



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
CRIMINAL APPEAL NO.4 OF 2015

BETWEEN

SYLVESTER ONYURO ODIWUOR APPELLANT

AND

STATE RESPONDENT

(An appeal from original conviction and sentence of the SRM's

Court at Mbita in criminal Case No.310 of 2014)

JUDGMENT

1. **SYLVESTER ONYURO ODIWUOR** (the Appellant) was convicted on a charge of robbery with violence contrary to **Section 296 (2) PC** and sentenced to death.
2. The prosecution case was that on 24th February 2014 at **MANGERA** area in Mbita, he jointly with others not before the court, robbed **MATHEUS ONIALA ODONGO** of a Toyota Hilux, Double Cabin Reg. No.KBR 802 B valued at Kshs.2.5 m, a mobile phone make Samsung Duos valued at Kshs.4500/= and cash Kshs.500/= all totalling to Kshs.2, 505,000/= and immediately before or immediately after the said robbery, he threatened to use actual violence against the said **MATHEUS**.
3. **MATHEUS ONIALA ODONGO** (PW1) was driving towards **SINDO** on 24th February 2014 at about 9.30 p.m. using motor vehicle KBR 802 P. There was a bridge under construction so he slowed down and drove on the sides of the road. He had full car headlights on and saw what looked like a tomatoe crate placed on the right side of the road. He swerved slowly to avoid the crate and just as he was about to join the main road, the driver's right side screen of his vehicle was shattered.
4. He got scared, checked and saw someone standing two metres away on the road with something which looked like a gun. The full lights helped him to see the man, and he realized there was a second person too. Suddenly two more people appeared and stood on the left hand side screen.
5. PW1 drove away very fast, but the car got stuck and as he tried to scream, the gang reached him and warned him that they would kill him if he screamed. They turned off the car engine and ordered PW1 to open the doors. One man took control of the car, the other sat on the passenger's seat and PW1 was pushed to the back seat where he was sandwiched between two people.
6. Each one of the attackers had a panga and PW1 identified the man who was driving the car – he was also the one consistently urging the other to kill PW1 but they could not agree on this.

7. At 1.00 a.m., after a long drive to various areas, they got to Kendu-Homa Bay road by which time they had taken away PW1's wallet containing Kshs.500/= and his driving licence; a Samsung Andrade phone, 2 ATM cards for KCB and Equity banks.

8. At 4.00 a.m. they got to Awasi area diverted into a rough road and ordered the complainant out of the car. He was then ordered to remove all his clothes and go to hide inside the sugar cane plantation. He eventually got his way to **NYANGERA** police station post and a good Samaritan arrested him with clothes after he heard the gang driving away. He later made a report about the incident to Mbita police station on 27th February 2014.

9. On 14th March 2014, police from Mbita called him to say they had arrested someone and requested him to go to an identification parade. He obliged and was able to pick out the appellant, in the parade saying he was the person who had robbed him. He explained that he did not wear a hood, so he was able to see him and note that he had nipple like scars on his right cheek. PW1 explained that the motor vehicle also had a light which switches on automatically whenever the car door is opened, and this too helped him to see the appellant whenever the gang opened the vehicle's door.

10. On cross examination the appellant stated:-

"I saw you many times from oncoming light of the vehicle and the light of the vehicle when you opened the door..."

There was a bulb in the car. I would see you whenever the light went on after the door was opened. I could also see you well when oncoming vehicles spread their lights on you."

11. The complainant explained that he was seated at the back and had been ordered to look straight ahead.

12. **IP STEPHEN KIBET** (PW3) who conducted the identification parade confirmed that appellant chose the position he wished to stand at and was identified by PW1.

13. The appellant's defence was that he did not rob PW1 on the night in question nor did he drive away that motor vehicle. He also complained that the identification parade was not done according to the law.

14. In his judgment the trial magistrate pointed that although PW1 was the sole witness regarding how the incident occurred; he had no doubt as to his credibility. The trial magistrate also noted that the appellant and his gang members were armed with pangas and he had even threatened to kill PW1.

15. The trial magistrate was satisfied that PW1 had ample opportunity to see and identify the appellant:-

a) With the aid of his car head lamps

b) Inside the motor vehicle as the appellant drove

c) His physical appearance, especially the distinct scar with outstanding nipple like features on his right cheek.

16. He found it safe to rely on PW1's evidence, saying it was not shaken.

17. The appellant was dissatisfied by both the sentence and conviction, and appealed saying the trial magistrate did not take into account the composition of the identification parade members, and PW1 did not give a physical description to police regarding his attackers – further that PW1 was placed on the floor of the motor vehicle and therefore could not see the person who was driving. He also faulted the conditions for identification saying the source of light at the time, was inadequate.

18. Mr. Ongoso submitted on behalf of the appellant that events happened too fast for the appellant to have had opportunity to identify the attacker and once the robbers took over the motor vehicle PW1 was

sandwiched between two people on the back seat and he could not have identified the person driving.

19. Mr. Ongoso further argued that during cross examination PW1 said the person who was driving had a scar on his face – which was a direct contradiction to the person he picked at the identification parade.

20. Further that the appellant only picked the appellant at the identification parade because one Gorette Achieng (who was in an unrelated matter) had also picked him out.

21. It was Mr. Ongoso's contention that despite the court ordering for the OB showing the first report to be produced at the trial, this was never done. Counsel submitted that this would have disclosed what report PW1 had made to police, saying the whole claim about a robbery was stage managed.

22. Counsel also faulted the trial magistrate saying he never considered the appellant's defence, and used a totally unrelated case i.e. No.359/2015 where Gorretti Achieng was the complainant, and totally unrelated to criminal case No.360/2014, involving the appellant.

23. He also pointed out that the trial magistrate never warned himself of the dangers of relying on a single witness.

24. In opposing the appeal Mr. Oluoch, on behalf of the State submitted that the trial magistrate did not rely on the Criminal Case No.359 of 2014 to convict the appellant; saying he infact stated clearly that the evidence in that case would not be considered in the case against the appellant (see page 3 paragraph 4 of the lower court's judgment).

25. Counsel also pointed out that the trial magistrate took cognisance of the dangers of relying on a single witness and duly warned himself at page 5 of the judgment. Further that conditions and opportunity for identification were favourable due to lights available and time spent together.

26. As regards the identification parade, it is his contention that the parade had persons of similar stature, not identical and it would be unreasonable to expect police to get another person with nipple like protrusions on the right side of the face like the ones the appellant had. At the identification parade PW1 easily picked out the appellant due to the protruding growths and scars he had on his face.

27. It was also argued that the parade was conducted in accordance with Police Force Standing Orders. Mr. Oluoch has urged that should the court be persuaded that the trial magistrate relied on the evidence of PW3 given on 27th January 2015 to convict the appellant, and this caused prejudice to him, then a Re-trial should be ordered due to the nature of evidence available – this would serve the interest of justice.

28. I will deal first with this last issue i.e whether the trial magistrate relied on criminal case No.359 of 2014 to convict the appellant. This is because the appellant's counsel is insistent that Mr. Oluoch is reading the findings and observations of the trial court in portions to only favour the position he has taken. Further if indeed the trial magistrate relied on that case then the issue of whether a re-trial is necessary would require to be addressed at the early stage so as to avoid analyzing the entire evidence.

29. From the record of the trial court, although PW1 had made a report about the incident to police, the appellant was not arrested immediately. Infact he was arrested in relation to an entirely different incident and on the strength of what PW1 had told police, they suspected he could be the same person they were looking for, so they requested PW1 to go to the police station and take part on the identification process by mounting an identification parade.

30. **PC JAMES MWENDA** (PW4) who investigated this incident as reported by PW1 told the trial court that the appellant was arrested at Ahero over a different matter. **IP STEPHEN KIBET** (PW3) was the parade officer – he testified on 15th June 2015 and 27th January 2015 but the trial magistrate noted that his evidence on 27th January 2015 was in regard to an identification parade which he conducted over a different case and trial magistrate stated:-

“That evidence will not be considered in this case. I have called for the record in Cr.359/14 and found that the complainant in the matter is one who identified the accused.

This evidence given by the witness on 15.06.2015 by IP Kibet is relevant for this case.”

31. I think with the greatest of respect, to Mr. Ongoso, he is splitting hairs. It is so clear that the trial magistrate did not rely on the evidence or identification by a witness in criminal No.359 of 2014 to convict the appellant herein. He called for the file to clarify whether the witness in that case had also identified the appellant so as to establish that IP Kibet’s claim of convicting two identification parades in respect of the appellant but in relation to two separate incidents was not just a red herring. I am satisfied that the trial magistrate did not rely on evidence in Cr. Case NO.359 of 2015 to make his decision and convict the appellant.

32. With regard to identification, I have considered what both counsel have stated; and the various decided cases Mr. Ongoso has referred to.

33. PW1 first saw the appellant when all was calm – he was simply avoiding a crate that was on part of the road at a section which was under construction. The motor vehicle had full headlights on and he explained that the appellant did not attempt to disguise himself or hide his face – he only had a shirt – unlike his other colleagues who emerged later from the shadows wearing hoods.

34. That was not a momentary glance and when PW1 sensed danger, he sped off but they caught up with him. When ordered to open the doors, he obliged – (he said when the car door opens the light inside the motor vehicle is automatically turned on) – and he saw the very person he’d first spotted i.e. the appellant, as the one who took over the steering.

35. They ordered him to the back seat where he was sandwiched between two people who instructed to look straight ahead – he obeyed. In so doing, he actually had the advantage of seeing the appellant’s face as he drove and his face would be illuminated by lights from oncoming passing vehicles.

36. He also was the one who kept informing his colleagues to kill PW1 – it was a long drive – from SINDO to AWASI. The appellant’s features were striking as he had a scar on the right cheek and protruding nipple like growths which the trial court noted during the proceedings.

37. When PW1 was eventually dropped off, he was again able to see the appellant again with the aid of the automatic car bulb which would turn on and appellant had a panga and maintained his position that PW1 should be killed.

38. In considering whether this evidence on identification was significant I am guided by the decision in **CHARLES O. MAITANYI –VS- R. 1986 KLR 198** which pointed out that evidence of a single witness under difficult circumstances must be carefully weighed. The court ought to take into account the prevailing conditions at the time – the nature of light available and its intensity, its positioning in relation to the accused person and the victim, and the time spent together.

39. All these factors were present – the assertion that the car had full headlight on, and the automatic lighting bulb in the car were unchallenged. PW1 had ample opportunity to see the appellant not just at the scene along the road, but they rode together for hours and at times the robbers would come out of the car, and finally at the Awasi scene where he was stripped off his clothes.

40. I am aware of the importance of description of an attacker at the initial report as was noted in the case of **SIMIYU & ANOTHER –VS- R. 2005 VOL.1 KLR 192** – yet from the record the issue of description first report was never raised during cross examination of PW4 to confirm whether PW1 had given him a description of the appellant – it remains an issue in limbo which cannot be visited against the prosecution and I distinguish this scenario from observations in **SIMIYU** (supra).

41. The trial magistrate infact bore in mind that there was danger in relying on the evidence of a single

witness and cited the case of **ROFA –VS- R (1967) EA 583** where the court pronounced:-

“Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult ...”

42. The trial magistrate observed that PW1 was not shaken in his identification and that it was safe to rely on him.

43. Was PW1 robbed of the motor vehicle and his property or was all this stage managed. There was no suggestion or evidence offered by the defence to draw an inference that perhaps PW1 cunningly disposed of the motor vehicle. To the contrary **PW2 PETER OSANGILI** presented a log book to the court confirming that the motor vehicle did exist and was no longer in the possession of appellant or the company where he worked as a driver.

44. I am satisfied that the trial magistrate duly considered the prevailing conditions and opportunity for identification in finding that the appellant was properly identified.

45. As regards the identification parade, I have read through **Rule 15** of the **Police Force Standing Orders** and the decision in **JAMES MUNENE KANYI –VS- R (2010) e KLR** – the identification was done in accordance with the Force Standing Orders – and infact the appellant’s complaint was noted – he objected saying he was dissatisfied as he was identified as the driver. As observed by Mr. Oluoch what is required is that the member of the parade be of similar stature, not identical and expecting police to find someone with scars and nipple like protrusions on the face would be pushing it too far. I hold that the identification parade was proper.

46. The upshot is that the appeal has no merit and is dismissed. Conviction is upheld and sentence confirmed.

Delivered and dated this **29th** day of **July, 2016** at Homa Bay.

H.A. OMONDI

JUDGE