



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM:OMOLO, WAKI & NYAMU, JJA)

CRIMINAL APPEAL NO 356 OF 2008

BETWEEN

KAHINDI MWATSUMA CHIVATSI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Malindi (Njagi & Omondi JJ) dated 24th September 2008

in

H.C.CR.A. NO. 77 of 2007)

JUDGMENT OF THE COURT

Kahindi Mwatsuma Chivatsi, the appellant herein, faced two charges of robbery with violence under **section 296(2)** of the Penal Code before a Senior Resident Magistrate, (Obulutsa, Esq) at Kilifi. The particulars of the first charge were that on 12th day of October, 2006 at Petanguo Sub-location in Kilifi District of Coast Province, the appellant jointly with others not before the court and while armed with dangerous weapons, namely knives, rungas and pangas, robbed Maoja Charo Ngoa of one camera and Ksh. 1,700/- all to the total value of Kshs 7,200/- and that during the said robbery they used personal violence to the said Maoja Charo Ngoa. The second count alleged in its particulars that on the same date at the same time and place and armed in the same way, the appellant and his confederates not before the court robbed Mwakamusha Katana Kiraga of one torch, one knife and Kshs 3,300/- all to the total value of Kshs 3,655/- and that during the robbery, they used personal violence to the said Mwakamusha Katana Kiraga. Having heard a total of seven witnesses on behalf of the prosecution and having listened to the appellant's sworn evidence in answer to the prosecution's case, the trial magistrate found the appellant guilty on both counts, convicted him and duly sentenced him to death. Thereupon, the appellant appealed against the conviction and sentence to the High Court, but in its judgment dated and delivered on 24th September 2008, the High Court (Njagi and Omondi, JJ) dismissed the appeal against the conviction and confirmed the sentence of death imposed by the Magistrate on each count. The High Court should in fact have corrected the sentence by setting aside the sentence of death on count two as there was no reason for imposing two sentences of death on one person. We were told during the hearing of the appeal that the death sentences were commuted by the President to life imprisonment which would mean that the

appellant is serving two terms of life imprisonment. There is no reason in law or in common sense for that sort of sentence as a person can have only one life span.

The appellant has appealed to the Court on a total of five grounds which his learned counsel Mr Jengo summarized and argued under two sub-heads namely identification of the appellant at the scene of the crime and secondly that the prosecution did not prove its case beyond a reasonable doubt as required by law.

The brief facts of the case as accepted by the trial magistrate and confirmed by the two learned Judges on the first appeal to them were that the two complainants Maoja Charo (PW2) and Mwakamsha Katana (PW3) were shopkeepers at Petanguo. On the night of 12th October, 2006 at around 1 a.m. Maoja Charo and his wife Agnes Maoja (PW6) were asleep either in their shop or just next to it. At 1 a.m. they heard dogs barking; there was a lantern on in the room. The Concise Oxford English Dictionary describes a “lantern” as “a lamp with a transparent case protecting the flame or electric bulb”. So as the Judges of the High court correctly found and held a lantern is not and cannot be equated to a rudimentary tin lamp which does not have anything covering its flame. Mr Jengo contended before us, as Mr Munzyu who had previously represented the appellant in the magistrate’s court and in the High Court did, that it was not proved how strong the light from the lantern was, where it was placed in the room and how long the witnesses were able to observe the appellant under that light. Charo (PW2) said the appellant was in the room with four or other persons. Agnes, Charo’s wife said:

“.....the door was knocked, my husband went to open it and people entered. A camera was taken. Of the group I recognized one. He had been selling us fish. The lantern was on and the group had torches. He had a torch and a red cap.”

Charo also said he recognized the appellant as he (appellant) used to sell to them fish and vegetables. They however did not know the appellant’s name.

For their part, Mwakamsha Katana and his wife Kadii Mwakamsha (PW5) stated they heard the commotion in the house of the first complainant and Mwakamsha attempted to escape and go for help. He was confronted by four or so persons and Mwakamsha said he recognized the appellant as he used to sell fish to them. Kadii also said in examination in chief that he saw four people and among them he recognized the appellant. The appellant used to sell fish to them.

A report of the robbery was made that same night to Corporal Mwakio (PW7) of Bamba Police Post. According to Corporal Mwakio:-

“ I booked that report, referred them to hospital for they had been assaulted. They robbed them of a camera, panga and arrow. They recognized one of the suspects as a person who sells them fish and was clad in a red hat (Exh 4) and the jacket (Exh 4) which were abandoned and recovered”

The appellant was arrested by the complainants after one month when he was seen passing by.

Put to his defence, the appellant himself told the magistrate in a sworn statement:-

“ On 12/10/2006 I don’t remember where I was. I am aware of the charge. The complainants are known to me. My wife hails from where they stay. I have not had any dealings with them. I remember I differed with them over my wife. She had also wanted to be married to their home and they were not happy when I married her. When I was arrested I had gone there to look for her. They want me jailed so that they can keep the lady.”

