



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL APPEAL 387 & 385 OF 2006

STEPHEN OUMA1ST APPELLANT

DICKSON OUNGU Alias ALPHONE OCHIENG.....2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No.2996 of 2004 of the Chief Magistrate's Court at Nairobi by Mrs. R.E. Ougo – Principal Magistrate)

JUDGMENT

The appellants, **STEPHEN OUMA OKETCH** and **DICKSON OUNGU Alias ALPHONE OCHIENG** were each convicted for the offences of Robbery with violence **contrary to section 296 (2) of the Penal Code**. Each of them was found guilty on four (4) counts of Robbery with violence.

Thereafter, each of them was sentenced to death in respect to each of the four (4) counts.

In their appeals, the appellants have raised similar issues, which can be summarized as follows;

(i) *The conviction was founded on alleged identification, which was inconclusive. The witnesses never indicated the source of light at the various scenes of crime, nor the intensity of such light, if any.*

The witnesses are also said to have failed to indicate to the trial court, the length of time they spent observing the appellants.

Furthermore, the witnesses are said to have failed to describe the assailants to the police or to those that effected the arrest of the appellants.

(ii) *The appellants' rights to a fair trial were violated, as they were held in custody for over 14 days before they were first taken to court.*

Notwithstanding the said delay, the police are said to have failed to offer any or any reasonable

explanation for the delay.

- (iii) In any event, the circumstances prevailing at the time of the various incidents were not conducive for positive identification. In each instance, violence was visited upon the victims, leading to shock and confusion, submitted the appellants.*
- (iv) A first report would have enabled the court to verify the description of the assailants, if any was given to the police. But the prosecution failed to lead any evidence to prove the contents of such first reports. Indeed, the OCD of Kariobangi Police Station said that the O.B. could not be traced.*
- (v) The police arrested persons who were allegedly being chased by the members of the public. As the police did not first establish from the members of the public about the identities of the robbers before arresting the appellants, there was a possibility that the police could have arrested innocent persons.*
- (vi) The failure by the prosecution to make available the O.B. made it difficult for the appellants to adequately prepare their defences. According to the appellants, that constituted a violation of the Constitutional rights, as enshrined in section 77 (2) (c) of the (repealed) Constitution.*
- (vii) The appellants asserted that it was not clear whether PW 3 was stabbed with a knife or a “njora”. In any event, the doctor who performed the post-mortem examination is faulted for failing to state if the cause of death was the stabbing.*
- (viii) The evidence of PW 10 and PW 11 was tendered in English, which the appellants say they do not understand. The absence of translation is said to have been prejudicial to the appellants.*
- (ix) The defences put forward by the appellants were not accorded appropriate consideration.*
- (x) The refusal by the 2nd appellant to participate in the Identification parade was valid, as the intended identifying witnesses had seen him before the parade was mounted.*

In answer to the appeal, Ms Maina, learned state counsel, submitted that the evidence adduced by the prosecution Was sufficient to sustain both convictions and sentences.

The respondent summarized the evidence on record, pointing out that there was sufficient light at the house where **PW 1** and **PW 2** were robbed. The said incident took place in their dwelling house, which was a single room.

The second incident was at a supermarket, where **PW 3** was stabbed and then robbed. At the said supermarket, **PW 6** was also robbed.

The respondent pointed out that there was sufficient lighting in the supermarket.

In any event, both **PW 3** and **PW 6** were said to have known the assailants from before the incident. Therefore, the respondent submitted that that was a case of recognition.

The said recognition was verified by the fact that **PW 3** and **PW 6** gave the appellants’ names to the Elder who was in-charge of security matters within the area where the incident took place. The Elder was identified by the respondent as **PW 4**.

The appellants countered that contention by pointing out that **PW 12** was given the names STEPHEN OMONDI, which do not relate to either of them.

Being the first appellate court, we have re-evaluated all the evidence on record, and drawn our own conclusions. We appreciate that unlike the learned trial magistrate, we did not have the advantage of observing the witnesses when they gave evidence.

The particulars of the offence were that, on Count 1, the appellants robbed **PW 6** of KShs.1,600/-. **PW 6** was robbed whilst he was at Genesis Mini Supermarket, which is located within Kariobangi North, Nairobi.

The appellants are said to have used actual violence on **PW 6**, during the robbery.

Whilst **PW 6** was being robbed, **PW 3** walked into the supermarket. He was an innocent customer, who only wished to purchase some items.

PW 3 was forced to surrender KShs.300/- to the appellants. Nevertheless, the 1st appellant cut **PW 3** with a knife.

Both **PW 3** and **PW 6** testified that the appellants were not strangers to them; they had both seen the appellants prior to the robbery.

About 20 minutes after **PW 3** and **PW 6** were robbed, they heard screams from a residential plot nearby.

PW 1 testified that on 20th November 2004, he was at home, within Kariobangi. At about 7.10p.m, **PW 1** was washing clothes outside the house which he shared with his brother, JEREMIAH AKUKU OLIECH. On that day, **PW 2** was also staying within the same house. **PW 2** was visiting his cousins, **PW 1** and Jeremiah Akuku Oliech (now deceased).

Both **PW 1** and **PW 2** testified that the appellants robbed **PW 1** and the deceased. In the course of the said robberies, the appellants fatally stabbed Jeremiah Oliech with a knife.

PW 1 did not know either of the appellants before the incident. But he testified that he saw the 2nd appellant clearly, from a distance of 1.5 metres. There was light from the hurricane lamp.

PW 1 said that he saw the 2nd appellant stab Jeremiah, using a knife, which had a wooden handle.

According to **PW 1**, the 1st appellant entered the one roomed house after the 2nd appellant.

After **PW 1** surrendered his KShs.400/- to the appellants, and after the 2nd appellant had grabbed a wallet from Jeremiah Akuku Oliech, the appellants left the house and locked it from outside.

Later, **PW 1** and **PW 2** identified the 1st appellant at Identification parades. However, the 2nd appellant declined to participate in any parade, as he believed that the complainants had been enabled to see him by the police.

PW 2 corroborated the evidence of **PW 1**.

PW 3 testified that he did describe the 1st appellant to his grandmother. The grandmother then gave the particulars of the 1st appellant to the “Taliban”, who arrested the said appellant. The arrest was effected on the same night of the robberies.

PW 4 was the chairman of the Community Policing Group, called Gitathuru Community Services.

On the night of 20th November 2004, **PW 3** was accompanied by his grandmother when he told **PW 4** that he (**PW 3**) had been stabbed by “Aungu”.

According to **PW 4**, he had known the 2nd appellant by the name of Aungu.

PW 4 also testified that one of the other six robbers was said to be Ouma. However, **PW 4** did not know the said Ouma.

A person named Owino told **PW 4** that he knew who Ouma was and where he lived. Owino led the six members of the Community Policing to Ouma's home, within Gitathuru area. At about 11.00p.m, the team arrested Ouma.

According to **PW 4**, it is Ouma who then promised to lead the community policing team to Aungu's house. But he then changed his mind. **PW 4** did not know the residence of the 2nd appellant because the said appellant had moved houses, from Kariobangi to Korogocho.

However, **PW 4** emphasized that he had known the 2nd appellant for not less than 3 years.

PW 5, Owino, is the one who led **PW 4** and the community policing team to the house of the 1st appellant. **PW 5** knew both appellants, as well as their respective mothers.

It is noteworthy that when **PW 6** was being cross-examined, he said that when he first reported the incident to the police, he gave to them the name Stephen Ouma.

He also said that the robbery incident lasted about seven (7) minutes.

PW 7, Inspector Benson Omondi, was to conduct an Identification Parade for 2nd appellant. However, the 2nd appellant declined to take part in the said parades.

PW 8 conducted the parades at which the 1st appellant was identified by **PW 1** and **PW 2**, respectively.

PW 9 arrested the 2nd appellant on 26th November 2004. The arrest was in relation to another incident, wherein the 2nd appellant had possession of a toy pistol. The other person, who was with the 2nd appellant, in that other incident, was killed by members of the public.

PW 10 was the pathologist who conducted the post-mortem examination on the body of Jeremiah Akuku Oliech. The examination revealed that the deceased had a stab wound on the centre of the left chest wall. The heart was ruptured, with blood in the chest cavity. The cause of death was the penetrating chest injury.

PW 11, an analyst at the Government Chemist, Nairobi, testified that the blood stains found on the knife matched the blood sample of the Deceased, Jeremiah Akuku. Therefore, the blood stains from the knife could have come from the deceased after he was injured.

PW 12 was the Investigating Officer. His investigations revealed that **PW 6** knew his assailants very well. He reported to the vigilante group, resulting in **PW 4** mobilising his team to search for the assailants. The search resulted in the arrest of the 1st appellant, on the same night.

According to **PW 12**, the 2nd appellant was arrested within Umoja, when he had gone to rob another supermarket. That appellant was then locked up at Buru Buru Police Station.

Having re-evaluated all the evidence on record; and also having given due consideration to all the submissions made before us, we find as follows;

(a) PW 6 was based at Genesis Mini Supermarket, Kariobangi, on 20th November 2004. He was robbed of KShs.1,600/-. At the time of the robbery, the lights inside the supermarket were on. Therefore, PW 4 was able to clearly see the two persons who robbed him.

(b) PW 3 was a customer at Genesis Mini Supermarket. He walked in when PW 6 was being robbed. He too, fell victim to the two robbers.

(c) *Immediately after the said robbery, PW 3 told his grandmother that one of those who had robbed and also stabbed him, was the 2nd appellant. As a result of that information, which PW 3 also shared with PW 4, the community policing team went in search of the 2nd appellant. However, he was not arrested immediately because he had moved houses.*

(d) *Meanwhile, PW 5 led the community policing team to the house of the 1st appellant. He knew the Ouma who had been involved, because of the description given to him by PW 3.*

(e) *PW 1 and PW 2, who did not know the assailants before that day, did identify the 1st appellant at parades conducted by PW 8. To our minds, the said identification corroborated the evidence of both PW 1 and PW 2, regarding their positive identification of the 1st appellant, during the robbery.*

Those two identifying witnesses were in very close proximity to the appellants, inside the single-room, where there was sufficient lighting from the hurricane lamp, which was on the table. In those circumstances, they had no difficulty in identifying their two assailants.

(f) *Prior to the commencement of the actual robbery, the two appellants knocked on several other doors within the same plot. They then went to the house of PW 1 and PW 2. At that stage, they appeared friendly. Even when telling PW 1 to go inside the house, they talked in a “friendly way”. Therefore, at that stage, the two witnesses were not scared or apprehensive. It is thus not surprising that they did identify the appellants.*

(g) *The identification of the 1st appellant, by PW 1 and PW 2, was further verified at the Identification parades, where they picked him out.*

(h) *Although the 2nd appellant refused to participate in the parades, we are satisfied that PW 3 and PW 6 recognised him. Thereafter, it is the description which PW 3 provided which led to the search for the 2nd appellant.*

(i) *However, both the appellants vehemently challenged their alleged recognition or identification. Right from the beginning, to the very end of the trial, they asked for the production of the OBs wherein the complainants’ first reports were recorded.*

The learned trial magistrate ordered the prosecution to make available the said **OB**’s.

Although the prosecution promised to comply with the said orders, the **OB**s were never brought to court. It was explained that the **OB**’s were not traced.

The appellants had asked for the **OB** from Kariobangi Police Post, for 20th November 2004. They told the court that the said **OB** would enable them and the court to verify the contents of the reports made by the complainants.

The learned trial magistrate ordered the OCPD Kariobangi, to produce the said **OB**, in order to enable the appellants use it in their defences.

Regrettably, the prosecution failed to produce the **OB**. It was missing from both the Kariobangi Police Post and the store. The prosecution then offered to make available an extract from the Investigations Diary.

The appellants told the court that they had no faith in the extract from the Investigations Diary. Indeed, the 1st appellant described it as a piece of paper.

In the circumstances, we are faced with a difficult scenario. On the one hand, we have held that the appellants were identified by **PW 1** and **PW 2**; and were recognized by **PW 3** and **PW 6**.

We have also held that the identification by **PW 1** and **PW 2** was verified through the Identification of the 1st appellant at the Identification parades.

However, we cannot run away from the fact that both appellants did insist, throughout their trial, that the first report at the police post would enable the court to verify whether or not the alleged eye-witness had either named them or had described them sufficiently.

We must say here that the police had better start taking their overall responsibilities more seriously. Carrying out investigations and then arresting suspects is only half of the job. Presenting evidence that connects suspects to the offence is the more difficult part.

In this case, if the **OB** carries the names Stephen Omondi, as mentioned by **PW 12** (the Investigating Officer), we cannot assume that those names refer to Stephen Ouma, the 1st appellant, nor that he was therefore positively identified. If the identification was so positive, where did the Investigating Officer get the name Stephen Omondi? He did not offer any explanation.

Given the persistence of the appellants in their quest for the **OB**, we find and hold that the failure by the prosecution to make available the **OB** from Kariobangi Police Post, for 20th November 2004, did occasion prejudice the appellants.

We therefore have no option but to find that there is a possibility that if the **OB** was produced in evidence, it could have demonstrated that the appellants were neither named nor described in the first reports made to the police. That possibility gives rise to reasonable doubt on the identification or recognition of the appellants.

For the avoidance of any doubt, we wish to make it crystal clear that it is not our finding that whenever an **OB** is not produced in evidence a conviction should not follow. We recognize that the **OB** normally enables the prosecution to prove the information which was embodied in the first report; and that therefore the **OB** would usually make it possible for the court to verify the contents of such first reports. Ideally, therefore, the contents of such reports form a useful link in the chain where the identification of accused persons is one of the main issues.

In this case, the juice and the money which were recovered had no marks through which the complainants could identify them as those that had been stolen from them. Therefore, the identification of the appellants was the only basis upon which their convictions were founded.

And because the appellants challenged their alleged identification throughout the trial, yet the prosecution failed to produce the **OB** from which the issue would have been verified, we find that it would be unsafe to sustain the said convictions. Accordingly, the convictions are quashed, and the sentences are set aside. We order that the appellants be set at liberty forthwith unless they are, or either of them is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 20th day of June, 2012.

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FRED A. OCHIENG
JUDGE

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L.A. ACHODE
JUDGE