IN THE COURT OF APPEAL
AT KISUMU
(CORAM: BOSIRE, AGANYANYA & NYAMU JJA)
CRIMINAL APPEAL NO 291 OF 2010
BETWEEN

KEVIN OMONDI NYANDO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (KaranJa & Aroni JJ) dated 20th July 2010

in
H.C.CR.A. NO 164 OF 2009)
****

JUDGMENT OF THE COURT

Following his conviction and sentence for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code, before the Chief Magistrate's Court at Kisumu, Kevin Omondi Nyango alias Kevo, appealed against the conviction and sentence to the High Court; which Court heard his appeal and upon re-evaluation of the evidence came to the conclusion that the appellant's conviction was based on sound and overwhelming evidence. The appeal before us is the appellant's second, and by dint of the provisions of **section 361** of the Criminal Procedure Code, such an appeal is confined to issues of law only. **Section 361** aforesaid, as material provides that:-

" 361 (1) A party to an appeal from a subordinate court may, subject to sub-section (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section.

(a) On a matter of fact, and severity of sentence is a matter of fact; or

(b) against sentence, except where a sentence has been enhanced by the High Court unless the subordinate court had no power under section 7 to pass that sentence."

In his home-made memorandum of appeal the appellant has revised the following grounds:-

(1)The High Court failed to analyse and re-evaluate the evidence as a first appellate court.

(2)The evidence regarding his identification was insufficient and unbelievable.

(3)The evidence connecting the appellant to the commission of the offence charged lacked consideration.

(4)The trial magistrate did not warn himself of the dangers of convicting him when circumstances regarding his identification were difficult.

(5)The trial and first appellate courts failed to consider the appellant's alibi defence.

The main complaint raised by the appellant is identification. The offence for which the appellant stands convicted was committed at night. Fredrick Onyango Odawo, the complainant, who is an architect arrived at his Korando Village home at 12.30 am on 25th July 2009 in his Toyota car, Reg. NO KAT 044W, parked his said car, opened the door of his house and returned to his car to collect his travelling bag. As he walked back to his car he saw five boys armed with sticks and clubs walking toward him. It had rained, and therefore the ground was wet and a bit slippery. He slipped and fell down. Security lights were on, and he was able to observe and recognize Kevin Omondi, the appellant herein, as one of the five boys. The boys set on him and rained blows on him. They rummaged his pockets and took his wallet which contained Kshs 3000/-, they took his wrist watch valued at Ksh 5000/-, and his bag which contained a track suit, jeans trousers, towel, open shoes blue T-shirt, small electric iron box, among other items, after which they escaped. In the course of the attack the complainant raised an alarm calling his brother Bernard Otieno Odawa (PW2) whose house was nearby. PW2 responded to the alarm, went to the complainant's homestead and was able to see the complainant's attackers. He recognized the appellant, Mzee Ndege, Silas Adongo as among the people who had attacked the complaint. The attackers confronted him but he escaped before they could reach him. He ran to the house of one Joketeeni and reported to him about the robbery at the complainant's home. Together they proceeded there but found that the robbers had already escaped. The complainant had sustained some injuries on his leg and hand, as also on his back.

Both the complainant and PW2 testified that they knew the appellant before since he hailed from the same village with them. They knew the appellant by name and even the fact that he was popularly referred to as " Kevo", short for Kevin. It is however, noteworthy that in their first report to the police the two witnesses did not give the name of the appellant; but merely reported that his attackers were known to him.

The appellant was arrested on 25th July 2009 a day before the complainant recorded a statement with the police. None of the stolen items was recovered. Incidentally the complainant is the one who arrested the appellant with the assistance of one Alphonse Omondi Ombuya (PW4), a casual worker with a Mattress Company. The complainant saw the appellant walking past his front gate and went after him. The appellant tried to run away to avoid arrest but was unsuccessful. PW4 was after to catch up with him and arrested him. He is a person he knew well, having attended the same school together and they had been friends. He was later handed over to the police at Kisumu and was charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code.

As expected, the appellant denied the offence. He admitted he was arrested, and alleged that those arrested him beat him up. He denied he knew Mzee Ndege or one Cyrus who were alleged to have been with him during the robbery of the complainant.

The trial magistrate based the appellant's conviction on recognition. It was his view that both the complainant and his brother knew the appellant well before and with the aid of electric lights in the complainant's homestead, the two were able to clearly observe and recognize the appellant. He therefore believed them and held that the appellant was one of the people who attacked and robed the complainant. He was not oblivious of the fact that the robbery was committed at night time and in that regard the learned trial magistrate rendered himself thus:

" It is a fact that the complainant and PW2 in this case are brothers, this incident took place at their home, after midnight. It is inconceivable that one would expect an independent witness at that hour in somebody's home. I have warned myself as to the danger of mistaken identity as was envisaged in the case of Paul Etole & Another v Republic C.A. No 24 of 2000 where it was observed that:

"the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made finally, it should remind itself of any specific weakness which had appeared in the

identification evidence."

The trial magistrate then cited with approval this Court's decision in **Anjononi & Others v Republic (1980) KLR 59** and concluded:-
"I am satisfied that the circumstances of that instant case are significantly the same and I would find that there was no mistake in the identity of the accused."

