REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU
Criminal Appeal 168 & 169
of 2008

DICKSON MORRIS ODIERO …….. 1st APPELLANT

GEORGE ODUOR OPANDE ……2nd APPELLANT
VERSUS

REPUBLIC …….. RESPONDENT

[From original conviction and sentence in criminal case number 269 of 2007 of the Chief Magistrate's court at Kisumu].

Coram

Karanja, Aroni – JJ

Miss. Oundo for state

Court clerk Laban/George

Appellants in person

J U D G M E N T

The appellants, **Dickson Morris Odiero** and **George Oduor Opande**, appeared before the Chief Magistrate at Kisumu charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and in the alternative handling stolen property contrary to Section 322 (2) of the Penal Code.

In the main count, the particulars were that on the 13th April 2007 at Nyawita Estate Kisumu District jointly with others not before court being armed with dangerous weapon namely pistol robbed **Stephen Okwero Adur** of his DVD Machine make Aucma, a video deck make L. G. serial number 0067, a mobile phone make Nokia 1600 and an electric air fan all valued at Kshs. 18,700/= and immediately before the time of such robbery threatened to use actual violence against the said Stephen Okwero Adur.

On pleading not guilty to the charges, the appellants were tried, convicted and sentenced to death on the main count by the learned Principal Magistrate. However, being dissatisfied with the conviction and sentence they filed separate appeals which were consolidated and heard together.

The grounds of appeal were more or less identical and were aimed at the prosecution's evidence of identification and the reliance by the trial magistrate on the doctrine of recent possession without sufficient evidence.

The grounds are also aimed at the procedural aspect of the trial on the basis of Section 200 of the Criminal Procedure Code and Section 77 (2) (b) (f) of the Constitution of Kenya.

Both appellants appeared in person at the hearing of the appeals and relied on their written submissions.

The learned Principal State Counsel, **Miss. Oundo**, represented the respondent and opposed the appeals by submitting that the first appellant was identified by the complainant at the scene of the offence which was well lighted by electric energy and that both appellants were found in possession of the complainant's video-deck a day after its theft and further that both failed to give a satisfactory explanation of the

possession thereof.

The learned State Counsel contended that the two appellants were properly convicted on the basis of the doctrine of recent possession.

In response to the foregoing submissions, the first appellant (Dickson) contended that the suspects found in possession of the video-deck were arrested and released by the police and that the alleged identification parade was not conducted as the parade forms were never produced in court.

This is the first appellate court and our duty is to revisit the evidence afresh and draw our own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

However, for reasons which may become apparent later, we do not think it would be prudent for us to analyse the evidence afresh and draw our conclusions at this juncture. This is not to say that we have not considered the evidence, which we think provides good recipe for testing whether or not the prosecution attained the standard of proof required in criminal cases but it is necessary that we refrain from drawing our own conclusions at this stage considering that we have resolved to give priority to the ground of appeal relating to Section 200 of the Criminal Procedure Code. Our decision on that ground will invariably and ultimately determine the course of the appeals even without taking into consideration the rest of the grounds. Both appellants contended that Section 200 of the Criminal Procedure Code was not complied with by the trial magistrate. Whether this was so, may be deciphered from the record of the lower court which indicates as follows;

The trial commenced and proceeded before the learned Principal Magistrate (as he was then) **Mr. El-Kindy** upto the 11th June 2008 when he made a ruling that the appellants and a co-accused had a case to answer. Accordingly, the appellants were placed on their defence but due to an application for adjournment by the prosecution, the defence case was put off to the 1st July 2008 on which date the matter was placed before the learned Resident Magistrate **R. B. N. Maloba** who noted that the learned trial Principal Magistrate was under interdiction. Thereafter, several mention dates were taken until the matter was placed before the learned Chief Magistrate **Mr. B. Olao** on 8th September 2008 for directions.

The learned Chief Magistrate directed that the matter be heard on the 23rd October 2008 by a magistrate without the necessary jurisdiction. However, the learned Chief Magistrate realized the error and on 23rd October 2008 directed that the matter proceeds before the learned Principal Magistrate **A. Onginjo** in accordance with the provisions of Section 200 of the Criminal Procedure Code.

On 3rd November 2008 the case was placed for further hearing before the aforementioned Principal Magistrate who was taking over from the principal magistrate Mr. El-Kindy.

The record shows that on that date, Section 200 of the Criminal Procedure was complied with but it does not show whether or not the appellants were made to clearly understand their right under the provision.

There is no indication that the appellants readily agreed to proceed with the matter from where it stopped without re-calling any of the witnesses. The record goes as follows:-

> **"Court – Section 200 Criminal Procedure Code complied with Accused 1, 2, 3, - present in court.**
>
> **Matter to proceed from where it reached.**
>
> **Court::- Section 211 Criminal Procedure Code explained to accused persons and they reply……".**

This clearly indicates that Section 200 Criminal Procedure Code was not explained to the appellants by the incoming trial magistrate so that they could understand it and give their respective replies.

In effect, there was no proper compliance with Section 200 Criminal Procedure Code by the learned incoming trial magistrate.

Section 200 of the Criminal Procedure Code is for the protection of the rights of an accused person.

Sub-Section (3) of the provision specifically binds an incoming magistrate or succeeding magistrate to explain to the accused his rights. This is a mandatory provision which must be adhered to particularly when the charge facing the accused is extremely serious such as robbery with violence which carries a death sentence. It provides:-

> **"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right" (emphasis added).**

The duty to see that the right of an accused person is protected is placed on the trial magistrate and the burden to inform an accused of the right to have previous witnesses re-called and re-heard is placed on the trial magistrate in mandatory terms.

In the case of **Ndegwa =vs= Republic [1985] KLR 534**, the Court of Appeal considered the provisions of Section 200 Criminal Procedure Code and held "inter-alia" that:-

> **"No rule of natural justice, statutory protection, evidence or of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal**

administration".

Herein, there was clear failure by the succeeding magistrate to properly comply with the provisions of Section 200 Criminal Procedure Code. The omission was fatal and on that ground alone we must and hereby do allow the appeals. This now explains why we deemed it necessary to prioritize the ground.

It does not end there, considering that the offence occurred here in Kisumu in the year 2007 and the trial ended in the year 2008 and also that the possibility of the available evidence sustaining a conviction may not be remote, we think that a re-trial of the case is feasible. Accordingly, we hereby quash the appellants' conviction and set aside the sentence and order that the appellants shall be re-tried before a different magistrate of competent jurisdiction. Pending the re-trial, the appellants shall continue to be detained in prison custody.

Those are our orders.

Dated, signed and delivered at Kisumu this 13h day of July 2010

J. R. KARANJA
JUDGE

ALI-ARONI
JUDGE

JRK/aao