



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT KISUMU

CRIMINAL APPEAL NO. 242 OF 2005

1. JOSEPHAT KUNYALI KUNYAM
2. ALEX ALULU SHIKOKOTI
3. ALBERT KALIAVO KALIONDO.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kakamega (Sergon & Kariuki, JJ)

dated 19th March, 2004

in

H.C.C.R.A. NO. 236, 237 & 238 OF 2002)

JUDGMENT OF THE COURT

The three appellants herein were jointly charged with others not before the court with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. Two of those others, one **Lemicus Likavo Muhalia** and one **Morris Silele** were charged and tried separately in Kakamega and Butere law courts respectively. An appeal relating to the former was also heard before this bench and we shall comment on that matter shortly.

The particulars of the charge facing the appellants here were that on the 5th day of October, 2000 at Savane sub location, Iguhu location in Kakamega District within Western Province, jointly with others not before court they robbed **Aggrey Livoko Musindi** of cash Ksh.500/- and a pair of shoes valued at Kshs.1,400/- and after or immediately before or immediately after the time of such robbery wounded the said **Aggrey Livoko Musindi**. Upon conclusion of the trial by Kakamega Senior Principal Magistrate, Mr. Muiruri, the three were convicted as charged and were sentenced to death which is the only sentence provided for the offence. Their appeal to the superior court (*Sergon & Kariuki JJ*) was dismissed and they are now before us on a second appeal. As such, only issues of law may be raised – **see Section 361, Criminal Procedure Code**.

Each of the three appellants drew up their own “petitions” of appeal raising 5 grounds but all those grounds, except one, were abandoned by learned counsel who appeared for them *Mr. Onyango*. *Mr.*

Onyango argued four more grounds in a supplementary memorandum of appeal he filed. In summary, the five grounds relate to:

- 1) Identification;
- 2) Failure to analyze and re-evaluate evidence;
- 3) Contradictions in recorded evidence;
- 4) Failure to consider the appellants' defence; and
- 5) Failure to appreciate the absence of proof of particulars of the charge.

We will examine those grounds presently.

Aggrey Livoko Musindi (Aggrey) (PW8) who is the complainant in this matter, resides with his father at Savane village of Iguhu location, Kakamega. His father **Alfred Musindi (PW1)** had ordered some timber frames from a carpenter in a neighbouring village but was himself traveling away from home on 04.10.2000. So he gave his son some Sh.300/= to take to the carpenter the following day and collect the frames. Aggrey woke up the following morning, 05.10.2000 and was on the main Kakamega/Kaimosi road leading to Savane shopping centre at 7.30 a.m., when he saw a group of eight other persons ahead of him walking slowly. When he caught up with them near the gate of Savane Primary School, he noticed that some of them were armed with rungu. They stopped him and demanded money at the pain of death. He knew most of them since they came from the same village. **Lemicus Likavo Muhalia (Lemicus)** was his cousin and is the one who made the demand for money and removed a panga from his long trouser. Aggrey knew **Alex Alulu Shikokoti (Alex)**, the second appellant. They were both in the same school – Savane Primary School – before 1998. It was Alex who removed a slasher from his long trouser. The third appellant **Albert Kaliavo Kaliondo (Albert)** had a coiled whip and was also, at one time, a schoolmate at Savane Primary School; while the first appellant, **Josephat Kunyali Kunyamwa (Josephat)** was the son of a woman whose land was leased in the neighbourhood by Aggrey's father for cultivation. **Josephat** was holding a rungu. Aggrey mentioned names of two other persons he recognized but said he could identify the other two physically if he saw them again.

When the order was given by **Lemicus** for production of money and Aggrey said he had none, Alex aimed the slasher at Aggrey's neck but Aggrey blocked it with his left hand. His wrist was severed through the bone leaving only the skin holding it in place. He fell and **Lemicus** set upon him slashing him with the panga on his left shoulder. He aimed at his neck but Aggrey quickly ducked and his ear was partly severed instead. Then **Josephat** with his rungu, and **Albert** with his coiled whip, set upon him too and thrashed him. The assailants, he testified, took Shs.500 from his pocket and removed his pair of shoes. Throughout the attack Aggrey was screaming for help.

Fortunately help came from 20-30 metres down the same road. It was from **Ibrahim Angweye Iyayo (Ibrahim)(PW2)** who at 7.30 a.m. was standing beside the same main road waiting for milk. The group of eight had also passed by the place he stood, and 30 metres behind them was Aggrey. He knew four members in that group since they came from the same sub location; that is, **Lemicus**, and the three appellants **Josephat**, **Alex** and **Albert**. He also knew Aggrey as the son of **Alfred Musindi (PW1)**. He witnessed and heard the demand given to Aggrey to stop and produce money. He witnessed the assault on Aggrey and gave the same account of the weaponry held and participation by the three appellants in that assault. **Ibrahim** then screamed at the assailants asking them why they were killing Aggrey as he ran towards them. The group dispersed and he started assisting Aggrey as other members of the public were attracted to the scene by the screams. They took Aggrey to a nearby dispensary but he could not be treated there. Aggrey's mother **Doreen Inganji Muhala (PW3)** and wife then came and took him to Kakamega General Hospital where he was admitted and the severed hand was amputated.

When they arrived at the hospital, Aggrey, his mother and wife found four of the assailants, whom they knew, at the casualty. It was the three appellants and **Lemicus**. **Lemicus** and **Alex** then taunted and

flattered Aggrey with remarks to the effect that they “*had taken him to school that day*” and that “*he was a bull if he was still alive*”. The two left.

Aggrey’s father (**PW1**) did not return home until 06.10.00 when his wife, **PW3** told him about the assault on their son and the amputation of his wrist in hospital. She had been given the wrist which PW1 took to Kakamega police station the following day and reported the matter to **Pc. Peter Muturi (PW10)**. The police could not interview Aggrey immediately because he had slipped into a coma. They visited the scene of crime for any clues but it had rained for two consecutive days after the date of the crime. Then they tried to trace the suspects whose names had been given out but they were nowhere to be found.

When **Pc Muturi** was perusing the occurrence book at the police station, he noticed an entry made on 05.10.00 by a fellow officer indicating that two of the appellants here – Alex and Albert with one Lemicus, had made a report of assault on them by Aggrey. They had handed over to that officer a pair of shoes, a sword (slasher) and a panga. That officer had then advised them to report to the Officer in Charge, crime office but instead the persons had disappeared. It occurred to **Pc. Muturi** that the report had been made by the persons as a cover up for the serious crime they committed.

On 08.10.00, **PW1** says he was at Kakamega General Hospital to visit his son when he met the appellants *Josephat, Alex and Albert*, together with *Lemicus*. *Aggrey* however put the date as 09.10.00 when he saw the four persons. *Lemicus* had gone to *Aggrey’s* ward while the others stood outside, and he asked *Aggrey* whether he was still alive and he left. His father then arrived and on being told of the presence of the assailants whom he saw outside the hospital, he decided to rush to the police station nearby. In the meantime he informed some prison officers at the hospital to prevent the escape by the four persons. When **PW1** returned with 2 police officers, among them **Pc Maurice Njagi (PW5)** he only found one person, *Josephat*, in the custody of the prison officers. The others had escaped. Both **Pc Njagi** and the investigating officer, **Pc Muturi**, confirm that the arrest of *Josephat* was made at the hospital on 09.10.00. A warrant for the arrest of the appellants *Alex* and *Albert* was issued to the Assistant Chief of the area, **Kenneth Amwayi (PW4)** on 11.10.00. He managed to have both arrested on 16.10.00.

Aggrey was in hospital for about three weeks. **Dr. Matete Geoffrey (PW7)** examined him on his first arrival at the hospital on 05.10.00 at 11.00 a.m. He confirmed the injuries inflicted on *Aggrey* as a cut on the left shoulder, cut on the ear, and a deep cut on the wrist which severed all bones leaving the skin to support it. He amputated the wrist and attended to the other injuries including tenderness of the thorax and abdomen which he assessed were caused by sharp and blunt objects. He also assessed the injuries as grievous harm.

That, in essence, was the prosecution evidence accepted by the two courts below as probative of the charge laid. But each of the appellants gave totally different accounts of the story which were also examined but rejected by those courts. It was this:-

The first appellant, *Josephat* was in the business of selling “Mutumba” clothes and resided in Savane sub-location. He had a sick sister admitted in Kakamega General Hospital and he went to visit her on 09.10.00. There he met **Pw1** with three police officers. He knew **PW1** because **PW1** was cultivating their farm. **PW1** then asked him to testify in the matter of his son’s assault but *Josephat* refused saying he could not give false testimony. **PW1** then threatened him that he would be deprived of his freedom. Later that day two police officers came to him and tricked him to accompany them to the police station. They locked him up and charged him with the offence of robbery.

The second appellant, Alex is also from Savane village. On 05.10.00 he and *Lemicus* were taking the sick father of *Lemicus* to Kakamega District Hospital on foot. On the Kaimosi/Kakamega road near Savane Primary School, they found *Aggrey* with 3 other men he knew clearing bush on **PW1’s** fence using pangas. They went past the men but shortly thereafter they heard noise behind them telling *Lemicus* to stop and asking where his AP guards were that day. It was *Aggrey* and the other three wielding pangas and heading towards them. *Lemicus* reached for a stone but as he picked it up, *Aggrey* threw a panga at him and it cut his face. They all screamed and the four assailants fled into the bush. Members of the public came and pursued the attackers arresting one of them who had a panga. They also came out with a

pair of shoes and a panga which had been abandoned by Aggrey as he ran. As they frog-marched the arrested person across river Yala to an AP's camp nearby, he jumped over the bridge and disappeared. He and *Lemicus* then went to Kakamega Police Station where they made a report of the assault on *Lemicus* and deposited the shoes and two pangas with the police. The police officer then advised them to take *Lemicus* for treatment before recording their statements. Two days later, *Aggrey's* father PW1 went to Alex's home to persuade him to testify as a witness for Aggrey who had been attacked. Alex declined and said he would instead testify for *Lemicus* who was attacked by Aggrey. Then PW1 threatened him with a big problem. That is when he was arrested on 16.10.00 and was charged with robbery.

Alex called the father of *Lemicus* (DW1) and *Lemicus* himself (DW2) to support his story. While DW1 confirmed the version that they were on that road and spot on the same date, and found the group of four, including Aggrey, it was DW1's evidence that it was the man who was apprehended by members of the public and later jumped into river Yala who had cut *Lemicus* on the face. Some two pangas and a pair of shoes were recovered by the members of the public.

Lemicus for his part said Aggrey and the three men were his cousins but they were not in good terms because of land and stock theft matters. That was the second time they were fighting him. They fought again in November, 1999. It was Aggrey who had thrown the panga which cut his face on 05.10.00 and he had no idea when Aggrey's hand was cut or by whom. Cross-examined however, he conceded that he had injured Aggrey on 05.10.00 and was serving a jail sentence for grievous harm.

Lastly, the third appellant Albert said he was a pastor with P.A.G. Pentecostal Assemblies of God and a resident of Savane village. In August, 2000, Aggrey with some other young men went to his house playing Isukuti dances. They threatened and abused him when he stopped them from their dancing. He reported the matter to the Assistant Chief. The same group accosted him on 02.10.00 as he walked home near Savane Primary School and beat him up. He was rescued by members of the public. He reported to the Assistant Chief who gave him a letter to go to Kakamega police station. He went there on 16.10.00 but was locked up. He was not aware of the events of 05.10.00 as he was asleep in his house.

On the totality of that evidence, it was the submission of *Mr. Onyango* that the issue of identification was neither fully appreciated nor carefully considered by both courts below in order to avoid the possibility of error. The complainant was attacked by eight persons and there was a possibility that he could have been mistaken on the identity of his attackers.

On that issue, the trial court stated:-

"I am convinced that this robbery attack occurred as narrated to this Court by PW2 and PW8 (the complainant). It is quite true that it was during the day and there was ample sunlight to enable both PW2 and PW8 recognize and identify the assailants. Of these assailants the 1st, 2nd and 3rd accused as well as Lemicus (sic) (DW2) were people well known by both PW2 and PW8. PW2 knew them as living (sic) in the same sub location as him. And PW8 knew them as his former school mates. The question of identification does not therefore arise."

And the superior court before whom the same issue was raised stated:-

"The first ground argued was that the appellants were not properly identified hence it was not safe for the Senior Principal Magistrate to convict the appellants. The learned Senior State Counsel Mrs. Kithaka, opposed this ground by stating that the appellants were well known to the complainants and PW1 hence there was no possibility of mistaken identity. Being the first appellate court we are enjoined to re-evaluate the evidence presented before the trial court and come up with our own conclusions. We have perused the record and have come to the conclusion that the appellants were properly identified. The complainant and PW2 are people who come from the same sub location as the appellants. This was not denied by the appellants. We hold that this ground has no merit."

It would indeed appear from those passages, as submitted by *Mr. Onyango*, that the two courts below took a casual view of the issue of identification. But clearly this was not a case of identification but of

recognition and this Court drew a distinction between the two in *Siro Ole Giteya V. R. Cr. Appeal NO. 56/76 (UR)*. In *Anjononi & Others V. R. [1980] KLR 59* this Court further stated:-

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; 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 other”.

The offence charged here was committed in broad daylight. Both the complainant and the appellants come from the same village and admittedly knew each other well. Recognition of the assailants by the complainant was reassuring and we do not fault the courts below for their treatment of the issue. We find no merit in that ground of appeal.

The second and third grounds of appeal relating to failure to evaluate evidence and the existence of contradictions may be taken together. The inference where contradictions in evidence exist but are not identified is necessarily that the evidence on record was not re-evaluated by the superior court. In *Mr. Onyango’s* view, the superior court merely agreed with the conclusions made by the trial court instead of discharging the duty imposed on it as the first appellate court. If the superior court had done so, it would have found material contradictions in the evidence on record and allowed the appeal. Such was the contradiction between the evidence of PW1 and PW5 on the date of arrest of the first appellant. The former said 08.10.00 while the latter said it was 09.10.00.

Once again the issue of re-evaluation of evidence cannot be taken lightly. It was laid out emphatically by the predecessor of this Court and we need only refer to *OKENO V. R [1972] EA 32* where the court stated:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be 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 conclusion. Only then can it decide whether the magistrate’s finding 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 VS. SUNDAY POST [1958] E.A. 424”.

In the record before us, the superior court expressly recognized this duty and we need only therefore consider whether it merely paid lip service to that expression. The same ground of appeal was put forward before the superior court and was specifically dealt with. In particular the contradiction on the date of arrest which the trial court had found too minor to vitiate a conviction was examined. On our own, we have examined the contradiction alluded to and are left in no doubt that the view taken by the two courts below was reasonable. The date of arrest of the first appellant was the 09.10.00 and it was referred to by no less than three other witnesses – PW8, PW4 and PW10 – apart from the first appellant himself. That PW1 said it was 08.10.00 would not invalidate that evidence. That ground of appeal is not meritorious either.

The last two grounds of appeal may be considered together. They relate to the failure to examine critically the defences of the appellants and also the pieces of relevant prosecution evidence that tended to exonerate the appellants. Such pieces of evidence were, for example, the failure to validly produce the photograph of the amputated wrist; the fact that the exhibits produced in court were in fact taken to the police by the appellants themselves; none of the appellants were found with any of the stolen property; non-verification of the report that the pangas and shoes were recovered from the complainant by members of the public. As correctly submitted by learned Senior Principal State Counsel *Mr. Musau*, some of

those complaints strictly relate to matters of fact, findings on which the courts below made and are therefore not open for agitation before this Court. We think, nevertheless, that there was insufficient consideration of the defences made by the appellants which on proper analysis throw reasonable doubts as to whether the incident complained about amounted to an offence of robbery with violence or simply one of assault.

We are in no doubt that it was the three appellants with others not before court who set upon the complainant and viciously attacked him on 05.10.00. We do not, as did the two lower courts, accept the alibis advanced by the appellants in that regard. The conduct of the first appellant and *Lemicus* reporting the matter to the police and depositing the two weapons and shoes at the station was clearly self-serving. He and the two other appellants had committed a heinous crime of inflicting grievous harm to the complainant, for whatever motive, and they cannot get away from it. On the same facts another court had reached the same conclusion in respect of *Lemicus* and this Court has upheld that conclusion. We see no reason why we should hold a different view in this matter. See ***Remicus Ligavo Muharia v. R, Cr. App. No. 114/05 (UR)***

In the result, we allow the appeal and set aside the conviction and sentence of the three appellants for the offence of robbery with violence under ***section 296(2)*** of the penal code. In substitution thereof we convict the appellants for the lesser offence of causing grievous harm contrary to ***section 234*** of the Penal Code. In view of the gravity of the offence we sentence each appellant to serve seven years imprisonment, the said term to commence from the date of their conviction by the trial court.

That shall be our judgment.

DATED and DELIVERED at KISUMU this 31ST day of MARCH, 2006.

P.K. TUNOI

.....

JUDGE OF APPEAL

E.O. O’KUBASU

.....

JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR