REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 106 OF 2013

(From original conviction and sentence in Criminal Case No. 123 of 2013 of the Chief Magistrate's Court at Narok- Hon. T.A. Sitati [S.R.M] dated 27/06/2013)

AMOS OKINYI ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 118 OF 2013

EDWARD KING'ORI MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL NO. 120 OF 2013

BERNARD OUMA NYAMUTIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL NO. 107 OF 2013

David Ochieng Oneya.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. Edward King'ori Mwangi, David Ochieng Oneya, Amos Kinyi Odhiambo and Bernard Ouma Nyamotia *(hereinfter referred to as the 1st, 2nd, 3rd and 4th Appellants respectively)* were charged jointly with the offence of robbery with violence contrary to Section 296(2) of the Penal Code to which they pleaded not guilty. The particulars of the offence were that on the 2nd February 2013 at Narok Township in Narok District within Rift Valley Province, jointly with others not before the court, while armed with a dangerous weapon namely a pistol, robbed Ann Sadera Kshs. 15,000/= and two mobile phones make Nokia and Techno Phone valued at Kshs. 25,000/= and immediately before or immediately after the time of the robbery used actual violence against the said Ann Sadera. They were on the evidence convicted of the offence and sentenced to death in accordance with the law.

2. The Appellants filed separate appeals in this court against their conviction and sentence, on similar grounds that-

a. *the learned magistrate erred in law and fact in convicting the Appellants on the Prosecution evidence which did not prove the charges beyond reasonable doubt;*
b. *the learned magistrate erred in law and fact in relying on the contradictory evidence of PW1 and PW2 on the events leading to the arrest of the Appellants;*

c. *the learned magistrate erred in law and fact in convicting the Appellants on the basis of suspicions;*

d. *the learned magistrate erred in law and fact in relying on the evidence of dock identification when the same was not preceded by any recording of prior description of the assailants or a properly conducted identification parade;*

e. *the learned trial magistrate erred in law in relying on the unsubstantiated, uncorroborated and insufficient evidence to convict the Appellant;*

f. *the learned trial magistrate erred in law in shifting the burden of proof to the Appellant; and*

g. *the learned trial magistrate erred in law in failing to give due weight to the Appellant's defence.*

Submissions

3. The 1st Appellant made brief submissions in support of his appeal. He submitted that PW1 and PW2 did not recognise him and that he was wrongly convicted. Counsel for the 2nd, 3rd and 4th Appellants filed written submissions in their separate appeals but which were similar. These submissions were highlighted by Mr. Kipkoech during the hearing of the appeal. It was his submission that the Prosecution did not adduce sufficient evidence to sustain a conviction. The court acted on dock identification of the Appellants which was not preceded by any recording of prior description of the assailants.

4. He also contended that the court erred when it convicted the Appellants on the basis of suspicion because they were not identified at the time of their arrest. The prosecution evidence on identifying them was unsubstantiated, uncorroborated and insufficient. It was not sufficient to sustain a conviction. This kind of identification required extra caution because circumstances were not conducive for a positive identification and there was no other independent evidence linking Appellants to the offence.

5. Counsel for the Appellants added a further ground that Sections 306 and 307 of the Criminal Procedure Code were not complied with. The Appellants were not informed at the close of the prosecution case that they have a right to counsel. He prayed for the court to allow the appeals.

6. Ms. Ndubi for the State opposed the appeal. Firstly she contended that the contention of non-compliance with Section 306 and 307 of the Appeal were not complied with was not contained in the

Petition of Appeal. In any event the Appellants were given a chance to defend themselves. She considered the evidence against the Appellants watertight and asked the court to dismiss the appeals.

DETERMINATION

7. In determining this appeal, I am guided by the decision in **NJOROGE VS REPUBLIC [1987] KLR 19** wherein the duty of the first appellate court was stated as follows-

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties are entitled, as well as on the questions fact and law, to demand a decision of the court of the first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."***

8. The first issue that was raised was whether the trial court failed to comply with the provisions of Section 306 and 307 of the Criminal Procedure Code, *(Cap 75 Laws of Kenya)*. This particular allegation was not raised in the Petition of Appeal and in my view could not be raised during the submissions. The Prosecution Counsel was not given ample notice of the intention to make this argument and therefore it would be prejudicial to consider it in the circumstances.

9. On the evidence, it was proved by the prosecution through the evidence of PW1 *(the complainant)* and PW2 *(the complainant's son)* that on the night of 2nd February 2013, the complainant's house was invaded by a group of about 6 men who stole money and two phones. They were armed with dangerous weapons namely: a pistol and knives. During the attack, they used violence against the complainant. She testified that when she refused to comply with their demands for money, she was beaten. This was witnessed by PW2 and confirmed by PW4 who filled in and produced the P3 Form (exhibit 1). He examined the complainant and found that her head had painful swellings on the right side, she was feeling pain on her neck muscles on the back side, chest and abdomen. Her hips and thighs were also swollen. These set of facts satisfy the ingredients for the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

10. The question for determination and which forms the substance of the appeal is whether the Prosecution proved that the Appellants were among the robbers who committed the robbery.

11. The conviction against the Appellants was based solely on the evidence of PW1 and PW2 who alleged to have identified them as their attackers for there was no other evidence connecting them to the offence. The court must therefore treat this evidence with caution, careful to ensure that it is free of errors and that it points beyond reasonable doubt to the appellants as the culprits. In **WAMUNGA VS REPUBLIC [1989] KLR 424,** the court had this to say on the issue of identification -

> ***"Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against an accused depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the accused in reliance of the correctness of the identification."***

12. In **TETU OLE SEPHA VS. REPUBLIC [2011] eKLR** the credibility of the witness and the extent to which their evidence will be relied on are determined by the circumstances of identification. In this regard, the court should be guided by and look at the lighting situations as well as the demeanor of the witness as he testifies on the identity of the accused person. It stated:-

> ***"There is no rule of thumb for all situations and in our view a proper guide is to look and judge***

the lighting situations intelligently so as to ascertain that the identification is safe. It is sufficient for the courts to be good listeners and observers of the witnesses as they tell their stories from the standpoint of those situations and first ascertain why they say they were able to identify or recognize people, the confidence they radiate when describing the identification or recognition and the reasons for the confidence. It is on this basis that the court is able to assess the credibility of a witness or whether there exists a reasonable doubt. As long as a reasonable and intelligent approach is adopted in assessing the lighting conditions, the courts should never shy away from doing justice on the basis of it."

13. Again in **MAITANYI VS. REPUBLIC [1986] KLR 200** the court also held that the primary test in identification is the impression received by the witness which is largely dependent on the lighting situation. The second test is whether the witness was able to give some description or identification of his or her assailants to those who came to the complainant's aid or to the Police.

14. With these principles in mind, we now turn to the determination of the issue at hand. PW1 and PW2 were material witnesses who were at the scene of the crime. They testified on the fateful night, they were at home, watching television. The attack took place in the sitting room which was lit by electricity. PW1 also testified that the compound was illuminated by the security lights. They stated that the lights remained on during the time of the attack, which PW1 estimated to have lasted about ten minutes, and were turned off by the Appellants as they left.

15. They both identified the First Appellant, King'ori who remained outside during the robbery. They had known him well prior to the date of the incident. PW1 said that she had seen the First Appellant in their estate Langas but had not interacted with him until she employed him as a casual labourer for the three days preceding the attack and spent this entire time with him. Therefore, when PW1 heard a man outside giving the robbers instructions to kill them, she immediately recognised his voice. She also saw him peeping through the window as he issued these instructions.

16. PW2, a minor who was on examination by the court found to be capable of understanding the nature of an oath, gave sworn evidence that he was able to recognised the First Appellant as one of the attackers because they had shelled maize earlier. He stated that during the attack, he was kneeling down in a corner, and although his face was facing the room, he saw the First Appellant peeping through the window. When he saw him the following day, 3rd February 2013, he immediately informed his father, PW3, who arrested the Appellant.

17. The trial court found that this evidence proved the charge against the First Appellant beyond reasonable doubt. The court noted that the First Appellant was known to the witnesses and was easily pointed out by PW2. The court also considered his unsworn testimony that he was arrested while drunk and framed for the offence by PW3. He offered no reason why PW3 would frame him for the offence.

18. Having carefully analysed this evidence, we arrive at the same conclusion as the trial court. The witnesses were coherent and consistent on their identification of the First Appellant. Having worked with him for long periods of time only a few days prior to the incident, PW1 was able to comfortably recognise his voice and together with PW2 identify him when they saw him peeping through the window. Accordingly, we find that his conviction was safe and the same is hereby upheld.

19. The case against the 2nd, 3rd and 4th Appellants was however not satisfactory. PW3 told the court that the three were with the First Appellant when he was arrested. On seeing his arrest, they attempted to flee but were apprehended by members of the public. PW3 was categorical that PW2 only pointed to him the First Appellant from the four men in his company. He explained that he became suspicious of the rest when they fled and it is for this reason that he arrested them. In **SAWE VS REPUBLIC [2003] KLR 364** the court held that suspicion however strong cannot be a basis of sustaining a criminal conviction

20. The onus was on the prosecution to provide strong evidence to prove that these Appellants were involved in the attack. The evidence of PW1 and PW2 suggested that the Second, Third and Fourth Appellants were not well known to them prior to the date of the attacks. Therefore it was important for them to provide sufficient evidence of the description of the Appellant in order to satisfy the court that they were able to properly observe them and could later identify them.
21. When cross-examined, PW1 admitted that she did not know the Second Appellant and Third Appellants *(Accused 2 and 3 were total strangers)*, but that he was identified by her child, PW2. PW2 said also during cross-examination that he recalled that the 2nd Appellant was wearing a blue pair of jeans and a hat which had not covered his face. They both maintained that the person before the court was the person they had seen that day.
22. With regard to the 3rd Appellant, PW1 said while under cross-examination that she identified the 2nd Appellant because he had a lighter complexion than the rest. She did inform the Police of this fact although it was not reflected in the statement. PW2 did not offer any information on the 3rd Appellant.
23. On the 4th Appellant, PW1 said that she had met him earlier when he approached her for a casual job. She recalled that on that night, he was wearing a balaclava leaving only his eyes and mouth visible and was the one with the pistol. On his part, PW2 did not give any evidence placing him at the scene of the crime.
24. The 2nd and 3rd Appellants gave unsworn statements denying the charges against them and alleged that they were framed. Similarly the 4th Appellant denied the charges in his sworn testimony.
25. The lower court convicted the Appellants on the strength of the evidence of PW1 and PW2 which it found to be clear and direct and was not displaced by the Appellants' defences.
26. **Firstly** as earlier stated, it is the duty of this court as the first appellate court to evaluate the evidence before the lower court in order to make our own findings and draw our own conclusions. **Secondly,** the veracity of the evidence of any witness is testified by cross-examination. **Thirdly**, we must also bear in mind the injunction of Section 143 of the Evidence Act, *(Cap. 80, Laws of Kenya)* -

> ***"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

27. In this regard therefore we have evaluated the evidence of the star witnesses, PW1 and PW2 in relation to each of the appellants. Whereas PW1, in cross-examination admitted that the second and third appellants were total strangers to her, PW2 a twelve year minor was however emphatic in his evidence upon cross-examination by the second appellant -

> ***"... I saw you, you wore blue jeans. You had a hat but did not cover your face. You were black … It was not another person but you. You had a knife. I am not mistaking you. Yes it was the first time I saw you."***

28. Indeed this is the kind of situation envisaged in the case of **TETU OLE SEPHA VS. REPUBLIC** *(supra)* – this being on the first appellate court, if of course did not have the opportunity to list to or observe the witnesses as they told their stories, it is however clear from the above evidence though PW1 the mother of PW1, was candid that both the second and third appellants were total strangers to her, PW2 her son is clear and positive that the person he saw wielding a knife, was the second appellant. PW2 gave his reasons. The Second Appellant wore blue jeans, he wore a hat but did not cover his face. The second appellant was black in complexion in contrast to the Appellant who was light skinned. PW2 clearly though it was the first time he saw the second appellant, there was no question of mistaking him.
29. Dock identification without the above description, would be of little to the court. Combined with the said evidence, there is no doubt in our mind that the second appellant was properly identified as one of the robbers who attacked PW1 on the material night. We therefore uphold the learned trial magistrate's findings and hold that the conviction of the second appellant was safe.

30. Of the third Appellant, neither the evidence of PW1 nor PW2 is conclusive. Neither of these witnesses described or referred to the third appellant. He remained a total stranger. He was neither identified by PW1 or PW2. His sole reason for being arrested by PW3 and later by PW4 was that he was in the company of the First Appellant and took to his heels when the First Appellant was apprehended by PW3. His conviction is therefore unsafe. We allow his appeal. We set aside his conviction, and sentence. Unless otherwise lawfully held, we direct that he be set free forthwith.
31. Of the fourth Appellant, PW1 testified that he had prior the robbery, come to her home to look for a casual work. PW1 reiterated this evidence on cross-examination by the Fourth appellant -

> ***"... yes, I saw you in that gang. You were the one with the pistol. You pointed the pistol at me. You covered your face with a ….. that left your eyes and mouth exposed. I saw your eyes and mouth."***

Again this is a situation where the **dicta** in **Tetu Ole Sepha vs. Republic** ***(supra)*** may appropriately be applied. There were reasons why PW1 was able to identify and recognize the Fourth Appellant. He had on a previous occasion pretended to seek casual work from PW1. He may merely have been upon a reconnaissance mission.

32. In this case PW1 was clear and positive that the Fourth Appellant was part of the gang. He pointed a pistol at her. He had prior to the attack, come to seek casual work from her. There was therefore no question of mistaken identity. His sworn evidence merely related to his arrest by PW3. He made no reference to any part of the evidence of PW1.
33. It is of course important that first impressions are quite important, particularly when reporting to the Police, and making statements. However, I think, undue importance and reliance is often placed upon first reports to the Police. The dispute here is not whether a first report was made to the Police, but rather what weight to place on evidence which was not first included in the witness statement to the Police, or which the witness testifies, he/she gave but the Investigating Officer failed to record or record accurately.
34. In my humble opinion, where such a situation happens, it is important to bear in mind the witness statement is only a basis for charging the accused for the offence alleged to have been committed. The evidence is what the witness categorically states in court, even if it leads to the witness being declared hostile.
35. In this case, the Fourth Appellant stayed clear of the evidence of PW1 that he had sought work from her prior to the incident of robbery in her house, he was the person who pointed a pistol at her, and notwithstanding that he wore some cover, the bandanna was poor mask, it exposed both his eyes and mouth which PW1 readily recognized as those of the Fourth Appellant. He never refuted that evidence.
36. For those reasons, we find that the learned trial magistrate came to a correct finding and hold that the appellant's conviction was safe and confirm the same.

We dismiss the Fourth Appellant's appeal.

37. Other than the Third Appellant whose appeal we have allowed, the First, Second and Fourth Appellants *(whose appeals we have dismissed)* were sentenced to death in pursuant to Section 296(2) of the Penal Code.

38. We have often stated in this court that the Bill of Rights *(Chapter V of the Constitution of Kenya, 2010),* and in particular Article 26 thereof, guarantees the right to life, death being the final fate of creatures including human beings, we should uphold the right to life. We therefore set aside the sentence of death on the said Appellants, and sentence them to fifteen (15) years imprisonment to commence from the time of their incarceration.

39. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 31st day of October, 2014

M. J. ANYARA EMUKULE

JUDGE

ABIGAIL MSHILA

JUDGE