IN THE COURT OF APPEAL

AT ELDORET

CORAM: OMOLO, O'KUBASU & ONYANGO OTIENO, JJ.A.

CRIMINAL APPEAL NO. 248 OF 2003

BETWEEN

CHARLES MWITA ……. APPELLANT

AND

REPUBLIC ……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Eldoret (A. Etyang' & Omondi Tunya,JJ) dated 12 th November, 2002 in H.C.CR.A. NO. 11 OF 2001)

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JUDGMENT OF THE COURT

The appellant, ***Charles Mwita*** , was convicted on a charge of robbery with violence contrary to ***section 296(2)*** of the Penal Code and sentenced to death as mandatorily provided by law.

The particulars of the offence were that on the 29th August, 1999 at Kosoiywo Estate in Nandi District of the Rift Valley Province being armed with simis and iron bars, jointly with others not before court robbed Evans Achanga Mbaya of his motor vehicle battery valued at Kshs.4,000/= and at the time of such robbery wounded the said Evans Achanga Mbaya.

The facts may be briefly stated. The complainant Evans Achanga Mbaya (PW1) and his wife Caroline Achieng' (PW2) were resting in their house at about 8.00 pm, on 29th August, 1999 when some people knocked at the door, saying they were census officials. Caroline opened the door for these people explaining to them that they (PW1 and PW2) had already been counted. These people hit Evans on the head with an iron bar while demanding money. Evans fell down on being hit and when he looked up he saw the appellant. The attackers carried out a search in the house for about five minutes but got no money. They decided to leave but as they left the appellant took a motor vehicle battery. Evans grabbed the appellant as he shouted for assistance. Neighbours who included David Adembesa (PW3) and Hudson Ngadi (PW4) rushed to the scene and assisted in arresting the appellant. A report was made to Kapkorer Police Post at 9.30 p.m and as a result Cpl. Samuel Awour (PW6) rushed to the scene and re-arrested the appellant. Cpl. Awour took possession of the battery and iron bar which items he produced as exhibits during the trial of the appellant.

When put to his defence the appellant elected to give unsworn statement in which he said that on the material day he went to the nearby market to buy paraffin. He also bought some sugar and meat. On his way home he came across a religious crusade and decided to listen to them for about 30 minutes. It started raining and the appellant decided to take shelter. By the time he was able to go home it was already dark. He met three people who asked him to identify himself. He identified himself but the three people grabbed him and started beating him. He screamed saying that he was being attacked by thieves but the three people claimed that he was in fact the thief. He was then arrested.

The learned trial magistrate considered the evidence before him and came to the conclusion that the appellant was guilty and convicted him accordingly.

On his appeal to the superior court the learned Judges of that court considered his appeal but dismissed it, and hence this appeal before us.

The learned Counsel for the appellant Mr. Kigamwa in his submission before us started by stating that the charge against the appellant was defective as it failed to state whether the weapons were dangerous or offensive.

Mr. Kigamwa's second ground of appeal related to the issue of re-evaluation of evidence by the superior court. He was of the view that the superior court failed in its duty in that it failed to re-evaluate the evidence. Mr. Kigamwa then submitted on the issue of identification pointing out that the complainant Evans (PW1) talked of the appellant having worn a T-shirt while PW6 said that the appellant was wearing a mudstained jacket. Mr. Kigamwa was of the view that the defence of alibi by the appellant introduced a doubt in the prosecution case.

The learned Principal State Counsel, Mr. Omutelema invited us to dismiss the appeal as, in his view, the appellant was arrested at the scene and hence this displaced the defence of alibi.

We have considered the submissions by learned counsel for the State and for the appellant. It is our view that this appeal can be disposed of by considering the second and third grounds only. It is to be noted that the evidence relating to the manner in which the appellant was arrested was not very clear. The complainant's evidence was to the effect that the appellant was wearing a T-shirt but the evidence of Cpl. Awour (PW6) who received the appellant at the police station was to the effect that the appellant was wearing a jacket. If the appellant was grabbed at the scene as stated by the complainant then there was no opportunity for the appellant to change from a T-shirt to a jacket. It also appears that the appellant's defence of alibi was never given due consideration.

These, in our view are some of the contradictions that ought to have been considered by the superior court in its duty of re-evaluating the evidence. In their judgment the learned Judges of the superior court merely stated:-

> ***"We have re -evalua ted that evidence and we have come to the conclusion that the appellant was indeed arrested in the home of PW1 and PW2 in the manner explained to the learned trial Magistrate."***

Having so stated the learned Judges of the superior court proceeded to record what the learned State Counsel submitted and then proceeded to dismiss the appellant's appeal.

In Okeno v R [1972] E.A. 32 at page 36 the predecessor of this Court stated:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to b e submitted to a fresh and exhaustive examination (Pandya v. R. ,[1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its***

own findings and draw its own conclusi ons. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post , [1958] E.A. 424."

The above sets out the duty of the first appellate court. We are of the view that it is upon the first appellate court to carry out that duty by actually re-evaluating the evidence. It is not enough for the first appellate court to merely state that it has reevaluated the evidence. Indeed, in ***Gabriel Njoroge v. Republic*** [1988-85] 1 KAR 1134 , at page 1136 this Court said:-

"As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclus ions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect (see Pandya v. R . [1957] E.A. 336, Ruwala v. R [1957] E.A. 570). If the High Court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly misdirections and non -directions on material points are matters of law."

In the final analysis it would appear that the superior court failed in its duty as, apart from a bold but bald statement that it had re-evaluated the evidence, we found no evidence of such re-evaluation. Had the superior court re-evaluated the evidence we are not sure whether it would have come to the same conclusion as it did in that the appellant's guilt was proved beyond reasonable doubt.

That being our view of the matter we are unable to say that the appellant's conviction was safe.

The upshot of the foregoing is that this appeal is allowed, the conviction quashed and the death sentence imposed on the appellant set aside. We order that the appellant shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at Eldoret this 18th day of February, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E. O. O'KUBASU

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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