The two complainants and their wives swore they knew the appellant though not by name. They said they saw him during the robberies and Corporal Mwakio swore the complainants told him the same day that one of the robbers used to sell fish to them. Mr Jengo submitted that since the report to Corporal Mwakio must have been recorded in the Occurrence Book at the Police Post the OB itself should have been produced and the verbal evidence of Mwakio was, therefore, secondary evidence and amounted to

hearsay. We think this submission is misconceived. Mwakio himself said the witnesses told him a story which he heard himself and was merely telling the magistrate what he had heard. Direct evidence is set out in **section 63 (1) and (2)** as follows:-

“ 63 (1) Oral evidence in all cases must be direct evidence.

(2) For the purposes of subsection (1) direct evidence means

- (a) with reference to a fact which could be seen, the evidence of the witness who says he saw it.**
- (b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;**
- (c)**
- (d)”.**

Apart from the fact that Mwakio could have recorded the report made to him by the complainants in the OB, he heard the two complainants say that one of the persons who had robbed him used to sell fish and vegetables to him. We are at a loss to understand how that evidence could be described as hearsay; it was not. Whether it was believable or not was a different matter. The two courts below believed it and further believed the two complainants and their wives that they had known the appellant by appearance as he used to sell fish and vegetables to them. The appellant himself agreed he knew the complainants and was saying they were lying against him because of some rivalry over his wife. Once again the two courts below rejected that contention and on the recorded evidence there can be no basis upon which this Court, on a second appeal, can interfere with the concurrent findings of facts on those points.

A lantern was on in the room where the first complainant and his wife were attacked. The second complainant found the first complainant who had been forced to sit outside and the second complainant recognized the appellant by moonlight. The issue was not that of identifying a total stranger, but was rather one of recognition. Mr. Jengo contended that an identification parade ought to have been held to enable the witnesses pick out the appellant from such parade. That submission however ignores the unchallenged evidence of the prosecution witnesses that they had seen the appellant several times before the day of the robbery; the appellant himself said they knew each other, at the very least by appearance. It is also not to be forgotten that it was the two complainants who had themselves arrested the appellant and took him to the police post. In those circumstances, an identification parade would have served no useful purpose at all.

Mr. Jengo pointed out to us numerous factors from the evidence which he said constituted contradictions or inconsistencies in the evidence of the prosecution witnesses and which according to Mr. Jengo were not considered by the trial court and the first appellate court. According to Mr. Jengo, Maoja Charo, the first complainant, said four people entered the house while according to the wife Agnes, only one person entered the house. That was one contradiction or inconsistency. Maoja Charo and Mwakamsha Katana said they were hit on the face; the P3 reports produced by Dr. Gacheru (PW1), did not show any injuries to the face. That was another contradiction or inconsistency. Had Maoja Charo seen the appellant six times or three times before the night of the attack?

Even if these matters set out could be described as contradictions or inconsistencies, they really did not affect the substance of the prosecution case which the two courts below accepted. The substance of the case was that the two complainants were attacked during the night and their property stolen. A group of people whether four or more were involved in the attack and the two complainants and their wives who knew the appellant by appearance recognized him as being among the attackers. The two told Corporal Mwakio that same night that they had recognized the appellant who used to sell fish to them. After about one month, the two complainants arrested the appellant when he passed by their place. The trial magistrate accepted that evidence and stated as follows:

“Having assessed the contacts (sic) the court is satisfied the accused has been positively identified

and recognized by the complainants and the witnesses”.

The superior court, for its part and having reconsidered the entire evidence, stated as follows:

“All the (PW2, PW5, PW6) witnesses in their evidence stated that appellant used to supply them with fish in fact PW2 stated he was supplying them with fish and vegetables whereas PW3 said appellant was supplying them with vegetables and when recalled for cross-examination PW3 stated appellant supplied them with fish. There is nothing to suggest that appellant’s trade was restricted to supplying fish only and this variance is not fatal – he was not being identified by the fish – that was just an opportunity for interaction that they knew and recognized him.

Our finding is that there was adequate opportunity for identification – the lighting conditions were favourable and the time spent was enough for the witnesses to see and identify the appellant simply by his manner of dress in fact they did not claim that the said garments were his frequent mode or distinguishing mode of dressing. The witnesses simply referred to the kind of dress they each noted on the appellant on the night of attack.

.....
.....
.....

Our finding is that the learned trial magistrate considered the evidence adduced, adequately and the convictions and sentence legal”.

This being a second appeal, we can only interfere with these concurrent findings of fact if it was shown to us that there was no evidence at all to support them or that if there was some evidence, it was of such a nature that no reasonable court could be expected to found a conviction on it. None of these two propositions is available in the appeal. Mr. Ondari, the Assistant Deputy Public Prosecutor, supported the two convictions.

We have looked at the authorities which Mr. Jengo cited to us but we have not found it necessary to deal with any of them because none of them can carry the matter any further. We dismiss the appeal against the two convictions.

On sentence, we set aside the sentence on count two as the appellant is now serving a life sentence on count one. Those shall be our orders in the appeal.

Dated and delivered at Mombasa this 21st day of January, 2011.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR