REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Criminal Appeal 116 of 2007

KENNEDY OMONDI OCHIENG …… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

[From original conviction and sentence in Criminal Case number 611 of 2007 of the Senior Resident Magistrate's Court at Nyando]

CORAM

Mwera, Karanja J. J.

Musau for State

Court Clerk – Raymond/Laban

Appellant in person

JUDGMENT

The appellant, Kennedy Omondi Ochieng and another appeared before the Senior Resident Magistrate at Nyando charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code, in that on the 27th March 2006 at about 10:00 p.m. at Nyando, Nyando District Nyanza Province, with others not before court robbed Peter Otieno Oriwa (In count one) of one radio Star valued at Kshs. 2,700/=, a T. V. set valued at Kshs. 4,500, a bag containing assorted clothes valued at Kshs. 4,000/=, six long trousers valued at Kshs. 3,000/=, a jacket valued at Kshs. 950/=, an electrical invertor valued at Kshs. 13,000/=, a water –pump valued at Kshs. 27,000/=, four bags containing assorted clothes, one Sony T. V. valued at Kshs. 8,450/=, two Sony radio cassettes valued at Kshs. 18,000/=, one gas cooker valued at Kshs. 4,500/=, three blankets valued at Kshs. 6,000/=, two bed covers valued at Kshs. 2,000/= all valued at Kshs. 91,000/=. They also robbed Nehemiah Ashira Omukumba (In count two) of three hundred shillings, two long trousers valued at Kshs. 600/=, two shirts valued at Kshs. 300/= all valued at Kshs. 1,200/= and immediately before or immediately after the time of such robbery wounded the said Peter Otieno Oriwa and Nehemiah Ashira Omukumba.

After trial, the appellant was convicted and sentenced to death in both counts. His co-accused was found not guilty on both counts and acquitted accordingly.

At this juncture, we deem it fit to point out once again that where there are several counts of robbery with violence and a person is convicted on each one of the counts the sentence of death that follows should only be imposed on the first count while the sentences for the rest of the counts remain in abeyance.

In the case of **BORU & ANOTHER =vs= REPUBLIC [2005] I KLR 649**. The Court of Appeal held as follows:-

(i) Where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance including any sentence of imprisonment.

(ii) The reason for that is simple, in case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over, he can only be hanged once and hence the necessity for leaving the sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term

(iii) Once a sentence of death is imposed once, the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the court dealing with the appeal would consider all the counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed.

We have herein repeated the aforementioned holdings for the benefit of trial magistrates who keep on repeating the mistake of imposing several death sentences in a single case.

Be that as it may, the appellant herein being dissatisfied with the conviction and sentence lodged the present appeal on the basis of the grounds contained in his petition of appeal filed herein on 7th August 2007.

The grounds are essentially an attack of the prosecution's evidence of identification against the appellant and complaints of having been arrested without any exhibits and the rejection of the appellant's defence by the trial magistrate as well as the failure by the prosecution to call vital witnesses such as a woman who gave PW7 information about recovered items.

The appellant appeared in person before us and presented written submissions in support of his grounds of appeal.

Learned Senior Principal State Counsel, Mr. Musau, appeared for the Respondent and conceded the appeal. He argued that the evidence against the appellant was insufficient in that the only material evidence was that of PW1 who said that he identified the appellant by face and voice and also picked him out in an identification parade yet he (PW1) had not previously known the appellant and that the evidence of the identification parade was not tendered. The learned State Counsel contended that the foregoing omission deprived the court of the benefit of identification evidence.

Embarking on the scrutiny of the evidence afresh with a view of arriving at our own conclusion bearing in mind that the trial court had the benefit of seeing and hearing the witness **(See Okeno =vs= Republic [1972} EA32),** we note that the prosecution's case was that a shamba boy based in Koru Ashira Nehemia Omukumba (PW1) was on the material date at 10:00p.m. at home with his family when he heard his wife who was outside the house shouting thief! thief! He enquired and saw a person running after his wife. A second person confronted him and they struggled. He was overcome after being beaten and injured when a third person appeared. He was taken to the house of his workmate Peter Otieno Oriwa (PW2) who was also attacked and beaten up. He was again taken to the house of his employer where he was forced to part with the money in his possession and where he saw additional attackers. His property and that of Peter (PW2) were taken away. The attackers left after having invaded and stolen property from several homes in the neighbour hood.

The matter was reported to the police and in the course of investigations some of the stolen items were recovered and two suspects including the appellant were arrested and eventually charged with the material offences of robbery which they denied.

