REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL 118 OF 2008

JOHN OMONDI OKOTH…. ……..…….1ST APPELLANT

PAUL ODUOR OTIENO ALIAS

ODUOR SENZI……...…2ND APPELLANT

VERSUS

REPUBLIC ……..……. RESPONDENT

[Appeal from the Conviction and Sentence in Criminal Case of the S.R.M'S Court at Ukwala dated: 16.9.2008 Mr. Mutai Esq. – S.R.M.

S.R.M.'S Cr. Case No. 51 OF 2008]

Coram:

J.W. Mwera - J.

J.R. Karanja - J.

M/S Oundo- Senior State Counsel for the State.

Appellant present in person.

Court Clerk: George/Laban:

J U D G M E N T

The two appeals were consolidated and heard together. They arise from the decision of the learned Senior Resident Magistrate at Ukwala whereupon the appellants **John Omondi Okoth and Paul Oduor Otieno** (herein appellants one and two respectively) were convicted 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 30th December 2007 at Ugunja township Siaya District Nyanza province, jointly with others not before court while armed with dangerous weapons namely guns, robbed Lukas Omondi Rakama of Kshs. 12,000/= cash and a mobile phone make Nokia 2600 S/No. 355669008223938 valued at Kshs. 8,600/= and at or immediately before or after the time of such robbery, threatened to use actual violence to the said Lukas Omondi Rakama.

Being dissatisfied with the conviction and sentence, the appellants filed the appeals on the basis of the grounds contained in their respective petitions of appeal.

The first appellant's petition of appeal was filed on 19th September 2008 and contains nine grounds which were argued at the hearing by learned counsel, Mr. Onsongo.

The second appellant's petition of appeal was filed on the 26th September 2008 and contains eight grounds of appeal which were personally argued by the second appellant.

The respondent opposed the appeals through the learned Senior State Counsel, M/S Oundo.

Having heard both arguments by the appellants and the respondent, we are obliged to re-examine and re-evaluate the evidence adduced in the trial court so as to arrive at our own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses **(see Okeno –VS- Republic [1972] EA 32 and Achira –VS- Republic [2003] KLR 707).**

The prosecution's case was made of the facts as follows:-

On the 30th December 2007 at about 7.45 p.m, the complainant **Lukas Omondi Rakama (PW 1),** a businessman at Ugunja was heading home from his business premises and on reaching Divan bar a torch was shone at him. He saw two people with guns in the company of a woman. They were 15 meters away from him. Security lights were nearby about 10 meters away.

He could identify the group of people with the help of torches in their possession. He thought they were policemen. The lady with them told him not to run towards them as there was a ditch. The group approached him and fired a gunshot in the air. He was slapped and ordered to remove all he had. He removed a mobile phone Nokia 2600 and money Kshs. 12,000/= and handed them over to the first accused (second appellant) whom he saw. He also saw the second accused (first appellant). The lady with them told him to go and tell her mother that she had been held. He knew her mother who operated a shop next to his business premises. At about 8.30 p.m he heard gunshot near an area known as Savanna and on the following morning he found the girl/lady who had been held. She told him that she did not know where these people had come from. He did not report the matter due to the post election violence. He was later informed by a friend that a phone had been recovered. He went to Siaya police station on the 19th February 2008 where he saw and identified his stolen phone (PEX 1).

Its battery had his signature and initials i.e. **LR**. He produced the necessary purchase receipt. He was called to the police station on 21st February 2008 where he identified the first and second appellants on identification parades. He had previously not known them.

Raphael Odhiambo Ochieng (PW2) is a mason at Ugunja and was at his place of work on the 17th January 2008 when **Omondi Ameyo** whom he identified as the second accused (first appellant) arrived there with three mobile phones one of which was a Nokia 2600. He (PW 2) requested that one of the phones be given to him and while he was examining the phones a person called Acra Odhiambo who was normally involved in community policing appeared.

The first appellant on seeing Acra Odhiambo boarded a motor cycle and sped off. He (PW 2) was left with one of the phones and together with Acra examined it closely and tested whether it worked.

After enquiry as to any person who may have lost a phone, they received a call from a claimant and

advised him to report to the police on the 19th February 2008.

On 19th February 2008 **Raphael (PW 2)** took the phone to the police station and found the claimant who managed to identify it by the inscription **LR** on the phone battery and a receipt containing its serial number.

He (PW 2) was then asked to record a statement. He had previously known the first appellant and both hail from the same village. He bore no grudges against the first appellant.

Ainea Odhiambo Onyango (PW3) is the one referred to as Acra Odhiambo by Raphael (PW 2). He was at a market on the 17th January 2008 at around 4.30 p.m when he saw Omondi Amayo arrive on a motor cycle and converse with Raphael. He did not hear the conversation. They were 10 meters away from him. He saw Omondi carrying three mobile phones and leaving one with Raphael. Later, Raphael brought to him a Nokia mobile phone which Omondi wanted to sell. He advised Raphael not to buy the phone as it may not be working. They tested it with his sim card and it worked. They used it to call a person called Isaack Lwaya whose name was in the phone.

On 19th February 2008, Ainea (PW 3) received a call from a person who asked him whether he knew about the phone. He told the person to go to Siaya police station if he had a claim over the phone. He (PW3) then called Raphael and told him to go to Siaya. He also went to Siaya police station where the owner of the phone, Lucas, arrived and identified it. He was previously known to both the first and second accused (appellants). The first appellant is his cousin while the second appellant is his neighbour.

Inspector Elijah Macharia (PW 4) was at the time attached to Ukwala Police Station but was at Siaya Police Station on 21st February 2008 at about 10.30 a.m when he conducted identification parades respecting the two appellants. He said that both were identified by the complainant (PW 2). He thereafter completed the necessary identification parade forms and produced them in court.

P.C John Mburu (PW 5) was at the time based at Ugunja Police Patrol Base and on the 17th February 2008 at about 1.40 p.m he was on duty when he received information that a robbery suspect had been sighted. He proceeded to Ugunja Township together with his colleagues and found the suspect inside a photocopy shop. He arrested the suspect who was the first appellant. He also, at a later stage, arrested the second appellant.

He assisted the Criminal Investigation Department (C.I.D) in investigating the matter.

The learned trial magistrate after considering the foregoing evidence ruled that both appellants had a case to answer.

Both elected to make unsworn statements and none called a witness.

The first appellant (John) stated that he was a driver and had not known the complainant.

He was on his way to Kampala on that material date and time and had arrived in Jinja Uganda.

On 17th February 2008 he was heading to Kisumu and on reaching a place called Ogasso near Ugunja he met two youth wingers who asked him whether he had knocked down a certain child with a motor cycle. He told them that many people usually ride motor cycles. They later came with two police officers who arrested and took him to Ugunja Police Patrol Base on allegation of having knocked down a child with a motor cycle.

He was later taken to Ukwala Police Station and then Siaya Police Station where he went to the C.I.D office and found strangers seated down. He thought that the strangers were police officers. He was identified in a parade on 21st February 2008 by people whom he had seen at the C.I.D office. He did not know what the parade was all about. He signed the parade forms after being asked to do so. A second

parade was conducted on the 1st March 2008 and on the 3rd March 2008 he was arraigned in court. He denied the charge.

The second appellant (Paul) said that he was also a driver and did not know the complainant. He was at his home at Rumba Estate Busia on that material date and time of the robbery. He had gone for a burial on 17th February 2008 and in the process went to a shopping centre known as Ouro market.

After finishing shopping and when near his home two motor cycles stopped where he was. The occupants of the motor cycles alighted and drew out guns. They told him that he was wanted and should accompany them. He accompanied them to his homestead where a search was conducted. They demanded a gun from him. He was alarmed and denied owning any gun. He was taken to Ugunja Police Patrol Base and threatened with death if he failed to produce the gun. He was then taken to Ukwala Police Station and then to Siaya Police Station where he was thoroughly beaten. He remained in the police cells for 17 days during which period an identification parade was conducted. He was later charged with the present offence which he denied committing. He was forced to sign certain documents during the identification parade.

After having considered the entire evidence in its totality, the learned trial magistrate concluded that the prosecution had proved its case and that the appellants' defences were an after- thought and a sham.

In our own examination of the evidence in the light of the grounds of appeal and the arguments for and against, we are satisfied that the complainant (PW 1) was indeed confronted and attacked by a group of about two people who were armed with firearms.

In the process, the attackers who apparently had also abducted a lady known to the complainant ended up taking away the complainant's mobile phone Nokia 2600 and Kshs. 12, 000/=.

Clearly, the material ingredients of the offence of robbery with violence contrary to section 296 (2) of the Penal Code were established in terms of the principles set out in the case of **Johana Ndungu –VS-Republic Criminal appeal No. 116 of 1995 (unreported).**

On the crucial issue of identification, we note that the material evidence was that of the complainant Lukas Omondi Rakama

(PW 1) and that the circumstances of the alleged identification of the appellants at the scene of the offence were difficult in that the offence occurred in the hours of darkness at about 7.45 p.m.

The learned trial magistrate made a finding of fact that the complainant despite the difficult circumstances saw and identified the appellants through or with the help of nearby lights.

Mr. Onsongo, learned counsel for the first appellant took us through the prosecution evidence of identification and contended that the same was unreliable and full of errors. He said that the intensity of the light at the scene was not mentioned by the complainant or his distance from the offenders. He said with regard to the identification parades conducted by PW 4 that the same did not comply with the Forces Standing Orders.

To fortify his argument on the evidence of identification, Mr. Onsongo, relied on the decision in **Mburu & Another –VS-Republic [2008] 1 KLR {G & 7} 1229 and Wamunga –VS-Republic [1989] KLR 424.**

The former case essentially dealt with the issue of identification parades while in the latter case, it was held '***inter-alia'*** that:-

"**Where the only evidence against a defendant is evidence of identification or recognition, a trial court is expected to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the**

basis of conclusion".

The learned senior state counsel contended that the appellants were properly identified as there was adequate light at the scene. He also contended that the identification parade was properly conducted.

We accept without reservation that evidence of identification and more so, in difficult circumstances, must be examined with caution and care if only to eliminate the possibility of incorrect or mistaken identification.

Where the evidence is by a single witness, the standard of care would even be greater. However, it is instructive to note that a court may convict on the evidence of a single witness even if it is uncorroborated so long as there is certainty of the truth and reality of that evidence, **(see Dusara –VS- Republic [1981] KLR 139)**.

Our view herein is that the complainant's evidence of identification was not free from the possibility of error and therefore unreliable. We say so because there was no certainty as to the exact source of light which assisted the complainant to see and make a positive identification of the appellants at the scene. There was indication from the complainant that it was light from the torches that the attackers had that enabled him to identify them. There was also indication that light from nearby security lights made the identification of the appellants possible.

Even if it was torch light or security lights or both which helped the complainant to identify the two attackers, there was no mention at all of the intensity of the lights.

In cases of identification among the important factors to be considered is the intensity of the light at the scene **(see Kennedy Maina –VS- Republic. Criminal Appeal No. 14 of 2005 C/A at Nakuru (unreported).**

We agree with the learned counsel for the first appellant that the evidence of identification at the scene of the offence was wanting and unreliable such that it would not have formed a basis for the appellants conviction.

There having been no identification or proper identification of the attackers at the scene of the offence, the identification parades conducted by **IP Macharia (PW 4)** were exercises in futility.

Although the direct evidence of identification at the scene was unreliable, we do find that the prosecution was able to offer circumstantial evidence linking the first appellant to the offence. This came in the form of recent possession of a mobile phone stolen from the complainant.

The mobile phone was positively identified as being the property of the complainant. It was handed to **Raphael Odhiambo (PW 2)** by the first appellant.

Aineah or Acra Odhiambo (PW 3) who is a cousin of the first appellant confirmed that the phone was handed to Raphael (PW 2) by the first appellant. This happened on the 17th January 2008 a few weeks after the phone had been stolen from the complainant.

The first appellant made no attempt in his defence to offer an explanation of his possession of the phone after it had been stolen.

His defence was essentially a denial and was dismissed by the learned trial magistrate as an afterthought and a sham.

By failing to give a reasonable explanation as to how he came to be in possession of the complainant's mobile phone, the first appellant failed to rebut the presumption that he was involved in the material robbery.

In the case of **Peter Kariuki Kibue –VS- Republic Criminal Appeal No. 21 of 2001 at Nairobi (unreported),** the Court of Appeal stated the following:-

"**The appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items otherwise than as the thief or guilty receiver. Since he did not offer any explanation the rebuttable presumption in law raised based on the provision of section 119 of the Evidence Act, is that he was one of the people who robbed Damaris of the items together with her car and also robbed Irungu of his car. It is a presumption of fact which courts often refers to as the doctrine of possession of recently stolen property".**

The conviction of the first appellant on the basis of the doctrine of recent possession was sound and we uphold it.

There was no evidence showing that the second appellant was found in possession of any of the things stolen from the complainant. He was convicted by the learned trial magistrate solely on the evidence of identification which as stated herein above was unreliable. His conviction was in our view unsafe.

Before concluding, we may as well comment on grounds one and four of the first appellant's grounds of appeal. The said grounds raise pertinent issues. With regard to ground one, it is contended that the plea was not taken as required by law and practice.

Mr. Onsongo, submitted that the appellant was not informed of the change in the language that he understood and that there was no indication of the language used. Therefore, the entire trial proceeded on a plea which was not correctly taken.

Counsel relied on the case of **James Maina Wanjiru –VS- Republic Criminal Appeal No. 30 of 2006 at Nakuru (unreported)** and contended that there was contravention of section 77 (2) of the Constitution and also section 72 (3) of the Constitution.

The learned Senior State Counsel, contended that the plea was properly taken and although the language is not indicated translation was provided as it is shown that English, Kiswahili and Dholuo were used. Counsel further contended that there was nothing to show that the appellants did not understand the language used and in any event, the first appellant was duly represented by counsel at the trial. He cannot now allege that his constitutional rights were violated.

We have perused the original court record and in our minds the plea was properly taken in a language understood by the appellants and the trial was also conducted in a language understood by them. Interpretation was provided all along by a court clerk called Chadwick.

Further, at page 3 of the trial magistrate's hand-written record there is a bold heading indicating the languages used. It read:-

"**INTERPRATATION ENGLISH/DHOLUO/KISWAHILI**.

Contrary to what has been stated by learned counsel, Mr. Onsongo, we do not in any way detect violation of the provision of section 77 (2) of the Constitution of Kenya.

Neither do we detect any violation of section 72 (3) of the Constitution.

The charge sheet shows that the appellants were arrested on 17th February 2008 and taken to court on the 3rd March 2008.

The court record confirms that the plea was taken on 3rd March 2008.

We have checked the calendar for the year 2008 and noted that 17th February was a Sunday and that the

month of February 2008 ended on Friday 29th February 2008 thereby making the 3rd March 2008 a Monday.

Excluding the weekends, it would appear that the appellants were first brought to court on the 11th day after their arrest well within the period of 14 days provided by section 72 (3) of the constitution.

With regard to ground four of the first appellant's grounds of appeal, it is contended that the learned trial magistrate failed to comply with the requirements of section 169 of the Criminal Procedure Code.

Learned counsel, Mr. Onsongo, submitted that section 169 of the CPC was not complied with in that the points for determination were not set out, the decision and the reasons thereof were not indicated, there was no reason as to why the case for the prosecution had been proved beyond reason doubt and there was no indication as to the standard of proof on which the conviction was based.

Mr. Onsongo, relied on the decision in **Francis Kimani Muthoka & Another –VS-Republic Criminal Appeal No. 331 of 2005 at Nairobi** (unreported).

The learned senior state counsel contended that section 169 of the CPC was complied with and in any event this court being a first appellate court would re-evaluate the evidence and arrive at its own conclusion.

In the case aforementioned i.e. **Francis Kimani Muthoka & Another –VS- Republic**, the learned trial magistrate had signed but not dated the judgement as required by section 169 (1) of the CPC. This is not the complaint herein. This complaint herein is the manner in which the learned trial magistrate wrote his judgment thereby going against part of the requirements of section 169 (1) CPC.

We have perused the judgment. We think that the learned trial magistrate did in essence comply with the requirements of section 169 (1) of the Criminal Procedure Code. Perhaps his craftsmanship created the impression that the provision of section 169 of the Criminal Procedure Code was not adhered to but in general, there was compliance. After all, the writing of a judgment is an art peculiar to each individual judicial officer

This is not however to say that the provisions of section 169 CPC are to be disregarded. They are mandatory provisions which if ignored would render a trial a nullity.

In the end result, we find that the appeal by the first appellant **John Omondi Okoth** to be without merit and is dismissed.

The appeal by the second appellant, **Paul Oduor Otieno**, is merited and is allowed. His conviction is hereby quashed and the sentence of death set aside. He will be released forthwith unless otherwise lawfully held.

Those are our orders.

[Delivered & Signed at Kisumu this 9th day of June 200

J. W. Mwera **J. R. Karanja**

JUDGE **JUDGE**

J.R.K./va.