



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 186 of 2010

DAVID ODHIAMBO MARTIN APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence dated and delivered on

6th August 2010 by Hon. S.M.Shitubi in Migori Criminal Case No.226 of 2009)

JUDGMENT

1. The appellant herein, David Odhiambo Martin was arraigned before the Senior Principal Magistrate's court at Migori on a single count of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the 1st day of April 2009 at Giribe village in Migori District within Nyanza Province, jointly with others not before court and while armed with offensive and dangerous weapons to wit panga and unknown rifle robbed Aloice Tom Asiga of Kshs.156,000/= an ATM Card and ID Card and at or immediately before or immediately after the time of such robbery wounded the said Aloice Tom Asiga. The appellant pleaded not guilty to the charge and his case went to full trial.
2. The prosecution called 9 witnesses while the appellant also called 3 witnesses. PW1 was Aloice Tom Asiga, the complainant (Tom). He is a businessman at Giribe. On 1st April 2009 at about 8.00 p.m., he was seated at the verandah as he prepared to close his shop. Suddenly, a person appeared at the verandah and ordered him to sit down while pointing a gun at him. Tom was shot in the right shoulder. The bullet exited through the back. As Tom struggled to run for his life, the appellant appeared on the scene armed with a panga and he cut Tom on the back of the head and then on the right hand on the palm joint. Tom recognized the appellant and asked him why he was killing him, as he (Tom) ran away from the verandah. Tom went and hid behind a fence where his assailants who numbered about 7 could not see him. According to Tom, he knew the appellant well because the two hailed from the same village and had known each other since their childhood days. Tom testified that there was an electric light (using solar energy) at the verandah where the offence took place, and that with that light Tom was able to see the appellant clearly during the time of the attack.
3. After the attack, Tom was taken to Ombo Mission Hospital by his matatu driver. When Tom returned home he learnt that the thugs had stolen his Kshs.156,000/= from the business. The thugs also took Tom's national identity card and his ATM card for Post-Bank. The money had been placed on top of the bed in a big paper bag by Tom's wife. After establishing what had been stolen, Tom went and reported the matter to the police. He also told them about the person he had seen on the night of the

robbery and that if he saw him again he would identify him. Tom described the appellant's clothing thus:-

“He had a black overcoat and a hat that had partially

hidden his face. It was a woolen hat. “

4. Tom was cross examined at length by defence counsel, Tom Mboya. Tom testified that the appellant was well known to him and that he had been his employee in the posho mill for about 5 years before the posho mill was sold. Tom also told the court that the appellant was a diligent worker and that he left the employment on his own volition. The two had no grudge between them and that Tom had therefore no reason to want to frame the appellant.

5. As concerns the actual scene of the attack, Tom stated that the thugs found him in the verandah; that there was light in the verandah which has windows. Describing the gang of 7 thugs, Tom stated that the leader was armed with a gun and he also said that the attack was so sudden that he could not recognize the thugs, and that before he could obey the first command by the leader of the gang, he had been shot in the right shoulder. Tom also stated that when the thugs struck, he was seated in the verandah. Upon being shot, in the shoulder, he fell down and then got up, went outside and spotted the appellant. By that time, Tom was bleeding and was feeling scared and not in a clear state of mind. Tom further testified that the appellant slashed him as he (Tom) struggled with the gunman in the verandah. He stated further that the woolen hat that the appellant was wearing had been pulled to the forehead. He also said he was in pain. According to Tom, after he ran and hid in the bush, the thugs entered the house and stole cash of Kshs.156,000/= which were takings of the day from the business.

6. During re-examination, Tom stated that though his mental status was not clear after he was attacked, he was still able to identify the appellant because of the number of times that the appellant slashed him. He also said that he had known the appellant since childhood.

7. PW2 was Maurice Ododi, a matatu conductor in motor vehicle Reg. No. KBA 542 B belonging to Tom. He stated that at about 8.00 p.m. on 1st April 2009, he was seated in Tom's verandah with Tom after he had handed over the day's collection of Kshs.4500/= from the matatu. Tom put away that money in a black paper bag which had some other money. Suddenly, 8 people entered the verandah. One of them was armed with a gun while the rest were armed with pangas. Two shots were fired from the gun. The second shot hit Tom on the right side of the chest and then exited at the back. As the rest of the gang held Tom, the appellant slashed him. Tom was then dragged outside by some of the members of the gang while others entered Tom's house. PW2 (Maurice) escaped into the bush behind Tom's house and started screaming. Neighbours gathered at Tom's home, looked for him and found him.

8. Maurice also testified that the appellant was dressed in a black overcoat and a cap that was covering his head. Maurice stated that out of the 8 thugs, he could only identify the appellant whom he knew before.

9. During cross examination, Maurice testified that when the thugs entered the verandah, he was hidden by seats so that he was not visible to the thugs. Maurice also told the court that apart from being Tom's matatu conductor, he was Tom's brother in-law. He denied that his evidence was a pack of lies. He also said that the verandah where the attack took place was well lit though the night outside was dark as there was no moonlight. He further stated that he was scared when Tom was attacked. The gunshot terrified him even more.

10. Tom's wife, Moline Achieng Asiga testified as PW4, (Achieng). Her evidence was that on the 1st April 2009 at about 8.00 p.m. she was in her house together with her husband. They were relaxing in the sitting room counting the day's takings from their businesses. She arranged all the money, including the cash brought in by Maurice and the total was Kshs.156,000/=. As she went to keep the money on the bed, Tom went to the verandah where the children were and then she heard the words:- **“kaa chini”**. She then heard the sound of a gunshot and another. She hid under the bed, leaving the money on top of the bed. Soon thereafter, people entered the bedroom and after doing a quick search, they took away the

paper bag with the Kshs.156,000/= and went to another room in the house. After the people had left, she escaped through another door to neighbour Dominic's farm and started screaming. She also heard the screams of another person, but she could not tell who was screaming. Two hours later, neighbours came to her aid and they escorted her back to the house.

11. With the help of the neighbours, Achieng looked for Tom and found him in a thicket nearby. He was soiled in blood and looked exhausted. With the help of their matatu driver, one Abich Masaga, the neighbours took Tom to Ombo Mission Hospital while Achieng remained at home.

12. The police at Kopanga were informed about the incident and came to Tom's home. The police recovered 2 spent cartridges from the verandah. Achieng identified certain documents confirming that she and Tom were running matatu, posho mill and general trading at the local market. Achieng stated that she knew the appellant who was known as Martin Tineja in the village. Achieng could not say who robbed and shot Tom because she did not see the people as she was inside the house when the thugs struck and she was hiding under the bed when they entered the house and took the money plus Tom's ID and ATM cards.

13. PW3 was Maruti Lawrence, a Clinical Officer at Migori District Hospital. He testified that on 24th April 2009, he filled a P3 form in respect of Tom who alleged he had been assaulted in a robbery incident on 1st April 2009 at about 9.00 p.m.

14. PW3 confirmed that on examination, Tom had 2 gunshot wounds on the right side of the chest, one being on the right shoulder and the other on the anterior chest wall. PW3 also said that he observed one stitched cut wound on the right hand in the biceps region, and another cut wound and a compound fracture on the right upper limb (radial ulna region) which was in plaster.

15. PW3 opined that the weapons used to inflict the wounds were a gun and other sharp objects. It was also PW3's testimony that Tom had been admitted at Ombo Mission Hospital on 1st April 2009 and discharged on 9th April 2009. The P3 form which classified Tom's injuries as grievous harm was produced as **P. Exhibit 1**. The prosecution's efforts to produce Tom's treatment notes from Ombo Mission Hospital was thwarted by the defence, although he confirmed that in filling the P3 form, he relied on the very same notes.

16. During cross examination, PW3 stated that though he was only a clinical officer, he had stamped the P3 with the rubber stamp of the Medical Officer of Health. PW3 also testified that it was possible for a gunshot to cause a fracture. PW3 clarified on re-examination that the MOH is an office and not an individual person, and that the fracture suffered by Tom was a permanent injury.

17. PW5 was Charles Gwayi of Giribe village. He stated that at about 8.00 p.m. on 1st April 2009 while he was at his home, he heard screams on the upper side of the shops. He also heard gunshots. He then armed himself with a rungu and a panga and crossed the river. On the way he met the appellant who was accompanied by a big gang of 7 thugs. One of the gangsters had a gun while the others carried pangas and other small weapons. When he asked the group who they were, they asked him **"who are you, a fool to be asking us?"** PW5 (Gwayi) then ran for his life into a nearby farm and while there he heard the appellant's voice saying **"Don't kill Abongo – don't kill this old man."** Gwayi told the court that the appellant, David Odhiambo was his brother. He also said that he heard the appellant tell the gang not to kill him because Gwayi had nothing. They followed him where he had fallen and took Gwayi's weapons and ordered him not to scream, otherwise they would kill him. Gwayi confirmed to them that he would tell nobody. They then took Gwayi to the thicket. The thug with the gun kept hitting Gwayi's eyes with the gun, but the appellant pleaded with them not to kill him, because he was appellant's brother. Gwayi said out of the 8 thugs, he identified the appellant and two other persons namely David one Mboya and Aboko Nyadini. Later after the appellant and his accomplices had left Gwayi, he went to Tom's home and found when Tom was being put in a vehicle to be taken to hospital. Gwayi testified that the appellant carried an axe and a panga and wore a black jacket and a hat that was pulled over his eyes. Gwayi stated that he was able to recognize the appellant with the help of moonlight and by the voice because he had

known the appellant since childhood. He denied that he had any land dispute with the appellant.

18. During cross examination, Gwayi testified that he was with the thugs for about 2 hours. He also said that he knew the appellant's voice well since the appellant was his brother. Gwayi stated that though the appellant wore a hat over his face, the other thugs did not wear such hats. Gwayi denied that he had been paid to go to court to give fabricated evidence.

19. The Assistant Chief of Giribe sub location, one Fredrick Onyango Sketch (Frederick) testified as PW6. He stated that on the 21st April 2009, at about 6.00 a.m., he received information from the clan elder by the name Ezra, that the appellant had been seen at Giribe shopping centre. He did not find the appellant immediately so he went and informed both the DO and the DCIO. Later when Fredrick found the appellant, he was on the verge of being lynched. Fredrick took the appellant to the office before he was handed over to Administration Police Officers from Kopanga. Later the appellant was escorted to Migori Police Station.

20. PW7 was No.205313 CPC John Ogeto, the OC at Kopanga AP Post. He is the one who received the report about the robbery at Tom's home. Cpl Ogeto together with APC Kerisa went to Tom's home at about 9.00 a.m. on 1st April 2009. On arrival thereat, they found many people among them Tom's wife. The officers recovered 2 spent cartridges which were handed over to OCS Migori Police Station on 2nd April 2009.

21. Number 55842 Police Constable Stephen Chebon of Migori Police Station testified as PW8. He testified that on 3rd April 2009 at about 6.30 p.m., he received a report from members of the public concerning the robbery incident at Tom's house. He was also informed that Tom, who was injured during the robbery, had been rushed to Ombo Mission Hospital. PC Chebon immediately informed the OCS about the report and together they went to Ombo Mission Hospital where they found Tom nursing a bullet wound on the shoulder. Thereafter both PW8 and the OCS proceeded to Tom's house and after speaking to Tom's wife, they commenced investigations. PW8 summoned witnesses to the station and took their statements. On that same day, the appellant was arrested and handed over to the chief of the area and later on was collected by the police. PW8 also produced the 2 spent cartridges as **P. Exhibit 7 (a) and (b)**.

22. PW9 was No. 231165 Inspector of Police Alex Mdingi Mwandawiro based at the Ballistic Laboratory CID Head quarters Nairobi. He testified that his work entailed the examination and identification of firearms, ammunitions and their component parts. He testified that he was fully trained and qualified to carry out ballistic examinations. PW9 told the court that on 2nd October 2009, they received spent cartridges marked A1 and A2 for examination. Upon examination, it was established that the 2 Exhibits were Calibre 7.62x39 mm cartridges consistent with those used in AK 47 rifles. That the markings of the cartridges were of the Breech face and those of ejector and the firing pin and that the 2 were fired by the same gun. PW9 testified that upon further examination, it was established that the gun used to fire the 2 spent cartridges was also involved in another shooting incident under the jurisdiction of Migori Police Station charge Register No.661/211/09 bearing Laboratory Reference 471 of 2009. The report of PW9's findings dated 8th January 2010 Lab Reference 470/09 was produced as **P. Exhibit 9**.

23. At the close of the prosecution case, counsel for the appellant made lengthy submissions on no-case to answer and urged the court to acquit the appellant at that stage. The prosecutor vehemently opposed the submissions and contended that the prosecution had established a prima facie case against the appellant. Eventually, the appellant was put on his defence. The appellant gave sworn evidence and told the court that on 21st April 2009 at about 6.00 a.m., he woke up and went to the shamba to plough with oxen. He finished the work quickly and by 8.30 a.m. he was on his way to the shop to buy sugar. On reaching Giribe centre, he met the Assistant Chief and Tom's brother called Otieno Asiga, the latter being a police officer stationed in Kisumu. The appellant was invited to accompany the two to the Assistant Chief's office. While the appellant remained seated in the Assistant Chief's office, Otieno Asiga went to his house and brought back handcuffs with which he handcuffed him. Otieno Asiga took the appellant's phone and Kshs.720/= while the Assistant Chief tore some receipts which the appellant had used for travelling. Soon thereafter, the appellant was told he was under arrest. At about 9.00 a.m., 3 officers from

Kopanga police station went to the Assistant Chief's Office, arrested him put him in a vehicle and drove him to Otieno Asiga's house at Giribe centre.

24. At about 11.00a.m., the appellant was taken to Migori Police Station. The appellant stated that as they travelled to Migori Police Station, he was assaulted and asked to name his accomplices. Then on 30th April 2009, he was arraigned in court on charges he knew nothing about. It was the appellant's case that he went to Nairobi on 27th March 2009 and only came back home on 6th April 2009. He said he made another trip to Nairobi between 10th April and 20th April 2009.

25. During cross examination, the appellant told the court that Tom knew him well because Tom had employed him in his posho mill, and that the Assistant Chief also knew him well. The appellant also testified that Charles Gwayi (PW5) was his brother. He also testified that he had no documentary evidence by way of receipts to show that he had travelled to Nairobi on the dates he said he had travelled to Nairobi. When pressed to say why he and his advocate never questioned the Assistant Chief about the allegation that the Assistant Chief had torn the appellant's travel receipts, the appellant stated that since the cross examination was done in English, he did not follow the same. The appellant was also asked whether he had a wife. He answered in the affirmative, but stated that after his arrest, the wife went to attend her father's funeral. The appellant also testified that his brother Charles Gwayi Ochieng had a land dispute with him.

26. After carefully considering all the evidence that was placed before it, and also after carefully considering all the submissions made by both the defence and the prosecution, the learned trial magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt. The appellant was thus found guilty as charged and accordingly convicted. He was sentenced to suffer death as by law prescribed.

27. The appellant was aggrieved by both the conviction and the sentence. He has come before this court on appeal challenging the conviction and sentence on the following summarized grounds:-

- 1) *That the learned trial magistrate erred in both law and fact in failing to appreciate that the conditions prevailing on the night of the alleged attack were not conducive to positive and error-free identification/recognition of the appellant.*
- 2) *That the learned trial magistrate erred in law and fact in failing to appreciate that there was no evidence of identification/recognition with the first report to the police.*
- 3) *That the learned trial magistrate erred in law and fact in failing to evaluate the evidence as a whole and to find that the evidence on record was not sufficient to sustain a finding of guilty and the resultant conviction.*
- 4) *That the learned trial magistrate erred in law and fact in convicting the appellant in the absence of medical evidence from Ombo Mission Hospital.*
- 5) *That the learned trial magistrate erred in both law and fact in relying on inconclusive ballistic expert evidence.*
- 6) *That the learned trial magistrate erred in both law and fact in failing to appreciate that the evidence of PW5, Charles Okwae Ochieng was tainted because of a grudge related to a land dispute between him and the appellant.*
- 7) *That the learned trial magistrate erred in law and fact in failing to consider the appellant's defence of alibi.*
- 8) *That the learned trial magistrate erred in law and fact by failing to observe that the prosecution had not proved its case against the appellant beyond any reasonable doubt.*

28. The appellant prays that the appeal be allowed, the conviction quashed and the sentence of death set aside.

29. This is a first appeal. On a first appeal, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter, only remembering that it has no opportunity of seeing and hearing the witnesses who testified before the trial court. The duty of a first appellate court has been stated and restated in many decisions both by the High Court and Court of Appeal such as **Pandya vs- R[1958] EA 336** and **Okeno –vs- Republic [1972] EA 32**. Also see **Mwangi –vs- Republic [2004] 2 KLR 28** where the court held that **“an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court’s own decision on the evidence.”** In other words, an appellate court of first instance is expected to make its own findings and draw its own conclusions after reconsidering and evaluating the evidence afresh and it is only after this exhaustive examination of the evidence that the appellate court can determine whether the conclusions reached by the trial court can be supported.

30. When this appeal came up before us, we heard submissions from Senior Principal State Counsel Nicholas Mutuku. We also received the written submissions of the appellant. We have carefully read through the submissions. From those submissions, we note that the prosecution’s case against the appellant revolves around identification evidence. The courts have held that where a court relies on evidence of identification for the conviction of an accused, and especially when the conditions prevailing at time of the commission of the offence are difficult, the court must act with great circumspection in order to avoid miscarriage of justice. In the case of **Wamunga –vs- Republic [1989] KLR 424**, the Court of Appeal expressed itself on the issue as follows:-

“We now turn to the more troublesome part of this appeal, namely the appellant’s conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them What we have to decide now is whether that evidence was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever a case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual

identification was succinctly stated by Lord Widgery CJ in the well known case of Turnbull –vs-Republic [1976] 2 All ER 549 at page 552 where he said:-

“Recognition may be more reliable than the identification of a stranger; but even when the witness is purporting to recognize someone he knows, the jury should be reminded that mistakes in recognition of close relative’s friends are sometimes made.”

31. In the instant case, the attack on Tom took place at about 8.00 p.m. while he was seated in the verandah. Tom stated that he knew the appellant well since the appellant had previously worked for him for about 5 years. Tom said he knew the appellant well and that even as the appellant attacked him with a panga, Tom asked him why he (appellant) was killing him. Tom also said that there was electric light at the verandah and that at the time of the attack, he saw the appellant well with the help of that light. Tom stated that though the attack was sudden and that he was terrified and was bleeding profusely after he was shot in the chest, he was still able to recognize the appellant as the appellant slashed him repeatedly. According to Tom, the appellant was wearing a godfather woolen hat which was pulled to the forehead. Tom stated that he had a great opportunity to see the appellant clearly as the appellant slashed him on the head and the hand at close proximity.

32. PW2, Maurice Ododi, also testified that he recognized the appellant as the latter slashed Tom. Maurice stated that the appellant wore a cap that covered his head. Maurice also stated that the verandah where the attack took place was well lit though the night outside was dark as there was no moonlight. Gwayi, PW2 also testified that soon after he heard screams from the upper side of the shops, he armed himself and went out. That after crossing the river, he met the appellant who is his brother. The appellant spoke and that Gwayi recognized the appellant’s voice as the appellant told his 7 companions not to kill Bwayi for two reasons. One was that Gwayi was appellant’s brother and two that Gwayi had nothing. Gwayi also stated that he was in the company of the appellant and the 7 companions for about 2 hours before they left him. He then went to Tom’s home and found Tom being put in a vehicle that took him to hospital.

33. During submissions, learned Senior Principal State Counsel submitted that Tom’s testimony on the appellant’s recognition was fully supported by that of Maurice. Counsel also submitted that Charles who testified as PW5 and who was a brother to the appellant, met the gang of 8 after the gang had robbed Tom. Charles said he recognized the appellant both by the voice and physically. Counsel submitted that taken together, the evidence by Tom Maurice and Charles places the appellant squarely at the scene of the crime in which Tom was brutally shot, slashed and injured. Counsel dismissed the appellant’s contention that Charles testified against him because of a land dispute.

34. After analyzing the whole of the evidence on record, we are satisfied that the appellant was clearly and positively recognized by Tom, Maurice and Gwayi. We are satisfied that though the attack was sudden and ferocious, both Tom and Maurice clearly recognized the appellant under the electric light that was burning at the verandah where the attack took place. It is our considered view that Tom was an honest witness, who while admitting the ferocity and intensity of the attack maintained that he clearly recognized the appellant who had worked for him in the posho mill for 5 years before the appellant voluntarily left the job. We are fully aware o the fact that the appellant wore a godfather hat which had been pulled only to the forehead so that the rest of the appellant’s face was visible for both Tom and Maurice to see and to recognize. In his defence, the appellant admitted that Tom knew him well. Putting all this evidence together, we have reached the irresistible conclusion that there was no mistaken identity

of the appellant on that night of the attack. The evidence by Tom and Maurice thus clearly displaces the alibi defence put forth by the appellant.

35. There is also the evidence by Gwayi, PW5 who told the court that he met the appellant in the company of 7 other people soon after screams came from the direction of Tom's home. Gwayi said the appellant spoke to his companions within Gwayi's hearing as he pleaded with the armed gang not to kill his brother whom he referred to as "Abongo" and "this old man". Gwayi said he had known appellant since he (appellant) was a child. The appellant alleged that there was a land dispute between him and Gwayi and that that was the very reason why Gwayi decided to fabricate evidence against him. We have carefully considered this allegation by the appellant but find the same to be hollow and without substance. In our humble view, if there was such a grudge, the appellant would have had no reason to plead with his 7 companions to spare Gwayi's life. We accordingly dismiss the allegation.

36. We are also satisfied that all the ingredients of the offence of robbery with violence were fully proved by the prosecution. The appellant and his companions were armed with a gun, pangas and other small weapons. The appellant was in the company of others and at the time of the robbery, Tom was shot and also ferociously cut with a panga. In the circumstances, we roundly reject the appellant's contention that the prosecution failed to prove its case against him beyond any reasonable doubt.

37. The upshot of our above findings is that the appellant's appeal is devoid of any merit. The same is therefore dismissed in its entirety. R/A within 14 days.

38. It is so ordered.

Dated and delivered at Kisii this 21st day of March, 2013

RUTH NEKOYE SITATI

R. LAGAT KORIR

JUDGE.

JUDGE

In the presence of:

Present in person for Appellant
Mr. Majale (present) for Respondent
Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

R. LAGAT KORIR

JUDGE.

JUDGE