REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 15 OF 2010

JOSEPH OCHIENG OKAO …….…….. APPELLANT
-VERSUS-
REPUBLIC ……. RESPONDENT

JUDGMENT

(Being an Appeal from the original sentence and conviction of the Senior Resident Magistrate Hon. Mr. Z. J. Nyakundi at Rongo in Criminal Case No. 112 of 2009, delivered on 7th October, 2009)

Joseph Ochieng Okao, the appellant was charged before the Senior Resident Magistrate's court at Rongo with the offence of robbery with violence contrary to section 296 (2) of the **Penal code**. Particulars given were that on the 5th February, 2009 at Nyarombo village in west Sakwa location in Rongo district within Nyanza province jointly with others not before the court being armed with offensive weapon namely spears and pangas robbed **Calvins Ochieng Onyango** of one Television set make Mitachi coloured 14 inches, electricity extension wire and cash Kshs. 800/= all to a total value of Kshs. 7,900/= and at immediately before or immediately after the time of such robbery, used actual violence on the said **Calvins Ochieng Onyango**. The appellant returned a not guilty plea to the charge and he was subsequently tried.

PW1, **Calvins Ochieng Onyango,** the complainant testified that on 5th February, 2009 at 1.00a.m. he was in his house when some people stormed it and attacked him together with his wife. The gang of four cut him on his hand, ear, leg and shoulder. Among the gang was the appellant. It was infact him who cut his fingers using a Somali sword. He was able to identify the appellant because his walls are painted in white and the gang had torches which they flashed, and from the reflection on the said walls he was able to see the appellant among the robbers. The gang demanded cash and mobile phones and when he refused to part with any, they attacked him and the appellant cut him as aforesaid. The incident lasted 20 minutes and was also witnessed by his wife, **Beatrice Adhiambo** (PW2).

When done and as they escaped, the appellant fell. The complainant alerted his father and proceeded to have treatment at Dede Health Centre and later at Awendo Health Centre. He had known the appellant as they hailed from the same area. During the incident he lost a T.V set, cash Kshs. 800/=. He also reported the occurrence at Rongo Police Station and the report was received by **P.C Samson Ole Toire** (PW5) who in turn issued him with P3 form. The complainant was subsequently examined by **Julius Mokaya** (PW4), a clinical officer at Awendo Hospital. On examination PW4 noted a bandaged face, cut wound on left ear, cut wound on the left side of the back and stitched wound on the middle finger of the left hand. He further told the court that he filled the P3 form after one day and classified the injuries as harm.

PW5 who recorded the complainant's statement went to the scene and confirmed the robbery. The

complainant nonetheless told him that he could identify one of the robbers. The appellant was later arrested by members of public. Subsequently he charged him with the offence.

Put on his defence, the appellant elected to give a sworn statement of defence and called no witnesses. He testified that on 5th February, 2009 he was at home and nothing happened. On 8th February, 2009 he went to his place of work at Dede. After the day's work he closed his business and went home. At about 1.00a.m. some people who introduced themselves as police officers knocked at his door. When he opened he found people putting on black coats who took his Kshs. 4,500/= and his mobile phone valued at Kshs 5,000/=. They started beating him saying that he was boasting over his welding machine and he was later taken to Dede Ap camp. The following day he was taken to Rongo police station where he was charged with the offence.

The learned magistrate having considered and evaluated the evidence on record was of the view that the offence charged had been proved beyond reasonable doubt. Accordingly, he convicted the appellant and sentenced him to death as required by law.

That conviction and sentence triggered this appeal. The appellant advanced several grounds in support thereof. Broadly speaking he faulted the magistrate on the grounds that the circumstances obtaining during the commission of the offence could not have afforded his positive recognition by the witnesses or any one of them, he could thus have been a victim of mistaken identity, there was no police identification parade based on voice, essential witnesses were not called, there was non-compliance with section 200 of the **Criminal Procedure Code** and finally that his defence was not given due consideration.

When the appeal came before us for hearing on 19th January, 2011, the appellant elected to canvass it by way of written submissions. We have carefully read and considered the same.

The appeal was opposed. In doing so, **Mr. Mutuku**, learned Senior Principal State counsel, submitted that the robbers who numbered four when committing the offence were armed with bright torches. The complainant's house had walls painted in white. When the torches were directed to those walls, they reflected on the appellant and the complainant and his wife were able to recognize him as a person from their area. This was a person who was known to them. Thus the evidence of recognition was credible. The complainant even gave the name of the appellant to the police in his first report.

Re- consideration and evaluation of evidence tendered in the trial court is indeed a matter of law since it is a duty imposed on the first appellate court, as we are, to do so and draw our own conclusions in deciding whether the judgment of the trial court should be upheld. This duty has been spelt out in many cases including **Okeno –vs- Republic (1972) E. A 32**.

We are not oblivious to the fact that the evidence of recognition that nailed the appellant was that of the husband and his wife at night. The only source of light according to them was the bright torches the robbers had. We remind ourselves that the evidence of identification and or recognition in difficult circumstances must be tested with greatest care and can only form a basis for conviction, if it is absolutely watertight. But again this was, however, a case of recognition and not identification of the robbers. The court of appeal in the case of **Anjononi –vs- Republic (1980) KLR 59** did say that: ***"…recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other …".*** The foregoing notwithstanding there is still need for the trial court to be wary of the dangers of convicting on the basis of such evidence. For in the case of **Karanja & Another –vs- Republic (2004) 2 KLR 140**, the court of appeal said:-

"The law as regards identification under difficult conditions is now well settled. In the case of Cleophas Otieno Wamunga –vs- Republic Court of Appeal Criminal Appeal No. 20 of 1989 at Kisumu this court stated as follows:-

"…We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lillian Adhiambo Wagude

(PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them … what we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well known case of Republic –vs- Turnbull (1976) 2 ALL E 549 at page 552 where he said:-

"Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made".

According to the complainant, the offence was committed at night. Infact it was at 1.00 a.m a gang of four people simply stormed into his house and cut him on the hand, shoulder, leg and ear. This goes to show that the execution of the offence was very violent. There were no lights at all in the house save for the torches carried by the gang. According to these two witnesses, PW1 and PW2, they were able to recognize the appellant among the gang courtesy of the reflection of torchlight from the walls of their houses that were painted in white. We are unable to fathom or comprehend how that was possible. Even assuming that indeed it was possible, the intensity of the light emitted by the torches was not inquired into, whether the said reflection was specifically directed at the face of the appellant and for how long such reflection was. Nor was the position of the appellant vis a vis the rest of the gang inquired into. All these issues required to be interrogated by the trial court before it could place its reliance on such evidence of recognition to find a conviction. In the case of **Maitanyi –vs- Republic (1986) KLR 198**, the Court of Appeal observed that failure to undertake such an inquiry is an error of law and such evidence cannot safely support a conviction. There was no such inquiry undertaken in the circumstances of this case. We cannot therefore see how the conviction can then be allowed to stand.

Mr. Mutuku, perhaps aware of this injunction of law, did submit that the gang had bright torches. However that submission is not backed by the evidence on record of either the complainant or his wife. Nowhere in their testimony do these witnesses allude to the fact that the gang were armed with bright torches. On this score, the complainant testified thus: ***"…The flashed (sic) from the torch you had enabled me to see you …"***. As for his wife she stated thus in her evidence in chief ***"…Our walls were painted white and the torch flashes reflected the faces of the intruders …"***. Under cross-examination she stated ***"….The torch flashes enabled me to see you. You people had torches …"***. From the foregoing where is any reference to bright torch light?

The complainant did also suggest that he recognized the appellant by his voice. Of course evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, however, care is necessary to ensure that the voice sought to be recognized was the accused's, that the witness purporting to recognize the same was familiar with it and recognized it. Above all, it must be shown that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it. See **Choge –vs- Republic (1985) KLR 1**. In this case there is no evidence that the appellant ever spoke during the robbery. In other words this witness failed to state what the appellant said during the robbery that enabled him to recognize his voice. Nor did he attest to the fact that he was familiar with his voice. Further during the episode, the evidence suggests that it was raining. How then could he have been able to recognize the voice of the appellant in those circumstances? Yes, the appellant and the witnesses may have come from the same village. However, that perse does not mean that they are familiar with his voice.

In convicting the appellant, the learned magistrate expressed himself thus in part of his judgment:

"1. Though the accused told the court that on 5th February, 2009 he was at home and did not know

what happened he failed to give any evidence to corroborate his evidence, at least to confirm that he was at home as he alleges.

2. Though the accused told the court that on 8th February, 2009 he was at his work place he did not adduce any evidence to corroborate his evidence that he was at his work place.

3. Though the accused alleges that the people who knocked at his door and took away Kshs. 4,500/= and mobile phone worth Kshs. 5,000/=, he did not produce any purchase receipt to confirm that he ever owned a mobile phone valued at Kshs. 5,000/=….".

These were serious misdirections in law on the part of the learned magistrate. They amount to shifting the burden of proof to the appellant. In every criminal case the burden of proof save in very rare cases always rests on the prosecution. The accused person has no obligation to prove his innocence. The burden of proof never shifts to the accused. By making the above observations, clearly the learned magistrate was shifting the burden of proof to the appellant which is not permissible by law and must be frowned upon.

In the result we are satisfied that the conviction of the appellant was not safe. We therefore allow this appeal, quash the conviction and set aside the sentence of death imposed. The appellant should at once be set at liberty unless otherwise lawfully held.

Judgment, dated, signed and **delivered** at Kisii this 7th day of March, 2011.

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