



REPUBLIC OF KENYA
COURT APPEAL OF KENYA
AT NAIROBI

Criminal Appeal 220 of 2006

PLANTINO WAAL AYII.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kitale (Karanja & Dulu, JJ) dated 5th May, 2006

In

H.C.C.R.A. NO 43 PF 2005)

JUDGEMENT OF THE COURT

PLANTINO WAAL AYII, the appellant, was convicted of robbery with violence contrary to section 296(2) of the penal code and sentenced to death by the Senior Resident Magistrate at Lodwar on 11th May, 2005. His first appeal to the High Court of Kenya at Kitale was dismissed on the 5th May, 2006 by Karanja and Dulu, JJ. And hence this is his second and final appeal.

The prosecutor's case before the trial court was as follows. During the night of 8th and 9th October 2004 at about 3.00 a.m.

Ndahijimana Wallars (pw1) and his wife Sara (pw2) were asleep in their house at Zone V in Kakuma Refugee Camp. PW2 heard some things falling inside the adjacent room. She woke up and looked through a hole in the window. She saw three people inside the said room and two others outside the house. She woke up her husband PW1 and told him what she had seen. PW1 also checked outside and he saw five people. He testified that there was intense moonlight which made him identify the appellant herein whom he said he had known for two years prior to this incident. Both PW1 and PW2, who also said she recognized the appellant, described the clothes the appellant was wearing that night. They testified that the appellant was wearing white and green T-shirts, one worn under another and a black pair of trousers. PW1 hurriedly dressed up and crept out where the robbers were. He got hold of the Appellant who nonetheless aimed a knife at him and stabbed PW1 on his back near the hip. PW1 held on to the appellant as he and PW2 started screaming loudly in order to attract the attention of their neighbours. The other members of the gang fled. Neighbour, among them some Ethiopian Security Guards responded and rushed to the scene where they found PW1 and the appellant struggling. In the process, PW1 who

appeared over-whelmed fell down unconscious while still holding onto the appellant. The neighbours rescued PW1 and administered first aid. They arrested the appellant and tied him with ropes. Later, they handed him over to P.C Kiprotich (PW3) of Kakuma Police Station. This witness recovered the knife and some articles allegedly stolen from PW1 at the scene. PW1 was taken to the local IRC hospital where he was admitted for 3 days and discharged thereafter. DR. DAN KOROS (PW4) examined him and completed the P3 form, which was produced before the trial court as an exhibit. PW4 confirmed that PW1 had sustained a stab wound on the left lumber region about 4cm in diameter and 10 cm deep.

He assessed the degree of injury as grievous harm.

In his defence the appellant told the court that on the material night he had been given a lift and dropped at he junction to Kakuma Refugee camp along the Lokichoggio – Kakuma road and he started walking to his house. He heard some noise and then he saw a crowd of people armed with crude weapons. They stopped him and started interviewing him. They then ordered him to sit down. He said that PW1 was in the crowd and told the others that the appellant had troubled him for a long time and so they tied him up and beat him. He said that he lost consciousness and when he regained it, he found himself at the hospital where he admitted for two days. Upon discharge, he was taken to Kakuma Police Station where he was charged with the offence now before the court. He claimed that the charge was a frame up. He added that he had previously worked for PW1 at his posho mill for four months but PW1 had refused to pay him his dues and so they had a grudge. From this evidence, it can safely e concluded that the appellant and PW1 were not strangers, since they had known each other before the commission of the crime charged.

The trail court in convicting the appellant, held, inter alia:

“in view of the recovery of Exhibits 2,3,4,5 and 6 together with the direct evidence of PW1 and PW2, who recognized accurately and unmistakably coupled with the wound sustained on PW1 as per Exh1 and the evidence of PW3 and PW4 it cannot be said accused was framed up. All these accused. Therefore, his defence version is mere denial and spurious. Furthermore, visual identification of accused by PW1 and PW2 who had known him previously was reasonable and sufficient as the identifying witnesses were at least, two in those circumstances where accused was arrested on the spot”.

In his first appeal the appellant put in written submissions in which he analyzed the evidence of the witnesses and submitted; firstly, that the trail magistrate had failed to note that he case against him was not properly investigated as the law enjoins; secondly, that the essential witnesses were not called to testify; and thirdly, that the testimony of PW1 and PW2 was concocted and rehearsed.

The superior court, however, did not agree with him. It concluded that:

“The issue of identification does not therefore arise. There is no dispute that the appellant and PW1 Knew each other very well before”.

And also that:

“Our finding is that other than seeing and recognizing the appellant in their house, PW1 was able to get hold of him and ensured that he did not leave the scene until he was handed over to the police. As stated earlier on in his judgment, the issue of identification or mistaken identify does not arise as the appellant was arrested at the scene. He did not disappear from the sight of the witnesses from the time they saw him first inside their house upto the time they handed him over to PW3”.

On the basis of that evidence, the superior court was satisfied that the appellant’s conviction was safe as the case against him had been proved beyond all reasonable doubt and dismissed his appeal.

Mr. Modi, the leaned counsel for the appellant, challenges the conclusions reached by the two courts below; mainly, on the ground that the evidence against the appellant was contradictory and inconsistent and, that the same was not re-evaluated and analyzed by the first appellant court and that in not doing so it

had prejudiced the Appellant.

Mr. Omutelema the learned Senior State Counsel, in supporting the appellant's conviction reiterated what the superior court said in its judgment.

PW1 and PW2 testified to have recognized the appellant having arrested him in a earlier incident of robbery against PW1. The appellant on other hand testified that he had been employed by PW1 prior to the incident but had failed to pay him for his services. This admission in, our view, strengthened the evidence of PW1 and PW2 on recognition of the appellant. Moreover, the appellant was arrested outside the appellant's house with a knife near him. He appellant did not offer any reasonable explanation as to what was doing there at that ungodly hour. We do not therefore discern any contradictions or inconsistency in the evidence. Again, we cannot fault the first appellate court since it strictly followed the guidelines issued by the court In **Okeno V.R** [1972] EA 32.

On the basis of the evidence on record, which both courts below analyzed and accepted, we have no basis for holding that the identification of the appellant which was mainly of recognition was mistakable. There is overwhelming evidence to show that the appellant committed the offence of which he was convicted; and it is our judgment that he was properly convicted. We have no basis for interfering with his conviction and, accordingly, we dismiss his appeal.

Dated and delivered at Eldoret this day of 24th April 2009.

P.K. TUNOI

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JUDGE OF APPEAL

D.K.S AGANYANYA

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR