IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 191 OF 2004

CHARLES CHEMASWETI …….....1ST APPELLANT

MARTIN WANJALA CHUMA ……...…….....2ND APPELLANT

AND

REPUBLIC …….....…..…RESPONDENT

(An Appeal from a Judgment and Conviction of the High Court of Kenya at Kitale (Gacheche, J & Dulu, Ag. J) dated 17th March 2004

in

H.C.CR. C. No. 208 & 306 of 2001)

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JUDGMENT OF THE COURT

The appellants herein **Charles Simatwa Chemasweti** (1st appellant) and **Martin Wanjala Chuma** (2nd appellant) were convicted of robbery with violence contrary to ***section 296(2)*** of the Penal Code and each of them sentenced to death as provided by the law, by the Senior Resident Magistrate, Kitale (Mr. D.K. Gichuki). Their appeals to the superior court were dismissed. They are now before us by way of second appeal.

When the appeal came up for hearing on 20th September, 2005 the 1st appellant was represented by Mr. Duke Omwenga while the 2nd appellant was represented by Mr. Omondi Obudo. The State was represented by Mr. Omutelema (Principal State Counsel).

This being a second appeal only matters of law fall for consideration as matters relating to facts have been dealt with and resolved by the trial court and the first appellate court – see ***section 361(1)*** of the Criminal Procedure Code.

The facts as confirmed by the first appellate court were that the complainant, David Keter Limisi (PW1) was in his house at about 7.30 P.M. on 5th January, 2001 when he was invaded by a gang of robbers. There was a lamp on the table and there was moonlight outside. Limisi was able to recognize both appellants. These were people that Limisi knew. The sister of Limisi, one Florence Khabayi (PW2) was standing at the door of her mother's house and was able to recognize the two appellants. The robbers set the complainant's house on fire and as this happened the complainant's brother was watching from his house. He too recognized the two appellants. Fred Wanyonyi (PW4) a neighbour of the complainant was

hiding by the hedge and he, too, was able to recognize the two appellants. A police officer P.C. Satia (PW5) who arrived at the scene of robbery was immediately given the names of the two appellants as the people who had robbed the complainant. On being arrested a few days later, the 1st appellant was found in possession of a blanket, which the complainant identified as one of the items stolen during the robbery. He was also found in possession of a rifle which was hidden under his bed. Each appellant recorded a charge and cautionary statement in which each admitted having been involved in the crime although each tried to blame the other for having instigated the robbery.

Mr. Omwenga filed a supplementary memorandum of appeal setting out the following six grounds of appeal:-

1. That the learned Judges of the superior court erred in law and fact in upholding the conviction by the lower court based on defective charges.

2. That the learned Judges of the superior court erred in law in not finding that the Ballistic (sic) report was improperly produced in the lower court and that the same did not connect the appellant to the alleged offence.

3. That the learned Judges of the superior court erred in law in not finding that the P3 form in which the lower court relied upon in convicting the appellant was improperly produced by an incompetent witness.

4. That the learned Judges of the superior court erred in law in upholding the conviction by the lower court based on the charges and cautionary statements which were irregularly taken.

5. That the learned Judges of the superior court erred in law in not finding that the evidence of identification/recognition of the appellant was not safe and positive enough to support the conviction.

6. That the learned Judges of the superior court erred in law in failing to reconsider the evidence, evaluate it and draw its own conclusion in deciding whether the judgment of the trial court should be upheld. "

It was Mr. Omwenga's submission that the charge was defective because of the use of the word "***or***". As regards the second ground the complaint was that ballistic expert's report was produced by PW5 who was not the maker of the document. It was similarly submitted that P3 form was produced by a clinical officer who was not a medical practioner. On the issue of charge and cautionary statement it was Mr. Omwenga's submission that this was irregularly taken by Chief Inspector Etyang (PW6) who was the investigating officer.

The last two grounds (5th & 6th) were argued together and they related to the issue of identification. It was submitted that the evidence of identification was not sufficient. Mr. Omwenga went on to argue that had the superior court re-evaluated the evidence it would have come to a different conclusion.

Mr. Obudo for the 2nd appellant attacked the evidence of confession as not being conclusive to prove the appellants' guilt. On the issue of identification Mr. Obudo submitted that identification by recognition by PW1, PW2 and PW4 was insufficient. He further submitted that his client (2nd appellant) was not found in possession of any stolen property.

The learned Principal State Counsel (Mr. Omutelema) opposed the appeal on the ground that this was a case of recognition by four witnesses, and hence, in his view the appellants were convicted on very sound evidence.

