REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL 188 OF 2004

WALTER NGESO MALOME ……………………………. 1st APPEALLANT

GEORGE OTIENO OGUDA ………………..……………..… 2nd APPELLANT

EZEKIEL OTOGO OGOLLA …………..…………………… 3rd APPELLANT

VERSUS

REPUBLIC ………...…………………………………………. RESPONDENT

From original conviction and sentence in criminal case number 919 of 2003 of the Chief Magistrate's Court at Kisumu

CORAM

Mwera, Karanja J. J.

Musau for State

Court Clerk – Raymond / Laban

Appellants in person

JUDGMENT

The appellants Walter Ngeso Malome(appellant one), George Otieno Oguda (appellant two) and Ezekiel Otogo Ogolla (appellant three) were jointly charged with the offence of attempted robbery contrary to Section 297 (2) of the Penal Code, in that on the 15th December 2003, at Kindu Village Kajulu West Location in Kisumu District within Nyanza Province jointly with others not before court while armed with a toy pistol attempted to rob David Okongo Abongo and at or immediately before or immediately after the time of the attempted robbery threatened to use actual violence to the said David Okongo Abongo.

The third appellant was, in addition, charged with the offence of being in possession of a firearm (home-made gun) contrary to Section 89 (1) of the Penal Code, in that on the 15th December 2003, at Kindu Village Kajulu West Location in Kisumu District Nyanza Province without reasonable excuse had

in his possession a firearm home-made gun in circumstances which raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order.

In the lower court, the first appellant was the second accused, the second appellant the third accused and the third appellant the first accused. They appeared before the Kisumu Chief Magistrate (O. A. Sewe Mrs.) for plea on 19th December 2003. They all pleaded "**NOT GULITY**" to the charges and a hearing date was set. The hearing was adjourned on several occasions before it commenced on the 7th June 2004. The case for the prosecution was that on the 15th December 2003, at about 8:00 p.m. the complainant David Okongo Abongo (PW1) was at his homestead inside his house, while his children and wife were outside when he heard some people asking for him. He moved closer to the glass framed house door and saw a group of five (5) people. He was able to see the five (5) people with the help of light emanating from a nearby jaggery. He recognized four (4) of the people and they included the three (3) appellants herein. The second appellant whom he knew as Otinyo had a spotlight, which he flashed on him. The third appellant whom he knew as Otogo drew out a pistol prompting his son (complainant's) to jump on and kick him. He got hold of the first appellant whom he knew as Ngeso. He also got hold of the third appellant whom he wrestled down and who had a big knife which caused him (complainant) to fear for his life and release the hold on the third appellant. Thereafter, the appellants escaped leaving behind a gun and a wrist watch which the complainant feared had been stolen. The matter was reported to the police resulting in the arrest and arraignment of the three appellants.

After hearing the prosecution's case, the trial magistrate ruled that a prima facie case had been established against all the three appellants. They were all placed on their defences and all except the third appellant gave sworn statement. The first appellant denied the offence and stated that he had arrived home from a funeral on the morning of 16th December 2003 and was informed by his wife that police officers had come looking for him. He was thereafter arrested and taken to Kondele Police Station. He was then charged with the present offence. For that he blamed the complainant who is his cousin and who had threatened him after he refused to sell to him a piece of land. The second appellant in denying the offence said that he was a bicycle taxi operator and was at Gita shopping centre on 16th December 2003, when a scramble over customers made his bicycle to knock and injure a girl. He was then arrested and taken to Kondele Police Station and was surprised when he was taken to court charged with the present offence of attempted robbery. The third appellant denied the offence and stated that he knew nothing about it.

The trial court considered the evidence in totality and in a judgment delivered on 17th September 2004 found all the appellants guilty as charged in the first count of attempted robbery and the third appellant also guilty as charged in the second count. They were all convicted accordingly and were sentenced to suffer death in the first count. The third appellant was also sentenced to seven (7) years imprisonment in the second count. The appellants being dissatisfied with the conviction and sentence meted out by the lower court, have now appealed to this court on the following basic grounds:-

For the third appellant that:-

(i) That the magistrate erred in failing to appreciate that evidence of identification was gravely diluted whereas circumstances were not favourable for positive identification.

(ii) The trial magistrate lowered to the prejudice of the accused person the standard of proof in this criminal case.

