IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 642 OF 2010

BETWEEN

EVANS LIYAI KANDAMBI……APPELLANT

AND

REPUBLIC……RESPONDENT

(AN APPEAL FROM A DECISION OF THE HIGH COURT OF KENYA AT NAIROBI, (OJWANG&DULU, JJ.) DATED 4TH MARCH, 2008

in

H.C.C.RA 184 OF 2006)

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JUDGMENT OF THE COURT

This is an appeal by **EVANS LIYAI KANDAMBI** (the appellant) who was charged, tried, convicted and sentenced to death for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** by the Principal Magistrate at Kibera. He was alleged to have robbed one DAVID SAMUEL SYUKI (PW2) of Kshs. 3,500.00 cash and a Nokia cell phone all valued at Kshs. 12,500.00 on 23rd July, 2005 in Ongata Rongai, Kajiado District.

He was in the company of another and armed with a kitchen knife as a weapon of offence and he threatened to use actual violence on PW2.

The appellant's first appeal to the High Court was dismissed by Ojwang, J. (as he then was) sitting at Nairobi with Dulu, J., hence this appeal captured in the Supplementary Memorandum of Appeal filed by his learned counsel, Ms. Khaemba as follows:

"1. THAT the 1st Appellant (sic) Court erred in law by failing to evaluate the evidence presented to court which did not conform with the ingredients of the charge of robbery with violence

contrary to Section 296(2) of the penal code.

2. THAT the 1st Appellant (sic) Court erred in law in affirming the conviction of the Appellant while relying on recognition/identification whereas the circumstance favouring a positive identification were difficult and stressful and not free from possibility of error.

3. THAT the 1st Appellant (sic) Court erred in law in affirming the conviction of the Appellant whereas the Appellant's defence and defence alibi were neither considered nor displaced.

4. THAT the 1st Appellant (sic) Court erred in law in failing to analyze and evaluate the evidence adduced at the trial and thus came to a wrong conclusion.

5. THAT the 1st Appellant (sic) Court erred in law in upholding the Appellant's conviction and sentence whereas the Appellants constitutional right to a fair trial was contravened contrary to Section 77(1) (2)b,f,g, of the former constitution."

At the hearing of the appeal, Ms. Khaemba abandoned and did not argue the first ground of appeal. That was the proper thing to do, for from what we have said already, the ingredients of the offence of robbery with violence, a singleone of which is sufficient, were present. We say no more.

Arguing the second ground of appeal, Ms. Khaemba tried to persuade us that the identification of the appellant as PW2's assailant was not safe. She in particular took issue with the fact that the complainant did not immediately report the robbery and did not give a description of his assailants. She asserted that the case called for an identification parade but none was mounted.

Next it was urged on the appellants' behalf that he was wrongly convicted when his defence, which was, in his reckoning, in the nature of an alibi, was neither considered nor displaced. The rejection of that defence by the two courts below was criticized for not being based on cogent reasons contrary to **Section 169 of the Evidence Act**. Counsel maintained that the appellant was the victim of a mugging, and not a robber.

Ms. Khaemba also assailed the learned Judgesof the High Court for failing to analyze and evaluate the evidence and arrive at their own independent conclusions. She took issue with the failure of the trial court to summon crucial witnesses pursuant to **Section 150 of the Criminal Procedure Code,** and with the High Court for not dealing with the issue of the vital witnesses who could have included thepeople who took the appellant to hospital. Counsel also submitted that the learned Judges should have held that PW4, Senior Sgt. Boniface, was not a reliable witness. That witness had testified on how he was on patrol duties in Rongai where he found the appellant being taken to hospital with a stab wound. It was around midnight and he insisted that the appellant first report to the Police Station.

The appellant's final complaint was that his fair trial rights were violated due to prolonged and unlawful pre-trial detention. Counsel submitted that having been charged in November 2007 yet he had been arrested in July of that year, the appellant was entitled to an unconditional acquittal for violation of rights.

