



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 202 OF 2005

NICKSON NGODODI CHANZU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kakamega (Sergon & Kariuki, JJ) dated 28th April, 2005

in

H.C. Cr. Appeal No. 49 of 2003)

JUDGMENT OF THE COURT

NICKSON NGODODI CHANZU, the appellant, was after trial convicted on 26th February, 2003 by the Senior Resident Magistrate’s Court in Vihiga (Mr. Kinyanjui) of robbery with violence contrary to **section 296(2)** of the Penal Code and sentenced to death. His first appeal to the High Court of Kenya at Kakamega (Sergon and Kariuki, JJ) was dismissed on 28th April, 2005 and hence this is a second appeal.

It is contended before us by Mr. Odunga, for the appellant, that the first appellate court erred in not re-evaluating the evidence on record but merely repeated what the trial court had concluded. He went further to highlight some contradictions which he stated were material but were ignored by that court. These omissions in Mr. Odunga’s view, ought to have been resolved in favour of the appellant and the failure to do so had occasioned a failure of justice to the appellant and consequently the conviction should not be sustained.

The learned State Counsel, Mr. Musau, associated himself with the submissions of Mr. Odunga and concedes the appeal.

We draw the attention of the learned Judges to **Okeno v R. [1972] EA 32**, and to **Pandya v R. [1957] EA 336**, as was said in Okeno’s case, at page 36:-

“The first appellate court must reconsider the evidence, evaluate it itself, and draw its own conclusions.”

We reiterate, though it is trite that it is not enough for the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the trial court’s findings and conclusions. It is accordingly incumbent on the said court to make its own evaluation of the evidence, so as to satisfy itself

that no failure of justice has been occasioned by the defects in the first appellate court's judgment.

Taking into account the foregoing and in view of the fact that the State is conceding the appeal, we are not satisfied that the first appellate court discharged its duty fully as set out above.

The complainants, who were the main prosecution witnesses, Abdul Karim (PW 3) and Alex Levesa (PW 4) testified that at about 9.00 p.m. they were on their way home from a local trading centre when they were attacked and robbed by a group of four people, among them the appellant and his co-accused who was acquitted after trial. The witnesses alleged that they were able to identify the accused persons because there was moonlight and also by means of the head lights of a passing motor vehicle. The trial Magistrate disbelieved the evidence of PW 3 on the ground that it was doubtful whether the two accused persons were in the group that staged the robbery. But surprisingly and without giving reasons he accepted the evidence of PW 4 and founded the conviction of the appellant on it and acquitted the co-accused. In our view, the evidence of PW 4 without any other evidence, was most unsatisfactory and could not sustain a conviction on the charge. The benefit of doubt extended by the trial magistrate to the co-accused should also have been extended to the appellant. Indeed there was a major misapprehension of the evidence by both courts below when they concluded that the appellant was positively identified as the person who was employed at a certain Kiosk but the evidence on record was that PW 3 identified the appellant's co-accused who was acquitted as the person who actually had worked in the kiosk.

The record of the trial court also shows that the appellant had put forward the defence of an *alibi* as an answer to the charge preferred against him. It is manifest that the two courts below did not consider it. The omission to consider the defence of *alibi* was unfortunate in that in raising such evidence, it was apparent that the appellant had introduced into the mind of the two courts a doubt that is not unreasonable.

Having considered the issues raised in this appeal particularly relating to the duty of the first appellate court as set out in **Okeno v R.** (*supra*) we are of the view that it would be unsafe to allow the conviction to stand, and this appeal accordingly succeeds. The appellant's conviction is quashed and the sentence of death is set aside. He is ordered to be released forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 31st day of March, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR