



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL APPEAL NO. 59 OF 2018

CHRISPINE ODHIAMBO OJODE *alias* SALIM.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. K. Langat,

Senior Resident Magistrate in Rongo Senior Resident Magistrate's

Criminal Case No. 307 of 2017 delivered on 17/10/2018)

JUDGMENT

1. *Chrispine Odhiambo Ojode alias Salim*, is the appellant in this appeal. He was charged with two counts of *robbery with violence*.

2. The particulars of the offences were as follows: -

On the 30th day of June 2017 at Ogeng'o Private Hostel in Rongo township, within Migori County in the Republic of Kenya, jointly with others not before Court, armed with dangerous weapons pangas and a huge stone robbed CHRISTOPHER NJUKI KIRAGU of his gas cylinder 6Kg, mobile phone make TECNO Y6 all valued at Kshs. 11,900/= and immediately before the time of such robbery threatened to use actual violence to the said CCHRISTOPHER NJUKI KIRAGU.

On the 30th day of June 2017 at Ogeng'o Private Hostel in Rongo township, within Migori County in the Republic of Kenya, jointly with others not before Court, armed with dangerous weapons pangas and a huge stone robbed CLINTON ODERA OUMA of his gas cylinder 6Kg, mobile phone make INFINIX X551 and a laptop make HP 15 all valued at Kshs. 45,900/= and immediately before the time of such robbery threatened to use actual violence to the said CLINTON ODERA OUMA.

3. The appellant denied the charges and was tried. Six witnesses testified in support of the prosecution's case. **PW1** was *Vincent Malaki Oduka*. He was a student at the Rongo University. *Christopher Njuki Kiragu* testified as **PW2**. He was also a student at Rongo University and the complainant in the first count. The complainant in the second count testified as **PW3**. He was also a student at Rongo University. He was *Clinton Odera Ouma*. Another student at the Rongo University also testified as **PW5**. She was *Everlyne Okello*.

4. No. 231186 CIP Philemon Kimitai was the DCIO Rongo. He conducted the identification parade. He testified as **PW4**. The Investigating Officer testified as **PW6**. He was *No. 64781 Corp. James Thuva*. He was stationed at Kamagambo Police Station. For the purposes of this appeal I will refer to the witnesses in the sequence in which they testified.

5. At the close of the prosecution's case the appellant was placed on his defence. He gave sworn testimony. He did not call any witness.

6. By a judgment rendered on 17/10/2018 the appellant was found guilty as charged in both counts. He was accordingly convicted. He was subsequently sentenced to life imprisonment on each count.

7. Dissatisfied with the convictions and sentences the appellant timeously lodged an appeal. He alleged that the offences were not proved more so on identification of the assailants. He also alleged that the sentences were too harsh and draconian. He prayed that the appeal be allowed.

8. Directions were taken and the appeal was disposed of by way of written submissions. The appellant expounded on the grounds.

9. The State opposed the appeal. It submitted that offences were properly founded and proved. It was further submitted that identification of the appellant was settled by PW1, PW2 and PW3 who saw him during the ordeal. On sentence, it was submitted that since the appellant was sentenced to life imprisonment on both counts then sentence was to be held in abeyance. Section 354 of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya was called in to remedy the error. In a nutshell the State prayed that the appeal be dismissed.

10. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

11. In line with the foregone, this Court in determining this appeal is to satisfy itself that the ingredients of the offence were proved beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions. The trial court captured the evidence so well and I will adopt the evidence as part of this judgment by reference.

12. I will start with the issue of identification. The offences were committed in the night of 29th and 30th June 2017. It was around 02:00am. The offences were committed in a hostel not far from the Rongo University. PW1, PW2 and PW3 were inside the hostel that night. Each occupied a room out of the 13 rooms. They occupied rooms 8, 12 and 9 respectively.

13. PW1, PW2 and PW3 were asleep in their rooms. They were woken up when the main door of the hostel was forced open using a big stone. The assailants who were three walked inside the hostel. PW2 and PW3 were robbed of several items. The assailants however did not manage to access PW1's room. The hostel had a corridor leading to the rooms. The corridor was lit using a fluorescent light. Each of the rooms had a window on the side of the corridor.

14. PW1 testified that he saw the appellant together with his two accomplices as they walked to the window of his room. One of them attempted to open the door to his room in vain. By then PW1 was heating cooking fat in a *sufuria* as a safeguard. The light along the corridor and the light inside PW1's room were both on. The window was a glass window. There was a curtain inside the room. The assailants pulled the curtain using a *panga*. The assailants talked to PW1 as they ordered him not to surrender and not make any calls.

15. PW1 saw the appellant at the window. He knew the appellant. The appellant wore a marvin and a brown jacket. The assailants left after around 20 minutes. They put off the lights along the corridor.

16. PW2's room was assessed by the three robbers. They banged the door twice before it opened. He was forced to lie on his stomach as they took away his items. A cold metallic item was placed on his neck. He freaked. His pockets were ransacked. They then left to the other rooms and later the robbers left the hostel in a hurry.

17. PW2 stated that he saw the appellant during the ordeal by the aid of the security lights. The appellant wore a marvin and a brown jacket. He however did not know the appellant before the attack. PW2 stated that he gave the description of the appellant to the police.

18. PW3 heard three bangs before he finally woke up. He did not put on the light in his room on. The light at the corridor was on and some light entered his room through the window. The door to his room was broken. Three armed men walked in. One had a something that appeared like a gun and the others carried pangas. He was ordered to lie on his bed and he complied. He was scared. One of the attackers stood next to PW3 as the others carted away his items. They later left.

19. PW3 stated that he saw the man who stood guard next to him. He clearly saw him when he was leaving the room. He was tall and built. He wore a marvin which did not cover his face. He was in a black trousers and a brown jacket. PW3 identified him as the appellant. He did not know him before the attack, but he gave the description of the appellant to the police.

20. PW4 conducted an identification parade for PW1, PW2 and PW3. All positively identified the appellant at the parade.

21. Identification of the assailants was very crucial in this case. A Court dealing with the aspect of identification is under a legal duty to weigh the evidence of the witnesses with such greatest care and to satisfy itself that in all circumstances, it is safe to act on such evidence. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested.

22. The Court of Appeal in **Wamunga vs Republic (1989) KLR 426** stated as under:

It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

23. The Court further held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

24. In **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a witness. The Court

said:

... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

25. The Court of Appeal in **Peter Musau Mwanzia vs. Republic (2008) eKLR** dealt with the distinction between recognition and identification of a suspect. The Court stated as follows: -

We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for along time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition.

26. On the issue of identification parades, the Court of Appeal in **John Mwangi Kamau vs. Republic (2014) eKLR** greatly and at length expressed themselves as under: -

15. Identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68& 69 of 2008. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that DW1, CPL John Makumi (CPL John), in producing the Occurrence Book testified that the incident was recorded as OB. No. 45 of 24/6/2003; the assailants' were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. In Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134, this Court observed:-

“A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”

16. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequence of the said failure? In Nathan Kamau Mugwe –vs- Republic- Criminal Appeal No. 63 of 2008 this Court faced with a similar situation expressed itself as follows:-

“As to the compliant in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected.”

17. Based on the foregoing, we are of the considered view that the failure to give the description did not invalidate the identification parade. We find the issue that falls for our consideration is the weight to be attached to the said identification evidence. On the issue of whether the identification parade was properly conducted we can do no better than to reproduce this Court's observations in David Mwita Wanja & 2 others –vs- Republic- Criminal Appeal No. 117 of 2005:-

“The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwangi s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR

422 where the court stated at page 424: -

“It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

“6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -

.....

(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

.....

(n)The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;”

18. PW5 (IP Francis) gave evidence of how the identification parade was conducted. He testified that the appellant was placed amongst eight members; the witnesses were in a different room while the parade was being prepared; none of the witnesses met the appellant before the parade; each witness was called alone to identify the assailants from the parade; after identification each witness was taken to a different place in order not to influence the others who had not gone through the parade. IP Francis testified that the appellant changed his position in the parade when each of the witnesses identified him. The appellant never objected to the manner in which the parade was conducted. Based on the foregoing evidence and the identification parade form on record we concur with the two lower courts that the identification parade was properly conducted. We also note that each witness identified the appellant as the assailant who was armed with the pistol. Therefore, there was corroboration of the identification evidence. We are of the considered view that the identification evidence was positive and free from error

27. In this case PW1 knew the appellant well. Although he attended the parade the results thereof did not carry any weight. (See the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic** (unreported).

28. On the other hand, PW2 and PW3 did not know the appellant. They both allegedly saw him for the first time during the ordeal. Each described the circumstances under which they were subjected to during the attack. PW2 stated that ‘*he freaked*’ whereas PW3 stated that ‘*he was scared*’.

29. They were both forced to lie on their stomach. A cold metallic thing was placed on the neck of PW2. PW3 saw what looked like a gun. The ordeal was indeed terrifying. Each witness feared for his life.

30. PW2 stated that he saw the appellant when he peeped through the window to his room. The light in his room was on. How long did the person stay at the window? Did the light inside the room in any hinder PW2 from seeing the person at the outside of the window?

31. PW3 testified that he saw the appellant as he left the room. Was PW3 still lying on his stomach? If so, how did he see the assailant and yet the light in his room was still off?

