



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 287 OF 2005**

**COLUMBUS DINDI OKOTH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal, from the judgment of the High Court of Kenya at Nairobi (Onyancha & Kubo JJ.) dated 8<sup>th</sup> June 2004**

**in**

**H.C.CR.A. NO. 1347 OF 1993**

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**JUDGMENT OF COURT**

Upon his trial for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code, jointly with another person whose appeal is not before us, the appellant **Columbus Dindi Okoth**, was convicted and thereafter sentenced to the mandatory death sentence by the Senior Resident Magistrate at Busia. As was expected he was aggrieved and lodged his first appeal to the superior court, which was dismissed by a bench of that court comprising Onyancha and Kubo JJ. This is therefore his second appeal which on the basis of the provisions of section 361 of the Criminal Procedure Code, has to be confined to issues of law only.

In his homemade memorandum of appeal, the appellant has raised three broad grounds of appeal, namely, first, that his conviction was based on evidence of identification under difficult circumstances and such identification was therefore unreliable. Second, that he raised the defence of alibi which he contends was not considered by both courts below. Third, that two essential witnesses who should have testified were not called and the failure greatly prejudiced his case.

Mr. J. Opini was appointed by the Court to represent the appellant in this appeal. In his submissions he urged the view that although the trial and first appellate courts held that the appellant was recognized by eye witnesses as having participated in the robbery the subjectmatter of his conviction, there was no finding whether the recognition was by voice, sight or otherwise. Besides, he said, there was no clear evidence on the quality of light which enabled the witnesses to recognize the appellant.

As regards the appellant’s alibi defence learned counsel submitted, inter alia, that the burden lay on the prosecution to dislodge the defence and because, in his view, the trial court did not make a specific

finding on this, the superior court had no business making a finding on the matter.

On the third ground, Mr. Opini submitted that the failure to call some witnesses was prejudicial to the appellant's case and was fatal to the prosecution case. He invited us to draw an adverse inference that had they testified their evidence would have tended to be adverse to the prosecution case.

Before we consider those submissions and the submission of Mr. Kivihya, for the respondent, it is essential to outline, in resume form only, the background facts.

**Venzasio Omuse Ekisa**, the deceased in this case, was a shop-keeper at Segero Shopping Centre and resided at Segero Village with his two wives, **Rebecca Omuse** (P.W.5) and **Teresa Atyang Ekisa** (P.W.6) and also daughters among them, **Celestin Aramisi Ekisa** (P.W.7). On 31<sup>st</sup> May 1991 at about 9:30 p.m. robbers attacked his home. They numbered at least four, and were armed with a firearm. PW5 testified that she saw these people as she walked from a small house she used as a kitchen and before she opened the door to the main house. These people accosted her and ordered her to open the door to the main house. She hesitated whereupon they ordered the deceased who was inside to open the door which he did. He had a powerful torch which he flashed at the attackers who were still holding PW5 hostage. She was able to observe her captors and realized that one of them had a gun, another had a hammer and a small axe. A third person was wearing what appeared to her to be army uniform. Other than the torch light there was a pressure lamp inside the house whose light lit the entrance area. The main door was made of steel frames and glass panes. So light passed through to light the entrance area. Using that light P.W.5 said, she was able to recognize the appellant and to identify his co-accused. She observed that the appellant had "a green army shirt and trousers" on as also a black cap and gumboots. He was the one who was holding her while facing her. So because she was also facing him she was able to observe him closely as to recognize him.

The deceased lived in that house with both his wives and at least two daughters. P.W.5 testified that at the time the deceased flashed his torch on their attackers her co-wife (P.W.6) was standing beside him holding the pressure lamp. However, when she realized robbers had invaded their home she placed the pressure lamp on the ground and escaped into a nearby bush through a back door. It was her evidence that she had ample time before she escaped to observe their attackers. She was able to recognize the appellant, a person whom she said she knew well before the attack because he was their neighbour. She was also able to identify the appellant's co-accused, even though she had not met him before.

The robbers demanded money from the deceased but he said he did not have any whereupon he was whipped, and together with P.W.5 was ordered to sit down outside their house. The appellant, his co-accused and a third person led the deceased into the house so that he would produce some money. A fourth person was left outside guarding P.W.5. A few minutes later those who went indoors came out carrying a record player, a red bag, radio and other items. They then frogmarched the deceased and P.W.5 towards the gate and to the road leading to Segero trading centre. After a short distance the deceased was ordered to sit down whereupon the appellant allegedly ordered his co-accused to shoot him once only. He obliged and shot the deceased through the back. The deceased fell down and died.

The appellant and his co-accused were later arrested and charged with the offence of robbery with violence. Their respective convictions were based on the visual identification evidence of P.W.5, her co-wife and that of the deceased's daughter Celestin Aramisi Ekisa (P.W.7). The appellant's co-accused's conviction was also based on the doctrine of possession of recently stolen property, to wit a record player, radio and other items which were stolen from the deceased's house on the material night of the robbery. Nothing was recovered from the appellant. The grounds the appellant has raised in this appeal for challenging his conviction are the same grounds he raised in his first appeal.

In convicting the appellant the trial Magistrate (Mr. Ong'anyi) rendered himself thus:

**"I find therefore, on the whole that the evidence of PW5, P.W.6 and P.W.7 is that of recognition and conditions favouring such recognition were satisfactory, especially by P.W.5 and P.W.6**

...

**I am also satisfied that personal violence was used to the deceased immediately after the two accused robbed him. They killed him. In my view, I am satisfied that the two accused jointly committed the offence and find them guilty and jointly convict them as charged.”**

The superior court quite properly held that the main issue in the appellant’s first appeal was identification. It is also the main issue before us. On that issue the superior court considered in detail the evidence of P.W.5, P.W.6 and P.W.7. These are the people who said they witnessed the attack and were able to recognize the appellant as one of the attackers. In the end that court was satisfied the appellant was unmistakably identified by those witnesses as having participated in the commission of the robbery with violence. The court rendered itself thus on that issue:

**“It is clear from the evidence of the eye witnesses P.W.5, P.W.6, and P.W.7 who were believed by the learned trial magistrate, that the robbers took their time in perpetrating the robbery at the deceased’s home. The robbery lasted for about half an hour. The appellant had been known to the three witnesses over a long period – from 1968 in the case of P.W. 6 and from 1973 in the case of P.W.5 (the appellant infact acknowledged that P.W.5 knew him very well.). In the case of PW7, the duration for which she had known the appellant was not indicated, but she said she knew him. There were three sources of light. Moonlight, pressure lamp and a three battery torch which were put to use in identifying the appellant. We are satisfied that the eye-witnesses had adequate opportunity to positively identify and did positively identify the appellant, whom they knew, by recognition.**

We earlier set out arguments which were put forward in support of the appellant’s appeal. On the facts and circumstances of this case it is clearly a red-herring to argue as Mr. Opini for the appellant did that the prosecution did not prove whether the recognition of the appellant by witnesses was by sight or hearing. The evidence of those witnesses is clear in itself without more. The witnesses testified that they observed and saw the appellant among the robbers. They were categorical that they used the light from the deceased’s torch, pressure lamp and moonlight. Had it been otherwise they would have said so. The learned Judges of the superior court were alive to this and hence their statement which we reproduced earlier in this judgment. Besides, P.W.5 gave the appellant’s name to the police at the earliest possible opportunity. It was on the basis of her information that the appellant was arrested. The appellant was arrested by among other officers, constable Patrick Kariuki (P.W.8), on 1<sup>st</sup> June 1991 at 4 a.m, which was a few hours after the robbery. Additionally, the appellant and his accomplices stayed with P.W.5 for long while within her vicinity. He appeared to her to have been in charge of the group. The pressure lamp was on, and according to PW5, P.W.6 and P.W.7, it produced brilliant light which aided them to observe and recognize the appellant. Their respective evidence on this aspect mutually supported or confirmed each other. The witnesses were consistent and were believed by both the trial and first appellate courts. Those were concurrent findings of fact and we have no basis for interfering with those findings. We remind ourselves that this is a second appeal and we cannot interfere with findings of fact by the two courts below unless they are not based on evidence on record.

