



IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 173 OF 2010

BETWEEN

KENNEDY OCHIENG OLUNGA APPELLANT

AND

REPUBLICRESPONDENT

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

Kisii,(Musinga & Muchelule, JJ) dated 10th December, 2009

in

HCCRA NO. 145 OF 2007)

JUDGEMENT OF THE COURT

The appellant, Kennedy Ochieng Olunga, was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code particulars being that on the 13th day of November, 2006 at about 11:00 p.m. at [particulars withheld] Homa Bay District in Nyanza Province jointly with others not before the court robbed Silas Owuor Oyugi of cash Kshs. 16,000/=, one bag containing assorted clothes, 4 blankets, an identification card, 3 jungle jackets, 3 berets fitted with crown, 1 coat, Form 4 original certificate, 5 garment materials and 3 bar soaps all valued at Kshs. 50,000/= and at or immediately before or immediately after the time of such robbery wounded or beat or struck the said Silas Owuor Oyugi. A trial was conducted by the Senior Resident Magistrate at Homa Bay (Hon. E. K. Mwaita) who convicted the appellant and sentenced him to death. The appellant filed an appeal at the High Court of Kenya, Kisii, but in a Judgement delivered on 10th December, 2009 (D. Musinga, J (as he then was) and A. O. Muchelule, J) the learned Judges did not find favour with the appeal and dismissed it. That provoked this appeal.

As this Court has stated in the many judgements that have dealt with second appeals our

jurisdiction is to deal only with matters of law but not matters of fact that have been tried by the trial court and re-addressed by the first appellate court. This is the essence of Section 361 (1) (a) Criminal Procedure Code and restated in such decisions as **Thiongo v Republic [2004] 1 EA 333** and **Njoroge v Republic [1982] KLR 388**. In the latter case this court differently constituted stated:

“On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence.”

In the home-made Memorandum of Appeal dated 19th October, 2011 and the Supplementary Memorandum drawn by counsel for the appellant dated 28th June, 2013 the appellant takes issue with the learned Judges for failing to evaluate the contents of the charge sheet which was allegedly defective and also that the judges erred in finding that there was recognition when conditions for identification were lacking; that they erred in failing to find that a report was not made immediately to the police; that there was no corroboration; that the evidence of children was not corroborated and that the learned judges did not re-evaluate the evidence as was required of them.

The prosecution case was through the evidence of 6 witnesses. Silas Awino Oyugi (PW1) named S O O in the charge sheet said that on the material day in the evening he was at home in bed because he was unwell. At about 11:00 p.m. he heard voices outside the house of people who asked his wife to open the door. The people outside the house called his wife by a nickname “N” by which she was known and they told her that they wanted to see Silas who was a Chief of the area. That N peered outside but the people forced the door and burst into the house. They were three – one had a berret, a crown and a jungle jacket; the second carried a gun while the third brandished a panga. They entered his bedroom where they stated that they were on a mission to kill him for which they had been paid Kshs. 100,000/= but could spare him if he doubled this sum. PW1 didn't have that kind of money and he therefore told them they were free to accomplish their mission. This did not go down well with the raiders who demanded PW1s' official uniform which they took alongside Kshs. 16,000/= proceeds from sale of cows and they also took the other items particularized in the charge sheet. In the course of the robbery they were beating PW1 as they demanded for money. In the midst of this drama PW1s' daughter Q.A (PW2) ran out of the house but was pursued by one of the raiders who caught up with her. He lit a torch and shone it on PW2 who recognized her pursuer as Omboga son of Jacobo who she knew before. Omboga was the appellants nickname. She pleaded with him asking “..why are you killing me and already you have killed my father” ... believing, then, that her father was no more. This plea was heard by PW1 and the other occupants of the house who testified in court. When Omboga son of Jacobo caught up with PW2 and as he took her back to the house the other raiders flashed torches and PW2 was further able to recognize her pursuer. PW1s' wife C.A (PW5) cried out for help and stated that she had recognized 2 attackers Otieno and Omboga. PW1 reported the matter at Homa Bay Police Station where investigations commenced. Four days after the incident PW1 met the appellant who was called by a nickname Omboga. He had him arrested.

PW2, a child of 12 years and who the trial court found competent to testify under oath confirmed her fathers' narration of the facts adding that she knew some of the attackers -Otieno son of Kojowi who switched off lights in the house and the appellant who chased after her and took her back to the house. She was able to describe to court the clothes that the attackers wore that night and the beatings she received that led her to lose consciousness.

J.A.S (PW3), another child found by the court to be competent to testify on oath narrated the same facts but went a notch higher – she not only knew the appellant who was from the same locality as herself but knew the appellants sister, one A, her school mate.

PW5 described the attack in detail stating further that she knew two of the attackers – Otieno Ojowi who switched off the lights after the raiders entered the house and the appellant who was from the same locality as herself.

Joel Sutter (PW4), a Clinical Officer at Homa Bay District Hospital received and attended to PW1

who had suffered injuries to the head, neck, chest and lower limb.

No. 63459 Corporal Henry Momanyi (PW6) attached to Homa Bay Police Station received complaint, and investigated the case and arrested the appellant. The witness told the trial court that the other attackers were at large and had not been arrested.

These were the facts upon which the appellant was put on his defence.

In an unsworn statement the appellant denied the charge stating that he was arrested on a complaint by his uncle, PW1, which he knew nothing about. According to the appellant he was charged with the offence for failing to point out whereabouts of his brother who was wanted by police on account of the same charge facing the appellant.

When the appeal came for hearing before us it was urged by learned counsel for the appellant Mr. P. Ochieng Ochieng but was opposed by the learned Assistant Deputy Public Prosecutor Mr. C. A. Abele. Counsel for the appellant submitted that there was no sufficient light to enable the prosecution witnesses to recognise the attackers; that the lantern lamp was switched off; that PW1 could not corroborate the evidence of the child witnesses because he did not himself recognize the appellant; that the appellants' name was not given to the police immediately and that the judges on first appeal did not re-evaluate the evidence as it was their duty to do.

Mr. Abele on his part supported conviction submitting that the appellant was identified by witnesses who knew him before; there was electric light which was switched off upon entry of robbers as was a lantern ; that the appellant followed PW2 outside when she attempted to flee and shone a torch on her face making it possible for her to recognize the appellant who she knew before and finally that evidence had been corroborated.

The learned trial magistrate on the issue of identification stated the following in the course of the judgement:

“...Firstly, I have no doubt that the accused was positively recognised by PW2, PW3 and PW5 they were able to recognize him (accused) and another called Otieno Jowi due to the 2 lantern lamps which were on in the house plus sport lights which the robbers had. Apart from recognizing them in the room, PW2 tried to run outside and the accused herein who by then had a torch, chased and got hold of her outside. With the help of the torch, PW2 was able to see him properly and she even called him by his nickname i.e. Omboke..... Also the other two inside the house lit their torch towards them and again it enabled PW2 to clearly recognise the accused.

Secondly, the accused is a close relative of the complainant – an uncle and he also come from that locality hence he was not a stranger to them...”

The learned judges evaluated the evidence and could find no fault with the findings of the learned trial magistrate. They said this of the appellant:

“..Although the appellant denied that he had a nickname – Omboke, he did not deny that he was well known to the complainant and his family members. He said that the complainant was his uncle. It is also instructive to note that the appellant knew Otieno Ojowi who was said to be his brother. The appellant had also Otieno Ojowis' mobile telephone number...”

The learned judges relied on this courts decision in Anjononi v Republic [1980] KLR 59 where it was held that 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.

On the issue of corroboration it is true as submitted by counsel for the appellant that the evidence of the 2 children PW2 and PW3 being evidence of minors required corroboration. We may add that this is true except in sexual offences. For Section 124 of the Evidence Act provides that:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

In **Kibangeny Arap Kolil v Republic [1959] EA 92** “The appellant was convicted by the Supreme Court of the murder of his cousin. Evidence of the killing was given by the eye-witness testimony, upon affirmation, of the appellant's two sons whose ages the trial judge estimated at from twelve to fourteen years and nine to ten years respectively. The manner of killing was corroborated by medical evidence, but there was no corroboration by any other witness, nor by any circumstance sufficient to raise more than very slight suspicion, of the boys' evidence of the identity of the deceased's assailant. Throughout the trial it appeared to have been assumed both by defence counsel and the court that the murderer was the appellant and the only defence raised was that of insanity. The killing was at no time admitted by the appellant; in fact in a cautioned statement in answer to the charge he denied it, while in his unsworn statement from the dock he did not admit it but said “At this time I was sick and did not know what I was doing.... I was told I had killed someone. When I was told this I told them I did not know what I was doing”. The trial judge rejected the defence of legal insanity and convicted the appellant. At the hearing of the appeal State counsel intimated that he felt unable to support the conviction based as it was solely on the evidence of the two boys, for two reasons, namely: (a) the court had failed to satisfy itself, before they testified, whether or not they understood the nature of an oath or affirmation and (b) the court had failed to warn itself or the assessors of the danger of convicting on their uncorroborated testimony.

It was held:

“(i) since the evidence of the two boys was of so vital a nature the court could not say that the trial judge's failure to comply with the requirements of s. 19 (1) of the Oaths and Statutory Declaration's Ordinance was one which could have occasioned no miscarriage of justice;

(ii) the failure of the trial judge to warn either himself or the assessors of the danger of convicting upon the evidence of the two boys in view of the absence of corroboration and any admission by the appellant was an additional ground for allowing the appeal.”

The Sexual Offences Act No. 3 of 2006 which came into force in 2006 of course altered that position in relation to the evidence of a minor where corroboration was no longer necessary if the trial court was satisfied, for reasons to be recorded, that the evidence of the minor child should be believed.

In this matter the evidence of the 2 minors PW2 and PW3 was corroborated by their mother PW5 who like them knew the appellant before. When the appellant pursued PW2 who was attempting to escape he got hold of her and she pleaded, loudly enough for those in the house to hear, that he should not kill her like he had killed her father. She shouted the name by which the appellant was known in the locality and this was heard by PW1, PW3 and PW5. The evidence was therefore properly corroborated as required by law.

We can find no fault in the findings of the trial magistrate as confirmed by the first appellate court. There is no merit in the appeal which we accordingly dismiss.

Dated and Delivered at Kisumu this 4th day of October 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