32. Given that PW2 and PW3 were under immense fear of personal injuries, were they able to clearly see how the attackers looked like?

33. A witness ought to independently narrate what he or she saw. He/She ought not to be aided to reconstruct the events at the scene. In this case PW2 stated as follows: -

... We were called (by) the police. We went for identification parade. Vincent (PW1) told us (PW2 and PW3) that he knew the person I saw. He told us he is called Salim....

34. The evidence of PW2 shows that the three witnesses must have discussed the identity of the assailants. That ought not to be the position.

35. There was also the issue of how the appellant was allegedly dressed. PW1 stated that the appellant wore a marvin and a brown jacket. PW2 also testified that the appellant was dressed in a marvin and a brown jacket. PW3 stated that although the appellant wore a marvin he did not cover his face. PW1 and PW2 did not state whether the marvin covered the face or not.

36. PW4 did not indicate whether he was briefed of the issue of the suspect putting on a marvin. He therefore did not take that into account during the parade. In the circumstances of this case, it was imperative that all the parade members wore marvins.

37. PW1 armed himself with heating cooking oil just in case the attackers entered his room. Two of them stood at the window. It was a glass window. They struggled to open the window in vain. The light inside his room was on. Did the light inside the room hinder PW1 from clearly seeing the attackers who were outside the glass window given that the window did not open?

38. There was also a verbal exchange between the attackers and PW1. However, PW1 did not say that he recognized the appellant through his voice.

39. PW1 stated that he had known the appellant for at most 4 months. This is how PW1 described his acquaintance with the appellant: -

...I had previous encounter with Salim. My neighbour had confrontation with Salim. Everlyne had earlier shown me Salim along Rongo-Homa Bay road.....

40. On cross-examination PW1 stated that: -

..... Everlyne informed me that you tried to rape her.....

41. The foregone is how PW1 knew the appellant. PW1 did not expound on his encounter with Salim. To PW1 he had known PW1 as a trouble maker. He had an encounter with Salim. Salim had a confrontation with his neighbour. Salim also attempted to rape Everlyne. Given such state of affairs could PW1 have been on a revenge mission?

42. Having carefully reviewed the prosecution's evidence and the law, the following come to the fore. **One**, in view of the conditions under which the attack was committed PW2 and PW3 were under such great fear that it was not possible for them to clearly see the attackers in a manner as to be able to give honest descriptions on how the attackers looked like. **Two**, PW1, PW2 and PW3 discussed the ordeal and the appearances of the assailants after the ordeal. **Three**, PW1 did not disclose how he knew the appellant and the frequency of interaction with him. **Four**, the identification parade did not take into account the fact that one of the assailant (the appellant) wore a marvin. The parade was hence not conducted with scrupulous fairness. **Five**, there was a strain of bad blood between PW1 and the appellant. **Six**, although there was an exchange of words between PW1 and the attackers, PW1 did not recognize the voice of the appellant among the assailants.

43. From the foregone, it is therefore an uphill task for this Court to come to a finding that the identification of the appellant, whether by way of recognition or by way of identification, was free from error. The cumulative effect of the analysis and review fronts the conclusion that the circumstances in this case did not favour a positive identification or recognition of the appellant as one of the attackers.

44. The above finding is sufficient to dispose of this appeal. Proceeding on with the rest of the issues would be only academic.

45. I will however deal with two issues as I come to the end of this judgment. The first one was the position taken by the trial court on the death sentence. According to the court the '... the offence in question carries death penalty however in view of the recent supreme court decision, the court is confined to met other lawful sentence depending on the circumstance of the case other than death penalty.'

46. The court might have certainly had the Supreme Court decision in **Francis Karioko Muruatetu & Another v. Republic (2017) eKLR** in mind. To put the legal position right, I must reaffirm that the said decision did not outlaw death sentence. Death sentence in Kenya is still one of the lawful sentences. The Court dealt with the constitutionality of the death sentence to the extent of it being the only and mandatory sentence on conviction in capital offences. It was unanimously held that the position interfered with and took away the discretion of a sentencing court. It also rendered mitigations worthless. The Court then outlawed the mandatory nature of the death sentence as the only sentence on conviction of an accused person with a capital offence. In other words, the discretion of a sentencing court to render death sentence in appropriate cases was retained.

47. The second issue was how the court sentenced the appellant twice to life imprisonment. A human being can only live once. As submitted by the State the court ought to have held one of the life sentences in abeyance.

48. With the foregone I now come to the end of this judgment. The appeal is hereby allowed. The convictions are quashed and the life sentences set-aside. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

49. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 26th day of June 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Chrispine Odhiambo Ojode *alias* Salim, the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant