IN THE HIGH COURT OF KENYA

**AT KISUMU**

**Criminal Appeal 107 of 2008**

**DAVID OCHIENG OBACHA …….....……. APPELLANT**

**VERSUS**

**REPUBLIC…..……..RESPONDENT**

***[From original conviction and sentence from SRM'S Court***

***at Maseno Criminal Case No. 1045 of 2007]***

Coram

Karanja, Aroni –JJ

Miss Oundo for state

Court clerk Laban/ George

Appellants in person

JUDGMENT

This appeal arises from the decision of the Senior Resident Magistrate at Maseno in criminal case number 1045 of 2007 in which the appellant, David Ochieng Obacha, was tried and sentenced to death for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars of the charge were that on the nights of 17th / 12th September 2007 at Ebusiralo Sub Location, West Bunyore Vihiga District Western Province, jointly with others not before court while armed with dangerous weapons namely pangas and rungus robbed RO of Kshs. 900/= a radio make Osaka valued at Kshs. 11,100/=, a video deck make LG valued at Kshs. 5,000/=, a Motorola cell phone C 200 valued at Kshs. 7,000/=, a Motorola cell phone valued at Kshs. 3,400/= all valued at Kshs. 16,300/= and at or immediately before or immediately after the time of such robbery used actual violence to the said RO.

Being dissatisfied with the decision of the Learned Senior Resident Magistrate, the appellant preferred this appeal on the basis of the grounds contained in the petition of appeal filed herein on 31st July 2008.

Basically, the grounds are a complaint on the infringement of the appellant's constitutional rights under Section 72 (3) (b) of the Constitution and a complaint that the prosecution evidence was inadequate in proving the offence against the appellant.

The appellant appeared in person at the hearing of the appeal and presented written submissions to augment his grounds of appeal.

The respondent opposed the appeal through the learned Senior State Counsel, Miss Oundo.

Our obligation as the first appellate court is to reconsider the evidence and make our own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See, Okeno =vs= Rep[1972] E A 32)

Briefly, the case for the prosecution was that on the material night at about 1:00 a.m. the complainant, RO (PW1) was asleep in her house when she was awoken by bangs and hard knocks on the walls of the house. She was at the time with her house maid MA ( PW2) and children including PA ( PW3). She went to the sitting room and screamed but the intruders remained unperturbed even as she activated the house alarm-system. She proceeded to the maid's bedroom where she hid with the children.

The attackers managed to break and enter the house. They also broke and entered the maid's bedroom. They had a torch flashing inside the room.

The complainant said that she noticed a tall man and a short man. They hit her with a panga (machete) and demanded money. They were shown a drawer which they broke and removed Kshs. 5,000/=. They demanded more and were given Kshs. 900/=. They left the scene after having cut the complainant's left palm and having stolen a radio, a video-deck, clothes and cell phones.
The complainant was taken to K Mission Hospital for treatment and on the following day reported the incident to the police at L Police Station.

The complainant said that she was able to recognize the short man as a person previously known to her. She said that the person was a neighbour popularly known as "Davie". She identified him as the appellant herein who was the first accused in the lower court.
The complainant also said that the appellant was very close to her and was the person slapping her using a panga as he and his accomplice flashed torches inside the house. She said that she did not know the accomplice who was the tall man.
The complainant further said that she also recognized the appellant's voice and that she saw him well even though he had partly covered his face with a wrap. She said that he was arrested after being pointed out by her brother – in – law called WO
The house maid (PW2) confirmed more or less what was stated by the complainant with regard to the commission of the offence. She added that after the complainant was taken to the hospital, the attackers returned to the scene and ordered her out of the house. They attempted to rape her but she managed to run away. She said that she recognized the would be rapist as "Davie" a person known to her. She also said that she recognized him when the attackers first entered her room. She identified him as the appellant and said that he had shone a torch on her face. She said that he had a cap which he removed while outside the house.
The complainant's daughter (PW3) confirmed the occurrence of the offence and the fact that the intruders returned to the scene after the complainant had been taken to hospital.
She (PW3) said that when the intruders returned to the scene a second time they dragged her outside the house and also attempted to rape her. She said that she recognized one of the attackers as "Davie" who was a neighbour. She identified him as the appellant and said that she recognized him outside the house with the help of moonlight. She said that she also recognized his voice.

The clinical officer Fred Wekesa (PW5) examined the complainant after the attack and confirmed that she had been injured in the process.
P. C. Andrew Naibei (PW6) of L Police Station received the report of the robbery. He said that the complainant gave the name of a suspect whom she recognized, he said that the name given was David Onyango who was the appellant and who was arrested on 15th September 2007.
Cpl. Aneko Tekei ( PW4) of L Police Station acted on a tip off from a person called David Obacha and arrested the appellant on the 15th September 2007 at about 3:30 p.m. He
(PW4) said that the appellant led him to arrest one of his
(appellant's ) accomplices who was the second accused.
The Learned trial magistrate considered the foregoing prosecution evidence and ruled that the appellant had a case to answer. However, his alleged accomplice, the second accused was acquitted in accordance to Section 210 of the Criminal Procedure Code for the reason that the evidence against him was insufficient for him to be placed on his defence.
In his defence, the appellant denied the offence and said that he was arrested on the 15th September 2007 while at home. He was taken to the police station and locked in the cells where he met the second accused. He was not told the reason for his arrest but was taken to court seven (7) days later and charged with a strange offence.

In his final judgment, the learned trial magistrate found that the appellant was positively identified by the complainant (PW1) and her house maid (PW2) as one of those that committed the robbery. In so doing, the learned trial magistrate remarked:-
"The complainant and PW2 had a better opportunity to see him well. The complainant went with him from PW2's room to her room where the drawer was broken and cash taken. PW2 also had another opportunity to see the 1st accused when he took him outside on the second attack. I therefore accept the evidence of the complainant and PW2 that they positively recognized the 1st accused as one of the robbers and accordingly find so".
On our part we are satisfied that the evidence by the prosecution sufficiently established the necessary ingredients of the offence of robbery with violence under Section 296 (2) of the Penal Code.
Indeed, there was no dispute that the offence was committed against the complainant on that material night.
The identification of the attackers was the crucial point for determination.
The learned State Counsel submitted herein that the appellant was properly identified by recognition as he was a person previously known and that his name was given to PW6.
The learned State counsel further submitted that the torch flashes made it possible for the complainant to identify the appellant and the fact

that the appellant fled from the area was conduct unbecoming of an innocent man.

In his written submissions, the appellant submits that there was no indication from the complainant of the intensity of the torch flash, the duration of the incident and the distance between herself and the intruders as to enable her identify the robbers.

Further, the appellant submitted that there was indication from the complainant that he was wearing a cap.

As to the evidence of PW2, the appellant submitted that the witness indicated that she only made an identification of him in the second attack and not the first attack.

The appellant also submitted that the witness (PW2) contradicted the complainant with regard to the cap allegedly worn by himself.

As to the evidence of PW3, the appellant submitted that the witness talked of moonlight but did not state its intensity and the distance between herself and the robbers.

In sum, the appellant submitted that the prosecution evidence of identification was not proper and reliable.

We have carefully considered the evidence of identifications in the light of the rivalry arguments in respect thereof and must state that we are not satisfied that the said evidence was sufficient and watertight enough as to rule out the possibility of an error or mistaken identification.

We say so because the offence occurred in difficult circumstances. It was during the hours of darkness and the conditions favourable for positive identification were almost none existent.

The complainant and indeed the rest of the witness (i.e. PW2 and PW3) implied that the house was in darkness at the time of the robbery and that the only source of light was the torch or torches in the possession of the attackers. It was implied that flashes from the torches made it possible for the complainant and the housemaid (PW2) to identify the appellant by recognition.

However, there was failure by both the complainant and PW2 to indicate with certainty the brightness or intensity of the torch flashes and whether this was enough to enable positive identification and more so when it was indicated that the appellant had his face partly concealed by a cap and / or wrap over his head.

Both the complainant and the house maid ( PW2) did not state with certainty where the appellant was when they identified him, how far he was, and for how long they had him under observation.

In cases of identification among the important factors to consider is the intensity of the light at the scene ( See, R. =vs= Turnbull [1976] ALL ER 549).

Even in cases of identification by recognition there must be adequate and credible evidence showing reliable and favourable conditions for identification beside adequate opportunity.

As a whole, we do not think that the learned trial magistrate treated with great care the prosecution evidence of identification.

The appellant denied the offence. The burden did not fall on him to prove his innocence. The burden fell on the prosecution to prove beyond any reasonable doubt that he was among the group of people who attacked and robbed the complainant. This burden was in our view not discharged.

Other than the foregoing, it was not proved that those who returned to the scene a second time and attempted to rape the house maid (PW2) and the complainant's daughter (PW3) were the same people who committed the robbery.

It was highly unlikely that robbers would accomplish their mission and return to the scene only to rape the victims. It is often said that "lightening does not strike twice at the same place".

It would be instructive to note that there was material contradiction between the evidence of the complainant and that of her house maid (PW2) as to whether the appellant had a cap or wrap over his head. Also, the house maid said that the torches were flashed on her face. How then could she see and identify a person when she was "blinded"?

All the foregoing factors clearly show that the prosecution evidence of identification against the appellant was not reliable and free from the possibility of error or mistaken identification.

Consequently, we hold that the appellant was not positively identified as one of those who committed the offence.

Therefore, this appeal is allowed, the conviction is quashed and the sentence set aside.

The appellant is set at liberty unless otherwise lawfully held.

Ordered accordingly

Dated, signed and delivered at Kisumu this 16th day of February 2010