REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 519 OF 2007

NICHOLAS ODUOR ARON..... APPELLANT
VERSUS

REPUBLIC ……..……. RESPONDENT

(From the original conviction and sentence in Criminal Case No.5652 of 2006 of the Chief Magistrate's Court at Kibera by H. Wasilwa – Principal Magistrate)

JUDGMENT

The appellant, **NICHOLAS ODUOR ARON**, was convicted for the offence of Robbery with violence contrary to **section 296 (2) of the Penal Code.** He was then sentenced to death.

In his appeal, he points out that his constitutional rights were infringed when he was held for 20 days before being taken to court.

He also submitted that there was no interpretation at the time of plea. That failure, in his contention, constituted a violation of his rights under **Section 77 (2) of the Constitution.**

The third issue raised by him was that there was no positive identification. That submission was premised on the fact that the alleged identifying witnesses did not describe the assailants in their first report.

To make matters worse, the police officer to whom the first report was made did not testify at the trial.

The appellant also said that the prosecution witnesses did not specify the duration of the robbery incident, or the length of time that they observed the robbers.

Meanwhile, as the complainant was attacked and left unconscious, the appellant submitted that the circumstances prevailing at the time of the robbery were not conducive for positive identification.

And even though the complainant had described the appellant as "Asha's son", the appellant argued that the prosecution did not demonstrate that Asha had only one son.

After all, the appellant had been arrested in relation to something un-related to the offence in issue. Therefore, he is convinced that that shows that he had not been identified positively.

The third issue canvassed by the appellant was that the charge was not proved to the standard required by law.

None of the stolen items were recovered in his possession, and he was also not found in possession of any weapons. Therefore, the appellant believes that he should not have been convicted for the offence of robbery with violence.

At the time when the appellant was on trial, bail could not be granted to an accused person who had been charged with the offence of robbery with violence.

However, in this case, the appellant says that one of the three suspects who had been arrested, was granted bail. That particular suspect escaped whilst he was out on bail

In the circumstances, the appellant believes that the whole case had un-explained issues. We understand him to be suggesting that there cannot have been a genuine intention to have him convicted for capital robbery when one of the persons arrested in relation to the same incident was granted bail.

As regards the death sentence, the same was described as harsh and degrading. The appellant submitted that the death penalty constituted a violation of his rights under **Section 74 (1) of the Constitution**. He therefore urged us to find that the said sentence was a total violation of human rights.

Finally, the appellant submitted that the learned trial magistrate failed to give due consideration to his defence. In the said defence, he had attributed the case to a frame-up, due to the fact that the complainant was unhappy about his friendship with the said complainant's daughter.
In answer to the appeal, Ms Mwanza, learned state counsel, submitted that the appellant was not just identified, he was recognized.

The complainant and the appellant lived in the same estate, and had known each other.

Those persons who heard the complainant screaming, and who went to his rescue, are also said to have recognized the appellant.

Being the first appellate court, we have re-evaluated all the evidence on record.

First, we note that in the particulars of the offence, as set out in the charge sheet, the appellant and his co-accused were said to have been in the company of another person at the time they robbed the complainant. That third person was not before the court.

The 3 robbers are said to have been armed with offensive weapons, namely pangas.

The robbers are also said to have used actual violence on the complainant.

On 9th October 2006, the plea was taken before Hon. Wasilwa PM. However, on the typed record of the proceedings the language in which the plea was taken is not indicated. That is what prompted the appellant to raise that issue in this appeal.

A perusal of the original hand-written record clearly shows that there was interpretation;

"Eng/Kisw"

Therefore, there is no merit in the appellant's contention that the trial court did not record the language in which the plea was taken.

The complainant testified that the boy who ordered him to stop was;

"a boy I knew in the estate called Oduor- Mama Asha son. I asked him, Oduor what are you doing with a panga?"

From that testimony, it is clear that the complainant did not just say that the person who assaulted him was a son of Mama Asha. The complainant explicitly identified the person by his name,

Oduor. Therefore, even if Mama Asha may have had other sons, the complainant only made reference to the one called Oduor.

And when this court inquired from the appellant if his mother is called Asha, he answered in the affirmative.

The complainant also testified that when he reported the incident at the Kilimani Police Station, he said that he knew Oduor was one of the people who had attacked him.

But just how much light was present at the place where the incident took place?

According to the complainant, there was moonlight without cloud cover.

But if the complainant had known the appellant for a very long period of time, and if the appellant lived within the same estate as the complainant, why did the complainant not lead the police to arrest him?

It was the testimony of the complainant that he did not know the house in which the appellant lived.

However, when the complainant found the appellant when the appellant had been arrested in connection to another offence, he called the police who then arrested the appellant.

PW 2 is a son to the complainant. On the material night he heard his father's voice screaming that he (the father) was being killed.

PW 2, his brother Ochieng and their friend Ambrose Akeyo rushed out. They then saw 3 people running towards them. The 3 people were from the direction where **PW 2** had heard voices coming from.

All the 3 people had pangas.
PW 2 recognized 2 of the people, as Nicholas Oduor and Fredrick Olende, alias Ones.

PW 2 told the trial court that the appellant herein is the person called Nicholas Oduor.

PW 2 corroborated the testimony of **PW 1**, concerning the presence of moonlight.

He also added that his brother, David, shone a torch on the 3 people.

PW 2 then asked those people why they were running. The answer was that they were chasing thieves.

Later that night, when **PW 1** regained consciousness, he told **PW 2** that he had been attacked by the appellant amongst others.

PW 2 also told **PW 1** that on the material night, he had seen the appellant with Fredrick Olende and another person running.

Whilst PW 2 and PW 1 were walking back home from Kenyatta National Hospital, where PW 1 had been treated, they found the appellant seated down. A Taita man was asking the appellant why he had attacked him. They then escorted him to Jamhuri Police Post.

Given the sequence of events, the first report to the police was made when the appellant was already under arrest. The initial arrest was by a Taita man, who was also allegedly a victim of an attack by the appellant.

The complainant in this case and **PW 2** then escorted the appellant to the police.

In those circumstances, there was absolutely no need for the complainant or **PW 2** to either give the name or the description of the appellant.

PW 3 was the police officer who investigated the case. When he was assigned the said case, **PW 3** found that the suspects faced a charge of assaulting and robbing the complainant. Those 2 are the ingredients of the offence of robbery with violence. Therefore, we are satisfied that if the prosecution proved that the complainant was assaulted and robbed, the person or persons responsible were liable to conviction for the offence of robbery with violence.

Of course, we are not suggesting that in each and every offence of robbery with violence, there should be evidence of assault and robbery.

The provisions of **section 296 (2) of the Penal Code** are to be read in a disjunctive manner; so that if any one of the 3 specified ingredients are proved against an accused, he should be convicted.

PW 4 is the doctor who examined the complainant. He testified that the complainant sustained multiple injuries to his scalp. The said injuries were caused by a sharp object.

In effect, the doctor's evidence corroborated the evidence of the complainant, who had said that the robbers had cut him using a panga.

Having re-evaluated the evidence on record, we find that the conviction of the appellant was well founded.

But then, should he not be acquitted because his constitutional rights were violated?

It is clear, from the dates cited on the charge sheet that the appellant was arrested on 20th September 2006. However, it was not until 9th October 2006 that he was first arraigned in court.

There is no explanation tendered by the prosecution to explain the delay in taking the appellant to court.

In **JULIUS KAMAU MBUGUA Vs REPUBLIC CRIMINAL APPEAL NO. 50 of 2008,** the Court of Appeal reviewed a wide range of the previous decisions on the issue of remedies available to accused persons who were taken to court later than provided for. Having done so, the Court held as follows;

"Moreover, it was not shown that the alleged unlawful detention had any link or effect on the trial process itself or that it caused trial related prejudice to the appellant which affected the validity of the trial. The alleged unlawful detention occurred long before the appellant was charged. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in *Section 72 (6).* ***That is the appropriate remedy which the appellant should have sought in a different forum."***

In the result, as the evidence tendered by the prosecution was simply overwhelming; and because the defence did not cast any doubts on it, we find that the conviction was sound. We therefore uphold it.

As regards the assertion that the sentence was handed down before the appellant was given an opportunity for mitigation, the record of the proceeding reveals that the trial court did give to the appellant, a chance to mitigate.

The appellant chose to say nothing in his mitigation.

It is thereafter that the sentence was passed. Therefore, the learned trial magistrate cannot be faulted in the manner suggested by the appellant.

Their Lordships in the Court of Appeal did not declare the death penalty unconstitutional.

In **GODFREY NGOTHO MUTISO Vs REPUBLIC, CRIMINAL APPEAL NO. 17 OF 2008,** their Lordships said:;

"We must re-emphasize that in appropriate cases, the courts will continue to impose the death penalty. But that will only be done after the court has heard submissions relevant to the circumstances of each particular case."

The Court then proceeded to remit the case to the trial Judge to receive the appellant's submissions and the prosecutor's records, before deciding on the sentence befitting the appellant.

In this case, as the appellant made a decision to say nothing in mitigation, there would be no basis for remitting the case to the trial court.
We therefore uphold the sentence.

In the result, the appeal is dismissed. We uphold both conviction and sentence.

Dated, Signed and Delivered at Nairobi this 21st day of February, 2012

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FRED A. OCHIENG	**L.A. ACHODE**
JUDGE	**JUDGE**