



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MALINDI

Criminal Appeal 49 of 2007

SAMSON KATANA KAZUNGU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Sergon & Maraga, JJ) dated
8th May, 2007

in

H.C. Criminal Appeal No. 207 of 2004)

JUDGMENT OF THE COURT

The appellant in this second and last appeal, **Samson Katana Kazungu**, together with one Mugandi Mwandalu Murema, were charged in the Senior Resident Magistrate's Court at Malindi with one count of robbery with violence contrary to **section 296(2)** of the Penal Code; one count of rape contrary to **section 140** of the Penal Code; an alternative count of indecent assault of a female contrary to **section 144(1)** of the Penal Code and three counts of assault causing actual bodily harm contrary to **section 251** of the Penal Code. The appellant was further charged with handling stolen goods contrary to **section 322(2)** of the Penal Code. The two denied the charges and after full hearing, the learned Senior Resident Magistrate (Obulutsa) in a judgment dated and delivered on 16th August 2004, found the appellant who was the first accused before that court guilty of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code and of one count of assault causing actual bodily harm contrary to **section 251** of the Penal Code, convicted him of the two counts and sentenced him to death on the first count of robbery with violence contrary to **section 296(2)** of the Penal Code and to serve 18 months imprisonment for the offence of assault causing actual bodily harm contrary to **section 251** of the Penal Code. We note that he did not order the suspension of the sentence of imprisonment. That, however, is not important in this appeal for what happened later. The co-accused in that court was found not guilty of all the charges and was released.

The appellant was not satisfied with the decision of that court and he appealed to the superior court

against the conviction and sentence in respect of both convictions and sentences. The superior court, (Sergon and Maraga JJ.) after hearing that appeal, allowed the appeal against the assault charge but dismissed the appeal against the charge of robbery with violence.

The particulars of the charge in respect of which the appellant stands convicted and sentenced to death read as follows:

“On the 25th day of April 2003 at Kilifi District within the Coast Province, jointly with others not before court, while armed with dangerous weapons namely pangas and rungu, robbed Jonathan Kenga Kitsao of 2 mobile phones, make Sagem and Siemens, a radio cassette make Sony, a small radio make Sonitec, cash Kshs.30,000/= and assorted shop goods all valued at Kshs.65,000/= and at or immediately before or immediately after the time of such robbery used actual violence on the said Jonathan Kenga Kitsao.”

The above is the genesis of this appeal before us which is premised on two grounds of appeal in the supplementary memorandum of appeal filed on behalf of the appellant by his advocates. These grounds are:

“1. The learned Judges of the superior court erred in law and fact by failing to hold that the alleged identification and/or recognition of the appellant at the scene of crime by PW 1 and PW 2 was not satisfactorily (sic) and was not free from any possibility of error or mistake.

2. The learned Judges of the superior court erred in law and fact by finding that the conviction of the appellant was based on sound and credible evidence whereas there was no sufficient proof that the alleged stolen items i.e. the small pocket radio (Ex. 3), the track suit trouser (Ex. 2) and the underwear of Dora (PW 4) were found in possession of the appellant and that these items had actually been stolen.”