The main issue in these consolidated appeals is identification. There can be no doubt that on the material night the complainant was invaded by a gang of robbers which not only violently robbed him but also burnt down his house in the process. In his judgment the learned trial magistrate stated inter alia:-

"Having considered the evidence adduced herein both by the prosecution and the defence, I find that the points of (sic) determination herein are whether the accused herein were positively identified as the robbers who robbed Limisi (PW1) on the material date. The court would further determine whether the statements under inquiry were properly obtained from the accused and whether the statement(s) of either of the accused persons could be considered by the court as against the maker as well as the co-accused."

Clearly, the conviction of the appellants was based on identification. It was at night but the prevailing conditions had to be considered. The complainant testified that when the assailant struck his lamp was on the table and so there was sufficient light. There was moonlight which assisted him to recognize the two appellants. The other witnesses at the scene, PW2, PW3 and PW4 were able to recognize the appellants as there was enough light from the burning house of the complainant. Having considered the evidence before him the learned trial Magistrate was satisfied that he was dealing with the evidence of recognition rather than identification. On this issue of recognition of the appellants the learned trial Magistrate expressed himself thus:-

"***The evidence of Limisi (PW1) FLORENCE (PW2) BONFACE (PW3) and that of WANYONYI (PW5) is evidence of identification of people they knew. It is evidence of recognition as opposed to identification of a mere stranger. In law, evidence of recognition is held to be firm and more reliable than identification of a mere stranger.***

In ANJONONI AND OTHERS VS. THE REPUBLIC (1980) KLR 59 which I have considered, the Court of Appeal held that recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another. As regards our present case, I find that this principle is applicable as regards the identification of he accused herein by Limisi (PW1) FLORENCE (PW2) BONFACE (PW3) and WANYONYI (PW4). Proper identification of the accused by the witnesses was made possible by the bright flames of the burning house of Limisi (PW1) which the robbers set on fire".

In view of the foregoing it was not surprising that the appellants were convicted as charged.

We may go back to the issue of the charge. It was argued that the charge was defective for being duplex by the use of the word "***or***" in the particulars of the charge. We have carefully considered that argument but found no substance in it. In our view there was nothing wrong with the charge. The appellants well knew the charge they were facing. Furthermore, ***section 382*** of Criminal Procedure Code would cure any irregularity alleged to be in the charge. We are, however, satisfied that the appellants have not been prejudiced or any failure of justice has been occasioned to them for the alleged defect.

A feeble attempt was made in a bid to criticize the reports produced in respect of the weapons recovered and the injuries sustained by the complainant. We found no merit in those two grounds, since these reports were produced pursuant to ***section 77*** of the Evidence Act.

There was a submission to the effect that the superior court did not re-evaluate the evidence. We do not agree. The record shows that the learned Judges of the superior court (Gacheche, J. & Dulu, Ag. J.) reviewed the evidence on record and considered the submissions made before concluding that the appellants had been properly convicted. The learned Judges considered the complainant's evidence as corroborated by the evidence of the other three witnesses and found the conviction of the appellants to be safe. In concluding their judgment the learned Judges of the superior court said:-

"***Though no identification parade was conducted, we conclude from the evidence on record established that the identification of the appellants at the scene was positive and that they participated in the crime of robbing the complainant. We conclude that the gun and ammunition and blanket that were found in the 1st appellant's house pointed to his involvement in the crime and that the statements that each of the appellants made to the police under caution associate them with the commission of the crime.***

The learned magistrate considered the defences of both appellants and disbelieved them. We find no

reason to depart from the finding of the learned magistrate. The convictions are safe and the sentences are lawful."

In view of the foregoing the learned Judges of the superior court cannot be faulted in the manner they dealt with the matter before them. They dealt with the matter in the proper manner as per the guidelines in **Okeno V. R [1972] E.A. 32**.

We have said enough in this appeal. The conviction of the appellants was based on the evidence of recognition. Many cases were cited to us but in the end the main issue was identification. The appellants were identified, nay, recognized by four witnesses who knew them well. There was sufficient light from the burning house. It is important to note that the first police officer to arrive at the scene was given the names of the two appellants. There was then the issue of statements made by the appellants to the police. It is significant to note that the statements were produced without any objection. Taking all this evidence of recognition into account in the spirit of the decision of this Court in **ANJONONI** case (supra) we find that the appellants were convicted on very sound evidence. We may add that the appellants' conviction was, indeed, inevitable as the evidence against them was watertight.

For the foregoing reasons we find no merit in this appeal and we order that the same be and is hereby dismissed.

Dated and delivered at Eldoret this 14th day of October, 2005.

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.