. He stated that he was not at the scene on the material day at all. He stated that there was a grudge between his family and that of the complainant. He complained that he was arrested and locked up on an offence that he knew nothing about.

The trial Magistrate found that the appellant was properly identified by PW1, PW2 and PW3 who all lived in the same locality with the appellant. It will indeed be seen that each of these witnesses gave the name of the appellant to each other and to the police at the earliest opportunity. Faced with this evidence the first appellate court whose responsibility it was to re-evaluate the same and reach its own conclusions found that the appellant was one of the attackers.

The appeal came for hearing before us on 24th April, 2013 when learned counsel for the appellant Mr. Onyango Jamsumbah appeared for the appellant while the Assistant Deputy Public Prosecutor Mr. C. A. Abele appeared for the Respondent.

Counsel for the appellant urged all the grounds of appeal together and submitted that proof had not been established beyond reasonable doubt. Counsel submitted further that the first appellate court had failed in its duty to re-evaluate the evidence which, according to him, was riddled with contradictions.

Counsel for the respondent supported the findings of the two courts and urged us to dismiss the appeal.

Section 361 of the Criminal Procedure Code allows a second appeal to this court but limits that right to issues of law only.

In **Hamisi Mbela Davis & Another v R (Mombasa) [Criminal Appeal No. 319 of 2009 (ur)]** it was held that:-

“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 v Republic [1983] KLR 45:

“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 holding 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))”.....

See also **Johana Ndungu v R (Mombasa) [Criminal Appeal No. 116 of 1995].**

We have carefully considered the grounds of appeal and submissions made before us. The findings of fact by the trial court were confirmed on the first appeal. The first appellate court reconsidered the evidence on identification and found that the attack took place at 7:00 p.m when it was not yet dark. The appellant was clearly recognized by PW1, PW2 and PW3 who knew him well before the attack because they lived in the same locality. The case was therefore not one of identification but of recognition

making it unnecessary to hold an identification parade. It was held in **Anjononi & others v R [1976-80]KLR 1566** on the issue of recognition as opposed to identification:-

“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..... This was a case of recognition, not identification, of 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 one form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported).”

Counsel for the appellant also submitted on ground five (5) of Memorandum of Appeal that the sentence imposed by the trial court was unlawful.

As already stated the appellant was charged on two (2) counts of robbery with violence and upon conviction was sentenced to death on the first count, the court holding sentence on the second count in abeyance. There cannot be any substance in the complaint here – it is trite law that an accused person cannot be hanged twice after such conviction and the trial magistrate was right to keep the sentence on the second count in abeyance. This court has stated that position in several decisions.

The upshot of our findings is that there is no merit in the appeal which we accordingly dismiss.

Dated and Delivered at Kisumu this 31st day of May 2013

J. W. ONYANGO OTIENO

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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

I certify that this is a true copy of the original

DEPUTY REGISTRAR