



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 541 of 2005

TOM TITUS ODHIAMBOAPPELLANT

-AND-

REPUBLICRESPONDENT

(An appeal from the Judgment of Senior Resident Magistrate Mrs. J. Gandani dated 10th

November, 2005 in Criminal Case No. 7018 of 2004 at Makadara Law Courts)

JUDGEMENT OF THE COURT

The appellant was charged with robbery with violence contrary to s.296 (2) of the Penal Code (Cap 63, Laws of Kenya). In the particulars, it was stated that the appellant, jointly with others not before the Court, and while armed with dangerous weapons, namely pistols, on 8th July, 2003 at Buru Buru Phase I, within Nairobi, robbed **Washington Kinyua** of Kshs.86,000/= in cash, a cellphone, of make Ericsson T28, and a gold ring – all valued at Kshs.105,000/= – and at or immediately after the time of such robbery, threatened to use actual violence upon the said **Washington Kinyua**.

The complainant testified that on the material day, as he went to open his gate, three men ran towards him and ordered him, at gun-point, to return to his compound and lie down. The assailants robbed him of money, a cellphone, and personal documents; and later on they grabbed his golden ring as well. He was then ordered to enter the car by one of the robbers; the complainant identified this particular robber as the one who took command of the said motor vehicle, and as the appellant herein. The robbers escorted the complainant to the ATM booth of Barclays Bank, Moi Avenue, and ordered him to withdraw money for them. After this attempted theft, the appellant and his collaborators drove the complainant randomly, and later abandoned him at Majengo in Nairobi.

PW2, who is the complainant's wife, saw him being robbed at the gate; but she had no opportunity to see the faces of the robbers.

The complainant testified that he was in the company of the robbers for more than two hours, and he had been able to see all of them clearly. Sometime in *September, 2003* the complainant, who was in his friend's car, saw the appellant herein walking about, in the neighbourhood of Buru Buru Police Station. The complainant called a Police officer on his cellphone; and he rushed to the Police station and reported that he had seen one of the robbers of the material date. By the time the complainant and Police officers got to the scene, the appellant herein had vanished. But on 23rd *November, 2003* as the complainant was driving towards the city Centre, he sighted the appellant in the area of Kimathi Estate, standing next to a kiosk, in the company of other people. The complainant then thought the appellant had seen him, as the appellant looked at his car keenly. The appellant drove to Jogoo Road Police Station, and reported the matter to the OCS. The OCS gave the appellant two Police officers, who went to Kimathi Estate in an unmarked civilian car, and the appellant was arrested and taken to Jogoo Road Police Station.

On cross-examination by defence counsel, the complainant testified that the robbers had detained him up to 9.30 pm. The robbers had spoken to him in Kiswahili throughout. The robbers had a pistol, which they showed to the complainant, to cow him down, while he was with them inside the car. Indeed, the complainant had already seen that the robbers had a gun, when they accosted him at the gate.

Of his impressions of the appellant at the material time, the complainant thus said, in answer to cross-examination:

“I saw the accused clearly on the day of the robbery. His picture is in my memory. At the bank, I and the accused walked to the ATM; there was a lot of light; I saw him clearly and he talked with me. He did not hide his face. At my gate, I also noticed him first, as he is the one who had a gun. I [had] never been car-jacked before. At first I panicked, but when I [entered] the car, they warned me that if I co-operated with them they would not harm me, so I relaxed and we had a friendly chat.”

The learned Magistrate recorded the appellant’s unsworn statement, in which he denied involvement in the robbery incident, and said he had at the material time, been at a barber’s, in Jerusalem Estate in Nairobi.

In the critical paragraph of the judgement, the learned Magistrate stated:

“The question to ask, therefore, will be whether any robbery occurred. PW2 gave evidence that she saw PW1, her husband, being frisked by some men who were armed with guns and then driven off. This confirms that PW1 was robbed. PW1 claims he was robbed of some money, a mobile phone, and a ring. I believe this...happened. PW1 gave evidence that he was driven around by the robbers for almost two hours while they chatted with him. Further, when he was taken to the bank to withdraw money, it is the accused person who escorted him to the ATM machine, and...the place was well lit. Therefore, he must have had a good look at the accused person.”

The learned Magistrate duly warned herself of the dangers attendant on identification, as was the case here, by *only the complainant*; but she then concluded that “the identification [was] convincing”; and she reached the conclusion that “the prosecution has proved its case against the accused person...beyond any reasonable doubt”; she concluded too that “the defence by the accused person is not convincing”; and she convicted the appellant herein, and sentenced him to death as prescribed by law.

The appellant came into Court, on the occasion of hearing this appeal, with a typescript of submissions, to which was appended “amended grounds of appeal”. In the re-fashioned grounds, the appellant thus states:

- (i) The trial Magistrate erred in both law and fact, by relying on the evidence of the complainant, without subjecting the same to accuracy tests;
- (ii) The “purported visual identification” of him as a suspect, required corroboration;
- (iii) The evidence of the complainant was taken without the appellant being accorded interpretation services;
- (iv) The appellant’s evidence was not accorded the significance it merited.

In his oral conduct of the appeal, the appellant urged that the prosecution case against him had no basis in evidence and was a frame-up.

Learned respondent’s counsel, *Mrs. Gakobo*, however, contested the appeal, and urged that the trial Court had properly assessed the evidence, and come to the right finding.

Counsel urged that since the attack on the complainant had taken place in the early part of the evening, at about 6.45 pm, it was not at all difficult for him to identify his attackers; the complainant remained in the company of the robbers for several hours, and was chatting with them in the meantime; the complainant had clearly seen the role played by the appellant in the execution of the robbery; there was plenty of lighting at the Barclays ATM, where the appellant took the complainant for the purpose of stealing his money; all this time the robbers had unmasked faces; for months following the robbery incident, the appellant’s facial appearance remained in the complainant’s memory, and twice when he saw the appellant, he drew the attention of the Police to the matter, and indeed, on the second such occasion Police officers tracked down and arrested the appellant.

The totality of the evidence, learned counsel submitted, shows that a positive identification of the appellant had taken place – and this identification was free from any possibility of error.

Counsel noted that the trial Court, in analyzing the evidence, had warned itself of the dangers attendant on identification of a suspect by a single witness; but thereafter, the Court had rightly come to the conclusion that the appellant was properly identified. Counsel urged that the appellant’s challenge to the manner in which he had been identified as a suspect, had no merit.

Counsel contested the linguistic challenge raised by the appellant, regarding availability of interpretation. The appellant confirms that he had given his statement in Kiswahili, and the complainant had given testimony in English. But counsel urged that the challenge had no basis in law, in view of the terms of s.198(2) of the Criminal Procedure Code (Cap. 75, Laws of Kenya), which would require interpretation of the language of the Court only where an *Advocate* appearing does not understand the language. An advocate had appeared for the appellant herein, when the complainant's testimony was being given; and this advocate had cross-examined the complainant in some detail: and accordingly, the appellant cannot claim to have been prejudiced. Since all the other witnesses had testified in *Kiswahili*, once again, the appellant had not been prejudiced.

Counsel urged that the entire evidence of the appellant had been duly considered, but it was found to present no doubts in the prosecution evidence.

We have in this judgement, carefully considered all the evidence, and it is our conviction that the line of analysis taken by learned counsel **Mrs. Gakobo**, represents the right position to take on the law and the evidence. The learned Magistrate carefully reviewed the evidence, and rightly came to the conclusion that the appellant was accurately identified as one of the robbers on the material evening. The trial Court rightly *cautioned itself* as to the dangers of convicting on the evidence of a *single identifying witness*, before coming to the right conclusion, in our view, that the appellant had been properly identified.

On the merits, therefore, the appellant was rightly convicted. We do not agree that there was any shortfall of form in the trial process which may have caused prejudice to the appellant.

Consequently, we dismiss the appeal; uphold conviction; and affirm sentence as imposed by the trial Court.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 24th day of October, 2008.

J.B. OJWANG

H.A. OMONDI

JUDGE

JUDGE

Coram: Ojwang & Omondi, JJ.

Court Clerks: Huka & Erick

For the Respondent: Mrs. Gakobo

Appellant in person