



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: BOSIRE, ONYANGO OTIENO & VISRAM, J.J.A

CRIMINAL APPEAL NO. 284 OF 2008

BETWEEN

ROBERT EKAI MARTIN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Koome & Maraga, JJ) dated 11th December, 2008

in

H.C.C.R.A. NO. 245 OF 2006)

JUDGMENT OF THE COURT

This is a second and last appeal. The appellant, **Robert Ekai Martin**, was charged before the Chief Magistrate's Court at Nakuru with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars were that:-

“On the 16th day of July, 2005 at Kimakia Estate Njoro within Nakuru District of the Rift Valley Province jointly with others not before Court while armed with offensive weapons namely bows and arrows, pangas, and rungus robbed Michael Macharia Karanja Kshs.4,500/= 15 Kgs of sugar, 12 packets of unga ngano, 10 Kgs of rice, 10 pairs of eveready all valued at Kshs.7,088/= and at or immediately after or immediately before the robbery used actual violence to the said Michael Macharia Karanja.”

He pleaded not guilty to the charge, but after the learned Senior Resident Magistrate (M. W. Onditi) considered the evidence adduced by five prosecution witnesses, his defence and evidence of three defence witnesses, the appellant was found guilty of the offence as charged, convicted and was sentenced to death. He was not satisfied with that verdict and the sentence. He appealed to the superior court vide

Criminal Appeal No. 245 of 2006. The superior court (Koome and Maraga JJ) in their judgment dated and delivered on 11th December 2008 dismissed that appeal and hence the appeal before us premised on five grounds filed by the appellant in person, seven supplementary grounds also filed by the appellant and two further supplementary grounds filed by Gitau Njogu & Company, Advocates for the appellant in this appeal. A brief summary of those grounds is that there was no proof that he was found under a bed with a metal bar allegedly used in the robbery; that there was no proper evidence of identification even by recognition; that his defence alleging a grudge between him and the complainant was not considered by both the trial court and the first appellate courts; that the first appellate court failed to consider his defence as is required by law; that evidence of PW2 was not credible and should not have been relied upon by both courts; that the chain of evidence leading to his arrest did not establish his guilt; that the conviction was not supported by evidence that was adduced by the prosecution witnesses and that the two courts below erred in failing to appreciate that the death sentence was not mandatory and thus the trial court erred in awarding death sentence and the first appellate court erred in law in upholding it.

Mr. Njogu, the learned counsel for the appellant submitted that identification by recognition could not be relied upon as the circumstances under which such identification proceeded were difficult as the offences took place at night and the only sources of light were torches flashed by the robbers. He stated further that although this was a matter of recognition, nonetheless the evidence was doubtful as a result of those circumstances. Further the courts below did not consider the appellant's defence. He urged us to allow the appeal.

Mr. Omutelema, the learned Senior Principal State Counsel opposed the appeal submitting that circumstances for proper identification by recognition were favourable and although it was at night the appellant and his colleagues had powerful torches and thus there was enough light for purposes for recognition of the appellant who was well known to the first two witnesses i.e. the complainant and PW2. Further the appellant's conduct of hiding under a bed with a metal bar allegedly used in the robbery, provided further support to the prosecution's case; and lastly, he submitted that the defence of the appellant alleging grudges between him and the complaint were considered and rejected. He asked us to dismiss the appeal.

We will consider all these submissions, the record, the evidence, the judgments of the trial court and the superior court, and of the law, but first, the brief facts giving rise to the appeal before us.

On the night of 16th/17th July 2005, Michael Macharia Karanja (PW1) a businessman who runs a shop and does retail of assorted goods at Kimakia, Njoro together with Peter Wanjogu (PW2) his nephew, were asleep in one of the rooms in the aforesaid shop. At 3.00 a.m., robbers broke the shop's door and entered the shop. Some of those robbers were armed with crude weapons, and others with pangas, arrows and pieces of wood. They ordered the two to continue sleeping as they stole shop goods. Michael got annoyed and started fighting the robbers. Peter joined in the fight. But before long, they were overpowered by the thugs. They ran out but after they had been injured. Michael was injured on the mouth and on his right hand second finger. Once outside, they called neighbours. The robbers had spotlights which were bright. On sensing the approach of the neighbours, the robbers ran away. Michael told the neighbours who included Samuel Mbogo Karanja (PW3) that two of their attackers were the appellant who was known to them and whose nick-name was Kijana and another called Fisi Nyonge. Peter and Samuel knew the appellant's house. They traced him to his house which was not far from the scene and on reaching there, they found the door locked with a padlock from outside. A woman they found there said the appellant was not there. On threatening to report the matter to the police, a young man opened the door from outside. They found the appellant inside the house under the bed. A metal bar similar to the one he was seen with at the time of the robbery was with him there. Michael contacted the police by telephone and talked to PC Philemon Kibenei (PW4) who was on duty at Njoro Police Station. Philemon booked the report in the Police OB. They confirmed that they had arrested one suspect whose name was Ekai. Soon they took the appellant to the police station where PC Philemon re-arrested him and also received the

metal bar, bow and 3 arrows. Michael and Peter went to Njoro Health Centre where Jonathan Moromoch (PW5) a clinical officer examined them and confirmed that they were injured. In each case, the degree of injury was classified as harm. The appellant was taken to court on 19th July 2005 where he was charged as stated above. In his defence, he gave an unsworn statement and called three witnesses. His defence was that he was not involved in the alleged robbery and was arrested as he slept in his house by police officers without informing him the reason for his arrest. He blamed the entire episode on Michael who, he said framed him because on 20th May 2005, he went to Michael and bought goods from him and gave him Ksh.500/- but Michael failed to give back change as he (Michael) had promised. They had an altercation in which he threatened to report Michael to police and Michael's response was that he would "finish" him though he eventually returned the change. Maurice Ekwam was his first witness. On 15th July 2005, he heard screams from the appellant's house. He responded and found people chasing thugs. He joined them and they chased thugs up to Ngongogei farm. They returned together with complainant and went to Jirani Estate where appellant was staying. They knocked at appellant's door and the members of the public arrested the appellant and a lady. The appellant was taken to the police station after Michael pointed him out as one of his attackers. In cross-examination he agreed he did not know where the appellant was at the time of robbery as he was only awoken up by screams from the members of the public. Jane Akuru (DW3) was the appellant's neighbour. On 15th July 2005 at 3.30 a.m. people knocked at her door and requested her to call the appellant. They entered appellant's house and began beating him, after they had assaulted his brother. She screamed and people responded. According to her, that was how appellant was arrested. In cross-examination, she said the appellant was in his house that night as his radio was on. The last of the appellant's witnesses was Margaret Lopkoki (DW4). She testified that she heard Akuru raising alarm and she woke up, went to appellant's house where she met many people. She found the appellant already under arrest. She did not know where the appellant was that night.

This is a second and last appeal as we have stated. Pursuant to the provisions of **section 361 (1)** of the Criminal Procedure Act, only matters of law would be due for consideration unless it is demonstrated that the trial court and the first appellate court failed to consider matters they should have considered or considered matters they should not have considered or that looking at the evidence as a whole they were plainly wrong in their findings of facts, and in each of those situations such failures would amount to matters of law. In this appeal, the robbery took place at night. However, the robbers had torches described by Michael and Peter as producing very bright light and it was through that the appellant, who was coming from the neighbourhood was identified by recognition as one of the perpetrators of the robbery upon the complainant. The law is clear, that although identification by recognition of a suspect is better than identification of a stranger, nonetheless, even in cases of recognition it is essential to exercise care before an accused person can be convicted upon such recognition. In the case of ***R vs. Turnbull (1976) 3 ALL ER 549 at page 552***, the House of Lords stated:-

“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

In this case, matters did not stop at recognition only. The appellant was found some few minutes after the robbery in his house but under the bed with the metal bar that resembled the one Michael said he had seen him carrying at the time of the robbery. He also still had a bow and arrows in the same house. As if that was not enough, he had had the door to his house locked with a padlock from outside. The learned Judges of the superior court considered those aspects and stated:-

“On going to appellant's house they found his house locked with a padlock from outside, and it was not until they threatened to call police and break in that appellant's brother came out through the window and opened the door. When they went in they found the appellant hiding under the bed. Before that a woman who was in the house denied his presence.

That is not the conduct of an innocent neighbour. In the cases of Malova vs. Republic (1980) KLR 110 citing the Uganda case of Terikah vs. Uganda (1975) EA 60 the Court of Appeal held that the conduct of an accused person escaping from the scene of crime was indicative of his guilt. In this case the conduct of the appellant hiding under the bed and instructing his relatives to say he was not in, corroborated PW1 and PW2's testimony that he was one of the robbers."

We agree. In this case there was not only evidence of identification of the appellant by recognition but over and above that, there was evidence of his conduct. Even though one of his grounds of appeal is that there was no sufficient evidence that he was found hiding under the bed with a metal bar seen at the scene of the robbery, Peter and Samuel testified that they both went to his house and found him under the bed. All the evidence on his being recognized at the scene by Michael, and Peter and on his conduct of hiding under bed with a metal bar as given by Peter and Samuel, were matters of fact. The trial court analysed the evidence and accepted it as credible. The first appellate court likewise exercising its duty as such revisited the evidence afresh, analysed and re-evaluated the same and also accepted it. Under **section 361 (1)** (supra) we have no reason to consider the same as they were matters of fact and were properly considered by the two courts below.

On the ground that the appellants defence was not considered, we again find no reason to interfere with the judgment of the trial court nor of the first appellate court on that score. The first appellate court had this to say on that issue:-

"He called three witnesses who said they did not know where he was at the time of robbery. Their evidence was mainly on his arrest by the neighbours."

That answers the complaint and that ground cannot stand. The appellant's defence in which he denied the offence and the evidence of his witnesses were considered and were rejected. The other ground was that the trial court and the first appellate court did not consider his defence particularly as concerns the grudge he alleged existed between him and the complainant. On our careful reading of the record, we find that allegation is not well founded. The superior court stated on that issue as follows:-

"The appellant's allegation of a grudge between him and the complainant over a quarrel they had on change about two years previously is simply inept and cannot hold. Even if there was any such a quarrel it could not have been the basis of a criminal charge as serious as this one and the trial magistrate was right in rejecting it."

It thus cannot be seriously contended that the issue of a grudge between the complainant and the appellant was not considered. It was clearly considered and rejected. The superior court felt that even if it did exist, its existence was of no consequence as far as the charge was concerned. We may add that if there was any grudge between the complainant and the appellant, and even if the complainant's evidence were to be ignored on that account, there was still the evidence of Peter and the appellant's conduct on which to base a conviction as those were strong pieces of evidence in themselves. The appellant stated in his grounds of appeal that the evidence of PW2 should not have been relied upon to convict him, but he did not state any reasons why he felt it should not be relied upon, neither did Mr. Njogu, address us on that issue. We leave it at that as we see no reason on our own why it cannot be relied upon. Indeed as indicated above if there was a grudge between the complainant and the appellant, which we cannot possibly discern, Peter an independent eye witness would have testified on it.

Mr. Njogu stated from the bar that he did not wish to pursue the appellant's appeal and sentence as the appellant's death sentence had been commuted to life imprisonment. We will say no more on it.

The upshot of all that we have stated above is that this appeal cannot stand. It is dismissed.

Dated and delivered at Nakuru this 10th day of June, 2011.

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR