IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 386 OF 2009

BETWEEN

KENNEDY BOGONKO MONYONCHO……..…….….APPELLANT

AND

REPUBLIC……RESPONDENT

(Appeal from Judgment of the High Court of Kenya at Kisii (Musinga & Muchelule, JJ) dated 1st December 2009

in

HCCRA NO. 211 OF 2008)

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JUDGMENT OF THE COURT

The appellant herein, ***Kennedy Bogonko Monyoncho***, (as the 1st Accused) and ***Kennedy Mokaya Nyachuba*** (as the 2nd Accused), were jointly charged with two counts of the offence of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code before the Chief Magistrate's Court at Kisii. It was alleged, in the first count, that on the 2nd day of May, 2008 at Nyandiba village, Matongo Sublocation, Kisii Central District in Nyanza Province, the appellant and the 2nd Accused, jointly, with others not before the court, while armed with bows and arrows robbed ***Mary Bosibori*** of Kshs.10,000 and four (4) chicken valued at Kshs.800/= and at and /or immediately before the time of such robbery threatened to use violence against the said Mary Bosibori (hereinafter (P.W 1).

It was alleged, in the 2nd count, that on the same day, at the same place, while similarly armed, the appellant and the 2nd accused in consort with others not before the court, robbed ***Samuel Onsomu*** (P.W.2) of a radio valued at Kshs.1,500/=, one (1) sack of maize valued at Kshs.3,000/= and at the time of such robbery threatened to use violence upon the said Samuel Onsomu.

The appellant also faced an alternative charge of handling stolen goods contrary to ***Section 322 (2)*** of the Penal Code.

The findings of fact made by the two courts below upon consideration of the evidence tendered by

prosecution witnesses and the appellant and his co-accused were that on the material date, the 2nd May, 2008 at about 1.00 a.m., the complainants P.W.1 and Samuel Onsomu P.W.2 and ***Peruse Onsangu*** (P.W.3) the wife of P.W.2, were asleep in their respective houses when they were woken up by people who were knocking and hitting their respective main doors. P.W.2 and P.W.3 are neighbours of PW1. The people forced their way into the houses. PW1 testified that the person who entered her house was never found but he was armed with a panga. She said further that she identified the appellant by voice. P.W.2 testified that when the attackers broke into his house he identified the appellant (1st accused) who took his radio after threatening to shoot him with an arrow. P.W.3, who was at the material time with P.W.2, stated that she also saw the appellant then armed with 2 arrows and a bow. One thug took her clothes in which she had Kshs.2000/= a sack of maize and a sack of beans.

The next morning, P.W.I and P.W.2 reported the robberies to their Assistant Chief, ***Samuel Ombui Mecha*** (P.W.4) who arrested the appellant and his co-accused. For fear of being lynched, the appellant led P.W.4, P.W.2 and village vigilantes to a place near his house where P.W.2's radio was recovered from a hole covered with banana leaves. In their evidence P.W.2 and P.W.3 testified that the appellant was like their son and nephew respectively and they had no difficulty in identifying him.

At the close of the prosecution case, the learned trial Magistrate found no case to answer against the 2nd accused but placed the appellant on his defense. The appellant gave evidence on oath. In his testimony, he denied robbing the complainants, stating that he was arrested by P.W.4 and charged with offences which were strange to him.

The learned trial Magistrate considered the entire evidence placed before him and concluded that the appellant was one of those who robbed P.W.2 and P.W.3. He also found that the evidence linking the appellant with respect to count one (1) was weak and acquitted him of that count accordingly. With regard to the second count, the learned trial magistrate concluded as follows:-

> **"I have no doubt that PW2 and PW3 were robbed of a sonitec radio. Both of them described the 1st accused as someone they knew as a younger relative almost a son. I had the benefit of observing especially PW2's demeanor. Even from the testimony itself, he gives compelling impression of an elderly man devoid of malice. But he and PW3 testified that they identified the 1st Accused as there was a tin lamp in their room. They recognized someone they already know and who had come quite close during the robbery and even spoke to them. Further, PW2 and PW4 gave good evidence of how the 1st accused led to the recovery of the stolen radio. The 1st accused's defence is therefore no more than a denial of the offence. I find that the 2nd charge has been proved against 1st accused beyond reasonable doubt. He is convicted as charged. I will make no finding, on the alternative charge".**

Consequent upon that conviction, the appellant was sentenced to suffer death as mandatorily required by law.

The appellant was dissatisfied with both conviction and sentence and therefore lodged an appeal in the High Court. The High Court (Musinga J, as he then was, and Muchelule J,) re-considered and reviewed the evidence afresh and while they did not accept the evidence regarding recognition of the appellant, they accepted the evidence of the recovery of the radio which had been stolen during the robbery and which P.W.2 and P.W.3 positively identified. In their own words:

> **"We accept that the evidence regarding recognition was not reliable. PW2 and PW3 knew the appellant, there is no dispute. However, whereas PW2 stated that the appellant and one more person entered the house, PW3 stated that many people entered the house until it was full. It was a small house. That is material contradiction. Even if there was a tin lamp on, if the small house was crowded, then it was difficult to make a correct and error – free identification or recognition. The situation was made even more difficult by the fact that there was no evidence about the intensity of light and how long it showed on**

the appellants face or how long this attack took.

Even more important the court did not warn itself of the special need for caution when dealing with evidence of visual identification (see Roria -v- Republic (1967) E.A. 583 and R-V- Turnbull 1976/0 3 All E.R. 449). The trial court should have considered that PW2 and PW3 may have been honest but mistaken.

…….

But there was evidence that when the appellant was arrested he led people to his home where in banana leaves, the radio belonging to the couple and which had been robbed 2 days earlier was recovered. Where it is proved that the accused is found with recently stolen property, he may be the thief or person who came by it feloniously. (See Maina & 3 others -V- Republic (1986) KLR 301). There was no dispute that this radio belonged to the couple and was taken from their house during the robbery that was perpetrated by more than one person. PW2, and PW3 come from the same sub-location as the appellant and the area Assistant Chief, PW 4. PW4 testified how the appellant led to this recovery on 4/5/2008. The attack had been 2 days before…….

PW2 stated he was present at the recovery……

It was quite clear that the prosecution evidence on the recovery was consistent and categorical…..

We have considered the evidence as recorded and have come to our own conclusion that the appellant led to the recovery of the radio at his home two days after it had been robbed in the neighborhood. He had hidden it beneath banana leaves outside his house."

Having so stated, the learned judges of the High Court concluded as follows:-

"These circumstances have led us to the irresistible conclusion that he (the appellant) had the radio because he had participated in the robbery at the house of PW2 and PW3. He was consequently properly convicted as charged".

The appellant was still dissatisfied and has come to this court by way of a second appeal. That being so, only matters of law fall for consideration as provided by **Section 361 (1) (a)** of the Criminal Procedure Code (Cap 75 Laws of Kenya).

The appeal came up for hearing before us on 22nd April, 2013 when learned counsel, Mr. Onyango Jamsumbah, appeared for the appellant while Mr. Riechi Meroka, learned prosecution counsel appeared for the state. The appellant cited four grounds of appeal which his counsel expressed as follows:-

"1) The learned Judges erred in both law and fact in upholding the conviction and sentence of the subordinate court without considering that the appellant's constitutional rights were violated.

2. **The learned Judges erred in both law and fact when they failed to re-evaluate the evidence on record and came to an obviously wrong conclusion.**

3. **The learned Judges erred in both law and fact in failing to find that the charge in the charge sheet was not supported by the evidence on record.**

4. **The learned Judges erred in Law and in fact in imposing an unlawful sentence."**

Mr Jamsumbah commenced his submissions by stating that the appellant was not afforded an interpreter and further that witnesses were not sworn. In our view, Mr. Jamsumbah's submission on those

complaints lacked merit since we have perused the record of the learned trial Magistrate and note that on all material occasions during his trial, the appellant was afforded an interpreter. We also do not find any evidence that any witness gave evidence unsworn.

Mr. Jamsumbah then further submitted that the learned Judges of the High Court failed to re-evaluate the evidence which was adduced before the trial court in order to arrive at an independent conclusion of their own. Mr. Jamsumbah was in reality alleging that the principle in **Okeno -v- R [1972] E.A. 32**, and other decisions of this Court, was not complied with by the learned Judges of the High Court. In counsel's view, the evidence relied upon in convicting the appellant was contradictory and inconsistent. Counsel identified, as significant, the failure of P.W.1 to mention the recovery of the radio in her testimony and the different accounts of witnesses regarding which, where and when the weapons used during the robbery were found. Those discrepancies, according to counsel, were not appreciated because the learned Judges of the High Court did not re-evaluate the evidence.

Mr. Meroka, in supporting the conviction of the appellant, submitted that the learned Judges of the High Court were loyal to their duty and after duly reviewing the evidence adduced at the trial, arrived at their own conclusion that it was the appellant who led to the recovery of the stolen radio, two days after the complainants had been robbed.

We have reproduced above, a significant part of the analysis made by the learned Judges of the High Court and find it difficult to appreciate the appellant's complaint that the learned judges failed to re-evaluate the evidence adduced before the trial court. As shown in the said analysis, it is clear to us that a detailed evaluation of the evidence was carried out by the learned Judges who arrived at their own independent conclusion. The learned Judges, unlike the learned trial Magistrate, found that the evidence of alleged recognition of the appellant was unsafe but accepted the evidence of recovery of the stolen radio.

For our part, the learned judges cannot be faulted in the performance of their duty. The learned judges took into account all relevant factors in arriving at the conclusion that the appellant was properly convicted as charged. The evidence on record shows that the appellant led P.W.4, P.W.3 and a number of vigilantes to where the radio, stolen from P.W.2 and P.W.3, was found hidden in a hole covered with banana leaves where the appellant lived. P.W.2 and P.W.3 positively identified the radio which had been stolen from them just two days prior to the recovery. That evidence was of recent possession of the radio and was sufficient to draw the inference that the appellant was one of the robbers rather than the handler of the same. The evidence of the recovery of the stolen radio was accepted by the learned trial magistrate. In his own words:-

"Further PW2 and PW4 gave good evidence of how the 1st accused led to the recovery of the stolen radio"

The evidence on record does not show that the appellant proffered any explanation on how he came by the radio. In any event radios lawfully in possession of anyone are not buried in the ground and covered by banana leaves.

In **Maina -V- Republic [C.A Cr. Appeal No. II of 2003] (UR),** this Court stated as follows:-

> **"Where there is evidence that the accused person is found in actual possession or has shortly after a robbery, sold one of the items stolen during the robbery he is deemed to be in recent possession of stolen item. Evidence of recent possession of a stolen item alone is sufficient to found a conviction for the offence of robbery with violence."**

In this case the two courts below found that the appellant was found in recent possession of the radio stolen from P.W.2 and P.W.3. Those were findings of fact upon which the two courts below concurred. We, on our part, do not find any contradictions or inconsistencies in the evidence material enough to make us interfere with those concurrent findings of the courts below.

In **Kainga -V- Republic [1982] KLR 213** at page 219, this court said:

> **"A second appeal must be confined to points of Law and this court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied is whether there was any evidence on which the trial court could find as it did (Reuben Karari S/O Karanja -V- Republic (1950) 17 EACA 146)"**

And in **M'Iriungu -v- Republic [1983] KLR 455,** it was stated as follows:-

> **"Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept findings of fact of the lower court(s) and resist the temptation to treat findings of fact as findings of law or mixed findings of fact and law and it should not interfere with the decisions of the trial or first appellate court unless it is apparent on the evidence no reasonable tribunal could have reached that conclusion which would be the same thing as holding that the decision is bad in law (Martin -V- Glyneed Distributors Ltd (t/a MBS fastenings) - The Times of March 30 1983"**

We have (above) considered the points of law raised in this appeal and the submissions of counsel for the appellant and the state and having done so , we are satisfied that the appellant was convicted on very sound evidence and the High Court was entitled to uphold his conviction.

On sentence, counsel for the appellant had, in the grounds of appeal, stated that the sentence imposed upon the appellant was unlawful. He however, did not urge that ground in his address before us. The decision not to urge that ground of appeal was wise in our view because the appellant was convicted of robbery with violence under **Section 296 (2)** of the Penal Code. Conviction under that section attracts the sentence of death. In the premises the sentence imposed upon the appellant was lawful and was rightly confirmed by the learned judges of the High Court.

In the result and for the reasons discussed above, we find this appeal without merit and we dismiss it in its entirety.

Dated and delivered at Kisumu this 31st day of May, 2013.

ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

……..……..

JUDGE OF APPEAL

S. ole KANTAI

…….……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR