REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 143 OF 2010

WYCLIFF OTIENO SAASITA …… APPELLANT

-VERSUS-

REPUBLIC ……..….. RESPONDENT

JUDGMENT

(An appeal from the Original Conviction and Sentence of the Senior Resident Magistrate's Court at Homa-Bay Hon. C. A. S Mutai in Criminal Case No. 2 of 2010 on 4th June, 2010)

The appellant, **Wycliff Otieno Saa Sita** was charged before the Senior Resident Magistrate's Court at Homabay with two counts of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars given in respect of the 1st count were that on the 29th December, 2008 at Ratanga Area in Ndhiwa district within Nyanza Province, he jointly with another not before court while armed with dangerous weapons namely knives robbed **Agneta Akinyi Owiti** Kshs. 5,500/= and a mobile phone Nokia 3310 valued at Kshs. 4,000/= and immediately after the time of such robbery, beat the said **Agneta Akinyi Owiti**. In the 2nd count, it was alleged that on the same date and place and in similar fashion he robbed **Margaret Anyango Odhulu** Kshs. 2,000/= and immediately before or immediately after the time of such robbery beat the said **Margaret Anyango Odhulu**. He pleaded not guilty to both counts.

The prosecution case in brief was that on the 29th December, 2008 at about 7.00p.m PW1, **Agneta Akinyi Awiti,** the complainant in count 1 and his co-wife **Margaret Anyango Odhulu** (PW2), the complainant in count II were coming from the market heading home. On reaching a place between Oruti and Kobwayi, someone suddenly appeared infront of **Margaret Anyango Odhulu** and asked her if she knew him. When she asked him why, he abandoned her and proceeded to where PW1 was. She was in front of her. Suddenly another person hit her sending her sprawling to the ground and cut her with a panga. That person was wearing a yellow T-Shirt. The appellant was in the company of this person. In the meantime, the appellant having left the PW2 confronted PW1 and cut her on the right hand as well and as they struggled, he took from her a mobile phone Nokia 3310 and Kshs. 5,500/=. They raised an alarm and the appellant and his accomplice ran away. They made report of the incident at Kobama D.O's office. They later went to the Ndhiwa Police Station and were issued with P3 forms by **P.C Peter Gachie** (PW4). Those P3 forms were subsequently filled at Ndhiwa District Hospital. Upon concluding his investigations PW4 issued an order for the arrest of the appellant to assistant chief of Odhiambo Kembo sub location, **Berita Achieng Ramogi** (PW3) where the appellant hailed from. Apparently PW1 and PW2 had given the name of the appellant to PW4 as they had seen and recognized him during the robbery. According to them there was moonlight during the incident and it was not yet dark. He was a person they knew very well. PW3 duly executed the order of arrest and caused the appellant to be arrested

on 29th December, 2008 whereupon she escorted him to Ndhiwa Police Station. He was later charged.

Put on his defence, the appellant elected to give a sworn statement of defence and called no witnesses. He testified that on the 29th December, 2008 at about 7.00p.m. he was at home at Uruti and he never saw the complainants whom he knew. The charges preferred against him were thus unfounded.

The learned magistrate having duly considered the evidence on record found both counts against the appellant proved. He convicted him and sentenced him to death in accordance with the law. The learned magistrate however ordered and rightly so in our view that execution of the sentence in respect of count II be held in abeyance. This is how it should be.

The appellant was aggrieved by the conviction and sentence. He therefore lodged this appeal on grounds that evidence of recognition was unreliable, vital witnesses were not called, the court relied on hearsay evidence and finally that the evidence of the prosecution was contradictory and inconsistent.

When the appeal came before us for hearing on 20th January, 2011, the appellant elected to canvass the same by way of written submissions. We have carefully read and considered them.

Mr. Mutuku, learned senior principal state counsel opposed the appeal. In so doing he submitted that the two complainants knew the appellant as they came from the same village. They reported the incident to PW3 and PW4 and gave the name of the appellant. The appellant's recognition cannot therefore be faulted. However counsel felt that since the P3 forms in respect of the complainants were not tendered in evidence, the trial court should have convicted the appellant under section 296 (1) as opposed to section 296 (2) of the **Penal Code**.

This is a first appeal. As such it is in the nature of a retrial and we must deal with it in accordance with the principles set out in the celebrated case of **Okeno –vs- Republic (1972) E.A 32**. It is for this reason that we have set out in some detail what we consider the salient portions of the evidence tendered before the trial court.

