REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Criminal Appeal 84 of 2009

ALFRED ONYANGO AKOKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in the SRM's court at Oyugis

dated on 8th April, 2009, R.Ngetich, Ag.PM.)

JUDGEMENT.

The appellant, Alfred Onyango Akoko, was charged before the Senior Resident Magistrate's court at Oyugis with the offence of Robbery with violence contrary to section 296(2) of the Penal Code. Particulars were that on the night of 17th and 18th days of November, 2006 at Chabera trading centre in Rachuonyo district of Nyanza Province, he jointly with others not before court while armed with dangerous weapons namely; one home made gun, iron bars and rungus robbed Steven Odhiambo items listed in the charge sheet all valued at kshs.40,300/- and at or immediately after the said robbery used or threatened to use personal violence to the said Steven Odhiambo Omollo. The appellant also faced two other counts to wit; Being in possession of a firearm without a certificate contrary to section 4(2) of the Firearms Act. The particulars were that on the 21st day of November, 2006 at Migori township in Migori district of the Nyanza province he was found in possession of one home made gun without a firearm certificate. In count III the appellant was charged with the offence of being in possession of forged bank note contrary to section 359 of the penal code. Particulars were that on the 17th day of November 2006 at Chabera trading centre in Rachuonyo district of Nyanza Province without lawful authority or excuse he had in his possession one forged currency note of Kshs.1000/- Serial Number AW62284902 knowing it to be forged.

To both counts the appellant entered a plea of not guilty and he was accordingly tried in earnest.

The prosecution case was that on 19th November, 2007 PW2 who operated a shop at Chabera shopping centre opened the same in the morning only to find that the door to the said shop had been broken. into. On checking further she found that some items she had brought from Nairobi for selling in the shop were missing. She reported the matter at Othoro Police Post. Subsequent thereto the said items were recovered in Migori and she positively identified them. PW3 the husband of PW2 in his testimony confirmed that PW1 had brought the items in the shop in his company on 16th November, 2007. He testified further that one of his employees in the shop (PW4) was arrested following allegations that he was found in possession of a fake note on 18th November, 2007. It was his evidence that his said employee informed him that the person who had given him the fake note later came back to the shop in the company of others whilst armed with a gun and stole the items after threatening to kill him. The same employee then led them to PW1's house where part of the consignment consisting of 2 bikers were recovered. PW1 in turn volunteered to show them the person who had sold him the bikers. He led them to the appellant's house where a bag which PW2 and PW3 had used to ferry the items to Chabera Shopping Centre was recovered. They checked inside the bag and found a home made gun and some items which were positively identified by PW3. On his part PW4 testified that on 7th November, 2007 at around 6.30P.M. a person went to the hotel where he worked, ordered for tea and paid for the same using a note of 1000/- which turned out to be fake. On 18th November, 2006 at 1.00a.m. he was asleep when he heard somebody calling him to open the hotel door. He testified that he identified that person's voice and on opening he also looked at his face and identified him as the appellant. Other people followed him into the hotel. The appellant then asked him for the key to the shop but he told him that he did not have the same. Suddenly two of his accomplice who were standing at the door held him with a gun. Thereafter they opened the shop and carted away the items in two big bags and boarded a vehicle. PW5 a police officer testified that he and one PC. Rono, complainant and pw4 went to Migori on 21st November, 2006 in the company of PW4 who was to lead them to the appellant. As they were headed for the appellant's residence, PW4 saw the appellant along the road and pointed him out to them. They then arrested him and asked himto take them to his house. He did so but the house was found to be empty. PW1 who had purchased 2 bikers from the appellant then led police to another house purporting to be the appellant's where the recovery of assorted items was made which items were positively identified by the complainant. They also recovered a home made gun in a wooden box. PW7, an officer from Central Bank of Kenya, Kisumu branch, testified that on 2nd November, 2007 he received a 1000/- note serial number AW62284907 for scanning. Four features on the note were to be scanned. These were:

1. Reflection of a figure of the denomination

2. Vertical serial numbers which are supposed to turn and glitter.

3. Lion's mark – lion should be seen looking at you

4. Security line should show one straight line when placed against light.

He testified further that the Kshs.1000/- note scanned did not have those four features. He confirmed that the note was therefore a counterfeit note.

PW8, a Firearm's Examiner, testified that he received one home made gun for examination. On examination he found that it was of undeterminable caliber. He stated that it consisted of a round metal pipe, had a striker, cocking piece, a cocking handle, loading and cocking provisions with complete trigger mechanism and a pistol grip. He went on to state that the home made gun did not have a chamber of any known conventional ammunition. He however formed the opinion that it was a firearm in terms of the Firearms Act.

Put on his defence, the appellant chose to adduce sworn evidence. He denied having committed the offence. He said that nothing was recovered from him. He further stated that the items produced in court were infact recovered from PW1's house.

The learned magistrate having carefully pondered over the evidence by both the prosecution and defence was convinced that the prosecution had made out a case against the appellant. She therefore found the appellant guilty in respect of count one and two, convicted him and sentenced him to death as well as five years imprisonment. The learned magistrate correctly ordered that the prison sentence in respect of count two be held in abeyance. She however acquitted the appellant in respect of count three.

The appellant was aggrieved by the conviction and sentence. Hence he preferred this appeal. In his petition of appeal he faulted his conviction and sentence by the trial magistrate on grounds that the case was not proved against him to the required standard, that the learned magistrate failed to appreciate that the prosecution case was full of contradictions, vital witnesses were not called to testify, his identification was not reliable nor positive, ingredients of the offence were not proved and finally that his defence was rejected for no apparent or plausible reasons.

When the appeal came up for hearing before us on 17th March, 2010, the appellant chose to canvass the appeal by way of written submissions. We have carefully read and considered the same. On its part, the state through Mr. Kemo, learned Senior Principal State counsel conceded the appeal on the grounds that the prosecution case was not proved, the identification of the appellant was doubtful and therefore unsafe to found a conviction, the charge sheet was defective as the person robbed was not the owner of the property stolen and finally that the evidence of PW4 should not have been relied on as it was one of an accomplice.

On our part, we have endeavored to reconsider the evidence, re-evaluate it and come to our own conclusions since

this is a first appeal-see Okeno V Republic[1972] E.A.32. It matters not that the state conceded the appeal.

Having considered and evaluated the evidence fresh, we have no hestitation whatsoever in agreeing with both the appellant and the state counsel that the case against the appellant was not proved beyond reasonable doubt by the prosecution as required by law. The prosecution based the appellant's alleged involvement in crime on the evidence tendered by PW1, PW2, PW3, PW4, PW5 and PW8. The court held that the said evidence was corroborative and consistent. However, we are of a different opinion. We find the evidence to have been insufficient, evasive and contradictory to warrant a conviction. The prosecution ought to have tendered evidence to prove that the house in which the items and home made gun were allegedly recovered belonged to the appellant. Further, the evidence of recovery of the home made gun is contradictory in the sense that whereas PW3 claimed that it was recovered from the same bag as the other items, PW4 and PW8 claimed that it was infact recovered from a wooden box. Further, the evidence on record suggests that when arrested and asked to take the police to his house, the appellant did so. However, when the house was searched nothing was recovered therein. It was at this juncture that PW1 allegedly volunteered to show the police another house which he claimed belonged to the appellant. It is in this house that the items in the charge sheet as well as the home made gun were recovered. There is no cogent evidence that this house ever belonged to the appellant. There was allegation that police got the keys to the said house from the appellant.

On the day of the incident it is doubtful and unbelievable that PW4 would have been a victim of robbery when he was infact already in the custody of Administration Police for being in possession of forged bank note. It is even doubtful that he identified the appellant visually and by voice. For if he truly did so, he could not have failed to mention either the appellant's names or appearance to the police in his first report. On the same issue of identification and or recognition of the appellant, the only available evidence was that of a single witness, PW4. The Court of Appeal as well was as this court has dealt with the issue of identification/recognition in many cases, See for example, Abdalla bin Wendo and another V Republic (1953), 20 EACA.166, Roria V. Republic [1967] EA 583, Francis Kariuki Njiru & Others V Republic, Criminal appeal No. 6 of 2001 (UR) Karanja & Another V Republic[2000] 2KLR 140 and Maitanyi V Republic [1986]198. In the case of Abdalla bin wendo(supra), the Court of Appeal delivered itself thus:-

> "Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.
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> In such circumstance what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonable conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".

In this case and as we have already stated, the crime was allegedly committed at night and therefore in darkness. That calls into question the circumstances under which the complainant identified the appellant. He mentions availability of light. However, the intensity of the light, its source in relation to the appellant and the time taken by this witness to observe the appellant so as to be able to identify him subsequently is not indicated. In the absence of such details, it

cannot be said that the identification of the appellant was safe and free from possibility of mistake or error. See Maitanyi V Republic(supra).

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 person'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 V Republic,[1985] KLR1. In this case, it is clear that the appellant was a stranger to PW4. He was thus not familiar with his voice. Secondly, there is no evidence as to what the appellant uttered during the encounter as would have enabled this witness to recognize the appellant's voice. After all the evidence on record suggests that the robbery, if at all, was not committed by the appellant alone. There were other people involved who were also talking to the complainant. Is it possible that the complainant could have mistaken these voices for the appellant's? That possibility cannot wholly be ruled out. That being our view of the matter, it was not safe to hold as the learned magistrate did, that PW4's identification of the appellant's voice was free from possibility of error.

In any event, PW4 was a suspect in the crime and was indeed arrested for the same as well as being in possession of a fake bank note. He led the police to the house where the items were allegedly recovered. He must have known more about the crime than he disclosed to court in evidence. His evidence was thus of an accomplice which the learned magistrate ought to have dealt with caution and greater circumspection. She did not do so and instead relied on it heavily to find the conviction.

How about the charge sheet in respect of the capital offence? It is clearly defective. The particulars state that the items, the subject of the robbery belonged to Steve Odhiambo Omollo. Yet the evidence on record shows that infact the items belonged to Joyce Akinyi Odero (PW2) and Jekonia Odero Akumu(PW3) who jointly owned and ran the shop at Chabera shopping centre from whence the items were allegedly stolen. From the foregoing it is quite clear that the person allegedly robbed was PW4 who was not the owner of the property allegedly stolen. The evidence tendered was thus at variance with the charge sheet.

In all the circumstances we find no basis in upholding the appellant's conviction and we agree with the learned Senior Principal State Counsel, Mr. Kemo, who readily conceded the appeal. We would then allow the appeal, quash the conviction and set aside the sentences of death and imprisonment imposed on the appellant. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

DATED,SIGNED and DELIVERED at KISII this 23rd day of April, 2010.

D. MUSINGA **M.A. MAKHANDIA.**

JUDGE. **JUDGE.**