



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 210 OF 2013

BRIAN OCHIENG OMOLO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 2258 of 2011 delivered by Hon. J. Wanjala, CM on 3rd and 15th October, 2013).

JUDGMENT

Background

1. Brian Ochieng Omolo was charged alongside another with two counts of robbery with violence. The particulars of the 1st count were that on 22nd June, 2011 at Jamhuri Estate in Nairobi within Nairobi County, jointly with others not before the court while armed with dangerous weapons namely pistols robbed Daniel Opiyo of one laptop make Toshiba, one mobile phone make Samsung Galaxy and a wrist watch make Tag all valued at Kshs. 118,000/- and at or immediately after the time of such robbery used actual violence to the said Daniel Opiyo. The particulars of the 2nd count were that on 22nd June, 2011 at Jamhuri Estate in Nairobi within Nairobi County, jointly with others not before court while armed with dangerous weapons namely pistols robbed Tina Arufeni of a gold wrist watch make Casio, gold chain, a ring, a mobile phone make Samsung GB5722, ATM card for Housing Finance, Southern credit card and a medical card for Jubilee Insurance Company all valued at Kshs. 28,400/- and at or immediately after the time of such robbery used actual violence to the said Tina Arufeni.

2. At the conclusion of the trial, the Appellant and his co-accused who was the 1st accused were found guilty and sentenced to suffer death. The Appellant was dissatisfied with both the conviction and sentence against which he filed the present appeal. He set out his memorandum of grounds of appeal as an addendum to his written submissions filed on 26th November, 2018. They were that; (i) the learned trial magistrate erred in failing to find that the prosecution did not prove its case beyond a reasonable doubt, (ii) the trial magistrate erred by convicting him on unreliable identification evidence of a single witness, (iii) the honorable magistrate erred in failing to observe that there were inconsistencies, contradictory and conflicting inadmissible hearsay evidence concerning his arrest, (iv) the trial magistrate erred in failing to consider his defence, and (v) the death sentence was unwarranted in view of the Supreme Court decision in **Francis Muruatetu & another v. Republic**[2017] eKLR.

Evidence.

3. **PW1**, Ismael Opiyo, was a businessman in Nairobi. On 22nd June, 2011 at around 1:00 a.m. he picked up his wife, **PW3**, and they were headed home where in their usual fashion he was to open the gate and she would drive the car into the compound. As he was locking the gate he noticed a white Toyota car about twenty meters from their gate from which men alighted who ordered them into the back of their vehicle. The men took charge of their vehicle and drove out of the compound. They passed under a street light that illuminated the inside of the vehicle which enabled him to identify the people in the vehicle. The car was then driven to the Fort Jesus area where the robbers ransacked them taking away their belongings. He testified that he could see the robbers at this point as the light from the other vehicle under the command of the robbers was illuminating the inside of their vehicle. They were robbed of their ATM cards with which one robber was sent to try and access the funds but due to insufficiency of funds they were not successful. They were set free after one and a half hours. As they drove towards their home they came across police officers who had been informed by **PW2, David Kidoom Munene** of the robbery. Later **PW1** went to Kilimani Police Station where he took part in an identification parade in which he identified one of the suspects. His evidence was corroborated by **PW3, Faustina Everlyne Aruteni Munene**, his wife who did not take part in an identification parade.

4. **PW4, CIP Joseph Kipkule** of Kilimani Police Station conducted the identification parade in which the 1st accused, Michael Opiyo, was identified by **PW1**. The Appellant refused to take part in the parade. **PW5, CPL William Saiyanga** was the investigating officer. He received information on 29th June, 2011 that two wanted criminals were at a hotel within the area. Together with other police officers they

went and arrested the Appellant and the first accused. They escorted them to Kilimani Police Station where investigations were conducted. PW5 thereafter preferred charges against them.

5. After the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave an unsworn statement of defence and testified as **DW2**. He stated that on 29th June, 2011 he spent the day at work before returning home in the evening. He was preparing for 6:00 o'clock prayers when he passed by a nearby restaurant to have some tea. That is when they were arrested by officers and booked at Kilimani Police Station where he stayed for two days before being charged in court. He denied being party to the robbery. He also denied that he knew that 1st accused.

Determination.

6. It is now the onerous duty of this court, as the first appellate court to reevaluate the evidence on record and come up with its independent conclusion. The court must however bear in mind that it has neither heard nor seen the witnesses and give due regard for that. After considering the evidence and the respective rival submissions, I have concluded that the issues arising for determination are whether the offence was proved beyond a reasonable doubt and whether the sentence was harsh and excessive in the circumstances.

7. The Appellant was represented by learned counsel, Mr. Muchiri whilst Ms. Atina acted for the Respondent. The Appellant filed written submissions which were supplemented by oral submissions made when the appeal was canvassed on 26th November, 2018. Ms. Atina made oral submissions.

Whether the offence was proved beyond all doubts.

8. The Appellant was convicted on the basis that he was properly identified by PW1. Mr. Muchiri submitted that the Appellant refused to take part in an identification parade as he was afraid that his identity had been disclosed to the witnesses. That in the circumstances, all the identification evidence was dock identification whose veracity was not tested as full proof. He submitted that it was also clear that a description of the Appellant was given prior to the participation in the parades. He added that the identification of the Appellant was questionable in light of the conflicting evidence adduced by the complainants of the prevailing conditions at the scene of the incident. He pointed out that PW1 testified that he did not record the nature of the light at the scene while there was uncertainty about the presence of a church in the vicinity. Further, that while the investigating officer drew a sketch map of the scene he did not map it out. He submitted that these circumstances did not give a bearing of a positive identification.

9. In reply, Ms. Atina submitted that during the incident, the robbers were parked under a security light which enabled the complainants to identify them. Further, that PW1 described the light at the scene. That therefore, PW1 ably described the three men who got into their vehicle who he had an opportunity to view when they were taken to Fort Jesus. She submitted that his evidence was corroborated by the evidence of PW3, his wife. In addition, she submitted that the sketch map adduced by the investigating officer was a testimony corroborative of the conducive identification circumstances. This was in view of the fact that it pointed that there were security lights at the scene. It was Ms. Atina's submission that the Appellant was properly identified. She urged that the court upholds the conviction.

10. No doubt the identification of the Appellant was visual. On this aspect, the Privy Council in **Freemantle v. The Queen [1994] 1 WLR 1437**, delivered itself thus:

“...experience has shown that visual identification (even by recognition) is a category of evidence which is particularly vulnerable to error and that no matter how honest or convinced the eye witness may be as to the correctness of their visual identification and no matter how impressive and convincing that they might nevertheless be mistaken in their identification.”

11. This requires the court to test with the greatest care visual identification as the same is vulnerable to error. Court must then apply certain basic but cardinal tests that will assess the veracity of the visual identification; simply stated to test if the witness indeed was able to identify his assailant. The tests entail but are not limited to, assessing the nature of lighting at the scene, the time the robbery took place, the number of persons who allegedly identified the assailant and the report of description of the robbers as well as the prevailing conditions at the scene of the robbery.

12. In the present case, there were two complainants one of whom PW1, was invited to take part in an identification parade while the other, PW3, did not. The parade only related to the 1st accused, the Appellant having declined to take part. In refusing to take part in the parade the Appellant informed the parade officer that he was worried that his identity had been disclosed to the witness. The matter was further complicated by the fact that the initial report in the matter, Occurrence Book entry No. 08/22/06/2011 was not reported by the complainants but by PW2.

13. PW1 testified that after the incident he gave the description of three robbers to the police and when he went to take part in the parade he was informed that the Appellant refused to take part in it. In court, PW1 testified that he could identify the Appellant as he was tall and had a defect in his teeth although he did testify that this description was not contained in his statement. The failure to give the description of the suspects in his statement that he could identify clearly called into question any subsequent identification as was ably stated in **Terekali s/o Korongozi & others v. R [1952] 19 EACA 259**, that:

“Their importance can scarcely be exaggerated for they often provide a good test by which the truth and accuracy of the later statements are to be judged, thus providing a safeguard against later embellishments or the deliberate made-up case. Truth will often come out in the first statement taken from a witness at a time when recollection is very fresh and there had been no opportunity to consult with others.”

14. I have held this position because in his testimony, PW1 stated that he had two occasions when he clearly identified his assailants, first

with the help of some light from an under tunnel and second, when the robbers' car directed its headlight to their car. It begged how such circumstances would have escaped his mind when he was recording his statement. I do accordingly find that the failure to describe the assailants by PW1 renders the court unable to test the accuracy of the dock identification, further bearing in mind that of the Appellant's failure to take part in the parade. My view is that since no evidence attested that the parade was a set up, it would have been a good avenue of exonerating himself. Had the contrary been the case, the court may probably have relied on the dock identification of the Appellant in the exceptional circumstance.

15. Be that as it may, I have already observed that the identification of the Appellant was put to doubt for want of his description in the statement of PW1. For this reason, I find that his conviction was not safe more so, bearing in in that it was by a single witness. See: **Naftali Njeru Irungu v. Republic[2005] eKLR**.

16. In the upshot, I allow the appeal. I find that the prosecution did not prove their case beyond all reasonable doubt. I quash the conviction, set aside the death sentence and order that the Appellant be forthwith set free forthwith unless otherwise lawfully held.

17. The issue on the propriety of the sentence is rendered moot by virtue of the success of the appeal on conviction. It is so ordered.

Dated and Delivered at Nairobi This 26th Day of February, 2019.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.
2. Miss Sigei for the Respondent.