REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 20 OF 2017

WILSON NGOKO ODERA ……..…….. 1ST APPELLANT

DUNCAN OCHIENG OGOLLA …….. 2ND APPELLANT

VERSUS

REPUBLIC ……..... RESPONDENT

(Appeal against Judgment, Conviction and Sentence imposed in Criminal Case Number 436 OF 2015 in the* Chief Magistrate's court at *Kisumu delivered by T.Obutu (S.P.M.) on 21.3.17).

JUDGMENT

The trial

The Appellantherein**WILSON NGOKO ODERA** and **DUNCAN OCHIENG OGOLLA**(who were the 2nd and 1st accused respectively in the trial court) have filed this appeal against their conviction and sentence on a charge of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code. The particulars of the offence were that:-

> ***"On 2.5.15 at about 00.20 hrs at Super Lake Victoria Hotel along Accra Street in Kisumu East District within Kisumu County jointly armed withoffensive weapons namely a toy pistol and a knife robbed Laxman Singh Mehra Kshs. 150,000/-, 2 mobile phones (Nokia and Samsung), and immediately after the time of such robbery wounded the said Laxman Singh Mehra***

The prosecution called a total of six(6) witnesses in support of their case. The brief facts were that at 2.5.15 at about 00.20 hrs, the complainant went to shower in his hotel room at Super Lake Victoria Hotel when suddenly two men, one of whom was armed with a gun and the second with a knife entered into the room whose door was open. That they ordered him to lie down and stole Kshs. 150,000/- among other items from him. He said that before they left the room, they tied his hands and put him under the bed. He said that the 2nd appellant had a knife and that he had managed to take the knife from him and injure him on the head with it. He identified the 1st appellant as the one that had a gun. He said that his assailants left the knife and the gun in his room and he handed them over to the police. That when police arrived, he asked them to call his number 072xxxxxx and it was picked by someone who said that its owner was in hospital with serious injuries. That he proceeded to Kisumu District Hospital with police and his Samsung phone was recovered from the 2nd appellant whom he later identified in an identification parade because he had a scar. He said he did not know the 1st appellant who was arrested after he was implicated by the 2nd appellant. PW2 said he arrested the 1st appellant on the night of 22.6.15 for a traffic offence and he later learnt that the appellant had been charged with a robbery case. PW3 said he heard screams from complainant's room and on his way there met the 2nd appellant who was armed with a gun. That they later recovered complainant's phone from the 2nd appellant who was being treated at the Kisumu District

Hospital. He said he also saw the 1st appellant at the scene of robbery. PW4 a clinical officer said filled complainant's P3 form which showed that on 3.5.15 he was injured on the knee and small finger. PW5 the investigating officer said he found the 2nd appellant lying on the road injured. That he later recovered complainant's Samsung Phone from the 2nd appellant who was being treated at Kisumu District Hospital. PW5 said he recovered complainant's Samsung Phone from the 2nd appellant who was being treated at Kisumu District Hospital. He confirmed that 1st appellant was arrested for a traffic offence and was charged after he was implicated by the 2nd appellant.

At the close of the prosecution case, the appellants were ruled to have a case to answer and were placed on their defence. In his sworn defence,the1st appellant stated that he was arrested on 2.5.15 at about 8.30 pm for riding a motor cycle without helmet and reflective jacket but was later charged with an offence that he did not commit.In his sworn defence, the 2nd appellant stated that he was involved in an accident on 1.5.15 at about 8 pm as a result of which he lost consciousness for 4 days. That when he came to, he found himself at the police station and he was later charged with an offence that he did not commit. He denied that he was treated at Kisumu District Hospital where the complainant's phone was allegedly recovered from him.

On 24.3.17, the learned trial magistrate delivered his judgment in which he convicted the appellants and, sentenced them to suffer death.

The appeal

Being dissatisfied with the conviction and sentence, appellants lodged the instant appeal. In the supplementary grounds of appeal, the 1st appellant raised 6 grounds to wit:-

(i) The trial court erred by appreciating the evidence of identification even when it was not supported by the prevailing circumstances

(ii) The trial court erred by appreciating that there was a scar on his neck when there was none

(iii) That evidence that the 2nd appellant implicated him was not tendered

(iv) That there was neither direct nor circumstantial evidence against hm

(v) That his alibi was not considered

In the supplementary grounds of appeal, the 2nd appellant raised 4 grounds to wit:-

i. That there was no evidence to prove that he was admitted at Kisumu District Hospital

ii. That evidence that the 2nd appellant implicated him was not tendered

iii. That the case was not properly investigated

iv. That his defence was not considered

Analysis and Determination

This being a court of first appeal, Iam guided by the ruling of the Court of Appeal in the case of ***OKENO VS. REPUBLIC[1972]E.A.32***, where it held that:-

"It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld"

In dealing with this appeal, I have in mind that the trial court had the advantage of observing the

demeanor of the witnesses and hearing them give evidence and I have given allowance for that.

In support of the aforesaid grounds of appeal, the appellantsalso tendered written submissions. The appeal was opposed by the state on the grounds that the court saw the scar inflicted on the 2nd appellant by the complainant and that complainant's phone was recovered from 2nd appellant. I have carefully read the written submissions and considered oral submissions by the appellant and on behalf of the state.

From the evidence on record, it is not disputed that complainant and PW3 did not know the appellants before the offence was committed. Time and time again the courts have emphasized that evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested.

In the case of***R –vs- Turnbull and others (1976) 3 All ER 549***, an English case, Lord Widgery C.J. had this to say:-

> "***First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, 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 the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" 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 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 the actual appearance".***

PW1 and PW3 did not give the assailant's description to the police. They purported to identify appellants in the dock as the persons that robbed the complainant.

In ***Gabriel KamauNjoroge –vs- Republic (1982-1988) 1KAR 1134,*** the Court of Appeal 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."***

From the foregoing; I find and hold that the correctness of the identifications of the appellants in the dock is unsafe ought to have been rejected.

From the evidence on record, it is not disputed that the 1st appellant was arrested for a traffic offence, by PW2 on the night of 22.6.15. PW5 the investigating officer confirmed that 1st appellant was arrested for a traffic offence and was charged after he was implicated by the 2nd appellant. Of interest to note is that the 2nd appellant did not give evidence implicating the 1st appellant. I thus find that there was no evidence to justify the conviction of the 1st appellant.

The 2nd appellant was alleged to have sustained injuries during the robbery and was supposedly treated at Kisumu District Hospital. No evidence was tendered in form of medical records to prove that the 2nd appellant had suffered any injures on his neck as alleged by the complainant or that he had been treated at Kisumu District Hospital. With utmost due respect to the trial court, the magistrate's finding that the 2nd appellant had a scar allegedly occasioned by the complainant is therefore without any basis since it is not supported by medical evidence.

Complainant, PW3 and the investigating officer claimed that the complainant's phone, stolen during the robbery, had been recovered from the 2nd appellant. The said phone was not tendered before court as an

exhibit and there was therefore no link between the 2nd appellant and the robbery.

From the foregoing, it is clear to this court that the prosecution did not discharge its burden to prove the case against appellants beyond any reasonable doubt or at all. I thus find and hold that the learned trial magistrate erred in convicting and sentencing the appellants. Accordingly, I set aside the judgment and quash the appellants' conviction and sentences and unless otherwise lawfully held, order that they shall be released and set free forthwith.

DATED, SIGNED AND DELIVERED THIS *16th* **DAY OF** *November* **2017**

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

1st Appellant - Present in Person

2nd Appellant - Present in Person

For the State - Ms Wafula