



NO. 377

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 97 OF 2008

GEORGE ODHIAMBO JAKOYO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

*(From the original conviction and sentence by the Senior Principal Magistrate's court at Migori criminal case no. 526 of 2007*

*by Ezra O. Owino (PM)*

**George Odhiambo Jakoyo** hereinafter "*the appellant*" was charged with four counts before the Senior Principal Magistrates court, Migori. They were all of robbery with violence contrary to section 296(2) of the **Penal Code**. All the particulars thereof were set out in detail in the charge sheet which is on record and which we need not reproduce them here. To all the counts, the appellant pleaded not guilty.

The complainant, **Peter Odhiambo Opiyo** (PW5) testified that on 18<sup>th</sup> April, 2007 at about 7.30 p.m he was on duty as a security guard at Sugarland Hotel, Awendo. Suddenly three people approached each carrying a bag . They asked him if they could get a room and he referred them to the reception. They then held him at gun point and pushed him to the floor where there were customers. The customers were ordered to remove all their belongings and place them on the table. The other robbers proceeded to the reception and the lady at the reception, **Beatrice Maureen Odero** (PW3), the complainant in count II screamed and ran at the sight of a gun. She was however pursued and caught. However, she subsequently managed to escape again. The customers on the upper floor of the hotel heard the screams and the robbers shot at them. The complainant was then robbed of his torch which according to him was taken by

the appellant. On 10<sup>th</sup> may, 2007 he was called by C.I.D office-Migori to attend a police identification parade. He did so and was able to identify the appellant. During the robbery he had noted that the appellant had a gap in his upper teeth.

The complainant in Count II, **Beatrice Maureen Odero** (PW3) testified that she was on duty as the receptionist at Sugarland Hotel when a customer came and asked for a room and when she gave him a form to fill the customer instead pulled out a gun. On the sight of the gun, she ran as she screamed. The customer however pursued and caught her and at the same time shots were fired in the air. At this point she managed to escape again and locked herself inside one of the rooms. She came out when the robbers had left and she noticed that her cell phone Samsung, money and credit cards had been stolen. She identified the appellant as the person she talked to at the counter. According to her, his teeth were not very good and were isolated. Subsequently she appeared in the police identification parade and she was able to pick out the appellant after asking the members of the parade to open their mouths.

The complainant in Count III, **James Nyabuto** (PW1) testified that he was relaxing at Sugarland Hotel with friends when he saw a watchman under arrest with three people with a pistol in tow. They were all ordered to sit down and give out money. He was robbed of Kshs. 6,000/- US dollars 280/=-, mobile phone and wrist watch. The two robbers went to the counter as one tall one guarded them. The appellant returned and asked him what work he did thinking that he was a police officer. He then heard gun shots outside as the thieves left the scene. They managed to contact the police who came after 20 minutes and he confirmed to them that he could identify the suspects. On 8<sup>th</sup> may, 2007 he attended police identification parade where he easily identified the appellant on the basis of his brown isolated teeth and short height.

The 4<sup>th</sup> complainant (PW2) was **John Ombasa Onderi**. He stated that whilst at Sugarland Hotel with PW1, robbers entered and ordered them to place the money and mobile phones on the table. He was robbed of Kshs. 700, mobile phone and jacket. The robbers left whilst firing in the air. He did not identify any of the robbers as he was seriously threatened.

**PC Owino** (PW6) of Awendo police station received the report of the incident at Sugarland Hotel and rushed there in the company of other police officers. He confirmed that indeed a robbery had been committed. They mounted a search of the area for spent cartridges and found two. They later handed over the file and the exhibits to C.I.D-Migori.

Inspector **Betty Chepngeno** (PW7) and Ag.Inspector **Kiboi** (PW8) conducted separate identification parades wherein the appellant was identified by PW1, PW3 and PW5. The spent cartridges were examined by firearms examiner, Inspector **Ndhiwa** (PW10). He found the same with the impressions consistent with Ceska family of pistols but was unable to identify one fired bullet because of the extent of the damage.

Put on his defence, the appellant elected to give sworn statement and had no witnesses to call. He stated that in 2006 while on his way to Mombasa his luggage of bhang was impounded at Voi but he managed to bribe his way out. However he was only a courier as the bhang belonged to one, **Ombok**. He returned on 3<sup>rd</sup> may, 2007 and went to see **Ombok**. They differed and **Ombok** framed him with the case.

The learned magistrate having considered and evaluated the evidence on record, was persuaded that the appellant was guilty as charged. Accordingly he convicted him on both counts and sentenced him to death

as provided for under the law. Aggrieved by the conviction and sentence, the appellant lodged the instant appeal and set out seven grounds in his petition of appeal. Broadly, the appellant complained that conditions prevailing at the scene of robbery were not favourable for positive identification, the evidence tendered by the prosecution was full of contradictions, the trial court treated the defence separately, there was no corroboration and therefore the prosecution case was not proved beyond reasonable doubt.

When the appeal came before us for hearing on 19<sup>th</sup> 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 doing so he submitted that the identification of the appellant was not in doubt. He never made attempts to hide his face during the robbery. The hotel was well lit. Thus the conviction of the appellant was safe.

This court, being the first appellate court, is under an obligation to reconsider the evidence that was adduced before the trial court, evaluate the same and reach its own conclusion. See **Okeno .v. Republic (1972) E.A. 32.**

The verdict of the trial court as reflected in its judgment shows that the appellant's conviction was founded on the purported evidence of identification by PW1, PW3 and PW5 for the learned magistrate stated:-

**“.....My finding is that the evidence of the three witnesses on identification is watertight and I now enter a conviction as charged in count 1,II,III &IV.....”**. However, was the evidence of identification of the appellant at the scene of crime that watertight as claimed by the trial magistrate?. We entertain our doubts.

PW1 **James Nyabuto**, had the following to state on the issue **“the accused had brown teeth and isolated, he was short and I saw him as kikuyu”**. PW3, **Beatrice Maurine Odero**, the receptionist of Sugarland Hotel had the following to say **“.....It is the accused I talked to him for 5 minutes. His teeth are not very good, there are gaps and isolated...”** On the identification parade she stated **“...I told them to open their mouths. I saw his teeth and identified the accused, nothing was recovered.....”**. Finally PW5 **Peter Odhiambo Opiyo**, the security guard at the said hotel said **“...the accused had a gap in the upper teeth. We talked and I saw and talked to accused...”** Such was the evidence of identification of the appellant. It was all about a gap in his teeth. However, care or caution was not exercised during the police identification parades. The appellant was the only person with a gap in his teeth in the identification parade. This fact was confirmed by PW8 Ag. I.P **Kiboi**, the parade officer. In any event those parades were meaningless in the absence of the first report by the identifying witnesses with clear details of description of the identity of the robbers. These witnesses never gave to the police who came to the scene including PW6 and the Deputy OCS of Awendo police station a description of the appellant. It has been said that the evidence of the first report to a person in authority is often important as it provides a good test of the truth and accuracy by which subsequent statements may be gauged and provide safe guard against later embellishment or made up case. In the absence of the first report and the fact that the appellant was the only person in those parades with gap in his teeth we do not think that the parade was properly conducted and was therefore of little or no evidential value at all. Afterall many communities in this country do remove lower or upper teeth for one reason or another.

Coming back to the scene of crime, all the witnesses who were the victims of the crime confirmed that the crime was committed at about 7.30 p.m. It was in the evening . It may or it may not have been dark. However the record is silent as to what enabled the identifying witness to see the appellant so as to be able to identify him. There is no mention at all of any source of light whether sunlight or electricity in all

their testimonies. Ofcourse we are aware that **Mr. Mutuku** submitted that there was electricity in the hotel and therefore it was well lit . However this submission is not borne out by the record. The appellants being a total stranger to all those witnesses, it was incumbent upon the trial court to closely scrutinize the evidence with regard to the source of light and quality of the same at the time of the robbery. None of the prosecution's 10 witnesses however alluded to any source of light available at the time of the robbery. One therefore shudders to imagine where the trial magistrate sourced his evidence of **"sufficient light illuminating the scene"** from.

We are made to understand that a court of law does not assume anything. The duty of the trial court is to determine the case on the weight of evidence tabled before it. The above proposition of law applies with equal force to the present case as the trial magistrate seems to have advanced his own fanciful theory and or attractive reasoning on the issue of light which was a crucial ingredient but not tendered in evidence during the entire trial. There was also reference to a torch allegedly stolen from PW5, **Peter Odhiambo Opiyo** during the robbery. One wonders how a torch would have been required when there was sufficient electric light at the scene as claimed by the learned Senior Principal State Counsel.

When the appellants were put on defence, he raised an alibi defence. That defence was not at all demolished despite intense cross examination by the prosecutor. It was not rebutted. In our view, the trial magistrate did not give it adequate consideration.

Still on the question of visual identification it was stated in the case of **Mwaura .v. Republic (1987)KLR 643** that

***"....In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light"***.

It was also observed in the case of **Republic -v- Turnbull-1976-3ALL ER 549** as follows:-

***How long did the witness have the accused under observation and at what distance.....in what light.....was the observation impeded in any way.....had the witness ever seen the accused before? How often? How long elapsed between the original observation and the subsequent identification to the police?"***

In the instant case, no such inquiry was made by the trial court nor was the court prosecutor of any assistance in that regard.

The upshot of the foregoing is that we are satisfied that the conditions prevailing at the time and at the scene where robbery was committed could not have favoured positive identification of the appellants. We therefore on that basis allow the appeal, quash the conviction and set aside the sentences of death imposed on the appellants on all the counts which was in any event irregular. The appellants should be set free forthwith unless otherwise lawfully held.

**Judgment dated, signed and delivered** at Kisii this 7<sup>th</sup> March, 2011.

**ASIKE-MAKHANDIA**

**RUTH NEKOYE SITATI**

**JUDGE**

**JUDGE**