REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 31B of 2011

SAMUEL ONYANGO OMONDI ……..……...…1ST APPELLANT

BENARD OTIENO OTIENO……..……2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 2254 of 2010 in the Chief Magistrate's Court at Makadara – Mr. M. M. Muya (CM) on 25/11/2011)

JUDGEMENT

1. The appellants, **Samuel Onyango Omondi** and **Benard Otieno Otieno** were charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code.** Subsequently the 1st appellant was convicted for the lesser offence of robbery contrary to **Section 296(1)** of **Penal Code**, and sentenced to 10 years imprisonment while the 2nd appellant was convicted for handling suspected property contrary to **Section 322(2)** of the **Penal Code**.

2. In their consolidated appeals the submission for the 1st appellant revolved around his identification. Miss Rashid the learned counsel submitted that the appellant was convicted on the sole evidence of identification from the complainant who did not give his description to the police in his first report, nor indicate that he could recognise his assailants if he saw them again. For this reason therefore, the subsequent identification of the appellant at an identification parade was flawed.

3. For this ground the learned counsel referred me to the case of **Musyoki Ndothoni v Rep Cr. App 84 of 2003** wherein the court cited with approval, the following words from the case of **Terekali & Anor v Rep [1952] E.A.**,

"Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statements may be gauged and provides a safeguard against later embellishments or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others."

It was submitted that the appellant bears a gap in his mouth as **PW1** testified in cross-examination and **PW1** would have described it in his past report or any other physical feature of the appellant to enable his subsequent alleged identification to be credible.

4. Secondly, Miss Rashid urged that the 1st appellant was convicted on the evidence of a single

witness, **PW1**, who testified that the appellant was seated at the back of the car while **PW1** drove the car. That in those circumstances close scrutiny may have not been possible. On this ground the learned counsel referred me to the case of **Charles Maitany v Rep** to which she provided no citation.

5. In **Charles Maitany v Rep 1980 KLR 1980** which sets out some of the inquiries that a trial court needs to make when analysing evidence of visual identification, however it was held that:

"Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but its roles does not lessen the need for testing 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. In such circumstance what is the other evidence whether it be circumstantial or direct pointing to guilt from which a Judge or Jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error".

The warning for caution has been repeated in many other cases, some of which the learned counsel adverted to as:

(1) Kamau vs. Republic 1957 (E.A) 139;

(2) Ezekiel Angwenyu Amollo vs. Republic 124/99;

(3) Republic vs. Turnbull (1976), 3 ALL 8 ER 549 at Page 552

(4) Cleophas Otieno Wamunga vs. Republic (1989) KLR 424

6. For the 2nd appellant, Miss Rashid submitted that the appellant was convicted on the sole evidence of **PW3** who had testified that the 2nd appellant denied being found in possession of the keys to the stolen car. That **PW3** testified in cross-examination about one Yusuf who was shot dead in the process without stating where the said Yusuf emerged from nor his connection to the case.

7. The learned counsel submitted that the learned trial magistrate was in error in finding that the stolen motor vehicle was found in the possession of the appellant since it was found parked in a parking lot.

8. In answer, Miss Maina the learned state counsel submitted on behalf of the respondent that the evidence on record was sufficient to support both convictions and the sentences.

9. That, with regard to the 1st appellant the robbery occurred in broad day light and **PW1** picked him from a subsequent identification parade. That with regard to the 2nd appellant, his neighbours pointed him out to the police as the owner of the missing motor vehicle when the police located it, and that the key which started the said car, was recovered in the pocket of the 2nd appellant.

10. The learned state counsel urged me to dismiss the appeal for those reasons.

11. I have scrutinized and re evaluated the evidence afresh to make my own findings and reach my own conclusions as is my mandate as the 1st appellate court. In so doing I bore in mind that I did not have the advantage that the trial court had of observing the witnesses as they testified.

12. With regard to the 1st appellant, I find that the circumstances of identification were difficult. The prosecution evidence was that the person **PW1** subsequently picked from the identification parade had been seated in the rear of the motor vehicle as it travelled from Eastleigh 12th Street to Kamulu junction. All that time **PW1** was driving the motor vehicle.

13. There is no evidence that **PW1** had ample time to observe the passengers at the time of boarding

the motor vehicle, or that during the journey he had the opportunity to turn back from time to time to see those who sat in the rear of the motor vehicle.

14. Secondly, there was no evidence that **PW1** identified the passengers and in particular the 1st appellant. In his report to the police he did not state that he had recognised, or could identify any of them if they were presented to him.

15. Lastly, evidence was led that the 1st appellant was arrested when he was lured to the scene of the recovery of the motor vehicle by the 2nd appellant. **PW1** did not lead to nor help in his arrest in any way.

16. With regard to the 2nd appellant, the star witness was **PW3**, Cpl Justus Waweru of CID Kayole police. His evidence was that a report was received at Kayole CID office, on 27th May 2010 of a robbery that had occurred at Kamulu, involving three armed men. **PW1** had not mentioned arms of any sort, having been used during the robbery.

17. Secondly, it was the testimony of **PW3** that "we were informed that it was parked there by Joseph Otieno". It is not clear whether one Joseph Otieno supplied the information to the police, or was the person whom the police were informed, had parked the motor vehicle where it was found. I compared the typed proceedings with the hand written proceedings and found that both carried the name of Joseph Otieno.

18. Lastly, the evidence of **PW3** on cross-examination that indeed there was one Yusuf who was shot later when he tried to shoot at the police, introduced a new angle in the 2nd appellant's case. The question arises as to what connection the said Yusuf had with the motor vehicle if at all, to go to the extent of shooting at the police.

19. Having therefore, warned myself of the dangers inherent in founding a conviction on the basis of the correctness of the identification of a single identifying witness, I find that the evidence of identification in the circumstances of this case was not cogent enough to sustain the conviction against the 1st appellant.

20. The evidence against the 2nd appellant boils down to the word of **PW3** against that of the 2nd appellant. This is in view of the fact that the 2nd appellant was not found inside the stolen motor vehicle, and in view of the existence of a 2nd person who was shot dead by the police after he shot at them. This being a criminal case the appellants were under no obligation to defend themselves or to prove their innocence. Having however tendered their defences I have considered them alongside the evidence on record and found that the prosecution had not proved their case beyond reasonable doubt.

21. I find that a reasonable doubt exists in the evidence of the prosecution in regard to each of the appellants, reasons for which the conviction against each of the appellants cannot be sustained.

22. The conviction against each appellant is quashed and the sentence following therefrom set aside. It is ordered that each appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

SIGNED DATED and **DELIVERED** in open court this ***18th* day** of ***February* 2012.**

L. A. ACHODE
JUDGE