No. 2943

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 234 OF 2010

JAMES ODHIAMBO OKETE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal of the Original Conviction and Sentence of the Principal Magistrate's Court at Oyugis Hon. Mrs. Ngetich in Criminal Case No. 1049 of 20009 dated on 3rd November, 2010)

The appellant, **James Odhiambo Okete** and one, **John Otieno Oyugi** were jointly charged before the Principal Magistrate's Court at Oyugis with two counts of robbery with violence contrary to section 296(2) of the **Penal Code**. Particulars with regard to count I were that on the 16th October, 2009 at Kakelo Kamroth sub location in Rachuonyo district, jointly with others not before court, the two being armed with a dangerous weapon namely a gun robbed **Anna Aoko Ogweno,** a mobile phone make Nokia 1110 valued at kshs. 3,000/=, cash kshs. 6,000/= all valued at kshs. 9,000/= and immediately after the time of such robbery used actual violence to the said **Anna Aoko Ogweno**. Particulars with regard to count II were that on the same day and place again and in similar fashion, they robbed **Elija Ogweno** cash kshs. 7,000/= and immediately before such robbery used actual violence to the said **Elija Ogweno**. Both the appellant and his co-accused denied the charges and were tried.

The prosecution case was that on 16th October, 2009 at 7.30p.m PW3, **Anna Aoko Ogweno**, the complainant in count I who operated a butchery with her husband **Elija Ogweno** (now deceased) left Oyugis town for their home arriving thereat 8.00p.m. They parked their motor vehicle and entered the

house. PW3 sent their child, **Meshak Oluoch Ogweno** (PW4) to the kitchen to collect a sufuria and stove. PW4 brought the stove and went back for the sufuria. On the way he heard people talking as they approached him. He entered the kitchen. They followed him and asked him to open for them as they were police officers. He saw the gun one of them was brandishing. They told him to call for them his father, from the main house. He complied. In the meantime his father had gone to the bedroom in the main house. PW4 went into the bedroom and informed him that there were people outside who wanted to talk to him. He came out and found 2 people standing at the door. Both PW3 and PW4 testified that the two people told him ***"Mzee it is you we wanted just come don't fear".*** When the deceased asked them why they wanted him, the two people first told him that they wanted to talk to him about a cow and thereafter told him point blank that they wanted to kill him. PW3 testified further that the two had a pistol and a torch which they flushed on her face thereby blinding her. Soon thereafter they shot dead her husband. After the shooting, the one without the gun went to the bedroom after hitting and knocking her down and removed the money which the deceased had kept under a mattress. After removing money, the two asked PW3 to accompany them to the bedroom to remove more money. PW3 told them that there was no more money in the house left after which they took her Nokia 1110 mobile phone, her husband's Nokia N82, her 6,000/= in a purse and 300/= that was in her mobile phone cover. One of the thugs asked the other if he had taken all the money and when he answered ***"yes"*** they left. Though the hurricane lamp was on PW3, according to her testimony could not identify the thugs as they flushed a torch into her eyes, thereby blinding her. That notwithstanding her son (PW4), however managed to identify them. According to PW4 he did so by the assistance of the hurricane lamp as well as the moonlight outside. When the robbers left, PW3 went out and screamed. Members of public and police officers from the nearby police station responded and came to the home. The body of PW3's husband was thereafter removed and taken by police to Matata hospital. Post mortem was later performed on the same by **Dr. Stephen Okelo** whose report was tendered in evidence by **Dr. Peter Ogolla** (PW7). After the post mortem, the body was released for burial.

According to PW4 he saw one tall person and a short stout person. He was convinced that he could properly identify the short one as he had a long head protruding towards the back and had no hair. When police arrived at the scene he informed them that he could identify the short person. This was the appellant. In cross-examination however, he stated that he was able to see appellant as he lay down in the main house. He stated that though he lay down on his belly he was himself not facing down though.

PW1, **Fredrick Odhiambo** was a taxi driver within Oyugis town. On 16th October, 2009 at 8.00p.m the appellant approached him at the stage and asked him to take him to Kakelo. He paid him kshs. 500/= and informed him that they were to pick another passenger at Kendu Bay junction. They picked the person and they all proceeded to Kakelo. He dropped them thereat and after giving them his mobile phone number to call him when they were done with their mission so that he could come for them, went back to Oyugis town. At 11.00p.m he was called and went and picked them. When he dropped them at Kakelo the person they had picked at Kendu Bay junction and who was not among those charged before court had a jacket. The appellant didn't have but on coming back for them he noted that all of them had jackets. On reaching Oyugis, the appellant and the other person asked him to take them to the appellant's home at Mithui and paid him a further kshs. 300/=. He dropped them at Ayoro as the road was muddy and went back to Oyugis. In the morning he learned that one, **Katieno** had been shot. Shortly thereafter the appellant came to see him and asked him to escort him to summit hotel within Oyugis town. On the way he asked him whether he knew what had taken place. He informed him that **Odhiambo** (not before court) who was with him at Kakelo had killed somebody. He asked him not to pass that information to anybody else. The witness was later arrested by the police and interrogated as to who was in charge of the motor vehicle on Friday and which people he had carried on that day. He stated that **Odhiambo,** had something protruding from his jacket when he was driving them back from Kakelo. He suspected the object to be a gun. He denied having carried the appellant's co-accused in his taxi nor did he see him at Kakelo. In cross-examination he stated that he dropped the appellant and one, **Odhiambo** at a feeder road heading to Kakelo, a kilometre away from the tarmac road.

PW9, **PC James Matere** acting on information intercepted the appellant at Ahero while heading to Kisumu. On searching him, he found kshs. 3000/= and a court bond bearing the names **James Odhiambo** showing that he had been charged with the offence of robbery with violence at Rongo Law

Courts. Following the arrest, PW5, **CIP Agnes Masibo** conducted a police identification parade involving the appellant and he was identified by PW4.

In his defence, the appellant gave a sworn statement of defence and called one witness. He testified that on 16th October, 2009, he in the company of a friend left home and went to see his cousin at Kakelo. They were dropped by a taxi at Kakelo junction at about 7.40p.m. He had gone to collect money being proceeds from the sale of his bull by his cousin. However, he found that he had not sold it. They stayed over, had supper and thereafter his cousin escorted them back to the main road to wait for a vehicle. The next day his cousin gave him kshs. 14,000/= being the proceeds for sale of the bull. He was thereafter arrested near Ahero with kshs. 13,150/=. He confirmed that a taxi driver, PW1 ferried him in his taxi on 16th October, 2009. He denied having robbed PW3 and killed her husband **Elija Ogweno**

DW1, **George Odhiambo Okello**, the appellant's cousin testified that on 16th October, 2009 the appellant and another person went to his home at 8.30p.m. He wanted the money from the sale of his bull. He had not sold the same. He then escorted them back to the main road at around 10.00p.m after supper. He sold the bull on 18th October, 2010 and handed over to the appellant the proceeds thereof.

The learned magistrate having carefully evaluated the evidence on record for both the prosecution and defence found the case against the appellant proved. Accordingly, he convicted the appellant on both counts of robbery with violence and sentenced him to the mandatory sentence of death. As for the appellant's co-accused, the learned magistrate found no sufficient evidence linking him to the offences. She therefore acquitted him of the offences under section 215 of the **Criminal Procedure Code**.

The appellant was aggrieved by the conviction and sentence. Through **Messrs Ko'winoh & Co. Advocates**, he lodged the instant appeal on the grounds that:

"1. The honourable trial magistrate erred in law in convicting the appellant while the circumstances obtaining at the time of the commission of the alleged offence were not conducive for a positive identification.

2. The trial magistrate erred in law in failing to find that the conduct of the identification parade was irregular and in contravention of the law and ought not to have been relied upon.

3. The trial magistrate erred in law in failing to believe the evidence of the defence.

4. The trial magistrate erred in law and fact in shifting the burden of proof to the defence.

5. The learned trial magistrate erred in law in convicting the appellant while the charges had not been proved beyond reasonable doubt.

6. The learned trial magistrate findings are against the weight of evidence on record…".

When the appeal came before us for plenary hearing on 26th July, 2011, **Mr. Owino** learned counsel for the appellant, submitted that the circumstances obtaining at the time of commission of the offence were not conducive for a positive identification, that the circumstantial evidence which the court relied on in convicting the appellant was extremely weak because PW1's evidence that he ferried the appellant with a colleague to a place called Kakelo junction was denied by the appellant in his defence and finally, the identification parade was conducted in contravention of police standing orders.

In response, **Mr. Mutuku,** learned senior principal state counsel submitted in opposing the appeal that the circumstances obtaining at the time of the commission of the offence were favourable for a positive identification of the appellant. PW4 also described the appellant's appearance and picked him out of a police identification parade. There was nothing wrong with the identification parade as conducted. In any event, the appellant was satisfied with the manner the same was conducted. Finally, he submitted that the conduct of the appellant the following day in approaching PW1 and warning him not to pass on the information that he had given him, that it was his colleague who shot and killed the deceased, cannot be that of an innocent person.

As a first appellate court, it is our duty to carefully consider and evaluate afresh the evidence before the trial court so as to determine whether the judgment of the trial court should stand or not.

The conviction of the appellant turned on the evidence of identification by PW4 and the subsequent conduct of the appellant. With regard to identification, it is common ground that the offence was committed at night, therefore calling into question how of all the witnesses available, only PW4 was able to identify the appellant. The appellant has joined issue with the alleged visual identification. Of course such evidence can bring about miscarriage of justice unless it is cautiously and carefully dealt with. As stated by the Court of Appeal in the case of **Paul Etole & Anor –vs- Republic NBI Criminal Appeal No. 24 of 2000, *"…But such miscarriages of justice occurring can be reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification of each witness came to be made. Finally, it must remind itself of any specific weaknesses which had appeared in the evidence…".*** Again we must appreciate that visual identification of the appellant at the scene was that of a single witness. It is therefore a requirement of law that in such circumstances the trial magistrate should direct his mind to the dangers attendant upon convicting on such evidence of a single identifying witness, in difficult circumstances. See **Abdala Wendo –vs- Republic (1953) EACA 166**.

Let us now apply the foregoing principles to the circumstances of this case. There were allegedly 2 eye witnesses to the offence, PW3 and PW4. PW3 was the wife to the deceased whereas PW4 was a 13 year old child of the deceased. PW3's evidence was that the offence was committed at 8.00p.m. The only source of light was a hurricane lamp. She however conceded that she was unable to identify any of the robbers. Nonetheless she saw the thugs shoot her husband. She even led the thugs to her bedroom where they took her mobile phone as well as some money. She saw them leave the house and thereafter she raised the alarm. Despite these long moments and or association with the thugs, she was categorical that she was not able to identify any of them. How then could 13 year old boy (PW4) have been able to identify the appellant in those circumstances, and who was a total stranger to him. Again PW4 did not even testify as to how he was able to identify the appellant. In his evidence, he merely mentioned moonlight and the hurricane lamp being on. However, he did not say that this was the source of light that enabled him to see the appellant. Again even if those were the sources of light available, there was no inquiry by the trial court as to the sort of light, its brightness or lack of it, its position in relation to the appellant and for how long PW4 kept the appellant under observation as to be able to visually identify him. As was held in the case **of Maitanyi –vs- Republic (1986) KLR** in the absence of such inquiry, evidence of visual identification may not be held to be free from error. PW4 too confirmed that when he went to call the deceased on the instructions of the attackers, he was petrified, terrified and in a state of shock. It was his testimony that immediately the robbers struck, he ran back into the main house as he led the attackers and fell down in the house. He lay down on his belly and remained so all the time that the robbers were in the house. Having been so shell shocked, remaining on his belly throughout the episode and considering his age, we entertain serious doubts as to whether he had the presence of mind to be able to identify any of the attackers. Yet this is the witness the learned magistrate believed on the issue of identification.

Apparently, this same witness described the appellant's head. That he had a long sharp head protruding towards the back with no hair. The court noted though that the description fitted the appellant's head. However, the witness never gave this unique description of the appellant's head to the police and prior to the identification parade. It was not at all captured in his first report to the police. Indeed even the

witness in his own evidence concedes that he never described to the police the head of the appellant. To our mind therefore the description of the appellant's head was given in court when the appellant was in the dock and after the witness had observed it. It was therefore dock identification which is of little evidential value.

From the evidence on record, the assailants never entered the house, they merely stood at the door and called for the deceased. When the deceased approached them whilst still at the door entrance, they first lied to him that they wanted to ask him about a cow. They then shifted gear somewhat and told him point blank that they had come to kill him. Now if the assailant stood at the door probably with their faces facing inside the house, how could PW4 have seen or known the way the appellant's head was shaped at the back? Again how could he have been able to identify the appellant with the assistance of the moonlight outside whilst in the house and lying on his belly?

On the whole we do not find the evidence of PW4 on identification to have been safe to be relied upon. First and foremost, being evidence of a single identifying witness, the trial court did not warn itself of the inherent dangers of convicting the appellant on such evidence. This is a requirement of law. We have no doubt at all in our minds that the conditions obtaining at the scene of crime were such that they could not have made for positive visual identification of the appellant by PW4. His own evidence is a clear testimony to this fact. He is 13 years old. He was immediately confronted by thugs as he entered the kitchen. He was then forced to lead them to the main house and called out his father. He was terrified, ran into the house called out the father and fell on his belly and remained that way throughout the ordeal. Immediately thereafter his father was shot dead. No doubt, PW4 was in shock and fear and could easily have been mistaken in his identification of the appellant. How could he have possibly seen the attackers who stood at the door? Then there was the aspect of the learned magistrate failing to test the evidence of identification with great care especially when it was known that the conditions favouring a correct identification were difficult. It has been constantly stated that most honest witness can be mistaken, when it comes to identification. In all the circumstances, we are unable to say that the conviction of the appellant can be supported as being reasonably free from possibility of error.

The circumstantial evidence which the court again relied on in convicting the appellant was to our mind extremely tenious. The evidence was that PW1 ferried the appellant with a colleague to a place called Kakelo junction. He claimed to have ferried them at about 8.00p.m. No evidence was led as to how long it took PW1 to drop the appellant at the Kakelo junction. This was important because according toPW3 and 4, the offence was committed at 8.00p.m. The prosecution should also have endeavoured to demonstrate the distance between where the appellant was dropped and the scene of crime.

Our reading of the evidence also leads us to the irresistible conclusion that infact PW1 could have been an accomplice in the crime if indeed it was committed. He had initially been arrested for the offence. He was subsequently turned into a state witness. His evidence therefore has to be taken with a pinch of salt. He will do or say anything to exonerate himself. We therefore doubt very much the evidence of PW1 to the effect that the following day the appellant approached him and told him that his companion had killed the deceased and that he should not tell anybody. We doubt very much that the appellant would have given such unsolicited but incriminating information to the said witness.

In all these circumstances, we have no doubt at all that the appellant's conviction was both unsafe and unsatisfactory. We therefore allow the appeal, quash the conviction, set aside the sentence of death and order that he be set at liberty forthwith unless otherwise lawfully held.

Judgment dated, signed and delivered at Kisii this 23rd day of September, 2011.

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