IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 301 OF 2009

BETWEEN

LEWIS MUSUNDI MAKOYI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction and judgment of the High Court of Kenya at Bungoma (Muchemi & Chitembwe JJ) dated 14th July 2009

in

H.C.CR.A. NO. 82 of 2009)
****

JUDGMENT OF THE COURT

LEWIS MUSUNDI MAKOYI, the appellant, was on 24th September 2008 convicted by the Principal Magistrate, Bungoma, of robbery with violence contrary to **section 296 (2)** of the Penal Code and sentenced to death. His appeal to the High Court of Kenya at Bungoma (Muchemi and Chitembwe JJ) against both conviction and sentence was dismissed on 14th July, 2009. This is a second appeal.

On 16th October 2007 at about 6.30 p.m. Godwin Wanyonyi (PW1) who operated a motor bike taxi at Mayanja market within Sirisia Location of Bungoma West District, Western Province, was hired by two men to take them to Bisunu market within the same location. Just before reaching the shopping centre the two passengers alighted and immediately attacked him with a knife. PW1 fell down and a struggle ensued with the assailants wanting to snatch from him the motor cycle. As the struggle continued PW1 was screaming and calling for help. Mwalimu Martin Mulongo (PW2) who lived about 150 metres from the road heard the screams and rushed to the scene while flashing his torch. The two assailants on

seeing PW2 started off the motorcycle and disappeared with it. The time was bout 7.30p.m.

It is the testimony of PW1 that he did not identify his attackers as it was dark when he ferried them on the motorcycle. He testified in the trial court that:-

> **" I had not known you before. I was attacked in darkness.....**
> **It is not me who reported to the police. I just heard that you have been arrested."**

During the struggle for the motorcycle PW1 snatched the knife from one of the assailants and stabbed one of them in the palm.

As a result of the injuries received during the robbery PW1 was rushed to the hospital where he was admitted for two days.

Chrispinus Bakasa (PW4) who also operated a motor bike taxi within the village was informed by another taxi operator that the stolen motor cycle had been seen with one Moses. PW4 and some members of the public mounted a search which led them to the home of the appellant's parents. When the appellant saw them he ran away. A search was conducted in several houses within the homestead and in one of them PW1's motorcycle was recovered. Inside the house, appellant's photographs, a bank plate, an identity card and other personal documents were found. All bore the names of Lewis Musundi Makoyi, the appellant before us. It is worthy of note that all the witnesses testified before the trial court that they only heard that a person known as Moses had been seen with the stolen motorcycle but none of them knew for certain who that person was. It is also significant that the motorcycle was recovered in the house within the homestead of the appellant's parents in the absence of both the appellant and his parents. In fact there was nobody in that house.

The appellant in his defence before the trial court stated that he was arrested in his electronics shop. He averred that he knew nothing about the motorcycle and its recovery. He told the trial court that he was assaulted on arrest by both the police and the members of the public.

In convicting the appellant the learned trial magistrate stated:-

> **"Evidence for the prosecution is basically hinged on the identification parade. As in the recovery the connection between accused and the house from which the motor bike was removed required direct evidence. The complainant was able to identify the accused from the parade."**

In dismissing the appellant's first appeal, the superior court stated:-

> **"The evidence of identification in this case is crystal clear and corroborated.**

> **PW1 identified the appellant during day light and was with him on his motorbike as a passenger for thirty (30) minutes. PW4, PW5 and PW7 went to the home of the parents of the appellant and saw him before he ran into a coffee plantation. The recovery was recent in a span of twenty four (24) hours after the incident. The mother of the accused reluctantly showed police his house in the coffee plantation. Police may have found it difficult to record a statement or testify against her son. We have no doubt that this gap was filled by the recovery of accused's identification documents in his house. This was a confirmation that the said house belonged to him."**

Mr Mtai learned counsel for the appellant started his submissions by saying that the main ground in this appeal was identification. He contended that evidence of identification was not evaluated either by the trial court or the superior court (the first appellate court). Further, Mr. Mtai submitted that conditions favouring a correct identification were difficult as it was already dark when the alleged robbery was committed. He also submitted that it was not proved at all that the house in which the motorcycle was recovered was established to belong to the appellant and there is no evidence at all on recorded as to whom it belonged.

Mr Mtai, also, submitted that the appellant's constitutional rights under **section 77(2) (b)** of the constitution had been violated as the language used in the testimony of some of the witnesses had not been shown or that that language was understood by the appellant.

Mr Omutelema, the learned Principal State Counsel, submitted that the superior court correctly re-evaluated the evidence and came to its own conclusion that the appellant was guilty as charged.

Having considered the submissions by Mr. Mtai and Omutelema, we are of the view that the main issues raised in this appeal are identification of the appellant and the duty of the first appellate court to re-evaluate the evidence.

Thus, the crux of the appeal is: in whose house was the stolen motorcycle found? This is so because since PW1 did not positively identify the appellant as his assailant could the question of possession be visited upon the appellant? Though the trial court posed the question on the ownership of the house, it did not attempt to answer it. The first appellate court equally failed to discuss the issue or to determine it. It would, in our view, be illogical to conclude that the mere findings of some documents in a certain house per se does prove beyond reasonable doubt that the owner of those documents is the owner of the house. Of course, it depends on the particular circumstances of each case. In the matter before us no evidence was tendered to show who owned the house in question and whether the appellant had been seen therein

at the material time.

Mr Mtai again argued that the identification parade was improperly conducted in that the appellant was the only person with a bandaged hand in the parade and was quickly picked out by PW1 who told the trial court:

"I identified the accused by the appearance on your hand."

It would appear therefore that the appellant was identified by PW1 only because he had a bandaged hand and presumably the person he picked was the person he had injured during the robbery and not because he had identified him at the scene. See **Njihia v Republic [1986] KLR 422**

The identification parade conducted in this case was not proper because contrary to the Police Force Standing Orders the appellant who was obviously suffering from some disfigurement was not afforded facilities to ensure that the bandaged hand was not especially apparent during the parade.It was prejudicial to the appellant and indeed a mockery of justice to place the appellant with a bandaged hand among eight healthy persons with no apparent physical disabilities. See **Oluoch v R 1985 KLR 549**

We would readily agree with Mr. Mtai that the superior court did not subject the evidence on identification to a fresh and exhaustive examination and make its own findings as it is required by law to do as the first appellate court.

On our part, having considered the entire evidence on record, together with submission of both counsel we think that the case against the appellant was not proved beyond all reasonable doubt. The conviction therefore is unsafe.

For the foregoing reasons, we allow the appeal mainly on the ground of unsatisfactory identification parade. We see no reason to determine the issue raised on the alleged breach of the appellant's constitutional rights.

In the result, the conviction is quashed and the sentence of death is set aside.

The appellant is set at liberty forthwith unless otherwise lawfully held. We so order.

This judgment has been delivered under **rule 32(2)** as Nyamu JA declined to sign it.

Dated and delivered at Eldoret this 28th day of May, 2010.

P.K. TUNOI
.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

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

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

DEPUTY REGISTRAR.