



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OMOLO, O’KUBASU & GITHINJI, J.J.A.)

CRIMINAL APPEAL NO. 352 OF 2010

BETWEEN

JARED OCHIENG MANGIRAAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ.) dated 2nd December, 2006

in

H.C.Cr.A. No. 277 of 2003)

JUDGMENT OF THE COURT

The appellant was convicted by the Senior Resident Magistrate Kisumu, for two offences, namely, robbery with violence, contrary to **section 296(2)** of the Penal Code for which he was sentenced to death and for possession of narcotic drugs (*one roll of bhang*) contrary to **section 3(1)** as read with **section 3(2)** of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 for which he was sentenced to 6 months imprisonment. His appeal to the High Court against conviction and sentence for robbery was subsequently dismissed.

The complainant, **John Kalapata** (PW1) was a hawker in Kisumu Town. On 5th February, 2003 the complainant was going around Kajulu, Mamboleo area selling various goods. At about 1.00 p.m. when he was leaving for Kisumu Town following the Railway line he was attacked by two people. One of the two people hit him on the face and head and the complainant fell down. As he was rising up one of the two people wanted to stab him with a knife but the complainant held the knife and in the process his hand was cut. The complainant was again hit with a broom. A lady who was nearby screamed and the two people left with the complainant’s goods. The complainant ran to his house. He later went to hospital for treatment after which he reported to police.

Meanwhile one Otieno reported the robbery to **Clement Odhiambo Onyango** (PW3) (*Clement*) about half an hour later. At the same time Clement saw the appellant who was carrying goods walking near the railway line. When Clement and Otieno walked towards him the appellant dropped the goods and run

away. They chased him and arrested him near Kajulu hills and took him back to where he had dropped the goods. The appellant and the goods were taken to Kondele Police Station. The complainant later went to the police station and identified the recovered goods as his. He also identified the appellant as one of the people who had attacked him.

The appellant stated at the trial that as he was walking along a path at about 1.00 p.m. he saw three people ahead of him and when he reached where he had seen them he found goods in a paper bag after which he was confronted by people who alleged that he knew the people who had the goods.

The trial magistrate made findings of fact, among other things, that the appellant was found in possession of stolen goods not very far away from the scene; that the appellant ran away, was chased and arrested and that the complainant identified the appellant.

Similarly the superior court made findings that the appellant was in possession of the stolen goods in the vicinity of the scene; that the appellant dropped the goods and that he was chased and ultimately arrested.

The main complaint in this appeal is that the superior court erred in law in failing to evaluate the evidence connecting the appellant with possession of the stolen goods. **Mr. Otieno**, learned counsel for the appellant, contended that the superior court should have analyzed the evidence; that it should have given reasons for rejecting the evidence of the appellant and that the evidence did not prove the guilt of the appellant.

It is trite law that the first appellate court has a duty to re-consider the evidence, re-evaluate it and make its own independent findings while appreciating that the trial court had the advantage of seeing and hearing the witnesses which it does not have. A mere scrutiny of evidence is not sufficient.

The trial court relied on the evidence of the identification of the appellant by the complainant at the time of the robbery and also on the evidence of Clement that the appellant was in possession of the stolen goods. However the superior court did not rely on the evidence of identification of the appellant by the complainant saying that the complainant had not claimed to having identified the appellant. The superior court specifically said:

“The complainant did not claim in his evidence that he identified the appellant at the scene.”

That finding is inconsistent with evidence of the complainant who categorically said that the appellant was one of the people who robbed him. Nevertheless, the evidence of identification of the appellant by complainant was unreliable. He was attacked by two people suddenly on the head and face and injured before he ran away. He had not reported to the police before the appellant was arrested. He saw the appellant at the police station after arrest. He did not claim to have known the appellant before. Thus the evidence of dock identification was unsatisfactory.

Regarding the evidence relating to recovery of the goods and the arrest of the appellant, it is clear that the trial magistrate misdirected himself by finding that the appellant had said that he was found with the goods which he had picked from the ground. This is what the learned magistrate said:-

“Accused did not mention this only saying he was found with goods which he had picked from the grounds.”

What the appellant said in his defence was that he saw goods in a paper bag where he had seen three people. The superior court correctly appreciated the evidence of the appellant for it said:-

“... The conviction was safe because the explanation that the appellant was merely found near the spot where other people had dropped the goods was not found reasonable.”

The conviction of the appellant was mainly dependent on the evidence of Clement. In our view the superior court relied on such evidence without sufficiently evaluating it. Firstly, the robbery was reported to Clement 30 minutes later. According to the complainant he was attacked by two people who went away with his goods. However, according to Clement he saw only one person carrying goods.

Secondly, according to the trial magistrate the appellant was found with the items “*not very far away from the scene*”. According to the superior court the appellant was found “*in the vicinity of the incident with the goods.*”

These findings that the appellant was arrested near the scene of the robbery is with respect unsupported by evidence. Clement did not know where the robbery took place. He was only told about the robbery by one Otieno who was not called as a witness. Furthermore, the appellant was seen about 30 minutes after the robbery raising the possibility that he had travelled for some time. It appears to be a strange coincidence that as soon as the robbery was reported to Clement by Otieno, he saw the appellant walking near the railway line carrying the goods.

Thirdly, the evidence of Clement does not conclusively show that the person who was arrested is the person who had dropped the goods. We say so because Clement does not disclose how far from the goods the appellant was arrested or the number of people who chased the appellant or say that they never lost sight of him. The evidence of the complainant that the appellant was “*arrested far*” shows that the appellant was not arrested near the scene of the robbery.

From the foregoing, it is clear that had the superior court properly evaluated the evidence it would have probably come to the conclusion that the evidence did not inextricably connect the appellant with the robbery.

In final analysis we are satisfied that the superior court failed to perform its duty.

In light of the foregoing, it is unnecessary to consider the issue raised by Mr. Otieno in the course of the appeal that the prosecution was conducted by an unqualified person – a police constable, which issue incidentally was neither a ground of appeal in the superior court nor in this Court.

There is no appeal against conviction and sentence for possession of bhang. For those reasons the appeal is allowed, the conviction is quashed and the sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Kisumu this 17th day of March, 2011

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR