



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 297 OF 2006

PAUL OTIENO OMBOGOAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence of the Principal Magistrate's Court at Migori

in Cr. Case No.786 of 2005 delivered by Hon. Ezra O. Awino, PM on 22nd November 2006)

JUDGMENT

1. The appellant was on the 22nd November 2006 convicted and sentenced to death for five of the six counts of robbery with violence that he had been charged with in relation to a robbery incident alleged to have taken place on the 21st May 2004 at Nyasoko area of Migori District of the then Nyanza Province. The appellant, who had been charged in a consolidated charge sheet with a second accused, had his trial proceeding separately after the 2nd accused absconded and was only subsequently arrested after the appellant's trial had already commenced, prompting the prosecution to withdraw the charge against the 2nd accused under section 87 (a) of the Criminal Procedure Code (CPC).

2. The prosecution's case before the trial court was that the appellant was part of gang of seven robbers who, on the evening of the 21st May 2004 at about 7.30pm, while dressed in police uniform and armed with guns and by placing stones on the road ambushed a motor vehicle hired by a tobacco company. The ten people in the vehicle [including the six complainants] who were employees of a tobacco company and the driver of the vehicle and his 'Manamba' [turnboy] were returning home to Migori from Nyasoko where they had gone to buy tobacco. The attackers robbed them of their assorted property including money, mobile phones, watches and other personal effects; raped the two women in the group; and beat up the male colleagues in the incident. The assailants tied up the victims, putting them in the back of the pick-up vehicle and drove with them to a house where they stole a solar panel and finally abandoned them in a sugar plantation at Awendo. The robbers then drove off in the said motor vehicle which was later recovered with its car radio, battery and ignition key missing. The victims were able to untie themselves and get assistance from the local Divisional Administration office. The Prosecution sought to prove that the appellant had been identified by two witnesses using the light from the motor vehicle headlights and subsequently picked out at an identification parade and that a third witness had informed the police that some of the robbers were calling each other the names of 'Paul, Otieno and Othis' which the police contended referred to the appellant names Paul Otieno.

3. The appellant denied the charge and in his sworn defence pleaded a case of mistaken identity; that the police officers who arrested him had said that because of his name Paul Otieno Ombogo he must have been involved in the robbery.

4. In convicting the appellant, the learned magistrate found that the prosecution had proved its case beyond reasonable doubt and that the appellant had been properly identified as a participant in the robbery. The court also found that the alleged recovery of a stolen solar panel from the house at which he was arrested, but which was not produced in evidence, corroborated the identification evidence. The Magistrate ruled that:

“Firstly, the issue raised is that of identification. Two witnesses, PW1 and 2 identified the accused at the scene and at a parade conducted on 11/6/2004. Benson Opiyo (PW6) stated in his evidence that he saw the accused very clearly at the scene, but he was not able to identify the accused at the parade. George Odhiambo who is PW7 also appeared to have identified the accused at the scene but he did not appear in the identification parade.

It is important to consider how much time the witnesses had the accused person under observation, what kind of light was available for a correct identification and any special features. There was the motor vehicle head light when the motor vehicle was first stopped. The witnesses used the light to identify the accused. The 2nd incident was when they were being robbed and addressed by the accused and they saw the scar in the face and the gap in his upper teeth.

It is not possible for a witness to pick and report every Nitty-gritty of an incident when making a report at a police station, for example, the complexion, facial features, teeth formation, etc, unless it is through question and answer form. It is imperative that the officer taking the statement leads the witness in that direction, unless questions are asked more details cannot emerge.

I am of the view that the witnesses had enough lighting and ample time to make a correct identification.

PW1 and 2 were raped in darkness, they were not able to see and recognize those who raped them. They were robbed in the light of motor vehicle head light and torches and raped in the dark.

IP. Lyambilla (PW4) who conducted identification parade was requested to do so by IP. Ouko. There is no record that shows that IP. Lyambilla was the arresting officer or that he played any other role other than the parade. He seemed to have complied with the rules, he invited the accused to make any comments, but the accused chose not to. I see nothing wrong in the manner the parade was conducted.

PW1 and 2 were able to identify the accused in the parade, it is not suggested that they had been made to see the suspect before, the suspect was able to change his position in the parade, but he was identified. This only shows that conditions for correct identification were favourable at the scene of robbery.

P.C. Asugo (PW5) might have exaggerated his evidence as the officer who investigated the case, the greater part of which appears to me as hearsay, they may not be accorded much probative value given that the witnesses he referred to, testified in Court.

It is however, noteworthy that P.C. Asugo participated in the arrest of the accused and one of the items stolen in another robbery of the same night, solar panel, was recovered at the house where the accused was arrested from. The witnesses in this case stated that the solar panel was stolen from another home as they were held captives, its recovery therefore adds weight to the evidence of identification. I could now enter an acquittal in Count No. III, but enter a conviction in Count I, II, IV and VI.”

5. The Counsel for the parties, Mr. Minda for appellant and Miss Cheruiyot for the State, made their respective submissions on the appeal and judgment was reserved. The counsel’s verbatim submissions are set out below:

‘Mr. Minda for the appellant: Appeal against conviction and sentence at Migori SPM Court criminal case no. 786 of 2005. I will urge only 2 issues. Identification and hearsay.

Identification:

It is not disputed that the offence took place at 7.00pm at night when it was dark. PW1 admits the fact that it was dark but p. 18 of the record, she states she was able to see and identify the appellant because he had a gap in the teeth and a small scar on the eye-lid. A reading of the proceedings show that the complainants were ambushed at night and they did not have torches. The only light was from the light on the motor vehicle. One could only see the person at the front not on the side of the vehicle. At p. 21 of the proceedings PW2 stated on cross-examination, that you have a gap on the lower teeth. [Witness has gap in upper teeth and not in the lower teeth]

At the parade, the witnesses said they identified him because he had a gap in the teeth. In the report, it does not show that the appellant was asked to open his mouth and part his lips so that the witness could see the teeth.

The conditions existing are not easy to identify the accused by the gap in the teeth and the small scar on the eyelid. I submit the appellant was not identified at all as being part of the group that attacked the complainants.

Hearsay

At p. 57 of the record, the trial magistrate relied on the fact that a solar panel that was among the stolen items was recovered in the possession of the appellant. The solar panel was not produced before the court as an exhibit and it should not therefore be taken as corroborative of the issue of identification. It was therefore unsafe to convict the appellant in the absence of any other evidence apart from the skewed identification. The issue of solar panel having not been produced is hearsay. I urge that the appeal be allowed and conviction quashed and sentence set aside.

Miss Cheruiyot for the State:

Appellant was convicted of 5 of 6 counts of robbery with violence. The prosecution called witnesses who clearly identified the appellant. PW1 at p. 15 stated that she identified the appellant with the gap in the teeth. She said there was light from the vehicle and the attackers had torches. PW2 also identified the appellant at p. 17 she said she was seated in front of the vehicle. She saw the appellant as one of the 7 people who stopped the vehicle. She said the appellant had a gap in the teeth. PW4 an inspector of police conducted an identification parade at p. 24. PW1 and PW2 both identified the accused even after changing of positions. The parade forms were presented in court as exhibits.

At p. 32 PW6 states that he saw the appellant who searched him asking for money although he had never seen him before. He was the driver of the vehicle. On cross-examination PW6 at p. 34 he stated 'I saw you when you people were asking how much we gave.'

PW7 identified the appellant at the dock. At p. 52, the trial magistrate was convinced that there was enough lighting and ample time to make identification. On hearsay of solar panel, PW5 who was the investigating officer said he received the report of the robbery in May 2004, at p. 30, 3rd paragraph. P. 53 of judgment magistrate indicates that solar panel was recovered. I refer to p. 15 of the evidence of PW1 and p. 30 evidence of PW5 indicating that a solar panel was recovered. The appellant in his mitigation at p. 54. I pray that the appeal be dismissed.

Mr. Minda in Reply:

There were two sources of light from torches from attackers and light from the vehicle. Evidence must be led to show where the appellant was standing. If he was holding a torch we cannot ascertain his face. There is no evidence that the appellant was identified in view of the two sources of light. The motor vehicle was ambushed. The motor vehicle's light is ruled out as the lights are pointing outwards. The circumstances were not safe to convict the appellant. The circumstances were not adequate to confirm that one of the attackers was the appellant.

The participants at an identification parade must have seen the person to identify. As there was no evidence that the participants had seen the accused in the unsuitable circumstances, they could not have been called to identify the accused. It was stage managed.”

6. There was no issue as to whether the offence of robbery with violence was committed in view of the existence of the ingredients of the offence having been proved by the theft of the victims' money and property, evidence of the number of the assailants, their being armed with rungas, pangas and guns, the raping of the women victims and the beating up of the men and the threat that they would all be thrown into river Kuja. See for the ingredients of the offence of robbery with violence, the Court of Appeal decision in **Ganzi vs. Republic** (2005) KLR 52. The issue for determination in this appeal, therefore, is whether the appellant was properly identified as one of the robbers to justify his conviction. No argument was presented on the severity of sentence and we shall consider ourselves bound by the decision of the Court of Appeal in the 5-judge bench in the Court of Appeal at Nairobi in **Mwaura and Ors. v. Republic**, Criminal Appeal No 5 of 2008 of 18th October 2013, that the death sentence is mandatory.

7. We have, as a first appellate court, minutely reexamined the evidence presented by the prosecution and the appellant in the trial court, in line with our duty as set out in **Okeno v. Republic** (1972) EA 32 and recently restated in **Muthoko and Anor vs. Republic** (2008) KLR 297.

8. The case against the appellant was based on alleged identification by PW1 and PW2. In accordance with a long line of authorities - see for example **Abdalla Bin Wendo & Anor vs. R** (1953) 20 EACA166; **Roria v. Republic** (1967) EA 583; **R v. Turnbull** 1976) 3 All ER 549; **Cleophas Otieno Wamunga –vs- R** (1989) KLR 424 and **Karanja & Anor vs. R** (2004) 2 KLR 140 - the court must warn itself of the dangers of convicting on such evidence where the circumstances favouring correct identification do not exist and there is a danger that the identification may not be free from possibility of error. The court is then obliged to establish whether there is corroborative evidence to support the identification before it can convict on the identification evidence.

9. The eye-witness accounts of the identifying witnesses [whose names have been withheld to protect the identities of the complainants of the sexual offences committed against them] was as follows:

PW1, a tobacco seller travelling on the pick-up motor vehicle during the attack on cross examination by accused said:

*“I met with the people at 7.30 p.m. **I managed to see some through our light of the motor vehicle and your torches.** I recorded in my statement that I can identify some. (reading statement) I did not record that I recognized you. We were told to look down later. That is what happened but I did not record that. We were taken to the sugar cane plantation at night. I saw people. The one with gap in the teeth robbed me, but I did not record that. You have a mark on top of the eye lid. I recognized you in the parade. You were many and I recognized. **Police told me that the suspects had been arrested. I made two statements. I described you in the 2nd statement.** I do not know who raped.” [emphasis added]*

PW2, an employee of Mastermind Tobacco on cross examination by accused said:

*“We met 7 people. **I was in the front cabin and the motor vehicle had light and they were just 1 metre away.** They had guns, pangas, I have not seen a gun.. I saw your face. I did not describe you to police, nor your face. You have gap in lower teeth and scar in the face. I saw you. I was raped. I do not know who raped me. **I was in the front cabin when I saw you.** We were taken to sugar cane plantation at 1 a.m. And it was dark. **Police told me that the suspect had been arrested and I came to the parade.** I did not record that you had a gap. I recorded two statements. It is dated 2/6/04 and 11/6/04. **I described you after the parade.** I am not lying to Court.” [emphasis added]*

10. The circumstances in which identification of the appellant was alleged to have been made were difficult in that it was at night and the only sources of light were the motor vehicle headlights and torches from the attackers. It is instructive that the eye-witnesses did not give a description of the appellant to the police while they recorded their first statements with the police. As PW1 and PW2 said on cross-

examination they both wrote two statements and they described the appellant only in the second statement which the PW2 said was after the identification parade. PW2 wrongly described the appellant's gap in the teeth as having been in the lower teeth – the appellant demonstrated before this court that his gap was in the upper teeth. It is difficult to hold that the situation afforded circumstances that would guarantee a positive identification that was free from possibility of error.

11. Two witnesses, PW6 and PW7, purported to identify the accused in the dock. It is trite law that dock-identification is of the least possible use in identification of an accused for the simple reason that a witness will easily relate an accused in the Dock as the person who participated in the offence. The Court of Appeal in *Murage and Anor. v Republic* (2006) 1 KLR 63, held that dock identification is worthless without an earlier identification parade and a conviction on such evidence in the absence of any other evidence was unsafe.

12. PW6, Benson Opiyo, the driver of the pick-up claimed to have seen the accused clearly during the robbery when the latter was searching him for money with 'the motor vehicle made to lit us'. On cross-examination by the accused PW6 said:

"I saw you when you people [were] asking how much we gave. You stepped on me to lie that I only gave shs. 500/-. I made a statement to police. They did not write that I used the motor vehicle light too see you. It was not read to me. I heard others call you Paul Otieno. You were the commander. That is not in my statement. You were near me when I was removing the terminal. They were pointing the torch to the terminal. I did not recover my items. I know about identification parade. I was called. I did not attend the parade. I did not pick you in the parade."

The apparent contradiction as to whether the witness attended the identification parade is resolved by the testimony of the parade conductor Inspector Lyambilla, PW4, who testified that he had three identifying witnesses, PW1, PW2 and PW6, the first two who identified the appellant and the third who did not identify the appellant in the parade.

13. PW7, George Odhiambo, the conductor of the pick-up motor vehicle on cross-examination by accused said:

'I am Odhiambo. We were attacked at 7.30 p.m. I saw 2 people. That is the day I saw them. It was a pick up. I saw you by motor vehicle light. I made a report to police that I can identify you if I see you. I did not describe you to police. You are the one who took my money.

I was told of the arrest of the suspect. I did not come to the parade because I had known you. I saw you. I voluntarily wrote my statement.'

14. Clearly, if PW6 the pick-up driver who claimed that the vehicle was made to light for them when the attackers were searching them, and who would claim to have a longer interaction with the appellant while he searched him, when stepping on him not to state the correct amount he had given and finally when he repaired the vehicle after it stalled, could not identify the appellant at the identification parade, there arises a doubt as to the possibility of the other witnesses who had lesser illuminated contact with the appellant.

15. There was an attempt by the prosecution to link the appellant to the robbery by reference to names allegedly used by the attackers in reference to each other during the robbery. The Investigating Officer, PW5, Police Constable Joseph Asugo testified that the complainants had told him that the suspects were **Paul, Collela** and **Odhis** because they had heard the names used by the attackers. PW6 said he heard the other attackers call the appellant, whom the witness said was the commander of the group, by the name **Paul Otieno**. PW8, Frederick Odoyo Juma, a worker with Mastermind Tobacco testified that while the attackers were searching them for money, he was hit with a kick in the eye and he bled profusely so that he could not see. He testified further that the attackers had a problem when sharing the money taken from the victims and that they had called each other using names '**Paul, Collera, Sirwa etc.**'.

16. Not to mention the inconclusiveness of identification of a person merely by reference to names allegedly used by attackers at the scene of crime and the improbability that the attackers were addressing the appellant by his full name and alias – **Paul Otieno ‘Ndweje’ Ombogo** - as alleged by PW5, the allegation was not proved by testimony as PW6 only alleged that the attackers had referred to the appellant as **Paul Otieno** and PW8 only heard the names ‘**Paul, Collera, Sirwa etc.**’ and not **Paul, Collela** and **Odhis**. A name like Paul which is a Christian name and given names or surnames Odhiambo and Otieno are common names in the area which may identify more than one person, as demonstrated by the names of the two accused persons in the present case before the discontinuation of the case against the 2nd accused – **Paul Otieno Ombogo alias ‘Ndejwe’** and **Paul Ouma Otieno alias ‘Collera’**. In such a case, the names Paul and Otieno separately or together cannot, without more, be held to be conclusive in identifying the appellant.

17. On the identification parade, PW4, the Parade conductor produced the parade report indicating that he had three witnesses PW1, PW2 and PW6, the first two identifying the appellant and the third failing to identify the appellant. Although the PW4 testified that the appellant changed his position between the identification by PW1 and PW2, the Parade report form shows that the appellant was allegedly identified by the two witnesses PW1 and PW2 while stationed at the same place between the 5th and 6th members of the 8-member parade, and that when he changed his position to between the 3rd and 4th members, the witness PW6 could not identify him.

There was no evidence that the appellant had chosen to stay at the same position on the parade line up while being identified by the witnesses PW1 and PW2, and the danger of a stage-managed identification parade is real. Moreover, as argued by counsel for the appellant, there was nothing in Parade report to show that the appellant was required to show his teeth to permit identification by the gap in the teeth alleged by the witnesses. How could they then claim to have identified the appellant using the gap in his lower teeth?

18. We think that the circumstances of the case where the robbery took place in the night with the only sources of light being motor vehicle headlights and a torch, where the identifying witnesses did not make any first-report descriptions of the appellant and the questionable identification parade in which a witness who claimed longest interaction with the accused could not identify him cannot afford a safe conviction based on identification that was free of possibility of error.

19. While seeking corroboration to support the identification evidence, we noted that although the Investigation Officer claimed that a solar panel stolen during the robbery incident, a Sony radio and one speaker were recovered at the house where the appellant was arrested, the same were not produced as exhibits. Such alleged recovery not put in evidence and the appellant not having been able to challenge such evidence of recovery cannot be taken to be proved and cannot be corroborative of the evidence of identification of the appellant.

20. In addition, the PW5 Investigation Officer’s testimony was made up of statements in positive direct assertions of an eye-witness while all of it could only have been based on information from witnesses. To the extent that the information in the testimony of PW5 was not given in the first-person testimony of the eye-witnesses the same is hearsay which cannot be corroboration of the evidence of identification. For example, on cross-examination PW5 said in part:

“Paul Otieno ‘Ndweje’ Ombogo raped the women in turns. You raped P. P said so. P recorded her statement.”

Yet there was no direct evidence given by the women that they identified the appellant as one of the rapists. Indeed, they both testified that they could not identify the rapists because it was dark. The statements by the Investigating Officer, PW5, are not reflected in the testimonies of the complainants who witnessed the incident and may have been obtained from the informer who allegedly led the police to the arrest of the suspects, and who was not called as a witness. The statements are clearly hearsay.

21. The learned trial magistrate was alive to the hearsay evidence of PW5 and we are surprised that he

found the allegation of recovery of the solar panel which was not produced as an exhibit before the court as corroborating the evidence of identification. He said:

“P.C. Asugo (PW5) might have exaggerated his evidence as the officer who investigated the case, the greater part of which appears to me as hearsay, they may not be accorded much probative value given that the witnesses he referred to, testified in Court.

It is however, noteworthy that P.C. Asugo participated in the arrest of the accused and one of the items stolen in another robbery of the same night, solar panel, was recovered at the house where the accused was arrested from. The witnesses in this case stated that the solar panel was stolen from another home as they were held captives, its recovery therefore adds weight to the evidence of identification.”

22. Without producing the allegedly recovered solar panel, and calling evidence to show that it had been stolen during the robbery and later recovered at the accused’s house, the bare statement by the Investigating Officer who had been shown to give exaggerated hearsay statements cannot, in our view, support a finding of guilt beyond reasonable doubt.

23. We have noted errors of fact in the findings of the trial magistrate making the factual foundation of the judgment of the Court wanting, as follows:

- a. While the magistrate correctly ruled that the duration that the identifying witnesses had to observe the appellant was important, he misdirected himself in finding that the witnesses who had identified the appellant had opportunity during the time they were being searched to observe the appellant’s appearances. From the evidence, the only witness who claimed to be able to identify the appellant on account of long interaction when the attackers were searching and asking for money and when he repaired the stalled vehicle was PW6 who, in fact, was not able to identify the appellant at the Identification Parade. The two witnesses who allegedly identified the appellant at the Identification Parade, PW1 and PW2, only claimed to have identified the appellant using the vehicle headlights when the attackers stopped them PW2 stating that she was seated in the pickup’s front cabin and the appellant was about one metre away.
- b. Contrary to the trial magistrate’s finding, the Parade Conductor PW4 Inspector Lyambilla was, as conceded by the Investigating Officer PW5 during cross-examination, one of the arresting officers and at one point also investigated the same case (see page 28 of the Record of proceedings). We think that to ensure integrity of the identification parade, it should be conducted by an independent officer other than the arresting or investigation officers. Indeed, Regulation 6 (iv) (b) of Chapter 46 of the Force Standing Orders on the conduct of identification parades requires that an officer in charge of the case shall not conduct the parade although he may be present.
- c. In addition, the police told witnesses that suspects in the case had been arrested and invited them to attend an identification parade. This was contrary to the provisions of the Force Standing Orders on identification parade Regulation 6 (iv) (k) whereof provides as follows:

“When explaining the procedure to a witness the officer conducting the parade will tell him that he will see a group of people which may or may not contain the person responsible. The witness should not be told ‘to pick out somebody’ or be influenced in any way whatsoever.”

Having been told that the suspects had been arrested, the witnesses were influenced to pick out somebody from the group in which they must have expected the suspects to be paraded.

- d. The trial magistrate did not find anything wrong with the conduct of the parade at which the accused was at the same position when being identified by the two witnesses PW1 and PW2, without any explanation that he chose so to be positioned. It was not correct as the magistrate ruled, that the appellant had changed his position at the parade when he was identified by the two identifying witnesses. Regulation 6 (iv) (e) of Chapter 46 of the Force Standing Orders on identification parades provides that ‘the accused/suspected person will be allowed to take any

- position he chooses and will be allowed to change his position after each identifying witness has left, if he so desires’.
- e. The magistrate did not give due weight to the fact that the driver of the Pick-up, PW6, who claimed long interaction with the appellant was not able to identify the appellant at the Identification Parade. Unfortunately, the magistrate also sought to excuse the failure by witnesses to give detailed description of the suspect such as ‘complexion, facial features and teeth formation’. It is through such first report descriptions that the court may determine the identification of the suspect as being free from error.
 0. There was no evidence led by the alleged complainant or other witnesses in proof of the third count of the Charge Sheet, and the trial magistrate rightly rejected the charge on that count.
 0. Accordingly, for the reasons set out above, we find that the appeal has merit and we therefore quash the convictions and set aside the death sentence and order that the appellant be set at liberty forthwith, unless he is otherwise lawfully held.
 0. *The Court notes, from correspondence to the Court by the appellant, that he was also convicted and sentenced to death in another file **Migori Criminal Case No. 787 of 2005** giving rise to appeal **Kisii High Court Criminal Appeal No. 198 of 2006**, which, if still pending, is not affected by the outcome of this appeal.*

R.N. SITATI

E. M. MURIITHI

JUDGE.

JUDGE.

Dated and delivered this 24th day of July, 2014.

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RUTH SITATI

JUDGE

In the presence of: -

Mr. Ondari h/b for Mr. Minda (present) for the Appellant

Mr. Majale for the Respondent

Mr. Bibu - Court Assistant