



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Criminal Appeal 213 'B' of 2004

JOSPHAT MBEGE ONYANGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

**[From Original Conviction and Sentence in Criminal Case Number 350 of 2002 of the
Senior Resident Magistrate's Court at Maseno]**

CORAM

Mwera, Karanja J. J.

Musau for State

Court Clerk – Raymond/Laban

Appellant in person

JUDGMENT

The appellant Josphat Mbege Onyango was the first accused in the lower Court where he had been charged with three others with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the 12th March 2002, at Majengo township in Vihiga District within Western Province, jointly with others not before court being armed with dangerous or offensive weapons namely pistol, simis and pangas robbed Monicah Mumbi of Kenya Shillings Thirty Thousand (Kshs. 30,000/=), a radio cassette make Sony, a video deck, a mobile phone make Nokia 3310 and a T. V. remote control all valued at Kenya Shillings Sixty Six Thousand (Kshs. 66,000/=) and at or immediately before or after the time of such robbery used actual violence to the said Monicah Mumbi and also robbed Michael Kigo Njuguna of Kenya Shillings Two Thousand (Kshs. 2,000/=) and at or immediately before or after the time of such robbery used actual violence to the said Michael Kigo Njuguna.

After pleading not guilty to all the counts the appellant went through a trial which commenced on the 16th October 2002 and ended on the 23rd May 2003 with the delivery of judgment by the learned Senior Resident Magistrate (A. Onginjo). The appellant was found guilty as charged and sentenced to death. His co – accused had earlier been acquitted after the court ruled that they had no case to answer. The appellant is dissatisfied with the decision of the lower court and has now appealed to this court on the basis of the grounds set out in his memorandum of appeal filed herein on the 25th June 2003, and fortified by his written submission presented at the hearing of the appeal in which he represented himself.

The said grounds of appeal are basically a critical analysis of the evidence of identification adduced against the appellant and the failure by the prosecution to avail essential witnesses such as an Assistant Chief and the investigating officer. The state, through the learned Senior Principal State Counsel Mr. Musau opposed the appeal on the basis that the appellant was properly identified in favourable condition by one of the witnesses (i.e. PW2) who again pointed him out in an identification parade conducted three (3) weeks after the offence. Mr. Musau acknowledged that the trial court failed to warn itself before conviction but asked this court to make its own conclusions.

Our re-examination and re-evaluation of the evidence shows that the basic issue for determination was whether concurrent offences of robbery with violence were committed against the complainant Monicah Mumbi (PW1) and Michael Kigo Njuguna (PW2) and if so, whether the appellant was positively identified as having been among the offenders. Regarding the offences, the evidence by both complainants (PW1 & PW2) was undisputed and showed that they were attacked while at the first complainant's homestead by a group of about three to four people who were armed with dangerous and offensive weapons i.e. a pistol, panga and iron bar. The group harassed and intimidated the complainants before robbing them of their respective property.

The ingredients of Section 296 (2) of the Penal Code having been established, the prosecution was next required to establish that the appellant was positively identified as having been one of the offenders. The defence raised by the appellant implied that he was not involved in the offences. He said that he was arrested at his mother's house after his had been burnt on the 3rd April 2002. He was found there by an Assistant Chief whom he owed money and who had threatened to have him arrested. He was taken to Vihiga where he was beaten and held together with some suspects. He was later brought to court and charged. The evidence of identification against the appellant is that if a single witness i.e. the second complainant (PW2).

The first complainant (PW1) said that three robbers entered her house wearing long black coats while one had an army jungle jacket. She said that she was not able to identify any of those robbers as she was under harassment and shock. The first complainant's househelp Florence Ondiso Anubi (PW3) said that there was electricity in the house but she was unable to identify any of the robbers due to shock. The sole identifying witness (PW2) was the first complainant's driver. He said that he was at the first complainant's house when the offences occurred. It was then about 9:00 p.m. and as he was opening the house door to leave, he was confronted by four people who entered the house and ordered him to lie down. They tied him, as they demanded money from the first complainant.

The second complainant (PW2) said that every room in the house had electric light including the kitchen from where he wanted to leave. This meant that it was while opening the kitchen door that he was confronted by the four people. He said that he was in the process able to identify one robber. He said that the robber had a panga and was wearing a black long coat and had nothing covering his head. He further said that the robber was a tall man and he was the first among the robbers that he met when he opened the door. He further said that the tall robber is the one who ordered him back into the house and to lie down before securing his hands. He also said that he was lying down on his stomach with the hands tied when Kenya Shillings Two Thousand (Kshs. 2,000/=) was removed from him. He said that he looked at the tall robber face to face, as there was light in the house. He said that he again identified the one robber at an identification parade conducted at Vihiga Police Station on 8th April 2002.

The officer who conducted the identification parade was IP Peter Kuria (PW4). He confirmed that the suspect was the appellant and was identified by the second complainant (PW2). The identification parade

form (PEX 1) shows that the second complainant (PW2) identified the appellant by touching him.

P. C. Gilbert Olenyo (PW5) of the Vihiga C. I. D. indicated that the appellant was subjected to the identification parade after being arrested with others on the 4th April 2002 in a house planning a crime. He said that an ambush was laid and the arrest effected following a tip off from an informer. P. C. Olenyo (PW5) confirmed that he was the arresting officer and did not investigate the case. IP Kuria (PW4) of Vihiga Police Station said that he was requested by their investigating officer to conduct the identification parade. He did not mention the officer responsible for the investigations of the case. P. C. Olenyo (PW5) and IP Kuria (PW4) were the only police officers who testified in this case and none was the investigating officer. We shall deal with the issue of the investigating officer at a later stage in this judgment.

Right now, our minds are directed to whether the identification of the appellant by the single witness (PW2) was positive and free from the possibility of any error or mistake. The witness (PW2) stated that he had not previously known the appellant. His identification of the appellant was therefore visual identification in the hours of darkness. He however indicated that his identification of the appellant was possible due to the presence of electric light at the scene. But then, the first complainant (PW1) and her househelp (PW3) were at the same scene and yet did not identify any of the robbers. The first complainant stated that she was neither informed by the driver (PW2) the househelp (PW3) that they were able to identify any of the robbers. The driver (PW2) said that he informed the police that he could identify the robbers but this was not confirmed by any evidence from the police particularly through the investigating officer who incidentally was an essential witness but did not testify in court.

There is a long line of authorities regarding the dangers of identification by a single witness particularly at night. These began with the case of [ABDULLAH BIN WENDO =vs= REPUBLIC (1953) 20 EACA 166] and was followed by many others including [RORIA =vs= REPUBLIC 1967 EA 583]. It is well established law that the evidence of identification by a single witness should be carefully tested. Herein, the availability of electric light at the scene of the offence did provide favourable conditions for identification. However, electric light by itself may not be enough for positive identification in view of the fact that a person may be in a state of shock and confused at being suddenly confronted by a group of menacing strange people armed with a firearm. This explains why the first complainant (PW1) and her househelp (PW3) were unable to identify any of the robbers despite the presence of electric light at the scene. Apart from the electric light, adequate opportunity to see and make positive identification of a culprit is important.

There is nowhere in the evidence of the second complainant (PW2) which shows that he had not only the lights but also adequate opportunity to see and identify the appellant. His evidence indicated that no sooner had he opened the kitchen door he was suddenly confronted by four strange people who ordered him to lie down. They tied him up and demanded money from his employer (PW1). He indicated that he was lying down on his stomach facing downwards as his hands were tied. How then was it possible for him to identify the appellant if he is the person who tied his hands?? He said that he looked at the appellant face to face but did not state how long the stare took and how possible it was for him to look at him face to face when he was confronted suddenly by four people and immediately ordered to lie down on his stomach.

It is trite law that facts proved by a single witness can form the basis of a conviction. But this rule does not lessen the need to test with great care the evidence especially when it is identification made under unfavourable condition (see {Anditi =vs= Republic 1981 KLR 519}). We are of the view that the evidence of the second complainant (PW2) was not tested with great care by the trial magistrate although she did warn herself of the dangers of convicting on the evidence of a single witness. She was convinced by and believed the testimony of the second complainant (PW2). However, in assessing evidence a magistrate should not only look at the honesty of the witness. The magistrate has a duty to take into account the possibility that the witness is mistaken. Failure to take this into account is an error. (See Anditi =vs= Republic supra). The conviction of the appellant on the basis of the evidence of identification of the second complainant (PW2) was unsafe. The identification parade which followed the arrest of the appellant was of no value if the second complainant (PW2) was not in the first place in a position to

identify any of the robbers at the scene of the offence.

As regards the investigation officer none was called to testify in the lower court. This was a fatal error on the part of the prosecution. An investigation officer is a very essential witness for the prosecution in a criminal trial. He sums up the case for the prosecution and is normally at the forefront in determining whether or not sufficient evidence has been collected to prefer a charge against a suspect. He is an integral part of the prosecution's case and failure to call him as a witness is fatal to the prosecution. What is astonishing in this case is that despite the seriousness of the charge facing the appellant the prosecution either due to laxity or sheer carelessness failed to avail the investigations officer.

The sum total of all that has which been stated hereinabove makes it impossible for us not to allow the appeal. Consequently, the conviction by the lower court is quashed and sentence is set aside. The appellant shall be set at liberty unless otherwise lawfully withheld. Those are our orders.

Dated, signed and delivered at Kisumu this 3rd day of June 2008.

J. W. MWERA

J. R. KARANJA

JUDGE

JUDGE

JRK/ao