(iii) The prosecution failed to prove the owner of the alleged imitation firearm which was abandoned at the scene of crime by not calling ballistic report yet it was not recovered at the possession of the appellant.

(iv) The trial magistrate erred in convicting in the absence of essential witnesses evidence i.e.

investigation officer yet this is a capital offence

(v) The sentence imposed is too harsh and excessive in that the occurrence book (O/B) was not brought to prove that the appellant was booked with the imitation firearm.

For the second appellant

(i) That the trial Magistrate erred in not observing that the prosecution witnesses failed to make prompt report with the names or descriptions of the appellant yet it is a matter of identification by recognition.

(ii) That the trial magistrate erred in failure to observe that there were no sufficient light available at the place where the offence took place to enable the victims identify the assailant positively.

(iii) That the trial court erred by convicting on the circumstantial evidence of brown cap which was left at the scene yet the prosecution failed to call for the Government analyst's report.

(iv) That the trial magistrate erred in convicting in the absence of essential witness evidence i.e investigation officer yet this a capital offence.

(v) That the trial magistrate did not observe the contradiction evidence of PW1 and PW4 about first report made after the scene of crime.

(vi) That the trial magistrate erred by failing to consider the appellant's sworn defence statement which was strong enough to secure an acquittal.

And for the first appellant that:-

(i) That the trial magistrate erred in convicting with a purported evidence of identification by recognition whereas circumstances favouring positive identification at the scene of crime were not favourable.

(ii) That the trial magistrate erroneously failed to appreciate that there were material contradiction evidence of witnesses pertaining identification.

(iii) That the prosecution failed to avail all material evidence to court e.g. the investigation officers so as to enable court with all facts.

(iv) That the trial magistrate erred by not putting the appellant sworn defence statement into consideration.

At the hearing of the appeal, the appellants appeared in person and presented written submissions in support of their respective appeals. The state was represented by the learned Senior Principal State Counsel, Mr. Musau, who opposed the appeals and stated that the main grounds upon which the appeals are based are identification of the appellants and inadequacy of prosecution evidence. He contended that the appellants were seen at the scene and recognized by the complainant (PW1), PW2 and PW3. He further contended that the said PW1, PW2 and PW3 had previously known the appellants and that in fact, the complainant gave the police the names of the appellants thereby causing their arrest.

The learned state counsel went on to state that during the offence the third appellant was cut on the

forehead and during his arrest was found with a fresh wound on the forehead. He further stated that there was sufficient light for the appellants to be identified.

Regarding the second count the learned state counsel stated that PW2 and PW3 did see the third appellant with the material pistol and that he dropped it after being cut. The learned state counsel concluded by saying that the State supported the appellants' conviction and sentences and that the sentence of seven (7) years imprisonment is the minimum provided under Section 89 of the Penal Code.

The submissions and arguments advanced by the appellants and the State clearly show that in a broad sense, the appeals are grounded on the following factors:-

(i) the charges as presented in the lower court.

(ii) The identification of the appellants at the scene of the offences.

(iii) The recovery and possession of the alleged firearm.

The role of the first appellate count was spelt out in **OKENO =vs= R [1972] E. A. 32** at page 36 thus:-

"**An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya =vs= R [1975] E. A. 336). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters =vs= Sunday Post (1958) E. A. 424".**

The evidence presented in the lower court reveals that issues arising for determination are firstly, whether the offence of attempted robbery with violence was committed against the complainant and if so, whether the appellants were positively identified as having been responsible for the offence. Secondly, whether there was recovery of a firearm in the possession of the third appellant. Regarding the offences of attempted robbery contrary to Section 297(2) of the Penal Code (i. e. count 1), the original charge sheet contained in the lower court record criminal case file number 919 of 2003 shows that the appellants were jointly charged after having been arrested on the 17th December 2003.

The particulars of the charge are stated as follows:-

" **On the 15th day of December 2003 at Kindu Village Kajulu West Location in Kisumu District within Nyanza Province jointly with others not before court while armed with toy pistol attempted to rob David Okongo Abongo and at or immediately before or immediately after the time of the attempted robbery they threatened to use actual violence to the said David Okongo Abongo".**

The lower court took evidence and made its decision on the basis of the charge as presented by the prosecution. The appellants have raised issues pertaining to the validity of the charge. They contended that it is defective and were thus convicted on the basis of a defective charge.

However, when the matter came up for plea on 19th December 2003, they did not complain that the charge was defective. At no time in the course of the hearing in the lower court did they raise such an issue. Perhaps, having not had the benefit of legal representation the issue never crossed their minds or could not be comprehended by them.

Nonetheless, it is fundamental that every charge should allege all the essential ingredients of the offence. The trial court did not specifically address itself as to the defects or otherwise of the charge, but when considering whether the act of attempted robbery had occurred it observed as follows:-

" **From the facts presented, it was an attempt to rob PW1. The group asked PW3 where his father**

was and when immediately PW1 come out to talk to them and invite them inside the house. Accused 1 produced a gun prompting PW2 and PW3 to intervene, fearing that PW1 life was in danger. According to the evidence that was when 'PW1' cut accused 1 on the forehead with a panga. PW3 kicked one of the intruders but was on his part repulsed when he was hit with a rungu in turn. PW3 he suffered a fracture on the shoulder bone, though no medical evidence was adduced in confirmation thereof. The witnesses were unanimous that at the time of his arrest accused 1 had a fresh wound on his forehead and the court did see a scar thereon. Thus the prosecution has proved beyond reasonable doubt that an attempt was indeed made to rob PW1 as charged. The offenders had evidently started putting in motion by over acts their intention to rob PW1 and I so find (see Section 297 (2) 388 (2) of the Penal Code)".

The lower court thus concluded that there was no defect in the charge. The learned Senior Principal Counsel in his submissions herein was silent on the defects or otherwise of the charges as presented in the lower court by the prosecution.

The offence of robbery is defined by Section 295 of the penal code in the following terms:-

"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is guilty of the felony termed robbery".

And Section 297 (1) if the penal code provides that:-

" Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony………………………………"

Section 297 (2) " If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he **wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death".**

Considering all the aforementioned provisions of the law, there would be no reason to hold that the charge as presented by the prosecution in the lower court was defective. It's framing might have been poor but it did set out the essential ingredients of the offence. There was no failure of justice when the lower court proceeded and acted upon the charge as presented to it by the prosecution.

Turning to the issue as to whether indeed an act of attempted robbery was committed against the complainant, this court would uphold the findings of the lower court that indeed there was an attempt by a group of about five (5) or Six (6) people to rob the complainant of his property. The Complainant stated that he feared that his watch had been stolen but found it on the ground together with a gun that had been dropped by one of the intruders.

Regarding the identification of the offenders, the key witnesses were the complainants David Okongo Abongo (PW1) and his family consisting of his wife Gladys Atieno Okongo (PW2) and his son Merryl Odhiambo (PW3). There was nobody outside the complainant family who testified in relation to the identification of the offenders. Undoubtedly, the offence occurred in the hours of darkness at about 8:00 p.m. and all the aforementioned witnesses indicated in their respective testimonies that they saw and recognized the three appellants as having been part of the group of five (5) or six (6) people who committed the offence. All the three witnesses consistently indicated that despite the darkness they did identify the three (3) appellants due to the presence of light coming from security lights from a nearby jaggery.

They thus indicated that the said security lights provided avourable conditions for the identification of the appellants whom they had previously known.

The trial court treated the identification evidence of the three (3) witnesses (PW1, PW2 and PW3) as truthful and free from the possibility of any mistake given the circumstances under which the offence occurred. This is what the trial court had to say:-

" **No doubt it was dark and though the source of light was not close or bright enough, the torches had however enabled the witnesses to see and recognize the offenders, they being people that the witnesses had known very well before the incident……………………………The offenders names were promptly reported to PW4 who visited the scene almost immediately and the three were arrested swiftly………………………………"**

The trial court treated the appellants' identification by the witnesses as having been by recognition more than anything else. It then went ahead to act on the evidence on the basis of the decision in [**ANJONONI & OTHERS =vs= REP 1980 JLR 59**] and convicted the appellants. This is what the witnesses had to say regarding identification of the offenders:-

David Okongo Abongo (PW1)

" **I heard some people talking outside asking my wife Gladys Atieno Okongo for me saying they were from Got Nyabondo and had a motor vehicle which they left outside the compound. I could hear them well. I moved closer to the door to look at them. The door is glass panelled with steel grilles. There was light outside from a nearby jaggery. I saw five (5) people in total. So I went out and asked them to come in. I realised they were people I knew very well. There are:**

Ngeso – who is Accused 2

Oyogo who is Accused 1

Otinyo who is Accused 3

…………………………….. **Otinyo had a spotlight. When I asked them to come inside the house Otinyo flashed his torch on me and immediately Oyogo accused 1 drew a pistol."**

In cross –examination PW1 stated that the jaggery was about one (1) km from the scene but that it had powerful security lights that faced his home. He said that the offenders came in a group. He counted five (5) people and used the light of the jaggery in so doing. He also talked about a torch which was shone on him.

Gladys Atieno Okongo (PW2) said

"……………… **they were six (6) people. I approached them and asked them who they were. They told me that they wanted my husband. I could not know who they were then………**

However, I looked closer and saw Ngeso. He is my in law. He is accused 2 ……………………. The night was dark but there was security light from the jaggery……………. My husband got out and asked them who they were and invited them inside the house. Somebody said that he be given a spotlight to see the visitors and the torch was shone on my husband's face. The next thing I saw was a gun which Okongo had, Oyogo is accused 1 ……………… we got hold of two (2) people and the others ran away. The two (2) were accused 1 and accused 3. Accused 3 is Otieno"

In cross =examination PW2 said that she used the light from the jaggery which was not far from them. She said that the jaggery electric lights enabled her to see the offenders.

Merryl Odhiambo (PW3) said

" I went inside and notified my father and he came out to see the people. He asked them who they were and asked them to go in. One suggested that my father be given a torch to enable him see them well. Soon a fight started after one of them produced a gun…………………………

I recognized

- **Otinyo**
- **Walter**
- **Otogo**
- **Ouma who is not here ".**

In cross – examination PW3 said that he saw the offenders using electric lights from the jaggery one kilometre away.

Undoubtedly, the foregoing evidence by the three (3) identifying witnesses indicates that they were able to see and identify by recognition some of the offenders and more specifically the appellants. They categorically stated that the lights from the nearby jaggery made it possible for them to recognize the offenders. There was mention of a torch which was allegedly shone on the complainant and not any of the offenders. There was no indication that the light from the torch assisted in the identification of the offenders. The crucial light was that from a jaggery which was said to be about one kilometre from the scene. Proximity of the source of light from the scene and the intensity of the light would be vital factors in determining whether favourable conditions for identification existed at the time of the offence. It was established that the jaggery from where the light came from was one kilometre or so from the scene of the offence. It could not have been possible therefore that light one kilometre away created favourable conditions for identification as the identifying witnesses' wanted the lower court to believe.

The lower court did not believe the witnesses when it observed in its judgment that:-

" No doubt it was dark and though the source of light was not close or bright enough, the torches had however enabled the witnesses to see and recognize the offenders".

The lower court did not consider the lights from the jaggery as having provided favourable conditions for identification but it seriously misdirected itself when it indicated that torches provided the required conditions. This was contrary to what the identifying witnesses stated in evidence. The opinion of this court is that the evidence showed that conditions favourable for positive identification did not exist at the scene and time of the offence. For the offenders to have been recognized, they had first and foremost be seen with the naked eye to be identified. Recognition imputes personal knowledge of the offender in some form or other (**see Anjononi =vs= Rep (Supra).**

Even though the lower court noted that the witnesses had known the appellants very well before the incident, the evidence suggested that only one person (i.e. Ngeso (Accused 2) may have previously been known to the complainant. Ngeso is the first appellant. He stated in his evidence that the complainant is his cousin with whom they disagreed over the sale of a piece of land and who caused him to be charged. The complainant's wife (PW2) talked of the first appellant being her brother in law. However, she did not say how she came to know that appellant three is called Otogo and appellant two is called Otieno. The complainant's son (PW3) did not also say how he knew the names Otinyo, Walter and Otogo and their connection to the appellants. Most likely that not, the complainant's wife and son came to know the said names at the police station or in court.

The trial court found that P. C. John Wanjala (PW4) was given the names of the offenders who were then swiftly arrested. The first appellant indicated that he was arrested on 16th December 2003, after presenting himself to the police. The second appellant indicated that he was arrested on 16th December 2003 for injuring a girl after knocking her with his bicycle taxi at Gita shopping centre. The typed proceedings from the lower court show that the third appellant may have been arrested much earlier and was charged on his own prior to being joined with the first and second appellants. P. C. Wanjala (PW4) said that the complainant gave him the name of only one suspect i. e. a. person called John Ngeso believed to be the first appellant herein. However, the name of the first appellant is not John Ngeso but Walter Ngeso Malome. If indeed all the identifying witnesses had previously known the alleged offenders and had made a correct identification of them then they would have been in a position to provide P. C. Wanjala (PW4) with the correct and accurate names of all of them. The impression given by the witnesses in the lower court was that they truly and unmistakenly identified the offenders but the evidence by P. C. Wanjala did not bear them out.

There was another name offered to P. C. Wanjala and it was the name Ojwang believed to be the second appellant herein. It was not made clear how that name came up but it is instructive to note that the complainant's wife referred the second appellant by the name Otieno and not Ojwang. It is most likely considering the foregoing that P. C. Wanjala may not have been given the names of the offenders by any of the identifying witnesses and if he was given some names then they were not the names of the appellants herein. Let it be pointed out at this juncture that quite interestingly P. C. Wanjala stated that the complainant lied to the court when he said that he used electric lights from a nearby jaggery to identify the offenders. P. C. Wanjala indicated that the jaggery was far from the scene of the offence.

There is no doubt in our mind that the alleged identification of the appellants at the scene of the offence whether visual or by recognition was not watertight and free from the possibility of error or mistake. The evidence of the identifying witnesses was not only inadequate but also unreliable such that no reasonable tribunal would have acted on it to convict a suspect. Reference was made in the judgment of the lower court that two (2) caps were recovered at the scene and one was said to belong to the second appellant. The recovery of an item belonging to an offender at the scene of the offence may provide circumstantial evidence against the offender only if the item is proved to be his property. Two (2) caps were produced as exhibits (PEX 2 & 3) in the lower court and one was suspected to belong to the second appellant. It was linked to him by the complainant's wife (PW2) who also linked the second cap to the third appellant. The linkage in respect of both the second and third appellants was however not established and proved by material evidence. There was nothing peculiar or extraordinary about the caps to hold beyond any reasonable doubt that they respectively belonged to the second and third appellants to the exclusion of any other person.

Broadly, the entire evidence adduced by the prosecution against the appellants in the lower court in relation to identification was far from satisfactory to secure a conviction for the offence of attempted robbery contrary to Section 297 (2) of the Penal Code. The conviction of the appellants in relation thereto must and is hereby quashed.

With regard to the second count against the third appellant, the particulars of the charge show that on the 15th December 2003 at Kindu Village Kajulu West location he was found in possession of a home made gun. The trial court noted that the gun was in possession of the third appellant at the time a group of people attempted to rob the complainant in the first count. The lower court also noted that the gun was taken away from the third appellant at the time of the attempt by PW2 and PW3. It therefore concluded that possession had been proved and it convicted the third appellant accordingly. He was then sentenced to serve seven (7) years imprisonment on top of the death sentence passed in count one. The gun or toy pistol was produced in the lower court as an exhibit (PEX1). However, there was no evidence from a ballistic expert to prove that the gun was what it was said to be a firearm in terms of Section 89 (1) of the Penal Code. Therefore, it cannot be said that what was recovered and presented in court as a home-made gun or toy pistol was in fact a firearm. And even if it was indeed a firearm its possession by the third appellant was not established. It was not found in his personal possession and his identification as one of the people who attempted to rob the complainant in the first count was also not established by any of the witnesses including PW2 and PW3.

In effect, there was insufficiency of material evidence to sustain a conviction on the second count against the third appellant. The conviction by the lower court was therefore unmerited and is hereby quashed. In passing, the court would mention that having passed the death sentence in count one, the trial court ought to have left in abeyance the subsequent sentence of seven (7) years imprisonment in count two (2).

The appeals by the appellants are merited and allowed with the end result that the conviction by the lower court in all the counts is quashed and the sentences passed in respect thereof set aside.

The appellants shall forthwith be set at liberty unless otherwise lawfully with held. It is accordingly ordered.

Dated, signed and delivered at Kisumu this 22nd day of April 2008

J. W. MWERA

JUDGE

J. R. KARANJA

JUDGE

JRK/aao