IN THE COURT OF APPEAL

AT BUSIA

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 409 OF 2009

BETWEEN

BENEDICTO KWARULA INGOSI ..... APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Kakamega,(F. Muchemi & J. Chitembwe, JJ) dated 30th June, 2013

in

HCCRA NO. 87 & 88 OF 2005)

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JUDGEMENT OF THE COURT

The appellant, Benedicto Kwarula Ingosi was originally charged with two others before the Chief Magistrates Court, Kakamega, with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code in that :

"On the 9th day of November, 2004 at Mukango village, Lukusi sub location Ivihiga location in Kakamega District within the Western Province, jointly with others not before court, while armed with dangerous weapons namely pangas and an axe robbed Manase Wachira of cash Kenya Shillings eight thousand (8,000/=), one bicycle make Avon and assorted shop goods all valued at Kshs. 16,000/= and at or immediately before or immediately after the robbery wounded the said Manase Wachira."

There was an alternative charge which did not affect the appellant who was the 3rd accused in that court. A trial was conducted by the learned Principal Magistrate (S. M. Kibunja) who in a judgement delivered on 12th July 2005 convicted the appellant and sentenced him to death. The appellant was dissatisfied with those findings and appealed to the High Court of Kenya at Kakamega. The appeal was heard and dismissed by Florence M. Muchemi and Said J. Chitembwe, JJ, in the judgment delivered

on 30th June, 2009. Those findings did not sit well with the appellant hence this appeal. Being a second appeal we must remember our duty which is not to retry the case or re-evaluate the evidence . Our duty as a second appellate court is not to interfere with concurrent findings of fact by the trial court and the first appellate court unless the findings were bad in law for being perverse which is to say that no reasonable tribunal could on the evidence have arrived at such findings – See the cases of **Thiongo v R [2004] 1EA 333 and Muriungi v R [1982 – 1988] 1 KAR 360.**

In the Memorandum of Appeal drawn by his lawyers Wanyama & Company Advocates the appellant took four grounds of appeal. These were to the effect that the learned judges of the first appellate court erred in failing to evaluate and analyse the evidence thereby arriving at an unfair decision; that the learned judges erred in failing to consider the possibility that identification by recognition was mistaken; that the learned judges erred in failing to caution themselves that circumstances for identification were difficult and finally that the learned judges erred in relying on the evidence of a single witness.

The case for the prosecution was through the evidence of seven witnesses. **Manase Wachira (PW2) (Wachira)** testified that in his usual occupation of selling shop goods from his bicycle he on 9th November, 2004 visited his brother **Francis Salim Thuo (PW4) (Thuo)** and collected goods for sale from him as was their usual practice. He peddled off on his bicycle laden with the goods he had and managed to make sales of goods worth Kshs. 8,000/=. On the the return journey back he reached a river at Mukunga, crossed it and was pushing the bicycle uphill when he noticed four people approach him – the 1st and 2nd accused before the trial court came from one side of the road while the appellant and another person who was not charged in court approached from the opposite side . It was 7.30 p.m. and because there was moonlight Wachira was able to recognize all the four people. He told the court that he knew 1st the accused and the appellant who he used to see on the road patching pot poles for a fee while the 2nd accused was a local charcoal seller. He described the various weapons the four people were carrying – the 1st and 2nd accused had a panga each, the appellant had an axe and the one not before the court had a slasher. They surrounded him and he was asked for money by the 1st accused who proceeded to cut him on the head knocking him down. The appellant cut him on the right leg with the axe almost severing that leg. The 4th person lay on him and proceeded to cut his neck in the butchery style. Just then a motor vehicle happened by and the four attackers fled the scene - taking with them the bicycle and a crate of goods but forgetting the slasher behind. The motor vehicle slowed down but then drove off. The illumination created by the motor vehicle headlights caused more trouble for Wachira as the attackers returned and vowed to finish him off as he had recognized them. So they proceeded to cut him up so severely that he lost consciousness. They left him for dead. Upon regaining consciousness at 2.00 a.m. Wachira found himself in a sugar plantation and his forlorn cries for help did not attract anybodys' attention and when it did at 6.00 a.m those who would come by would look at him and leave, probably for the frightful sight they would encounter. His brother Thuo did in the process receive information and came to his rescue. A report was made to police and Wachira was taken first to a dispensary and thereafter to Kakamega Provincial General Hospital where he was admitted for one month and thereafter transferred to Kapsabet hospital where he was admitted for two months. He was visited by police while in hospital and he gave the names of the attackers to the police.

In cross – examination Wachira stated on the issue of identification of the 1st accused and the appellant :

"...I used to be a conductor in my brothers vehicle and we would give you some money on finding you filling the potholes. You are the one who gave me your names during that time …..when people came in the morning I gave them four names who attacked me (sic). I gave police your names. I had seen you well through moonlight....

And in re-examination:

"...the moonlight was bright and one could see well one who is four metres away and accused were next to me when robbing and attacking me. I saw and identified accused by their physical appearances as I knew them before...."

Thuo testified and confirmed being the owner of the bicycle stolen from his brother Wachira. He had given him goods to sell on 9th November, 2004 but he did not return. He later received information that Wachira had been attacked and injured and he took him to hospital.

Ochango Benard (PW1) (Benard), a Clinical Officer at Kakamega Provincial General Hospital saw Wachira for medical assessment. This was 156 days after the incident. He confirmed various injuries suffered by Wachira which he certified to have caused grievous harm.

No. 820247 A. P. Corporal George Mwanje received a report on the morning of 10th November, 2004 from Thuo that Wachira had been attacked and injured. He assisted in taking Wachira to hospital and in the process Wachira gave him the names of the people who had attacked him. He arrested all the three people who were charged before the Chief Magistrate including the appellant and recovered the stolen bicycle which had been hidden in a sugarcane plantation. This officer handed over the matter to Criminal Investigations Officers including **No. 61403 Police Constable James Kiogora** who testified that upon receiving information he visited Kakamega Provincial General Hospital on 10th November, 2004 where he met Wachira who narrated the incident to him and gave him the names of three persons who had attacked him and who he later charged with the offence relevant to this appeal. This witness was also among those who recovered the bicycle, a slasher and other exhibits. There was other evidence presented by the prosecution but as this appeal only relates to this appellant it is not necessary to refer to it.

The trial court received this evidence and found that the prosecution had established a *prima facie* case against the appellant who was therefore put on his defence.

In an unsworn statement the appellant testified that on 13th November, 2004 he was asleep in his house when at 3.45 a.m he was awakened by a knock at the door and upon opening was confronted by two police officers who handcuffed him, arrested him and took him to the police station where he was detained and later charged in court. He denied ever engaging in the work alleged by the complainant Wachira and wondered why stolen items were not found on him.

In the judgement which we have referred to the trial magistrate was satisfied that Wachira was attacked on 9th November, 2004 and robbed of money, a bicycle and various shop goods given to him to sell by his brother Thuo. The trial magistrate after warning himself of the danger of mistaken identity in an incident like the one before him that occurred at night stated:

"...However from the graphic and detailed information given by PW2 to the court on how he identified and recognized each of the accuseds' as among the four robbers am satisfied that there was sufficient occasion for him to see and identify the attackers through the moonlight. He said he could see well four metres away and the attackers had to come near him while cutting and hacking him and robbing him and as accused were people he knew he recognized them...

The moonlight was sufficient and the incident took long as the robbers had first left the scene on seeing the headlights of a vehicle which also enabled PW2 to see accuseds' and the other attack (sic) …."

Mr. O. M. Wanyama, the learned counsel for the appellant who was assisted by Mr. V. O. Osango appeared before us and argued the appeal. Ground 1 was abandoned. On ground 2 learned counsel faulted the learned judges and submitted that there was a possibility that the appellant was framed because, according to counsel, he was previously known to PW2 Wachira and PW4 Thuo who had seen the appellant on the road undertaking work of filling potholes.

On the combined grounds 3 and 4 of appeal learned counsel submitted that circumstances for identification were difficult because there was no other evidence to support identification. For all these reasons counsel urged that the appeal be allowed.

The learned Assistant Director of Public Prosecutions Mr. C.A. Abele supported conviction and sentence and submitted that the first appellate court properly re-evaluated the evidence and independently arrived at a correct decision. Counsel submitted that the two courts arrived at correct findings of fact and the facts could not be faulted.

We have considered the whole matter, the grounds of appeal, the submissions of counsel and the law.

On recognition, although the evidence of identification should be tested with great care especially when it is known that the conditions favouring a correct identification may be difficult (S**ee Abdullah bin Wendo & Another v R (1953) Vol XX 166 and Cleophas Otieno Wamunga v R Criminal Appeal No. 20 of 1989)** the evidence of the complainant was given in graphic detail. He described each of the persons who attacked him by name and gave details of the weapon each of the assailants was armed with. He gave details of the role played by each assailant and the injuries each of the assailants inflicted on him. There was moonlight enabling the complainant to observe and recognize the assailants who were people he knew because he had previously interacted with them. Recognition is in law the best form of identification because it is more reassuring – See **Anjononi v R [1980] KLR 59.**

If that evidence of recognition was not enough there is additional evidence of a motor vehicle happening at the scene whose headlights illuminated the place thus enabling the complainant to observe his attackers who fled the scene only to return moments after the motor vehicle had passed. The complainant stated:

".....I held the slasher but then a vehicle came and that person and accuseds ran away. The fourth one left the slasher with me. This is the slasher mfi – 2. They took with them the bicycle and crate I had carried goods on.

When the vehicle came it slowed down but left. The four people came back and they said they will finish me as I had recognize (sic) them and they cut me severally all over the body. I became unconscious..."

The complainant gave the names of his attackers to the police (PW6 and PW7) the following day on regaining consciousness and further gave the names to his brother Thuo (PW4).

The first appellate court on review of the evidence was satisfied that the complainant positively identified his attackers who robbed and injured him. That court therefore dismissed the first appeal. We are satisfied that the first appellate court properly carried out its duty of review and re-evaluation of evidence. This appeal has no merit and we dismiss it accordingly.

Dated and Delivered at Kisumu this 9th day of May, 2014.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR