



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL CASE NO. 183 OF 2016

(ROBBERY WITH VIOLENCE)

(CORAM: R. E. ABURILI - J.)

ERICK OTIENO OMONDI.....1ST APPELLANT

BYRON OMONDI OTIENO.....2ND APPELLANT

VS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the Conviction and Sentence dated 13.12.2016 in Criminal Case No. 350 of 2016 in Ukwala Law Court before Hon. G. ADHIAMBO – S.R.M.)

JUDGMENT

1. The Appellants herein **Erick Otieno Omondi** and **Byron Omondi Otieno** filed this appeal challenging their joint conviction and sentence by the learned Senior Resident Magistrate, sitting at Ukwala SRM's Court.
2. According to the charge sheet in Ukwala **SRM Cr. Case No. 350/2016**, the Appellants were arraigned in Court on 10.6.2016 charged with the offence of **Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code**.
3. The Appellants pleaded not guilty to the charge and their trial commenced in earnest culminating in their conviction and sentence on 13.12.2016 by Hon G. Adhiambo, SRM.
4. The prosecution's case was that on 7.9.2015, the Appellants, while at Hashi Petrol Station Ugunja, in Ugunja District within Siaya County, they jointly with others not before the Court robbed Amos Ouma Okongo, while they were armed with offensive weapons namely, pangas, rungus and metal bars. They allegedly robbed the complainant of one "HP Lap Top, two Mobile Phones and cash Shs.1, 100 and that immediately at the time of such robbery used actual violence to the said Amos Ouma Okongo.
5. The Prosecution, led by Prosecution Counsel, Mr Onanda, called Eight (8) witness.
6. The Complainant, Amos Ouma, testified as PW1 and stated on oath that he was an employee of Siaya County Government and that on 6.9.2015, he went to work at Hashi Petrol Station, Ugunja, as a Security Guard. He reported to work at 6.00 p.m. and in the company of his colleague Chrispine Odhiambo. At 10.00 p.m. the pump attendants closed work and left. He remained with Chrispine. At midnight on 7.9.2015 they went to sit at different points and at 1.00 a.m. he heard footsteps. As he checked to find out what was happening, he saw 6 people, one dressed in Administration Police Uniform and he thought that they could have been APs on patrol.
7. As the Security Lights were on, he saw them very well. The one who was in Police Uniform called out on PW1 who was by then on the staircase. The person in AP Uniform pretended to be arresting the one who was not in AP Uniform and said that he had arrested the "suspect" with an exhibit," alcohol. When the PW1 tried to respond, he was surrounded by other people who attacked him. He saw his two attackers using Security Lights. The one in AP uniform told PW1 to sit down, which he refused. He said it again but PW1 refused and so he hit PW1 on the left side of the head. PW1 sat down on realizing that he was in danger. He was ordered to lie down which he did while facing up.
8. The assailants are then said to have told PW1 to lay on his belly. They unlocked his boots and folded his legs and tied his hands and legs using the boot laces. They forced him to say where his colleague was. The (two) robbers guarded PW 1 as their colleagues went to look out for the PW1's workmate. Shortly thereafter, PW 1's workmate was brought. He was tied just like him. When PW 1's Techno 1100 phone rung, the robber in the AP uniform inquired to know who was calling. The name of the caller had been saved as Madam. PW1 was forced to

reveal who the caller was and he had to reveal that it was the former Manager of the Hashi Petrol Station. The robber in Police Uniform picked the call and told the caller that there was no problem at the Petrol Station and that whoever had told her that there was an issue had lied to her. The same caller rung again and told the robber that she had been informed that there was a problem so she was sending a Police Officer. The robber in AP Uniform searched PW1's pockets and took out a wallet containing Sh.1, 100 which he took away. He also took away 2 torches, one battery and the robbers escaped, leaving PW1 tied up.

9. Police arrived from Ugunja Police Station after about 20 minutes. Then PW1 and his colleague shouted for help. The Police assisted them and took him to Ambira Sub-County Hospital where his wounds were stitched and he was taken back to the Petrol Station.

10. The following day, PW1 went to Ugunja Police Station and recorded his statement. He identified the robbers in Court as the one who had worn AP uniform while the other was the one who pretended to have been arrested.

11. PW1 maintained that he saw the Appellants with the help of Security Lights as the Robbers took time to tie him because he was struggling with them. That the lights were at the canopy of the Petrol Pumps which was about 5 meters away and other bright light on the wall 10 meters away. He maintained that albeit he had not known the robbers before, he mastered their faces very well because they had not covered their faces.

12. In cross-examination by the 1st Appellant, PW1 maintained his testimony and stated that when he recorded his statement with the police, he stated that he identified the two robbers facially and memorized their faces.

13. PW2 Chrispine Odhiambo, who was PW1's workmate on the material night testified on oath and reiterated the testimony of PW1. He stated that he saw the assailants using Security Lights at the Petrol Station and that he looked at their faces and saw them clearly as they ordered him to lie down and as the robbers kept moving from darkness to where lights were. That after the robbers left, Police arrived and assisted PW1 and PW2 and took PW1 to Ambira Hospital. 14. PW1 and PW2 were taken to Ugunja Police Station where they recorded statements. PW2 saw Amos, PW1 injured on the head. PW2 was robbed of his phone Nokia 3310 and KSh.200. He identified the 1st Appellant as the one who escorted PW2 to the corner and told him "we are searching for you."

14. In cross-examination, PW2 maintained that there was light and that he gave the Police the description of the person who approached him as being short and that he saw his face.

15. PW3, Eric Otieno Odhiambo, a pump attendant at Harsh Petrol Station near Kamunya testified that on the material day of 6.9.2015 he worked until 1.00 p.m. and went to rest. At 1.00 p.m. he heard commotion and footsteps and after a while he heard noise of breakage. He was with Martin his colleague who was not well. He send an SMS to his Manager that they had been attacked and after 30 minutes Police arrived. The Police knocked where they had slept, they opened the door and saw what had happened. They found breakage and missing items namely: a laptop, and a Nokia M-pesa-phone. He later recorded his statement with Police.

16. On being cross-examined by the 2nd Appellant, PW3 stated that could not see what was happening outside.

17. PW4 did not witness the robbery but arrested the Accused Persons after receiving information from an informer that the 2nd Appellant had a gun and that they were directed to the 2nd Appellant's house where they found him, searched his house and found an AK-47, riffle hidden underneath the mattress on a bed, wrapped in a sack.

18. He testified that the Police also recovered some 3 ammunitions from the 2nd Appellant's jacket and how the 2nd Appellant revealed that he had his accomplices and took the Police to the 1st Appellant's home. The two were arrested and taken to the Police station.

19. PW6, is a Clinical Officer. He testified and produced a P3 form confirming that PW1 had injuries on his head sustained in the course of robbery. PW1 had a linear cut wound on the left side of his head with stiches *insitu* with mild swelling on the lower arms.

20. PW5, produced **Police Form No. 156** which was used for identification Parade. He testified that he conducted an identification Parade where PW2 positively identified the 1st Appellant.

21. PW7 Chief Inspector, Anastacia Kitari, DCIO, Siaya County, carried out an identification Parade for the 2nd Appellant by PW1.

22. PW8, CPL. David Warutumo, attached to DCIO, Ugenya, received a report of robbery. He went to the scene of the robbery with violence and confirmed its occurrence. He spoke to PW1 and PW2 who narrated to him their ordeal. He ensured that parade identification was carried out in accordance with the law, where PW1 and PW2 identified the two Appellants as the robbers on the material night at around 1.00a.m. He denied influencing witnesses to identify the Appellants.

23. The Appellants on Application had PW1 recalled for cross-examination. PW1 stated that he spent a long time with the robbers hence he was able to see and identify them well. PW1 also insisted that he told the Police that he saw the people who robbed him albeit the Police did not record it in his statement.

24. On further cross-examination, PW2 stated that he recognized the robbers by face and voice albeit that aspect was not recorded in his statement.

25. Both Appellants upon being placed on their defence gave sworn testimonies denying any involvement in the alleged robbery. The 1st appellant denied that he had any business with the 2nd Appellant.

26. The trial Magistrate after considering both the Prosecution and defence cases found and held that the Prosecution had proved the guilt of the Appellants beyond reasonable doubt that they were among the robbers who were identified by PW1 and PW2. She convicted them of the offence as charged and sentenced them to serve life imprisonment.

27. Being dissatisfied with the conviction and sentence meted out on them, the appellants filed this appeal. During the hearing of this appeal, the Appellants presented to Court an amended Petition of appeal. The 2 Appellants who appeared in Court in person also presented their written submissions. The amended grounds of appeal are 4 namely:

1. The learned trial Court erroneously convicted the Appellants by relying on the alleged identification by PW1 and PW2 without considering that the same lacked merit in totality due to failure to relay (sic) a prompt report.

2. The trial Court erred in its findings by convicting the Appellants on the issue of visual identification without considering that the circumstances were not conducive for proper identification.

3. The Prosecution case was not proved beyond reasonable doubt hence the findings were insufficient and unsatisfactory in law.

4. The Appellant's defence statements were not given due consideration whereas the same were capable of awarding (sic) for an acquittal.

28. In their written submissions accompanying the amended grounds of appeal, the Appellants submitted that albeit PW1 and PW2 stated that they managed to identify both the Appellants by marking their faces and recognizing their voices. However, it was submitted that the two complainants/ witnesses never gave any prompt first report to the Police or anybody else when they first relayed information to the authorities on the robbery incident that they knew the robbers.

29. Further, that there were no descriptions given by PW1 and PW2 as per the testimony in cross examination of the investigation officer that "May be he did not record that the witness said that they recognized the robbers" Further, that none of the witnesses gave a detailed account of the unique features if any that the robbers had, since there are many short people hence there was a possibility of mistaken identity. Further, that PW1 in further cross-examination stated that he did not give the Police Officers any description.

30. Reliance was placed on **Mutinda Kevea VS. R [2004] eKLR, citing Mbele Vs R [1984] KLR 626** where it was held inter alia that where a complainant alleges to have recognized the robbers, he must on making his first report to the Police or to anybody else, mention who it was that robbed him and describe the person. Further that for voice recognition to be accepted, the Court should ensure that the voice is that of the Accused, that the witness was familiar with the voice and recognized it and that the condition obtaining at the time it was made were such that there was no mistake in testifying to what was said and who said it [**Mbele Vs. R [1984] KLR 626**]. Further reliance was placed on **Choge Vs. R (1985) KLR 1** on voice identification.

31. It was further submitted that both PW1 and PW2 were not familiar with their attackers hence it was not possible for them to recognize voices of strangers under difficult circumstances and that as no voice parade identification was conducted to ascertain the credibility of the two witnesses PW1 and PW2.

32. On parade identification, it was submitted that no prior descriptions of the robbers were given by the Prosecution witnesses hence the evidence of parade identification lacked merit.

33. It was submitted that the parade identification at the trial was unsatisfactory because the two witnesses were never asked to describe their attackers features or clothing or anything else that would enable them recognize them again when they testified 10 months later.

34. It was further submitted that the members of the parade were 8 and who had come visiting and not from the cells. That suspects were from cells and were untidy so parading them with people from outside was unfair. The Appellants urged the Court to ignore the parade identification results as was stated in **Roria Vs. R (1967) E.A. 543 & Ajode V. R [2004] 2 KLR 81**.

35. On the ground that the Prosecution case was not proved beyond reasonable doubt, it was submitted that there was no corroborating evidence that the 1st Appellant was connected to the offence as he was merely implicated by the testimony of the 2nd Appellant.

36. It was submitted that in any event the 1st Appellant was never given an opportunity to cross examine the 2nd Appellant on the allegation that the 2nd Appellant led the Police to arrest the 1st Appellant. Reliance was placed on **Chaama Hassan Hasan V R (1976)89 I KLR 1**, where it was held that unsworn testimony could not be relied on where Accused was denied the opportunity to test allegation against him by cross-examination. Further, that no cautionary statement was administered on the 2nd Appellant before leading to the arrest of the 1st m Appellant. Reliance was placed on **Shaban Bin Hussein Vs. Chony Book (1969)** and a submission made that the evidence of the 2nd Accused should not be used against the 1st Accused since it was unsworn and must be regarded with extreme caution. It was further submitted that the Police failed to prove recovery from the 2nd Appellant as no documentary evidence was adduced to connect him to the firearm inventory form. That the Prosecution failed to prove their case against the Appellants beyond reasonable doubt.

37. On ground 4, it was submitted that the Appellant's defences were never given due consideration by the trial Court and that the Court shifted the burden of proof on the Appellants and that the evidence convicting them was not watertight and cogent but tainted with doubts.

38. This Court was urged to analyze and evaluate the evidence on record and make its own independent findings for the sake of dispensation of Justice.

39. In opposing the Appellant's Appeal, the Prosecution Counsel Miss. Odumba submitted that, conviction and sentence of the Appellants by the trial Court were sound and proper. Further, that PW5 and PW7 conducted two different identification parades for the Appellants and that the Appellants stated that, they were satisfied with the identification parade.

40. On facial identification, it was submitted that PW1 stated that there were bright lights and that the Appellants took time tying PW1 and PW2 on their both hands and legs which gave the witnesses sufficient time to identify the 2 Appellants. Further, that the witnesses described the 2nd Appellant to have been wearing police uniform and was speaking to the 1st Appellant while pretending to have arrested some suspects. Further, that upon being identified by PW1, Appellant no. 2 said he was satisfied. That the trial Court evaluated evidence and warned itself of the issue and satisfied itself that there was no Mistake in identifying the Appellants.

41. On proof, it was submitted that the Prosecution proved its case beyond reasonable doubt as all the elements of robbery with violence were proved to the required standard; and that the defence by each of the Appellants were mere denials. This Court was urged to uphold their conviction and sentence.

DETERMINATION:

42. This Court has a duty to analyze and evaluate the evidence adduced before the trial Court and the findings by the trial Court with a view to drawing its own independent conclusions and findings as is espoused in the case of **Okeno V. R. [1982]E.A. 32**, However, in doing so, the Court is conscious that it never heard nor saw the witnesses as they testified.

43. The trial Magistrate in her analysis of the evidence adduced before her was clear that the evidence adduced by the Prosecution witnesses Moreso PW1 and PW2 was consistent and that the two were eyewitnesses. Further, that the two witnesses positively identified the Appellants as there was sufficient light from the scene of crime and that the robbers had not covered their faces so the witnesses saw them very well.

44. On visual identification, the trial Court relied on **R Vs. Turnbull & Others [1976] 3 All ER 548** and set out factors to be considered in visual identification. She stated that there were a sequence of events that took place during the robbery. That PW1 had ample time to see his attackers as there were three sources of light which enabled him to see them well, being security lights, light from the canopy of the Petrol Pumps 5 meters from where the witnesses were with robbers and the light from the wall 10 meters opposite where the witnesses were.

45. The trial court concluded that PW1 viewed the offenders under sufficient lighting as the offenders were also close to him and they had not covered their faces. Moreso, that the identification parade was conducted to confirm that indeed PW1's visual identification evidence was not mistaken, albeit that was the first encounter with the robbers.

46. The trial Magistrate was also satisfied on the evidence adduced that PW5 & PW7 conducted proper identification parades in accordance with the Judges Rules and that the Appellants indicated that they were satisfied with the manner the ID/Parade was conducted.

47. The trial Court was also satisfied that the testimony of Prosecution Witnesses was credible and that the defence concentrated on what transpired on the day they were arrested on 24.5.2016 and not on 7.9.2015 hence their defences were mere denials and did not shake the testimonies of the Prosecution Witnesses. She convicted the Appellants accordingly.

48. Having evaluated and assessed the evidence on record by both Prosecution and defence, the findings of the learned trial Magistrate, the grounds of appeal as amended and detailed submissions by both the Appellants in person and the Prosecution Counsel, I now proceed to determine the issues as deduced from the grounds of appeal.

49. On whether the trial Court erroneously convicted the Appellants by relying on alleged identifications by PW1 and PW2 without considering that the same lacked merit and without considering that the same lacked merit and without considering the failure by the PW1 and PW2 to relay a prompt first report on the identity of the robbers.

50. This Court has considered the record and the Prosecution witnesses Nos. 1 & 2 on identification of the Appellants at the scene of Crime. The evidence of PW1 and PW2 was clear that they were on the material night of the robbery on duty as Security guards, guarding Hashi Petrol Station when about 5 – 6 men emerged. One was in an AP uniform and pretended to be arresting another and as the PW1 was coming to terms with what was happening, the robber in AP Uniform attacked him and commanded him to lie down. He resisted and he was hit on the left side of the head. He was tied both legs and hands using his boots' laces by the robber in the Police Uniform. There was sufficient light from three sources which the 2 witnesses used to identify the Accused who took some time with the witnesses tying them. The trial Magistrate in her analysis clearly satisfied herself that the conditions for facial or visual identification of the attackers were favourable and that there was no mistaken identification as corroborated by the identification parade forms conducted by PW5 and PW7.

51. Albeit the Appellants claim that there was also voice recognition and they concentrated on those authorities that refer to recognition of known persons as opposed to identification of a stranger using sufficient lighting, this Court on the evidence adduced on record is satisfied that there were good and favourable conditions for identification of the Appellants as robbers by PW1 and PW2, who were being seen for the first time. The Appellants were not masked. They exposed their faces to the witnesses for some time tying the witnesses. There was sufficient lighting from the security light within the Petrol Station, light from the canopy of Petrol pump 5 meters away and another light from the wall 10 meters nearby which enabled the 2 witnesses to positively identify their attackers. The 2 witnesses further testified that the attackers hit PW1 on the head. He bled. PW4 the Clinical Officer confirmed that PW1 was injured on the head and had swelling on the arm.

52. The 2 witnesses PW1 and PW2 also stated in their evidence, quite clearly that after being rescued by the Police, they later reported the incident to the Police Station and recorded their statements and told the Police that they identified the 2 robbers facially as the robbers were not masked. The 2 Prosecution witnesses did not claim that they knew the 2 robbers prior to the incident and as such, in my humble view, the question of failure to give first prompt report on the identity of the robbers does not arise and is misplaced. The evidence on record as

analyzed by the trial Court is clear that it was not the 2 Prosecution witnesses who led the Police to arrest the 2 Appellants. Further, it is also in evidence that the two Appellants were arrested under totally different circumstances wherein the 2nd Appellant was found in possession of a firearm without a permit, he was tried, convicted and sentenced to serve 10 years imprisonment.

53. Further, it is in evidence that it was not after the two Appellants were arrested under different circumstances that PW1 and PW2 were called upon to identify if in the identification parade were any of the robbers who attacked them, and that the two Prosecution witnesses did positively identify the two robbers from among members of the parade.

54. There is nothing in evidence suggestive of the 2 witnesses being couched to pick out the 2 robbers from the Police identification parades. The trial Magistrate found that the Prosecution witnesses were credible. Having considered the evidence on record, I have no reason to doubt the evidence by the Prosecution witnesses. I find that the witnesses were consistent and their testimonies were not shaken or displaced during cross-examination by the Appellants. In addition, there is nothing on record to suggest that the trial magistrate in convicting the Appellants relied on voice recognition, which the Appellants claim was erroneous.

55. Then PW1 and Pw2 were also clear that when they recorded their statements with the Police, they told the Police that albeit they did not know the robbers before, they saw their faces very well using the illuminating light and as the robbers were not masked. The Idea of first report not giving the description of unique features of the Appellants/Robbers does not arise because the trial Court was not asked to examine the first/initial report to the Police by the witnesses, to establish or make any specific finding that the witnesses did not record that they saw the robbers and identified them or that if they met them later at an identification parade they would not identify them.

56. PW2 was clear in his testimony that the Security Lights were less than one metre from where he and the person/robber who escorted him to a corner where he said he found five people and where he found PW1 also tied. He stated that he looked at the face of the said person when being escorted. This person was the 1st Appellant herein whom PW2 viewed using light which was less than one meter from where PW2 was. The trial Magistrate who heard and saw Pw2 as he testified found that PW2 did not first have a fleeting glance at the 1st Appellant but that he viewed the 1st Appellant from a close position and under sufficient light and that as such, there was nothing which could have impeded his proper identification of the 1st Appellant. The trial Magistrate further found that PW2's capacity to identify the 1st Appellant and the fact that he recognized the 1st Appellant was confirmed by PW5 and the fact that the said Appellant confirmed at the identification parade that it was properly done by PW5. She concluded that the circumstances of the visual identification evidence of PW2 met the threshold set in **R Vs. Turnbull [1976] 3 ALL ER 549**.

57. The above findings by the trial Court, in my humble view, were in line with the evidence adduced by PW2 and which the trial Court found to be consistent and believable.

58. The trial Court further believed the testimony of PW1 who was hit on the head. I find nothing erroneous in the findings and holding by the trial magistrate. In the end, I find and hold that the trial Magistrate did not err in convicting the appellants based on visual identification evidence adduced by PW1 and PW2. The identification in my view was sound and proper and therefore the conviction was safe. The 1st and 2nd grounds of appeal are accordingly dismissed.

59. The above also disposes off ground No 2 of the Petition of Appeal.

60. On ground No. 3 of the appeal that the trial Magistrate erroneously convicted the Appellants when the evidence adduced did not prove the offence of robbery with violence beyond reasonable doubt, I have considered the evidence on record as reproduced above and the analysis by the trial Magistrate and am persuaded that the evidence adduced proved beyond reasonable doubt, all the ingredients of robbery with violence. There was evidence from PW1 and PW2 that they were attacked by persons who were armed. The persons were more than two. They used actual violence during the attack and beat up the two witnesses, injuring PW1 on the head and he had to be treated in Hospital. A P3 form was produced by the Clinical Officer who attended to him. Further, the attackers stole from the two witnesses items listed in the charge sheet. In my view, the Prosecution did prove beyond reasonable doubt that the appellants were the persons who were positively identified by PW1 and PW2 as having been among the persons who violently attacked them at the Petrol Station on the material night of the robbery. That evidence on the whole was sufficient to prove the guilt of the Appellants beyond reasonable doubt. Accordingly, I find the ground of appeal lacking in merit. I dismiss the same.

61. The appellants further complained that their defences were not considered. I have considered the judgment of the trial court and I find that the trial court did consider the defences put forward by the Appellants before arriving at the conclusion that the prosecution had proved its case against them beyond reasonable doubt and before convicting them for the offence of Robbery with Violence. There is therefore no basis upon which the Appellants complain that their defences were not considered by the trial magistrate. In any event, I have given consideration to the evidence adduced vis a vis the defences put forth by the appellants which are mere denials. The evidence adduced by the Prosecution puts the Appellants at the center of the crime and there is nothing suggestive that the Appellants could have been framed by the police or by the Complainants who did not know them prior to the occurrence of the robbery. Accordingly, that ground fails.

62. In the end, I find and hold that the Appellants' appeal against conviction by the trial magistrate is devoid of merit. I dismiss all the grounds of appeal challenging conviction of the Appellant for the offence of Robbery with Violence contrary to **Section 296 (2) of the Penal Code**. I uphold the conviction having found it sound and lawful.

63. The Appellants were sentenced to serve life imprisonment upon conviction for the offence of robbery with violence. Albeit the maximum mandatory death sentences no longer exists in Law, the Court can sentence the Accused persons up to death sentence which is lawful. The trial Magistrate however exercised her discretion and sentenced the accused persons to serve life imprisonment.

64. The Appellants have not challenged the lawfulness of the sentence imposed which I find lawful.

65. However, considering the circumstances of the offence and the mitigations put forward by the Appellants at the trial, I find that the life sentence imposed on the Appellant was too harsh. I hereby set it aside and substitute it with sentence of 20 years imprisonment to be calculated from the date of arraignment in court.

Orders accordingly.

Dated, signed and delivered at Siaya this 27th day of August 2018

R.E.ABURILI

JUDGE