The conviction of the appellant turned on the evidence of recognition. No doubt a conviction resting entirely on identification and or recognition invariably causes a degree of uneasiness. It is therefore absolutely necessary that such evidence be tested with the greatest care using the guidelines in **Republic –vs- Turnbull (1976) 3 ALL ER 549** and must be absolutely watertight to justify a conviction. See also **Kiarie –vs- Republic (1984) KLR 739** and **Nzaro –vs- Republic (1991) KAR 212**. In a nutshell the court must satisfy itself that in all the circumstances it was safe to act on such evidence. These injunctions are necessary because it is possible for a witness to be honest but mistaken in matters of identification or recognition and or a number of witnesses to all be mistaken. Similarly it is not unheard of mistakes being made in a recognition of even close relatives and friends. See generally **Republic –vs- Turnbull** (Supra), **Nzaro –vs- Republic** (Supra), **Kiarie –vs- Republic (1984) KLR 739** and **Henry Kuria Muchiri –vs- Republic, Nyeri, criminal Appeal No. 74 of 2008 (UR)**.

It is common ground that these witnesses and the appellant knew each other. They all came from the same village. The appellant did admit that much in his sworn statement of defence. The offences were committed at about 7.00p.m. According to PW1 and PW2 it was not very dark and there was moonlight. The fact that at that time it was not very dark was not challenged by the appellant, so was the presence of the moon. It is not a rare occurrence in this part of the world that during certain months there is no darkness at all at about 7.00p.m. The appellant being a person who was familiar with the witnesses came in close contact with them. He even asked them whether they knew him. That question could not have been asked in vain. He must have known that there was the possibility of being recognized by these witnesses. Indeed when posing this question, the appellant first stood infront of PW2. He was thus in close proximity with this witness. As for PW1, she heard the appellant ask PW2 twice whether she knew him. She was walking ahead of PW2. She turned round saw and also recognized him. The appellant then confronted her. They struggled over the knife and he cut her. As they struggled they must have been in close embrace and proximity. Infact according to her they were 2 metres apart. The appellant was not at all disguised nor had he covered his face so as to make his recognition difficult. Indeed these witnesses

had earlier seen the appellant in the market. They had noted the clothes he had put on. He had been wearing a brown Kaunda suit and woolen cap with a red mark on it. It is also instructive that in their first report to the chief at Kobama chief's office, they gave out the name of the appellant. Similarly when they reported the incident to PWV, at Ndhiwa Police Station, they told him that they were able to recognize one of the assailants and gave him his name, which fitted the appellant. There is no evidence of any grudge between the appellant and these witness as would have compelled them to falsely testify against him.

Much as the sort of light, its intensity and its position relative to the appellant was not inquired into in terms of **Maitanyi –vs- Republic (1986) KLR 198**, we are nonetheless satisfied as indeed the learned magistrate was, that it was not fully dark as to make recognition of the appellant well nigh impossible. In any case, this was a case of recognition as opposed to visual identification. As stated in the case of **Anjononi –vs- Republic (1980) KLR 59** ***"…This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other …".*** We have no doubt at all that in the circumstances of this case, the appellant was positively recognized by the two witnesses. He is not therefore a victim of mistaken recognition.

In his submissions, the appellant has raised the issue of the variance between the charge sheet and the evidence led as to when the offence was committed. He claims that whereas the charge sheet talks of 29th December, 2008, PW3 in his evidence talked of having arrested the appellant on 28th December, 2008, a day before the offence was allegedly committed. Yet PW4, the arresting officer was categorical that his arrest was effected on 1st January, 2010. To our mind these are typographical errors which are curable. The victims of the robbery told the court the exact date when the offence was committed. The appellant too in his own statement of defence talks of being arrested in 2008 and not 2010. The variance in dates in our view did not occasion the appellant failure of justice or prejudice.

As correctly pointed out by **Mr. Mutuku**, though the complainants were assaulted and injured during the robbery and though they were subsequently treated and P3 forms filled, those P3 forms were never tendered in evidence for reasons which are not clear. The ingredient of robbery with violence in the charge sheet was one of ***" …and immediately before or immediately after the time of each robbery, beat .."***. This is the same ingredient which was pushed through evidence by the prosecution. In the absence of the medical evidence, we do not see how the appellant could have been convicted for the offence of capital robbery. The most that the trial court should have done was to convict the appellant for simple theft. Invoking section 179 (1) of the **Criminal Procedure Code** we now find the appellant guilty of the offence of theft contrary to section 275 of the **Penal Code** and sentence him to imprisonment for a term of one and a half (1 ½) years with effect from 4th June, 2010. To that limited extent the appeal succeeds.

Judgment dated, signed and **delivered** at Kisii this 15th day of March, 2011.

ASIKE-MAKHANDIA **RUTH NEKOYE SITATI**
JUDGE **JUDGE**