



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CRIMINAL APPEAL NO. 118 OF 2016
CONSOLIDATED WITH
CRIMINAL APPEAL NO. 119 OF 2016
CORAM: D.S. MAJANJA J.

BETWEEN

MAURICE OCHIENG OPIYO.....1ST APPELLANT

IBRAHIM OCHIENG ORWA.....2ND APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon. H.Wandere, PM dated 22nd September 2016 at the Principal Magistrates Court at Siaya in Criminal Case No. 119 of 2016)

JUDGMENT

1. The appellants, **MAURICE OCHIENG OPIYO** and **JAMES OTIENO OMOLO**, with another co-accused were charged and convicted with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the case were that on 18th April 2014 at Sagere within Siaya County jointly with others not before the court being armed with dangerous weapons namely rifles and pistols robbed **REAGAN NABOTH OTIENO** of motor vehicle Toyota Harrier Registration number UAP 832 M, Laptop, mobile handsets all valued at Kshs. 1,000,000/- and immediately before the time of such robbery threatened to use violence on the said **REAGAN NABOTH OTIENO**.

2. The brief facts giving rise to these charges were that on the night of 18th April 2014 at around 7:30pm while Reagan Naboth Otieno (PW 2) was driving his family and that of his brother Fanuel Aggrey Onyango (PW 3) he was ambushed by a group of assailants who robbed them their phones, laptop and motor vehicle registration No. UAP 832 M at gun point.

3. PW 2 testified that on the material evening, he was driving motor vehicle registration number UAP 832 M in the company of his wife, Agnes Adhiambo Owuor (PW 7), Fanuel's wife, Ruth Atieno Ogone (PW 5), their nanny, Margaret Omdisa Ebaimito (PW 6) and their young children. Along the way at junction near their home, PW 2 noticed that there Nissan X-trail following them from behind. He decided to slow down and the vehicle overtook them and parked just in front of their car there by blocking the way.

Immediately, four men armed with guns jumped of the vehicle and came to their vehicle pointing guns at them. PW 2 testified that the men ordered him and PW 5 who sat on front seat to shift to the back seat. The 1st appellant got into the co-driver seat whereas the 2nd appellant took the wheel.

4. The 2nd appellant drove off and the vehicle that blocked their way followed from behind. PW 2 testified that they drove for about 10 minutes and then the car stopped. The two robbers then ordered all of them to surrender their wallets, handbags and mobile phones. They all complied and PW 5 also surrendered her laptop. After that the 2nd appellant drove at a high speed towards Ukwala with the other vehicle following. Upon passing the Ugunja-Ukwala junction, the assailants stopped the vehicle and demanded that they all give out pin numbers to their mobile phones and ATM cards. PW 2 testified that after giving their pin numbers, they were driven towards Nzoia where they were abandoned by the road side. PW 2 stated that after the robbers were gone they realised that PW 6 still had her phone and they used it to call PW3 who came to their rescue.

5. PW 2 testified that he was able to clearly see the faces of the appellants because as the 1st appellant collected their handbags and wallets he put on the interior light of the vehicle on and faced behind. PW 2 was also seated facing the 2nd appellant who turned towards the back and he could clearly see his face during the ordeal which took over 10 minutes. PW 2 testified that he was therefore able to identify them in an identification parade with ease.

6. PW 5 testified that she was also able to see the 1st appellant as he is the one who came to her side and ordered her to move to the back and collected their personal items. She testified that she kept looking at the 1st appellant who sat directly opposite to her and when he noticed her looking at him he pointed a gun at her and ordered her not to look at him again. PW 5 also testified that she was also able to see the 2nd appellant as they were seated close to each other and she could see his face. PW 6 and PW 7 testified that though they were in the vehicle they were not able to see the faces of the robbers clearly.

7. Stephen Onyango (PW 4) who operated a car hire business in Kisumu City testified that on 7th April 2014 he hired his vehicle Nissan X-trail KBR 846 G to the 2nd appellant for three days. After the three days expired the 2nd appellant called him and requested that the days be extended for a further 3 days. He brought the vehicle back on 16th April 2016 and again hired it for another 3 days. On 20th April, 2014 he received a call from OCS Kondele informing him that his vehicle was held at Siaya Police Station as it had been used in criminal activities. PW 4 travelled to Siaya with the vehicle's log book and the hire contract signed by the 2nd appellant and the vehicle was released to him.

8. Steven Okoth Okumu (PW 1) testified that in April 2014 while he was at his place of work at Kibuye market he received a call from the 1st accused who told that his friend was Kisumu Town and he needed help. The 1st accused friend went to where PW 1 was and wanted to sell phone to him but PW 1 did not need a phone. PW 1 called Julius Otieno Onyango who was interested in buying a phone but he did not buy it as the phone requested for pin entry and the seller did not know the pin to the phone. PW 1 testified that later in 2015 he was arrested by the police over the same phone and he gave them information about the 1st accused as the person who had directed the seller of the phone to him.

9. The investigating officer, Sammy Ndungu (PW 8) testified that on 9th December, 2014 he received information that Julius Otieno Onyango had been spotted in Siaya town on his way to Awelo. He apprehended him as he had made use of a Nokia Phone that had been stolen during the robbery. Julius then mentioned that he got the phone from PW 1. PW 8 arrested PW1 who informed them that the phone was brought to him by the 1st accused who had received it from the 1st appellant and so they arrested him. PW 8 testified that after the arrests they organised identification parades and PW 2 identified the appellants from the parade and so they charged them together with the 1st accused

10. After conclusion of the trial, the trial magistrate was satisfied that the appellant and the 3rd accused were properly identified. The trial magistrate concluded that, "*Taking into account the totality of the*

foregoing, I am satisfied contrary to the submission of the second and third accused persons that the circumstances obtaining during the commission of the offence were such that the prosecution witnesses were in a position to positively identify the two as the robbers out of the four who entered their vehicle and robbed them.”

11. At the hearing Mr Wakla, counsel for the appellants submitted that the conviction was contested on the issues of identification and inconsistencies in the evidence. He argued that the Identification parades did not meet the legal requirements as it was not conducted in accordance with the Police Force Standing Orders. Counsel submitted the officer who conducted the parade was not called as a prosecution witness. He was of the view that the failure to call the officers who conducted the parades was incurable as they were crucial witnesses. He referred to the case of **Robert Kariuki Wachiuri v Republic NKU Criminal Appeal No. 369 of 2012[2016]eKLR**. Mr Wakla further submitted that there were glaring contradictions in the testimonies of PW 2 and PW 5 and that their evidence could not be relied upon in reaching any conclusion. Counsel concluded by arguing that the failure to produce the vehicle was used in the robbery was also fatal to the prosecution case.

12. Ms Odumba, counsel for the State, opposed the appeal. She submitted that the failure to call the officer who conducted the parades was not fatal. She was of the view that there was sufficient evidence from the testimony of PW 2 and PW 5 implicating the appellants and the inconsistencies in their testimonies were immaterial as two were clearly able to identify the appellants under conducive circumstances and ample time.

13. The conviction in this matter was based on identification. In a plethora of authorities; **Maitanyi v Republic [1986] 2 KLR 75**, **Karanja & Another v Republic [2004]2 KLR 140** and **Wanjohi & Others v Republic [1989]KLR 415**). In **Kiarie v Republic [1984] KLR 739**, the Court of Appeal was even more categorical on reliance on such evidence holding that the evidence must be “*absolutely watertight*” to justify conviction. In **Wamunga v Republic [1989] KLR 424** the Court of Appeal warned that;

[W]here 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 be the basis of a conviction.

Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see **Maitanyi v Republic (Supra)** and **R v Turnbull [1967] 3 ALL ER 549**).

14. It is also accepted that whenever the case against the suspect depends wholly or substantially on the correctness of one or more identifications of the suspect, caution is required in convicting such a person and an identification parade is called for in order to remove any doubt as to the identity of the suspect. *While it may not be mandatory to conduct an identification parade, the Court of Appeal has underscored the utility of identification parades in order to minimize the danger of mistaken identity. In James Tinoga Omwenga v Republic Criminal Appeal No. 143 of 2011, the Court of Appeal observed that:*

The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless.

15. The incident in this case occurred at around 7.30pm in PW 2’s vehicle. PW 2 testified that when the appellants got into their motor vehicle they put on the interior lights of the car. The ordeal took about 10 minutes during which time he was clearly able to see the appellants’ faces. PW 5 was also able to see the appellants and she narrated how the 1st appellant threatened to shoot her if she kept staring at him. The proximity between the appellants, PW 2 and PW 5, in the confined space of the case, was so close as it

was between the front seat and the back seat of a regular car. The interior lights were on and the appellants were unmasked and the time the ordeal took; I hold that the conditions were favourable for positive identification. Furthermore, the appellants drove around with the witnesses for a long time period of time and during this time, PW 2 and PW 5 had a good look at them and would be able to identify them at a properly conducted identification parade.

16. In order to test the identity of the suspects, an identification parade was mounted by Inspector Wanjala. He conducted the identification parade where appellants were identified by PW 2. The identification parade forms were not produced by the officer. The appellants contended that failure to call the call the maker of the parade forms was fatal to the case. I do not think that failure to produce the identification parade forms was necessarily fatal to the prosecution as the Court of Appeal held in ***Achieng v Republic* [1981] KLR 175:**

[W]here an identification parade was held, the officer who conducted it must be questioned about it. Where such an officer is not questioned the evidence of identification can still be accepted as reliable if there is other evidence such as the finding of goods in possession of the appellant.

17. Even in ***Robert Kariuki Wachiuri v Republic (Supra)***, the Court of Appeal accepted that in that case;

The High Court was keenly aware that it was assuming a higher burden or re-evaluating the evidence of identification after discounting the evidence of identification parades. In the end, the court had no doubt that the witnesses were truthful in the circumstances of the case and upheld their evidence.

18. What the court emphasized in those cases is that even without an identification parade the court must examine and test with greatest care the evidence before convicting an accused. As the Court of Appeal explained in ***Muiruri and 2 Others v Republic* [2002] KLR 274** that:

We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken.

19. The question then is whether the testimony of PW 2 and PW 5, who were the two identifying witnesses, is sufficient found a conviction. It is apparent from the testimony of both witnesses that they did not give a description of the assailants hence it is difficult to assess whether what was in effect a dock identification was sound and without error. In this instance, the inconsistency of the evidence regarding the identity of the assailants is heightened. PW 2 told the court that the 1st appellant was the driver while the 2nd appellant was seated at the back seat while PW 2 stated that the 2nd appellant was a driver. Is it because of the inconsistent evidence that the PW 5 was not called to identify the appellant at the identification parade?

20. For the reasons I have stated and from the totality of my findings, the conviction of the appellants is not safe and free from error. I allow the appeal and quash the appellant conviction and sentence. The appellants are set free unless otherwise held on a separate warrant.

SIGNED AT KISUMU

D.S. MAJANJA

JUDGE

DATED and DELIVERED at SIAYA this __20th__ day of April 2018.

J. A. MAKAU

JUDGE

Mr Wakla, Advocate for the appellants.

Mr Okach, Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.