The brief facts as can be deciphered from the record before us are that Jonathan Kenga Kitsao (PW 1) (Kenga) was a resident of Kilifi District. He was running a shop. On 24th April 2003 at 2.00 a.m., he was asleep in his shop together with his wife when he heard noise at his mother's home. He peeped outside and saw people with torches. Those people had pangas, stones and iron bars. They approached Kenga's house, broke the window and some of them entered the house. One of those who entered the house asked Kenga for the keys to open the main door. Kenga opened the main door and he saw the appellant whom he had known before, standing outside the house with other people. Kenga and his wife were ordered to keep quiet. They were asked for money, mobile phones and other valuable items as they were being beaten. He gave them Kshs.30,000/=, two mobile phones, a radio and assorted shop items. Kenga was able to see them by use of the light in the shop as he used solar energy in his shop. Kenga called for help but in vain. He was injured on the hand. The robbers then left with the loot. After they left, Kenga called his brother who reported to the scene with police officers and Kenga and his wife were taken to hospital for treatment. Pauline Kadi Charo (PW 2) who was on that date also asleep in her home was attacked in a similar way. The window to her house being smashed to enable the robbers gain access. She identified the appellant as one of those who attacked her and was standing outside her house at the time of attack on her. Iddi Kalume (PW 5) was also attacked that night in a similar way. He also identified the appellant as being one of his attackers. It took some time before any of the robbers was apprehended. However, on 5th July 2003, about 2¹/₂ months later, Kenga went to a funeral and saw the appellant at that funeral. He, together with others, went to the Kenya Wildlife Camp at R and reported to Hassan Bakari Fodha (PW 6) (Fodha), a ranger with KWS at that camp, the presence of the appellant at the funeral and they sought the assistance of the KWS personnel in arresting the appellant. Fodha went with Kenga to the funeral place where Kenga pointed out the appellant and Fodha arrested the appellant and took him to Kilifi Police Station where he was received by Pc Odha (PW 7) who had earlier, on 25th April 2003, received a report of the robbery. Pc Odha's evidence is that on interrogating the appellant, he led the police to Malanga where they recovered clothes, a radio and a track suit from his house. That radio and the track suit were identified as some of the items stolen from Kenga. The appellant together with another were thereafter charged with the offences as we have stated above.

In his defence, the appellant stated that on 25th April 2005, he was on duty as a watchman. Up to 4th July 2003, he was given off duty and went to R. At 8.00 p.m., he went to a funeral. While there, he met his former wife who wanted to stay with their child of marriage but the appellant refused. She went away but at 5.00 a.m., she returned with forest officers who asked him if he knew his former wife. They then went to Kilifi Police Station and after he agreed to release the child, his wife left saying the appellant would be released by the police but he was never released. In effect, though in his defence he did not specifically respond to the charge, he also did not admit it and so in law, he denied the offence.

The learned Magistrate, after analysing the evidence that was before him carefully and evaluating the same stated, *inter alia*:

“In respect to Samson, failure to conduct an identification parade is not fatal. In fact to an extent it was not necessary. PW 1 Jonathan said he knew the suspect even by name which he gave to the police. He is the one who saw the accused at a funeral and assisted in effecting arrest. Once arrested, he led to the recovery of a radio and trouser in his house in Malindi which items were identified by Jonathan and Pauline as part of the items stolen on that night.

In his defence, Samson daid (sic) not address himself to this. He has not denied having the items and has not explained how he came by them. Having been seen and recognised as one of the robbers, the finding of the items with him indeed confirms the evidence of the witnesses as to his participation in the incident.”

That court then referred to one decided case and concluded that as the appellant was found with stolen items and could not give proper account of the items he was found with, he participated in the robbery.

The superior court, likewise, analysed the evidence afresh and evaluated it as is required of a first appellate court – [see the case of **Okeno vs. R. (1972) EA 32**] and after doing so stated as follows on the question of identification of the appellant:

“We have carefully examined the lower court’s record and especially the evidence of PW 1 and PW 2 on the issue of identification. PW 1 said he knew the appellant by both appearance and name as he was not only married to a neighbour but also used to pass by his shop. When he subsequently saw him at a funeral, he alerted the forest guards, who arrested him and took him to police. In these circumstances, we agree with Miss Mwaniki that an identification parade was not necessary. We, however, think one should have been conducted for PW 2 who said he only knew the appellant by appearance and was not there at the time of arrest.

That omission, however, did not occasion a failure of justice. A careful perusal of the trial Magistrate’s judgment shows that he did not base his conviction solely on the appellant’s identification by PW 1 and PW 2 but also on recovery of the stolen items We therefore conclude this ground of appeal by starting (sic) that even though PW 1 did not give the appellant’s name and description to the police when he first reported the offence as he should have done, we are nonetheless satisfied that he properly identified the appellant as he is the one who later pointed him out to the forest guards and got him arrested after which some of the stolen items were found in his possession.”

And on the evidence on recovery of some of the stolen items, the superior court stated, *inter alia*, as follows:

“On being questioned, the appellant led the police to Malanga where he himself got out the stolen items, a pocket or small radio and a tract (sic) suit as well as Dora’s underwear. These items were identified by PW 1 and PW 2 as being among those stolen on the night of the robbery. There was even a radio permit Ex. 6 produced. When put on his defence, as the trial Magistrate found, the appellant did not make any reference to the stolen items allegedly found with him. We are satisfied that those items were found with him and having not said how he came to be in possession of them, on the doctrine of recent possession, he was properly convicted on the charge of robbery and not

handling.”

We have gone to this length of reproducing the relevant parts of the Magistrate’s decision and the superior court’s decision because the grounds upon which this appeal is premised, and particularly the second ground, and the main thrust of the learned counsel for the appellant’s submission, were on matters of fact upon which this Court by dint of **section 361(1)** of the Criminal Procedure Code has no jurisdiction as they are matters that, in law, fall within the purview of the trial court and the first appellate court. **Section 361(1) (a)** states as follows:

“A party to an appeal from a subordinate court may, subject to subsection (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.”

In our view, the concurrent findings of fact by the subordinate court and the superior court cannot be the subject of appeal to this Court unless it is shown that such findings were based on no evidence at all and that no reasonable court properly directing its mind could have reached such a finding. We have anxiously considered the record before us and we do not find such a situation obtaining in this case. We have set out above the findings and conclusions of the two courts below and it is clear to us that the same findings were based on evidence that was availed to the court at the appellant’s trial.

Having said so, in our view, two matters militate in favour of the conviction in the case. These are, first identification and second the recovery of some of the stolen items, and, in our mind, proof of any of the two could have been enough for a conviction. On whether the appellant was identified as one of the robbers or not, the position in this case was that of recognition as opposed to identification. In the case of ***R v. Turnbull* (1976) 3 ALL ER 549** particularly at page 552, it was stated:

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

Thus, even though recognition is more reliable than identification, still there is need for the trial court and the first appellate court to examine with care cases based on identification. This Court in the case of ***Cleophas Otieno Wamunga vs. Republic – Criminal Appeal No. 20 of 1989*** stated, *inter alia*, as follows:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize such danger.”

In this case, the appellant was known to Kenga as Kenga had seen him several times before the incident passing near his shop and he had married a woman from his neighbourhood. To confirm that, it was Kenga who, two and a half months later, saw him at a funeral and caused his arrest. As if that was not enough, when arrested, the appellant took the police to where some of the stolen items, among them, a radio were recovered. He did not claim the recovered items to be his nor did he, in his defence or during cross examination of the witnesses, give any explanation as to his possession of the same properties. That he knew where the properties stolen in the course of the robbery on Kenga were and had no explanation for such knowledge as required by **section 111** of the Evidence Act, was an added evidence that he must have been one of the robbers. This is what the two courts below found and relied on. We do not see how we can interfere with their concurrent findings on that question of identification or recognition.

The other aspect, as we have stated above, is that even if the appellant had not been seen at the scene of the robbery, there was the evidence that he had possession or had knowledge of where goods stolen in the course of the robbery were. We do agree that the recovery took place over two months after the robbery and that the items recovered such as the small radio and the track suit were items that can move from hand to hand easily and quickly, but in this case, the appellant was not a receiver or a handler for he

never claimed to be either of the two. He is the one who led Pc. Odha to where those items were and in reply to his questions in cross-examination, Pc Odha said:

“You were arrested on 7.5.2003 and brought to the station. We went to Malanga to recover the items. You are the one who removed the items yourself.”

That evidence was not challenged and so it stands. It means, in effect, that even if the appellant was not visually identified at the scene of the robbery, that evidence would prove that he was one of the robbers or that he took part in the robbery. The two courts below made a concurrent finding on that issue and again, we see no reason to interfere with that finding.

Thus, whichever approach is adopted, the evidence that is on record leaves no room for any other conclusion other than that the appellant took part in the robbery of Kenga as charged. The decisions of the two courts below were, in our view, made on sound evidence which was properly analysed and evaluated. In the result, we find no merit in the appeal. It is dismissed in its entirety. Judgment accordingly.

Dated and delivered at Nairobi this 18th day of July, 2008.

R.S.C OMOLO

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR