



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

Criminal Appeal 19 of 2006

WYCLIFFE OMONDI ORONDO APPELLANT

VERSUS

REPUBLIC RESPONDENT

[From original conviction and sentence in Criminal Case number 91 of 2005 of the Senior Resident Magistrate's Court at Kisumu]

CORAM

Mwera, Karanja J. J.

Musau for State

Court Clerk – Raymond/Laban

Appellant in person

JUDGMENT

The appellant Wycliffe Omondi Orondo was charged with robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the 11th January 2005 at Kibos in Kisumu District within Nyanza Province jointly with others not before court being armed with offensive weapon namely pangas and axes they robbed John Oduor Ogonda of his T. V. set make video-con, a car radio cassette make artech, a radio cassette make sony, a mobile phone make Motorola – C 330, five pairs of shoes and cash Kshs. 2, 500/=, all valued at Kshs. 39,800/= property of the said John Oduor Ogonda.

After the trial before the Senior Resident Magistrate at Winam Court the appellant was convicted and sentenced to suffer death. He now appeals against the conviction and sentence on the basis of the grounds

set out in his petition of appeal dated 20th February 2006 and the supplementary grounds filed herein of 30th May 2008. He basically complains about the evidence of identification adduced against him saying that it was doubtful. He also complains about the failure of the trial court to give due weight to his sworn defence and the failure to have him provided with the services of an interpreter in as much as he did not understand the language used by the court. He appeared in person at the hearing of the appeal and presented written submission to argue his grounds. He added that he did not understand the language of the court from the date of plea. The learned Senior Principal State Counsel, Mr. Musau appeared for the State and opposed the appeal on grounds that the appellant was seen and identified by prosecution witnesses number 1, 2, and 3 with the help of powerful torch light. That the said witnesses had previously known the appellant and he gave his name to the police. Mr. Musau thus contended that the evidence in support of the conviction was ample.

The prosecution called a total of four witnesses including the complainant, John Oduor Ogonda (PW1). His wife Florence Aloo Oduor (PW2) and a daughter Dorcas Tabitha Awuor (PW3). The last witness was a police officer P. C. Benson Maina (PW4). It was the prosecution's case that on the material date at 3:00 a.m. the complainant and his family were asleep at their house when a group of four people posing as police officers and armed with an axe, panga, hacksaw and a gun like weapon entered therein and demanded money. They ended up taking away Kshs. 2,500/=, and items such as a T. V. set, a radio cassette, a mobile phone, pairs of shoes and handbags. One of them was identified and recognized by the complainant and his wife as well as their daughter. He is said to be the appellant herein and was later arrested and charged accordingly. His defence was a denial of having committed the offence. He said that he sells Coca Cola products and on the 10th January 2005, left hospital in the evening and went to his house where he slept and woke up on the following day. He thereafter went to work and in the process was arrested by two people.

The basic issue arising for determination was whether the offence of robbery was committed against the complainant and if so, whether the appellant was positively identified as one of the people responsible. The occurrence of the offence was not a disputable factor. The evidence by the complainant (PW1) and members of his family (PW2 and PW3) showed that they were attacked while inside their house by a group of four armed people who stole money and additional property before leaving the scene.

The disputable factor was the identification of the appellant as having been one of the four people. The complainant (PW1) stated that he was sleeping in his bedroom when he heard breaking glass. He enquired and somebody said they were police officers. He went to the sitting room and found four people already therein. He met them at his bedroom door and was told to return to the bedroom. They demanded money and took Kshs. 2,500/= from a coat pocket. He said that three of them wore masks and that he was able to identify the one who had no mask. He said that the unmasked man was the appellant whom he previously knew by the name Wicky, a neighbour. The complainant's wife (PW2) said that she did not identify three offenders but was able to identify the appellant who she had previously known as Wicky. The complainant's daughter (PW3) said that three of the offenders entered her father's bedroom while others patrolled her bedroom and she was able to identify him as Wicky, the appellant herein whom she had previously known.

All the aforementioned witnesses (PW1, PW2 and PW3) indicated that light from torches in possession of the offenders made it possible for them to see and identify the appellant. The complainant said that the offenders had powerful torches, which enabled identification of the appellant. His wife (PW2) and daughter (PW3) talked of the same torch- light but did not indicate intensity. Further, the complainant, his wife and daughter stated that they had previously known the appellant by his name of Wicky. They thus indicated that the identification of the appellant was by recognition and this was made easier (per the complainant) by the fact that he (appellant) was the only one of the offenders not wearing a mask. It is significant to note that none of the other identifying witnesses (i.e. PW2 and PW3) mentioned that the offenders save one wore masks.

The incident was reported at Migosi Police base and received by P. C. Benson Maina (PW4) who stated that the complainant reported that a robbery had taken place in his house and property was stolen

from therein. P. C. Maina said that the complainant said that he had identified one of the robbers. However, P. C. Maina, did not say that the name of the identified robber was mentioned. The evidence of the complainant, (PW1) and his family members (PW2 & PW3) in as much as it was crucial required cautious and careful consideration in view of the circumstances under which the offence was committed. The offence was committed in the hours of darkness and this provided unfavourable conditions for identification. Before a person is recognized, he must first and foremost be seen with the naked eye. The only source of light to provide favourable conditions for identification was said to be torch light. However, the light came from torches in possession of the offenders. The witnesses did not state the number of the torches available and whether each of the four offenders had one. The complainant, talked of powerful torch light but did not say whether or not it was directed at the faces of the offender, from what angle and for how long. The complainant's wife (PW2) said that she identified the appellant with light from the torches. She also did not say whether or not the torch flash was aimed at the face of the appellant, from what angle and for how long. The complainant's daughter (PW3) stated that the robbers flashed their torches and made it possible for her to identify the appellant. She did not say whether or not the flashes were directed at the appellant, from what angle or position and for how long. The complainant, his wife and daughter (PW2 & PW3) were all consistent in saying that they had previously known the appellant who went by the name Wicky. However, none of them gave the name to P. C. Maina (PW4) or any other person.

Reporting to the police that one is able to identify a suspect is not the same as giving the name of the suspect to the police especially if he was previously known. The failure by the complainant and family to give the name of the appellant to the police at the time of reporting the robbery raises doubt as to whether they really saw and recognized him as one of the robbers. Most likely than not, the identification of the appellant was more of dock identification than identification by recognition. The complainant said that he could not shout the name of the appellant at the scene due to security reasons. His wife (PW2) said that she could not shout the name at the scene due to fear for her life. Shouting the name of the appellant at the scene was less significant than giving his name to the police. It would have been a different story if the name of the appellant was given at the scene to the first person or persons (if any) who went to the rescue of the complainant and family.

It may also be noted that there was uncertainty in the evidence of the complainant, his wife and daughter in relation to the point at which they were able to see and identify the appellant. The complainant stated that he met the four offenders at his bedroom door and they ordered him back into the bedroom. He therefore implied that he identified the unmasked offender while in his bedroom. The complainant's wife (PW2) also implied that all the four offenders entered the same bedroom and it was from therein that she was able to identify one of them. The complainant's daughter (PW3) stated that three of the offenders entered her parent's bedroom while one of them whom she identified patrolled her bedroom. If all the four offenders entered the complainant's bedroom, how did the complainant's daughter (PW3) identify the appellant? And if three of the offenders entered the complainant's bedroom and they did not include the appellant, how did the complainant and his wife (PW2) identify the appellant?

If all the offenders entered one bedroom with their torches where did the light in the other bedroom come from to enable positive identification by the complainant's daughter (PW3)?

In our view, the trial magistrate failed to treat the identification evidence with care and caution in view of the prevailing circumstances. The evidence was not cogent and credible enough for safe conviction and in the light of the defence raised was not free from the possibility of error or mistaken identify.

In addition to all the foregoing, the appellant herein raised the issue of the language used in the course of the trial in the lower court. He said that the trial was conducted in a language not understood by himself yet an interpreter was not provided. Our perusal of the court record confirms that right from the time of plea on 14th January 2005, upto the time of the conclusion of the case on 30th September 2005 the language used in the entire trial is not indicated and if it was English or Kiswahili there is no indication that an interpreter was provided for the appellant's benefit. The appellant presented his appeal in the Dholuo language, it is not indicated in the lower court record that the language used was interpreted into

Dholuo for the benefit of the appellant. The failure by the trial magistrate to indicate the language used and/or the interpretation provided to the appellant, was an error strong enough to invalidate the entire trial in so far as it touches on the appellant's constitutional and statutory rights.

Section 77(2) of the Constitution provides that:-

“ Every person who is charged with a criminal offence shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge”.

Section 198(1) of the Criminal Procedure Code provides that:-

“ Wherever any evidence is given in a language other than English not understood by the accused and he is present in person, it shall be interpreted to him in open court in a language which he understands”.

Section 198(4) of the Criminal Procedure Code provides that:-

“ The language of High Court shall be English and the language of a subordinate court shall be English and Swahili”.

In the case of DIBA WAKO =vs= REPUBLIC (1982-1988) I KLR 1974, the Court of Appeal held that:-

“ It is a fundamental right in Kenya, whatever the position is elsewhere, that an accused person is entitled to the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands”.

The court said:-

“ The practice of recordings, if not the name of the interpreter, at least the nature of the interpretation has been standard practice in these courts for many years. For example, that which is described as the ‘plea form’, Form Criminal 133, contains under all the other details of the case and of the accused, a space against the word ‘interpretation’. There was no compliance with either of these two statutory provisions or with the standard practice in the instant case. The magistrate made no note of the language into which the evidence of the witnesses, many of whom spoke in English or Swahili was being translated
.....”

The position in this case, is more or less similar to that in the aforementioned case. We allow the appeal, quash the conviction and set aside the sentence. The appellant shall forthwith be released unless otherwise lawfully held.

Dated, signed and delivered at Kisumu this 8th day of July 2008.

J. W. MWERA J. R. KARANJA

JUDGE JUDGE

JRK/aao