The appellant's case was that he was at the material time a casual worker at Muhoroni and on the 27th March 2006 he left his house at 5:30 a.m. He proceeded to his employer's house at 7:00 a.m. but did not find her. The employer brewed "Changaa" (illicit brew). He waited for her and in the process some administration police officers arrived at the scene looking for her. They went to look for her at a nearby river and returned with his co-accused. He was arrested and put inside a vehicle where he saw a generator and gas. He was taken to the D. O's office and then to a certain home before being placed in the cells. He was later put in a line and people were called to view him and others. He was identified by one of the people and thereafter charged with an offence he knew nothing about.

The basic issue that arose for determination is whether the offence or robbery with violence was committed against the two complainants Nehemiah Ashira Omukumba (PW1) and Peter Otieno Oriwa (PW2) and if so, whether the appellant was positively identified as having been one of the offenders.

That fact that the said complainants were attacked and injured by a group of people who ended up stealing their respective property was not in dispute. Indeed, it was established and proved by the evidence of the two complainants as supported by that of Catherine Phoebe Amondi (PW3), Elizabeth Nyagondo (PW4), Kennedy Omondi Osewe (PW5), Caleb Otieno Oduha (PW6) and Ruth Achieng (PW8) that a group of people raided several homes in one neighborhood and stole property using violence and threats of violence.

On identification, the evidence showed that the concurrent offences were committed at night i.e. 10:00 p.m

The first complainant (PW1), the second complainant (PW2), Catherine (PW3), Elizabeth (PW4), Kennedy (PW5) and Ruth (PW8) indicated the presence of torch light, electric and solar light at the general scene of the offence.

The first complainant (PW1) further indicated that the entire ordeal lasted for about two hours. It may therefore be said that the presence of light in some parts of the general scene provided favourable conditions for identification as well as adequate opportunity. However, most of the witnesses at the scene were unable to make a positive identification of the appellant as having been one of the offenders.

The second complainant (PW2) said that there was electric light in his house but he was unable to identify any of the offenders as they had heavy caps on their heads. He was very categorical when he said that he did not identify anyone and that he did not know the appellant.

Elizabeth (PW4) said that there was electric light but she was unable to identify any of the offenders. She also said that she did not know the appellant.

Kennedy (PW5) peeped through his window and saw many torches which were shone at him and his wife as they were outside their house raising alarm. They fled the scene and proceeded to a neighbours homestead. He (PW5) never identified anybody. He said that he did not know the appellant. Caleb (PW6) also said that he did not know the appellant and was only informed by his colleagues that thugs had attacked them. Ruth (PW8) said that she saw many torches and fled from the scene. She said that she did not know the appellant.

The appellant's defence was a denial of any involvement in the offences and a contention that he was arrested after being found at his employer's homestead by A.P's who were looking for the said employer called Akinyi who normally brewed changaa. He said that another person who was the co-accused in the lower court was also arrested. They were bundled into a vehicle wherein he saw a generator and gas cooker. He said that he heard conversations inside the vehicle which suggested that the items had been stolen. He said that he was put in cells, put at the inquiry desk and saw people being called, he was thereafter put in a line and the people were asked if they could point out the thieves. He said that about three people failed to point him out but a person appeared and pointed him out. It was then that he was charged.

The law places the burden of proof on the prosecution in all criminal cases. The accused assumes no legal burden of establishing his innocence except in certain limited cases where the law places a burden on the accused to explain matters which are peculiarly within his personal knowledge **(See Mkendeshwo =vs= Republic [2002] IKLR 461** and Section 111 of the Evidence Act).

Despite his denial, the first complainant (PW1) and Catherine (PW3) indicated in their evidence that they were able to identify the appellant as having been one of the offenders. It was on the basis of that evidence of identification that the appellant was convicted by the trial court and more so the evidence of the first complainant (PW1). The first complainant (PW1) indicated that he was unable to identify the offenders when they were at his house. The house had solar light but he was at the door when he saw a man chasing his wife. He was then confronted by a second person and put up a struggle. He was overcome and beaten up when a third person joined in. He was in the process injured. He said that the offenders had torches but he could not at that juncture identify them. He was then taken to the house of the second complainant (PW2) and thereafter to the house of his employer one Edward Odhiambo. He found more offenders in that house which had lights. He said that some of the offenders had caps put on but he saw the face of the one who had no hat. He said that he had not known that person previously and that he is the one who was removing things from the house and taking them outside. He (PW1) was later ordered together with the second complainant (PW2) to carry the stolen generator upto a certain place. He and the second complainant (PW2) were left under guard at a particular place while the offenders proceeded to another house. He said that the offender who was left guarding them was the person he had earlier identified. He said that he identified him by facial appearance and voice. He said that the person had conversed with them a lot while giving them orders to carry this or that item. He said that the person was the appellant whom he was able to again identify at an identification parade through a bruise on the left cheek and the voice.

This evidence by the first complainant (PW1) indicates that he was able to identify the appellant while they were inside his (PW1's) employers house where there was light. He indicated that the appellant's face was not covered at the time by any hat or cap. He also indicated that the frequent conversation he had with the appellant enabled him recognize his voice and that this was confirmed in an identification parade when he requested the parade members to say "**Ahero**".

We are of the view that the availability of lights inside the house of the first complainant's employer provided favourable conditions for visual identification even though the offence occurred in the night.

We are also of the view that the lengthy and frequent conversation that the first complainant had with the person he

identified was also capable of making him identify the person by voice at a later stage in an identification parade. However, there was no confirmation of that voice identification because the prosecution did not avail the evidence of the identification parade.

It is apparent from the evidence of the first complainant (PW1) and the appellant that an identification parade was conducted. It is however not understandable why the evidence pertaining to the parade was not availed to the trial court for it to form its independent opinion as to its credibility and efficacy in order to lay a basis for conviction on voice identification.

We would hold that the only proper identification evidence was that based on visual identification at the scene the offence. This is the evidence which would properly form the basis for a conviction. The learned trial magistrate was correct in referring to both visual and voice identification but she was clearly in error in applying voice identification as a basis for conviction. There was simply insufficient evidence to establish the identification of the appellant by voice.

Be that as it may, Catherine (PW3) also indicated that she made a positive identification of the appellant at the scene of the offences. She said as follows:-

"I saw clearly the man who directed me back to the house. He had a black trouser and coat that covered his forehead. He had a gun and was saying he is an officer. There was solar light that he switched on when he took me back to the house……. The man who directed us back to the house is not here. However, the man who slapped me when I was in the big house and was short is 1st accused. He had a coat. I know 1st accused because amongst my assailants only one was short and dark. I never saw his face".

The first accused was the appellant and according to Catherine (PW3) she identified him as having been one of the offenders. She said that she never saw his face but that he was the only short and dark person in that group. However, in cross – examination, she said that she did not know the appellant and did not identify him in any parade and could not identify him because she did not see his face.

Undoubtedly, the alleged identification of the appellant by the said Catherine (PW3) was not credible and could not be relied upon to convict him. Indeed, the trial magistrate did not rely on that evidence when she remarked:-

"PW3 however says that there had been one particular man she could identify clearly during the robbery but he is not one of the accused persons."

Therefore, the sole evidence of identification of the appellant was that of the first complainant (PW1).

In **RORIA =vs= REPUBLIC [1967] EA 583**, the Court of Appeal noted:-

"A conviction resting entirely on identity invariably causes a degree of uneasiness……., That danger is of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggests that conviction based on such identification should never be upheld it is the duty of the court to satisfy itself that in all circumstances it is safe to act on such identification".

Considering that the first complainant (PW1) saw and identified the appellant at a place which was lighted and had adequate opportunity to do so, we are satisfied that in all circumstances it is safe to act on such identification even in the absence of corroboration.

The trial Magistrate appreciated the need to test the identification evidence by the first complainant, [PW1] with caution and warned herself accordingly. Relying on the decision in the case of **Njeri =vs= Republic [1981] KLR 156**, she stated:-

"In the said case too, the court held that a trial magistrate must properly and carefully evaluate the danger of convicting on the basis of a single witness. And so this court has taken this warning into account and I find that PW1's evidence is free from possibility of error on his identification of the 1st accused".

We fully associate ourselves with this statement by the learned trial magistrate and hold that the appellant was indeed identified as having been among the group of people who terrorized a neighbourhood and stole assorted property including a water –pump and gas cooker (PEX 1 & 2 respectively).

The evidence of recovery of the said items was that of Caleb Okumu Agutu (PW7). He said that the items were found

near a road by a woman villager and handed over to the police.

The woman villager did not testify thereby failing to adduce evidence linking the appellant to possession of the items.

All in all the evidence of identification of the appellant at the scene of the offence was sufficient. He was properly convicted for the two counts of robbery with violence. We are unable to agree with the respondent's concession of the appeal.

The appeal is not merited and is hereby dismissed. We uphold the conviction and the sentence of death in count one.

The sentence of death in count two is however set aside and held in abeyance.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 21st day of October 2008.

J. W. MWERA **J. R. KARANJA**

JUDGE **JUDGE**

JRK/aao