REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 70 OF 2016

VINCENT OTIENO OHUNDO……..APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(*Appeal against Judgment, Conviction and Sentence imposed in Winam PM Criminal Case Number 37 of 2013 by Hon. B.Kasavuli SRM on 16.12.16*).

JUDGMENT

The trial

1. The Appellantherein**VINCENT OTIENO OHUNDO** (qua 1st accused) has filed this appeal against his convictionanddeath sentence ona chargeofrobbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code. Theparticularsof the offencewerethat:-

> **"Onthe night of 21st and 22nd December 2012, at Manyatta Estate in Kisumu East District within Kisumu County, the appellant jointly with Clington OtienoOndigo and others not before court robbedRODGERS BIRENDE OMONDI of a TV make Sony, gas cylinder and 2 mobile phones make Nokia C3 and Nokia 100 all valued at Kshs. 44,794/- and immediately after the time of such robbery wounded the said RODGERS BIRENDE OMONDI**

2. The prosecution called a total of eight (8) witnesses in support of their case. PW1, the complainant recalled that on thenight of 21st and 22nd December 2012 at about 12.30 am while he woke up from his uncle's house in Manyatta Estate, and went out to relief himself.

3. That he found 5 men outside the house. That he noticed that one of them was armed with a machete while the other 4 were armed with stones. That 2 of the men went into the house and stole a 6kg Meko gas cylinder and plasma TV.That when he shouted for help, he was attacked and injured on the left cheek with a machete. The witness stated that when he went back to the house, he realized that his phone and another belonging to his grandmother had been stolen.

4. It was his evidence that there was security lighting outside the house and that he was able to identify the man that wore dread rocks because he talked to him and was the one that attacked him with a machete.

5. The witness further told court that he was later called to an identification parade and was able to identify the appellant and ClingtonOtienoOndigo(qua 2nd accused) as some of the persons that robbed him.

6. PW2 Lillian Diana Omondiand PW3 Lawrence OchiengOmamorecalled that a TV make Sony, gas cylinder and 2 mobile phones make Nokia C3 and Nokia 100 were stolen from their house on the night of 21st and 22nd December 2012 by persons who also injured the complainant.

7. It was their evidence that Nokia 100 was recovered from a lady who said that she had bought it from ClingtonOtienoOndigo (qua 2nd accused) who was then arrested and charged.

8. PW4 PerisAkoth stated that she bought a Nokia 100 phone from one Otieno aka Soldier. It was his evidence that the appellant was unknown to him.

9. PW5 George Mwita, a clinical officer examined the complainant on 28.12.12 and filled his P3 Form which showed he had stitched cut wound on left side of cheek and on left finger.

10. PW6 PC Raymond Kwambai, the investigating officer recalled that after his arrest, the appellant was identified by the complainant in an identification parade.

11. It was further his evidence that ClingtonOtienoOndigo(qua 2nd accused) was arrested after PW4 identified him as the person that had sold to her one of the phones stolen from complainant.

12. In cross-examination by the appellant, the witness conceded that the appellant was the only member of the identification parade that wore dread rocks.

13. PW8 CIP JohnstoneNakitareWanyama stated that he conducted the identification parade in which the appellant was identified. It was further his evidence that he could not recall if appellant wore dread rocks at the time the identification parade was conducted.

14. ClingtonOtienoOndigo (qua 2nd accused) died while the case was still going on. At thecloseoftheprosecutioncase,theappellantwasruledtohaveacasetoanswer andwasplacedonhisdefence. Hegaveunsworndefenceinwhichhedeniedtheoffence. He called his wife who confirmed that the appellant was a bodaboda rider.

15. In a judgmentdeliveredon 16.12.16, the appellant was convicted and sentenced to serve death.

The Appeal

16. Aggrieved by this decision, the appellant lodged the instant appeal. In his Petition of Appeal filed on 3rd February, 2017, the appellant set out 9 grounds of appeal which I have summarized into 2to wit: - **THAT**

> **1.** ***The learned trial magistrate erred in law and in fact by failing to consider that the prosecution did not adduce any evidence linking the appellant to the alleged robbery***
>
> **2.** ***The learned trial magistrate erred in law and in fact in failing to consider the evidence as a whole and especially the defence***

16. When the appeal came up for hearing on 3rd October, 2017, the parties agreed to dispose it off by way of written submission. When the matter was mentioned on 14.11.17 to confirm if submission had been filed, appellant's counsel had dutifully filed the submissions and MsWafula forthe state informed the court that the state did not wish to file any submissions.

Analysis

17. Thisbeingacourtoffirstappeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal's decision in the case of **IssacNg'ang'a Alias Peter Ng'ang'aKahiga V Republic Criminal Appeal No. 272 of 2005** which

held as follows:-

> **“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.**

18. There are now a myriad of case law on this but the well-known case of ***Okeno v Republic (1972) EA 32*** will suffice. In this case, the predecessor of the Court of Appeal stated:-

> **The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwalav R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)**

19. I have considered the appeal in the light of the grounds of appeal and submissions for the appellant.

20. In dealing with this appeal, I will separately consider the weight of the identification *vis a vis* the defence.

i. *Identification of appellant by complainant*

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

22. The significance of accurate visual identification was underscored in the case of ***R –vs- Turnbull and others (1976) 3 All ER 549***, an English case, in which 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”.**

23. In the present case, PW1 did not give the assailants’ description to the policebut he told court that the only person that he could identify was one that wore dread rocks. The police officer who arrested the appellant did not testify and the reason for appellant’s arrest in the absence of being led by the complainant has not been explained. The complainant identified the appellant in an identification parade where appellant was the only person wearing dread rocks.

24. Based on the foregoing, the issue isnot whether the complainant gave the description of the appellant

to the police but whether the identification parade was properly conducted.

25. In the case of ***David Mwita Wanja & 2 others –v- Republic- Criminal Appeal No. 117 of 2005***, the Court of Appeal held as follows:

> **"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.**

26. In the case of***R v Mwango s/o Manaa (1936) 3 EACA 29***, the court laid down the procedure for identification among them that:-

> **"The accused is placed among at least 8 persons of as similar age, height, general appearance and class of life as him or her as possible".**

27. In the present case, the appellant was the only member of the identification parade that wore dread rocks. Consequently, I find and hold that the value ofidentification as evidence depreciated considerably sinceit was not held with meticulous fairness and in accordance with the instructions contained in Police Force Standing Orders.

28. Further to the foregoing, identification by night in normal circumstances will require corroboration because the court must satisfy itself that it is safe to act on the identification. In the instant case, the only evidence is identification by one witness and itwas in my considered view not absolutely water tight to justify a conviction. (***SeeRoria V. R (1967) E.A. 583***)

ii. *Appellant's defence*

The learned trial magistrate ruled that the defence was a general one and dismissed it. I however find thathad the learned trial magistrate carefully considered the issue of identification; he would have had no reason to dismiss the defence as a general denial.

30. As a result, it is clear to this court that the prosecution did not discharge its burden to prove the case against the appellant beyond any reasonable doubt or at all.

31. I thus find and hold that the learned trial magistrate erred in convicting and sentencing the appellant. Accordingly, I set aside the judgment and quash the appellant's conviction and sentence and unless otherwise lawfully held, order that he shall be released and set free forthwith.

DATED AND DELIVERED THIS *14TH* DAY OF *DECEMBER* 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Present in Person/ Advocate/Absent.

For the State - Mr Sintoi