We agree with Mr. Kivihya for the respondent that the eye witnesses were witnesses of truth and their respective evidence taken individually and cumulatively leave no doubt in our minds that each of them positively identified the appellant on the material night.

As regards the appellant’s alibi defence we agree with Mr. Opini that an accused who raises an alibi in his defence does not assume the burden of proving it. The burden lies on the prosecution to rebut or disprove it – see **Kiarie v. R.** (1984) KLR 739. Mr. Opini, however, submitted that the trial and first appellate courts appear to have shifted the burden to the appellant to prove his alibi. The appellant’s defence was that between 31<sup>st</sup> May 1991 and the time of his arrest at about 4 a.m. on 1<sup>st</sup> June 1991 he never left his home from where he was arrested.

The trial magistrate, apart from mentioning that defence in his narration of the background facts to the case, did not specifically consider it. However, considering his finding that P.W.5, P.W.6 and P.W.7

positively identified the appellant at the scene of the crime, there was nothing left of the appellant's defence to consider. The superior court however, specifically dealt with the appellant's defence and held that it was "*eminently dislodged*" by clear and detailed testimony of P.W.5, P.W.6 and P.W.7. We find no basis for saying that the burden of proof of the alibi was shifted to the appellant.

The final point which the appellant raised in this appeal relates to the failure by the prosecution to call certain witnesses. P.W.5 testified that immediately after the robbery she gave the name of the appellant to two people, namely, Dominic and Joseph Etyang. Neither Dominic nor Etyang were called to testify before the trial court in support of the prosecution case. Dominic was P.W.5's brother. Mr. Opini submitted before us that we should draw an adverse inference that had the witnesses been called, they would have given evidence adverse to the prosecution case. Learned counsel must have had in mind the decision in the case of **Bukenya v. Uganda [1972] EA 549** though he did not cite it to us. It is not however, in every case where the prosecution fails to call certain witnesses that a court will draw an adverse inference. In cases where, as here, the evidence is clear on a particular issue, there would be no necessity of drawing an adverse inference. A fact may be proved by the testimony of one witness (see **AbdulBin Wendo v. R [1953] EACA 166**; and there would therefore be no necessity of calling a superfluity of witnesses. An adverse inference is normally drawn where the evidence tendered to prove an essential fact in a case is insufficient or barely sufficient. We cannot say here, that the evidence on the identification of the appellant is barely sufficient. Nor can we say that the evidence to show that P.W.5, P.W.6 or P.W.7 are credible witnesses is barely sufficient. As we stated earlier both the trial and first appellate courts found as fact that they were witnesses of truth. The trial court saw these witnesses testify and was better placed than ourselves to assess their credibility as witnesses. (**Okeno v. R. (1972) EA 32.**)

As a last point, Mr. Opini, in passing stated that if the trial court failed to consider a particular issue, then the first appellate court would have no basis for dealing with it. For that proposition he cited this Court's decision in **Peter Njuguna Muriu v. R. (1982-88) 1 KAR 376**, in which the Court held, on the main, that the failure by the lower courts to make any finding on an alibi defence was fatal to the prosecution case as the Court would have no benefit of its evaluation by those courts.

In our view, Mr. Opini, cited the case out of context. The superior court on first appeal is obliged to analyse and re-evaluate the evidence presented to the trial court and itself draw its own conclusions on it without overlooking findings the trial court might have made on any given issue. It is a duty it has to perform and a failure to do so may be fatal to its decision. If the trial magistrate fails to consider a particular point, the superior court, as a first appellate court will be obliged to deal with it as its adjudication of the matter is in the nature of a rehearing. (**Okeno v. R.** (supra).

We have said enough to show that this appeal is for dismissal, and accordingly we order that it be and it is hereby dismissed.

Made and delivered at Nairobi this 11<sup>th</sup> 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. ALUOCH**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**