



IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 328 OF 2010

BETWEEN

WYCLIFFE AKELLO OCHIENG alias WIKIAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Kisumu, (Karanja & Aroni, JJ) dated 8th June 2010

in

HCCRA NO. 186 OF 2009)

JUDGEMENT OF THE COURT

The appellant, Wycliffe Akello Ochieng alias “WIKI” was charged before the Chief Magistrate, Kisumu, with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code, particulars being that on the 13th day of February, 2009 at Nyalenda Estate in Kisumu East District of Nyanza Province, jointly with another not before the court while armed with a hammer robbed Sohail Yassin Ahmed safaricom credit cards valued at Kshs. 40,000/= and cash Kshs. 20,000/= all valued at Kshs. 60,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said complainant. After hearing the prosecution case that was presented through 6 witnesses and the sworn testimony of the appellant, the trial court (A. Onginjo, Principal Magistrate) convicted the appellant of the said offence and sentenced him to death. The first appeal to the High Court of Kenya (J. R. Karanja and Ali-Aroni, JJ) was dismissed. The appellant was not satisfied with that finding and has come to this court.

Being a second appeal we are bound to consider or entertain only points of law as facts established by the trial court if properly re-evaluated by the High Court on the first appeal are not within our mandate – See **Stephen M’Riungu v Republic (1982 – 88) I KAR 360** where this court held that:

“... an appellate court should accept the findings of fact of

the lower court or courts and not treat them as holdings of law or mixed findings of fact and law. It should not interfere with decision of the trial or first appellant 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 was bad in law....”

See also on the same point the case of **Thiongo v Republic [2004] I EA 333 and Njoroge v Republic [1982] KLR 389**

Three (3) grounds of appeal are taken by the appellant in the appeal before us which were drawn and urged by learned counsel for the appellant Isaac E. N. Okero, Advocate. These are:

- “1. The learned judges erred in law in placing reliance (sic) upon on the evidence of PW2 and PW5 both tainted by inconsistencies, prejudice and contradictions for the purposes of establishing or corroborating the positive identification of the appellant;**
- 2. The learned judges misdirected themselves by failing to appreciate that without identification evidence of PW2 and PW5 the wrong test or standard was applied to the sole identification evidence of PW1;**
- 3. The learned judges erred in law in failing to appreciate that evidence of the testimony of the single witness required careful examination and consideration bearing in mind the discrepancy therein;”**

Let us briefly outline the case that was presented in support of the prosecution case.

Sohel Yassin Ahmed (PW1) testified that on 13th February, 2009 at about 10.30 a.m. he was riding a bicycle while selling credit cards at Nyalenda, when 2 young men approached him from both right and left. The one on the left held his head and he fell down. The young man on the right then tried to snatch PW1s' bag containing credit cards and cash. PW1 resisted upon which the young man on the left produced a hammer which he used to attack PW1. Both the young men ran away after snatching the bag and used the hammer to scare away passers-by who came to the scene to help the complainant. The

young men eventually dropped the hammer which was retrieved and eventually surrendered to the police. PW1 had seen and talked to the young men the day before the attack in Nyalenda.

On the said day 13th February, 2009 PW2 Ratib Ahmed Boiton, a resident of Nyalenda who operated a shop, heard screams and went outside to investigate. He witnessed 2 people he knew running away from where PW1 was. One of the 2 people had a hammer and the other a bag. He knew both of them before. PW1 informed him (PW2) that he had been attacked and robbed by the 2 people. He gave the names of the 2 people to Assistant Chief David Rajoro Ouko (PW3).

PW3 was in court on 27th February, 2009 to testify in an unrelated case when he spotted “WIKI” whom he had known before since childhood. This is one of the people whose names he had been given by PW2. He arrested him.

Philip C. Kilimo (PW4) is a Clinical Officer who attended to PW1 and confirmed that he suffered injuries in an attack.

The evidence of PW5 Solomon Meshack Owino was telling. He testified that on 13th February, 2009 while resting in his house in Nyalenda, upon hearing screams outside, he went to investigate and found 3 people engaged in a struggle. He tried to intervene but was threatened with a hammer. He retreated to his house to fetch a weapon but upon return only found PW1 injured. The 2 other people who had since fled the scene were well known to him. One was “Cess” who had a hammer while “WIKI” had snatched a bag from PW1.

No. 72602 P C Stephen Businei (PW6) received report from PW1 and with assistance of PW3 arrested the appellant.

Faced with this evidence the appellant gave a sworn statement where he denied the charge. He stated that on the material day he was at his place of work at Nyalenda and there was no incident. He was surprised when he was arrested and charged with an offence he knew nothing about.

The trial magistrate considered the evidence tendered in support of the prosecution case particularly the evidence of PW2 and PW5 who testified inter alia that they knew the appellant before the incident and saw the appellant attacking PW1 and robbing him of a bag. The trial magistrate believed this evidence and convicted the appellant.

The High Court Judges re-evaluated the evidence and were persuaded that there was evidence of recognition which connected the appellant directly to the offence for which he was convicted. They consequently dismissed the appeal.

The appeal came before us for hearing on 7th May, 2013 and as we have stated was urged by learned counsel for the appellant Mr. Okero but opposed by the learned Assistant Deputy Public Prosecutor Mr. E. A. Abele.

Mr. Okero submitted that both the trial court and the High Court erred in relying on the evidence of identification by PW2 and PW5 and that the High Court had not re-evaluated that piece of evidence.

This is the way the learned judges expressed themselves on this aspect of the matter:

“... Although the appellant denied the offence and raised an alibi to the effect that he was at his place of work at Kachok on the material date, the evidence against him by the complainant, PW2 and PW5 clearly displaced the defence. These three witnesses placed him at the scene of the offence at the material time. They saw and identified him by recognition. He was arrested at a later stage by the assistant Chief (PW3) who had been given his name and that of Cess as suspects. The prosecution evidence on identification of the appellant was therefore solid enough as to be believed by the learned trial magistrate. The conditions for identification having been favourable, the

possibility of wrongful or mistaken identification of the appellant was remote and more so, considering that he was previously known to the identifying witnesses. This was not identification of a stranger but recognition of a known person

Mr. Okero cited Ngumi v Republic [1985] KLR 1 in support of his further submission that prosecution witnesses had not given description of the appellant to the police. This, with respect, was not correct because PW2 and PW5 gave the name of the appellant who they knew as "WIKI" to the police immediately the attack occurred.

We can see no fault or error in the factual findings of the two counts below and it follows that the appeal has no merit and we accordingly dismiss it.

Dated and Delivered at Kisumu this 21st day of June 2013

J. W. ONYANGO OTIENO

.....

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