The appeal was opposed by the State though Mrs. G. Murungi, Senior Assistant Director of Public Prosecutions (SADPP) who first maintained that the appellant was properly identified by PW2 with the aid of moon light. She urged us to find as established by concurrent factual findings that the appellant was one in a gang of two who attacked the complainant. The complainant managed to wrest the knife and use it to stab the appellant before reporting the matter to the police. The blood on the knife and at the scene was the appellant's, she submitted.

Mrs. Murungi was emphatic that the appellant's conductwas inconsistent with innocence. In particular, he did not voluntarily take himself to the police after being allegedly mugged. Rather he did so only upon PW4's insistence. She submitted that the offence was fully and properly investigated and there was no necessity for the prosecution to call a multiplicity or superfluity of witnesses who, at any rate, arrived at the scene after the event and did not witness the robbery itself.

On the delay in charging the appellant with the offence after his arrest, Mrs. Murungi submitted that **Section 77** of the retired Constitution only required the prosecution to offer an explanation for such delay beyond fourteen (14) days. The explanation in the case of the appellant was the fact of his having been admitted in hospital and therefore unfit to be presented to court and tried. In any event,argued the learned Senior Assistant Director for Public Prosecutions, even had there been such violation of the appellant's rights, the remedy wouldlie in a suit for damages, not on acquittal as contended.

As a second appellate court, our jurisdiction is limited to a consideration of matters of law only. **Section 361(1) of the Criminal Procedure Code** expressly prohibits our consideration of matters of fact. ThisCourt has recognized and honoured this jurisdictional limitation on many occasions including **Kango vs Republic[1982] KLR 213**. In **Gachuru vs Republic [2005] 1KLR 688** it stated:

"In a second appeal only points of law may be raised since the Court of Appealwill not disturb concurrent findings of facts made by the two courts below unless these findings are shown to be based on no evidence."

The facts taken as established by the trial courts below are that on the material moonlit night, at about 7.45 pm, the complainant was attacked by two men including the appellant who was wielding a knife. The complainant fought back, overpowered the appellant and snatched the knife from him and used it to stab the appellant who ran off from him. The other attacker had managed to escape earlier taking with him PW2's Ksh 3500 in cash and a Nokia cell phone. PW2 alertedpassersby and also made a report to the police explaining that he had managed to stab one of the assailants.

The next morning, the police visited the scene and saw blood at the scene. A sample was taken which on DNA analysis matched theappellant's blood. It is the same blood type that was on the knife PW2 handed over to the police thereby banishing any doubt that the appellant was the robber stabbed by PW2. The appellant had himself been taken into custody after he was found shortly after the robbery incident attempting to find transport to take him to hospital for treatment for a stab wound sustained, according to him, at the hands of muggers. The patrolling policeofficer who found him, PW4, insisted that he first reported the matter at the police station before being taken to hospital.

Given the foregoing facts, we are fully satisfied that the appellantwas one of the two robbers who attacked PW2. He wasproperly identified by PW2 as there was moonlight at the scene. His blood type was found at the scene and on the knife prised from him by a much stronger PW2. There was no mistake as to his identity and his allegation that he had been mugged is effectively displaced by the cogencyand consistency of PW2's testimony and the physical evidence at the scene.

We are equally satisfied upon our consideration of the record thatthe learnedJudges of the High Court properly and effectively discharged their task of analyzing, re-evaluating and re-assessing the entire evidence that had been tendered before the trial courtand arriving at its own independent conclusions. This duty has been adverted to in many decisions of this Court and its predecessors including in **Pandya vs Republic[1972] 336** and**Okeno vs Republic [1972] EA 32.**The criticism that the learned Judges failed in this regard is therefore unwarranted.

In the premises then, it is clear to us that the appellant's conviction was based on sound and solid evidence leaving no doubt as to his guilt and we have no basis upon which to disturb the judgment of the High Court.

This appeal lacks merit and is accordingly dismissed in its entirety.

Dated and delivered at Nairobi this20th this day of December, 2013.

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR