



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 254 of 2010

No.546

CHARLES NYAMORI OTISO ..... 1<sup>ST</sup> APPELLANT

ISAAC MACHOGU ..... 2<sup>ND</sup> APPELLANT

AND

REPUBLIC ..... RESPONDENT

*(Being an appeal from original conviction and sentence of the SRM's court at Keroka*

*in criminal case No. 1126 of 2010 dated and delivered on 23<sup>rd</sup> November 2010 by J. Were, SRM)*

JUDGMENT

1. The two appellants, Charles Nyamori Otiso and Isaac Machogu were the 2<sup>nd</sup> and 1<sup>st</sup> accused respectively in Keroka Senior Resident Magistrate's Criminal Case Number 1126 of 2010. The two were charged with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the 11<sup>th</sup> day of August 2010 at Metembe sub location in Masaba South District within Nyanza Province jointly with others not before court, while armed with dangerous weapons namely rungun robbed Irene Maina Onyinge of her cash Kshs.20,000/= a mobile phone make Nokia 1208 valued at Kshs.2000/=, cooking fat, 12 cushions valued at Kshs.3000/=, all valued at Kshs.25,200/= and at the time of such robbery beat the said Irene Maina Onyinge.
2. The appellants denied the charge and the case went to trial. The prosecution called 6 witnesses. From the evidence of these 6 witnesses, the facts of the case emerge.
3. On the night of 11<sup>th</sup> August 2010 at about 3.00 a.m., the complainant herein, Irene Magoma Onyinge, PW1, was asleep in her house at Metembe sub location when she was woken up by noises coming to her from the wooden windows of her house. The night was windy according to PW1 (Irene). On waking up, Irene noticed that one of the wooden windows had been removed and she saw torch light outside the window. One of the people standing out there told her they were policemen and that she should open up and if not she and her family would be burned inside the house.
4. As Irene woke up the children, the front wooden door was broken. Then someone slapped her on the face. The person who had slapped her fell down, but he got up immediately. Irene identified the person as Mose Nyarangi, who is still at large. The said Mose pulled Irene out of the house when she got out, Irene saw 3 other people. When Irene called Nyarangi's name, the 2<sup>nd</sup> appellant herein Isaac Machogu stepped forward and beat her up. Irene said she was able to identify her assailants with the help of security lights from her neighbour's compound. Irene also said there was light from the torches which her assailants had and that the people who attacked her that night were people she used to see

around. They were armed with rungas which they used to assault her.

5. After the 2<sup>nd</sup> appellant beat Irene, Nyarangi got hold of her throat. Then Charles, the 1<sup>st</sup> appellant, joined the others and they all got into the house. Irene's face was pushed to the wall so that she could not even scream. The gang took away many things from her house, including a bag and cash after which they all left.

6. After the assailants left, Irene ran to the home of her neighbour Joshua Onyancha and told him what had happened. The assailants followed her to the house of Joshua Onyancha, PW2 (Joshua). By then, the assailants had changed into jeans. Joshua testified that when he first heard that people who had attacked Irene had said they were policemen, he knew at once that they were robbers. Irene informed him that she could identify some of the attackers by face.

7. Joshua called other neighbours and one of the neighbours by the name James (not called as a witness) accompanied him to Ramasha police station where they reported the incident to the police. Police Officers visited the scene and confirmed the incident. A report of the incident was also made to the area Assistant Chief, Kennedy Ondieki, who testified as PW4. The Assistant Chief (Kennedy) received the report on 12<sup>th</sup> August 2010. He went to the scene and after confirming what had happened, he called a public baraza with a view to strategizing on how to apprehend the culprits as he continued with investigations. According to Kennedy, Irene gave her names of two of the attackers, namely Nyarangi and Charles Otiso (1<sup>st</sup> appellant). Irene said she could identify the face of the 3<sup>rd</sup> person. Following the investigations, the 1<sup>st</sup> appellant was arrested on the same 12<sup>th</sup> August 2010 at Ekono Market. He was taken to Ramasha police station where he was received by Number 38851 Corporal Boniface Mugo, PW5.

8. PW5 investigated the matter. The investigations led to the arrest of the 2<sup>nd</sup> appellant at Ramasha market. The 2<sup>nd</sup> appellant was taken to the police station. Both appellants were subsequently charged with the offence. Irene's 12 cushions were recovered from a matatu which operates within the area. The 12 cushions were produced as **P. Exhibit 2**. PW5 issued Irene with a P3 form which she took to Kijauri District Hospital on the same 12<sup>th</sup> August 2010. At the hospital, Irene was attended to by Joel Ongaro, PW6 (Joel), a registered clinical officer. Irene had been treated at Ramasha Health Centre under OP No.2367/10. According to Joel, Irene had pain in the chest and back. She was treated with analgesics. The injury had been inflicted by a blunt object and was classified as harm. Joel filled and signed the P3 form which was produced as **P. Exhibit 1**.

9. PW3 was Edwin Ayieya Nyamwange, a neighbour of both Irene and Joshua. He saw Irene at about 6.00 a.m. on the morning after the attack. Irene gave him the identities of 2 of her assailants. PW3 told the court that he knew both appellants who hail from the same area. He also said he went to the same school with the 1<sup>st</sup> appellant. PW3 denied that there was any grudge between him and the 2<sup>nd</sup> appellant herein. He also confirmed that he did not witness the robbery but only got information about it and who was said to have perpetrated the crime from Irene.

10. At the close of the prosecution case, the appellants were put on their defence. They each elected to give unsworn statements and called no witnesses. The 1<sup>st</sup> appellant told the court that he works as a conductor in motor vehicle Reg. No. KBE 949 R plying the Ramasha-Masimba Route. He testified that on 11<sup>th</sup> August 2010, he woke up at 6.00 a.m., and went to work. He finished work at 7.00 p.m. and went home also and slept until the next morning. On 12<sup>th</sup> August 2010, he woke up as usual at 6.00a.m, and went through the same work schedule as that of the previous day. As he was heading home from parking the motor vehicle, he was arrested by the Assistant Chief and taken to the police station. He was later charged with an offence he knew nothing about. He said he did not know Irene and that she did not know him.

11. The 2<sup>nd</sup> appellant testified that on 12<sup>th</sup> August 2012, he went to harvest maize and got back home at about 5.00 p.m. He then went to a nearby shop to buy fertilizer. On his way back home at about 6.30 p.m.,

he met a police officer who arrested him and took him to the police station. He also stated that on 11<sup>th</sup> August 2011, he was at home all day long making bricks. He said he knew nothing about the charges against him.

12. After carefully analyzing the evidence that was placed before him, the trial court concluded that the prosecution had proved its case beyond any reasonable doubt against each of the 2 appellants. They were each found guilty, convicted and sentenced to suffer death as by law provided.

13. The appellants were aggrieved by both conviction and sentence. They each filed their appeals which were consolidated by an order of this court dated 21<sup>st</sup> February 2012. The 1<sup>st</sup> appellant contended that the circumstances prevailing on the night of the alleged attack were not conducive for proper and error free identification; that none of the exhibits produced in court were recovered from him and also that the evidence that was placed before the court fell short of proving the case against him beyond any reasonable doubt. The 1<sup>st</sup> appellant also alleged that PW2, Joshua Onyanha had a grudge with him and that it was that grudge that motivated Joshua to report a non-existent robbery to the police. The 1<sup>st</sup> appellant urged the court to allow the appeal, quash the conviction and set aside the sentence of death.

14. The 2<sup>nd</sup> appellant raised similar grounds of appeal in his Petition of Appeal and in particular, he contended that the learned trial magistrate erred in law and in fact by failing to appreciate that the only evidence that was before the court was so contradictory and so unreliable that the trial court should have given the benefit of the doubt to the appellant. The 2<sup>nd</sup> appellant prays that this appeal be allowed, conviction quashed and sentence set aside.

15. At the hearing of this appeal, we received written submissions from each of the appellants. We have carefully read those submissions in light of the evidence that is on record. We also heard submissions from counsel for the respondent. This is a first appeal, and that being the case, this court has the duty of reconsidering and evaluating the evidence afresh with a view to reaching its own conclusions in the matter. In doing so, this court has to remember that it does not have the privilege of seeing and hearing the witnesses who testified in the court below. See generally **Pandya –vs- R.[1957] EA 336; Roria –vs- Republic [1967] EA 583** and **Okeno –vs- Republic [1972] EA 32**.

16. After reconsidering and evaluating the evidence that is on record, we note that the alleged offence took place at 3.00 a.m. So the question of identification is key. This court must be satisfied that the conditions prevailing at that time of night were conducive for proper identification/ recognition of the appellants. Secondly, I note that the prosecution's case rests on the testimony of one identifying witness, namely Irene. This court must satisfy itself that the trial court properly appreciated the principles set out in the case of **Abdalla Bin Wendo –vs- R [1953] 20 EACA 166**, as regards the evidence of a single identifying witness.

17. This appeal was conceded by the respondent for the following reasons. First and foremost, that Irene was not quite sure of the identity of the persons who robbed her, and that in the circumstances, an identification parade should have been held although Irene said that her attackers were people she used to see though she did not know [their names]. Counsel for the respondent wondered how Irene could have mentioned the names of the appellants herein if she did not know them. Counsel submitted that Irene's testimony fell far short of the standard required for identifying the 2 appellants under difficult circumstances.

18. Secondly, counsel submitted that the circumstances leading to the recovery of the 12 cushions which were produced in court by PW5 were not clear and more so, when the owner/driver of the matatu from which the cushions were allegedly recovered was not called to testify. The respondent's counsel urged us to allow the appeal.

19. We have ourselves carefully reconsidered and evaluated the evidence afresh. We have also carefully read the submissions by both appellants. We have also carefully considered and weighed the judgment of the trial court. After doing all the above, we are of the considered view that the circumstances prevailing

on the night of the attack were such that proper and error free identification was not possible. In the case of **Wamunga –vs- Republic [1989] KLR 424**, the Court of Appeal, citing the English case of **R.-vs-Turnbull[1976] 3 All ER 549**, was categorical that when circumstances are difficult, mistakes may be made even in recognizing close friends and relatives and that a trial court has to be particularly careful not to cause a miscarriage of justice by founding a conviction on unreliable evidence of identification.

20. In the instant case, this is what Irene said regarding recognition of her assailants. We say recognition because she claimed to have been seeing the appellants and others for sometime:-

**“Then suddenly the front door was broken. There are no other doors except for the main door. Then someone slapped me on the face. He then fell and the torch he had shone on him. He then stood up immediately. I saw it was Mose Nyarangi. He is not in court. He pulled me outside and there were 3 other people. When I called the name of Nyarangi, Isaac came and also beat me up. There is a neighbour with security lights and I was able to see some of my assailants. They also had torches. They are people I see but I don’t know them. They had rungas that they were using to assault me.”**

21. In our considered view, the above evidence presents some problems. One, how far was the alleged neighbour’s security light from the spot where the attack was taking place, and how bright were those lights? Two, when Irene said that Mose Nyarangi fell down and the torch he had shone on him, for how long did the torch shine on the said Mose Nyarangi and on what part of the body did the torch shine? If the statement by Irene to the effect that **“he then stood up immediately”** is true, then it means that there was no time during which one could have observed Mose Nyarangi using the light from the torch that he had. We pause and observe here that the present appeal does not relate to Mose Nyarangi. Secondly, there is no indication by Irene as to how she was able to identify Isaac and as already noted, the court was not told how far or close the neighbour’s security lights were and how bright those lights were. Thirdly, if it is true that Irene only used to see those people and as she says she did not know them, how was she able to give their names to the police and to her neighbours?

22. The testimony of PW3 does not assist the prosecution’s case because he did not say the names given to him by Irene of the persons who attacked her. It would have helped if an identification parade had been conducted to give Irene a chance to positively identify her attackers. As it were, the Investigating Officer took it for granted that Irene had identified her attackers.

23. It is also noteworthy that the recovery of the 12 cushions by the roadside by Irene is left hanging in the air. It is our considered view that further investigations should have been carried out to establish who had dumped the cushions by the roadside and whether the circumstances of recovery could be traced back to the appellants.

24. We have also considered the issue of the single identifying witness and find that though the trial court properly addressed itself to this issue, Irene’s evidence fell far short of meeting the threshold of what could be classified as positive identification of her assailants.

25. In the circumstances and for the reasons above given, this appeal is found to have merit. The appeal is accordingly allowed. The conviction is quashed and the sentence of death is hereby set aside.

26. Unless otherwise lawfully held, each of the appellants is to be released from prison custody forthwith.

27. It is so ordered.

**Dated and delivered at Kisii this 11<sup>th</sup> day of October, 2012**

**RUTH NEKOYE SITATI**

**R. LAGAT KORIR**

**JUDGE.**

**JUDGE.**

In the presence of:

Present in person for 1<sup>st</sup> Appellant

present in person for 2<sup>nd</sup> Appellant

Mr. Mutuku (present) for Respondent

Mr. Bibu- Court Clerk

**RUTH NEKOYE SITATI**

**R. LAGAT KORIR**

**JUDGE.**

**JUDGE.**