The High Court, on first appeal like the trial court, relied on the case of **Paul Etole & Another v Republic** (supra) and after rehashing the evidence of the complainant and PW2, rendered itself thus:

" So that, the identification of the appellant, was through recognition, which is more reliable that identification of a stranger, although mistakes are still prone to occur. However, in this instance PW1 and PW2 recognised the appellant as a person previously known to them. They indeed both knew his name. The Court is convinced that the illumination was bright enough to enable PW1 and PW2 recognise and identify the appellant."

The Court then went on to consider other evidence which in its view connected the appellant to the commission of the offence, and the other grounds the appellant had raised to challenge his conviction. In the end that court was satisfied that the appellant's conviction was well founded and dismissed his appeal and thus provoked the appeal before us.

We earlier set out the appellant's grounds of appeal and observed that his main complaint was the issue of his identification. In his submissions before us Mr James Mwamu, for the appellant stated, inter alia, that the High Court did not re-evaluate the evidence against the appellant which, had that court done so, would have come to the conclusion that the evidence against the appellant was insufficient to sustain his conviction. He took us through the evidence of identification and sought to poke holes in the prosecution case. His main point was that both PW1 and PW2, in their initial reports to the police did not give his name, in his view, suggesting that they did not recognize him as they alleged.

This was not a case of a single identification witness in difficult circumstances. Both courts below recognized this as they alluded to the circumstances at ***the locus in quo***. In addition the High Court Judges (Karanja and Aroni, JJ.) appreciated their duty as a first appellate court, namely, to reconsider, analyse and re-evaluate the evidence which was before the trial court, and the need for it to draw its own conclusions from it giving allowance to the fact that they did not see or hear the witnesses testify as to fully assess their credibility. In this regard the learned Judges cited the often cited case of ***Okeno v Republic*** [1972] EA 32. The case, to our minds, was not cited perfunctorily. The learned Judges did consider the circumstances at the scene, cautioned themselves of the possible dangers of mistaken identification, but were satisfied, the appellant's identification was free from the possibility of a mistake. PW1 was categorical that he recognised Kevin, a person he knew before. His brother who unlike PW1 who said he panicked when he saw the five boys, did not panic. He was able to observe those boys before they threatened to attack him. It is noteworthy that PW1 is the person who arrested the appellant with the assistance of PW4. It is clear evidence that he knew the appellant was one of his attackers. PW2 on the other hand walked to where the appellant and his accomplices were and asked them what was going on. He engaged in a conversation with them. In view of that he had ample opportunity to observe them. It is instructive that he recognized more people than PW1; because unlike PW1 he was not under comparable stressful circumstances.

It is true as submitted by Mr Mwamu that no recovery was made of any of the items which were stolen from the complainant. That alone, in our view, would not weaken an otherwise clear case of recognition. Had any recovery been made it would only have served to strengthen the case against the appellant.

The initial reports to the police by both PW1 and PW2 were raised by Mr Mwamu as a ground for discrediting the two witnesses' evidence on recognition. The question we ask ourselves is what did the two witnesses tell the police? PW1 testified that his report was that he had been robbed by Kevin Omondi. The trial magistrate has noted in the recorded proceedings that the name of the appellant is

missing from that report. PW2 testified that he wrote the appellant's name in his statement to the police. PC Edwin Mahera (PW1) of Kisumu Police Station, Crime Branch Section, testified that he received the complainant's report on the robbery. His evidence under cross-examination, in that regard was as follows:

"The complainant made a report on 25th July 2009. He was with other members of the public. I visited the scene. He mentioned the names of Mzee Ndege, Cyrus and Kevin Omondi. You were arrested by members of the public. No relevancy was made. The statements were recorded after your arrest. I conducted interrogation. You were recognized by the complainant and another witness. He is a brother of the complainant."

In his judgment the trial magistrate considered the aforesaid evidence. He did not think a failure, if at all, of PW1 and PW2 to mention the name of the appellant was fatal to the prosecution case. In our view, PW2 was categorical that he mentioned the appellant's name, and PW6's evidence bears him out. In view of this, we have no basis for faulting both courts below**.**

Besides the other issues which Mr Mwamu raised for instance the age of the complainant's injuries as found by the doctor who examined him, are of no consequence. We say so advisedly. The robbery occurred at about 12.30 a.m. on 25th July 2009. Doctor Baraza Chris (PW5) testified that he examined PW1 on 26th July 2009 at 3.30 p.m. If we compute the time lapse since the robbery, it was about 40 hours. The doctor assessed the age of the injuries as 48 hours. The difference is about 8 hours. The assessment was not an exact assessment of the age. We agree with Mr Kiprop, State Counsel, that the difference is insignificant.

The other grounds raised by the appellant in his memorandum of appeal have no basis in view of the evidence on record.

In the result we find no basis for interfering with the appellant's conviction. His appeal fails and it is accordingly dismissed. It is so ordered.

Dated and delivered at Kisumu this 4th Day of November, 2011.

S.E.O BOSIRE

.....
JUDGE OF APPEAL

D.K.S. AGANYANYA
.....
JUDGE OF APPEAL

J.G. NYAMU
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR