



IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 410 OF 2010

BETWEEN

ERNEST OTENYO KEYA)..... APPELLANTS

SULEIMAN OSUNDWA)

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kakamega (Ombija &

Kariuki, JJ.) dated 4th June, 2008

in

H.C.C.R.A. NO. 55 OF 2005)

JUDGMENT OF THE COURT

The appellants, *Ernest Otenyo Keya* and *Suleiman Osundwa*, were jointly charged before the Senior Resident Magistrate's Court at Mumias with two counts of robbery with violence contrary to **Section 296(2)** of the Penal Code. Upon trial, they were convicted of the first count as charged. They were aggrieved and appealed to the High Court against their respective convictions and sentences which were imposed upon them. Their appeals were dismissed and hence this appeal before us.

This being a second appeal, only issues of law fall for consideration by reason of the provisions of **Section 361(1)(a)** of the Criminal Procedure Code; and perusing the Memorandum of Appeal filed by M/S Onsongo & Company, Advocates for the appellants, it is quite clear, that the main issues of law raised are identification and failure of the High Court to re-evaluate and re-analyse the evidence which was adduced before the learned trial Magistrate and reach its own independent decision thereon.

Before discussing those two main issues, it is important to first outline the evidence which was adduced before the trial court. There were two complainants in the charges against the appellants. *Reuben Shamalla (PW1)* was the first complainant and was an employee of a Petrol Filling Station at Shianda in Mumias area. On the material day, 6th July, 2004, at 7.30p.m., he was in the office at the filling station when two people arrived at the office door. One of them carried a jerrycan. PW1 opened

the door to go and serve the two people whom, he said he knew as the second appellant and his companion who was also familiar to him. As he did so, the 2nd appellant's companion shot him in the chest and he fell down. The attackers entered the office as he was down and were joined by a third person, who he identified as the 1st appellant. The new entrant asked him for money. He took money from his pocket and told the first appellant that more money was in the office. In total Ksh.22,495/= was stolen. After a while, other members of the public arrived at the filling station including his brother **Musa** and they took him to St. Mary's Hospital and later to a Kakamega Hospital where he was admitted for about one month. He mentioned the names of his assailants to his brother, Musa, two days after the robbery. He testified that he had known the appellants since childhood.

The 2nd complainant was **Ismael Makokha Nambuku**, and he testified as PW2. At the material time he owned a shop which he ran himself. He testified that at about 8.30p.m., on that date, he was in his shop when people arrived. One of them asked for paraffin which he did not have at the time. Three of the people then went to the counter. As the shop was lit, he said he identified the 1st appellant. One of the three showed him a gun and demanded money. He however, gave out 12 pairs of bed sheets worth Ksh.4,000/= and in addition they took a cash sum of Ksh.215/=, and his radio.

Dr. Jacob Stefano Maleche of Kakamega Highway Nursing Hospital examined PW1 who had been transferred from St. Mary's Hospital. He testified that PW1 had received a bullet shot which had gone through his chest injuring his lungs and spine. He discharged him after one month and filled the P3 form in respect of the injuries which he assessed as grievous harm.

Josephat Shijenje Shiroko, at the material time owned the petrol filling station at which PW1 worked. He testified as PW4. On the material date at about 8.00p.m., he received a call that his petrol filling station had been raided. He went to Kakamega Police Station and was given two police officers with whom he went to the petrol filling station where they found that PW1 had been shot in a robbery and had been taken to hospital. PW1 later told him he knew the robbers and he left the police officers to carry out their investigations.

Arthur Sangoro, was one of the police officers who participated in the arrest of 2nd appellant. He testified as PW5. He testified that on 10th July, 2004, on the instructions of the then OCS Mumias Police Station, **CI. Kimetto**, and with the help of two members of the public he arrested the 2nd appellant.

IP Ben Onyango (PW6), on his part, mounted an identification parade on 20th July, 2004, at which the 1st appellant was identified by the 2nd complainant (PW2). AP Sergeant, **Ben Kisaka (PW7)**, re-arrested the 1st appellant from members of the public and handed him over to the officer commanding Mumias Police Station on 11th July, 2004.

Ahmed Mustafa (PW8), was on the material date a watchman at Shianda Petrol Filling Station. He stated that although he was on duty at the material time he did not witness the robbery as he was at the time the raid took place at the back of the station.

In their respective defences, both appellants denied the charges against them and merely recounted how they were arrested and the circumstances relating to their arrest, which in no way related to the charges they faced.

In his submissions before us, Mr. Oguso, learned counsel for the appellants, expressed doubt as to whether the 1st complainant could remain conscious after being shot to be able to identify the people who attacked him. He also expressed the view that the conditions for a positive identification were not conducive to proper identification as the attack took place at 7.30p.m., and no evidence was led as to the source of light at the scene. Counsel also discredited the evidence of PW1 on the basis that he mentioned the names of the attackers to his brother after 4 days from the incident which suggested that he could have been mistaken. He placed reliance on the case of **Wamunga v Republic [1989] KLR, 424** for the proposition that such evidence as was adduced in this case should be carefully scrutinized before relying on the same.

In addition, Mr. Oguso pointed out certain alleged incorrect findings made by the learned trial magistrate and confirmed by the High Court to wit the shooting of the 1st complainant and the disclosure of the names of the attackers. In counsel's view, the Judges of the High Court instead of re-evaluating and re-analysing the evidence adduced before the trial court, merely agreed with it.

On sentence, counsel submitted that the learned Judges of the High Court expressed no view on the same and he urged us to interfere with the same on the authority of **Godfrey Ngotho Mutiso v Republic [2010] eKLR.**

In answer, Mr. Abele, learned Assistant Director of Public Prosecutions, expressed the view that the evidence which was adduced before the trial court against the appellants was overwhelming as the appellants were positively recognized by both complainants. According to Mr. Abele, the 1st complainant was conscious throughout the attack and the doubt expressed by counsel for the appellants had no basis. He was also of the view that the sentence imposed upon the appellants was deserved.

As regards the issue of identification the evidence of PW1 was as follows:-

“On 6.7.2004 at 7.30p.m. I was at work place when Wycliff Osundwa came with some one else. Osundwa had a jerrycan. He is the 2nd accused.

I was inside the office and they stood at door. So I went to put fuel. I opened the door and that is when his friend shot me in the chest and I fell. I saw gun. It was a pistol.

They then got in. The person who shot me is familiar, he ran away. When I fell Otenyo came and asked me for money. He is the 1st accused. I'd known him even before. He took money from my pocket and I told him more was in office. They stole 22,495/= in total. After a while another customer came for oil. He had a motor cycle. I asked for help. Someone else came and I was taken to hospital. My brother Musa was among them.

After 2 days I told Musa I had seen the people”

When the appellants were given an opportunity to cross-examine PW1, they did not challenge him regarding the source of light. We think, in the circumstances, they appreciated the circumstances regarding the source of light and its intensity. PW1's testimony was unambiguous. He was categorical that he saw the appellants at the scene and described the role each one of them played. PW1 did not say that he became unconscious at any moment during the attack. He indeed talked to new customers and even identified his brother after the shot. The suggestion by learned counsel for the appellants that PW1 could have become unconscious after being shot therefore has no basis.

Counsel for the appellants made heavy weather of the fact that PW1 mentioned the appellants to his brother, 4 days after the attack yet the brother appeared at the scene soon after the raid. The record however, shows that PW1 told the trial court that he informed his brother that he had seen his attackers after two days of the attack. None of the appellants at the trial sought from PW1 an explanation as to why he did not tell his brother those who attacked him earlier. PW1 testified as follows even before he was cross-examined:-

“1st accused is from Busesha. His father Otenyo, died. 2nd accused is my neighbour at home. I have known them since childhood.”

PW1 and the appellants were in very close proximity. PW1 was running a petrol filling station and when the appellants arrived at his office, his first reaction was that they were his customers. Indeed the 2nd appellant had a jerrycan and PW1's reaction was to serve them. At that point in time, he had no reason to be apprehensive. His identification of the 2nd appellant could not, in the circumstances, be mistaken especially since he had known him since childhood. After PW1 was shot, the 1st appellant entered the office and demanded money from PW1. He then ransacked his pocket. He even told the 1st appellant that there was more money in the office. So, PW1 and the 1st appellant held some sort of

conversation in close proximity.

In those premises, we are satisfied that PW1 positively identified the appellants as two of the robbers who attacked him. We do not think that the statement in the judgment of the learned trial magistrate, when she summarized the evidence, that the second appellant shot PW1 would, per se, vitiate the trial of the appellants. PW1 had been recorded by the same magistrate as having said that the person who shot him and who was with the appellants ran away. We find the statement a mere lapse in the recall of the evidence by the learned trial magistrate which did not go to the root of the case and the lapse did not prejudice the appellants as it did not result in any misjustice.

Heavy weather was also, made of the statements in the judgment of the High Court that it was the 2nd appellant who shot PW1 and that PW1 gave the names of his attackers to his employer, Josephat Shijenje Shiroko (PW1) on the material date. We have indeed observed that the learned Judges of the High Court incorrectly restated the testimonies of PW1 and PW8 with respect to the shooting and the disclosure of the names of the attackers respectively. The misstatements however, in our view, did not alter the recorded evidence of those witnesses which we have outlined elsewhere in this judgment. Notwithstanding those misstatements, we have, on our part, come to the conclusion that the learned Judges of the High Court properly re-analysed and re-evaluated the evidence which was adduced before the trial court and which we have also set out herein in outline and having done so, come to the conclusion that the appellants together with another robbed PW1. The two courts below correctly applied the principles enunciated in the case of **Wamunga v Republic [1989] (supra)**.

On sentence, the High Court affirmed the sentence of death meted out to the appellants on count one for the offence of robbery with violence under **Section 296(2)** of the Penal Code.

On the authority of the case of **Godfrey Ngotho Mutiso v Republic (supra)**, that may not be the only sentence the trial court could impose but it is nevertheless a lawful sentence. Under the provisions of **Section 361(1)** of the Criminal Procedure Code, complaints about severity of sentence do not lie to this Court as the complaint relates to an issue of fact – which is prohibited by **Section 361(1)(a)** of the same Code.

In the result, the appellants' appeal is dismissed and the convictions and sentences are hereby confirmed. The appellants shall suffer the death penalty unless the same has been commuted.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF NOVEMBR 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

certify that this is a true copy

of the original.

DEPUTY REGISTRAR