



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

Criminal Appeal 44 & 45 of 2007

RICHARD OCHIENG OGENDO 1st APPELLANT

JOSEPH OTIENO ALANYA.....2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

[From original conviction and sentence in Criminal Case number 384 of 2006 of the Chief

Magistrate's Court at Kisumu]

CORAM

Mwera, Karanja J. J.

Musau for State

Court Clerk – Raymond/Laban

Appellant in person

JUDGMENT

The appellants Richard Ochieng Ogendo and Joseph Otieno Alanya filed separate appeals numbers 44 of 2007 and 45 of 2007 which were consolidated and heard at the same time. They had also filed appeals number 54 of 2007 and number 55 of 2007 which were withdrawn in favour of appeals number 44 of 2007 and number 45 of 2007. This judgment therefore relates to appeals number 44 of 2007 and number 45 of 2007.

On the 22nd may 2006, the appellants and another appeared before the Senior Resident Magistrate (W. B. Mokayah M/s) charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code, in that on the 6th May 2006 within Kibuye Market near Star Hospital Kisumu City in Kisumu District Nyanza Province, jointly with others not before court, while armed with a rifle robbed Mahesh Patel of cash Kshs. 640,600/=, one motor vehicle registration number KAS 099U Toyota Corolla Saloon white in colour, two Nokia mobile phones, one wrist watch make rado, three bank cheques and three banking slips all valued at Kshs. 1,188,700/= and at or immediately before or immediately after the time of such robbery, threatened to use personal violence to the said Mahesh Patel.

The first appellant Richard Ochieng Ogendo faced a second charge of possession of a narcotic drug contrary to Section 3(2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act number 4 of 1994, in that on the 10th May 2005 within Gudka estate Kisumu City Kisumu District Nyanza Province, was found in possession of one kilogram of cannabis (bhang) in contravention of the said Act.

The trial of the case commenced before the Principal Magistrate (A. El-Kindy) on the 11th August 2006 and in the process, on the 20th December 2006, the charge against the third accused one Jagdish Shah was withdrawn in accordance with Section 87(a) Criminal Procedure Code. After trial, the appellants were convicted and sentenced to death on count one. The first appellant was also sentenced to eighteen (18) months imprisonment on count two.

We would point out that the second sentence respecting the first appellant ought to have been left in abeyance since he had already been sentenced to death in the first count, (**See, BORU & ANOTHER =VS= REPUBLIC [2005] IKLR 649**). Be that as it may, the appellants being aggrieved and dissatisfied with the decision of the learned Principal Magistrate lodged the present appeals on the basis of the grounds contained in a petition of appeal filed herein on 22nd March 2007 by Onsongo and Co Advocates on behalf of the first appellant and second appellant Joseph Otieno Alanya.

At the hearing of the appeal, Mr. Onsongo, appeared for and argued the appeals on behalf of both appellants. In so doing, he relied on the grounds contained in the identical petitions of appeal filed on 22nd March 2007. The said grounds are as follows:-

- (i) The learned trial magistrate erred in both law and fact in failing to appreciate the glaring contradictions in the evidence by the prosecution witness.**
- (ii) The learned trial magistrate failed to appreciate that the evidence on identification of the accused person was flawed and unsatisfactory in the circumstances.**
- (iii) The trial court erred in both law and fact in capitalizing minor weakness in the defence case to buttress an otherwise weak prosecution**
- (iv) The learned trial magistrate erred in law in lowering to the prejudice of the accused person, the standard of proof in a criminal case.**
- (v) The trial court shifted the burden of proof**
- (vi) The learned trial magistrate did not comply with Section 169 of the Criminal Procedure Code in writing the judgment therein**
- (vii) The judgment of the subordinate court is against the weight of evidence on record.**
- (viii) The sentence imposed on the Appellant is manifestly harsh and excessive in the circumstances**

In arguing the aforementioned grounds, Mr. Onsongo, condensed them into three broad grounds and capped them with the manner in which the judgment was written vis-à-vis the evidence. To that end, Mr. Onsongo, dealt with the evidence of the appellants' identification, conduct of the identification parade and the general contradiction in the prosecution's case. The learned Counsel argued that the complainant Mahesh Patel (PW1) did not identify any of the attackers and that his answer in cross – examination to the effect that he did not know Thomas Odoyo Awuor (PW6) was vital because the said Thomas Odoyo Awuor provided the only evidence of identification against the appellants.

Learned counsel further argued that PW6 said that he identified two of the attackers and saw their faces yet in cross – examination admitted that his eyes were dazzled by the vehicle's reflection and that he was riding a bicycle in slow motion thereby needing to concentrate on the bicycle to avoid falling down.

Learned counsel went on to argue that PW6 said that the robbers were not facing him but PW1 (Mahesh). He (learned counsel) opined that the priority of PW6 was to save his life and was therefore in fear such that he was not in a position to identify any of the robbers and did not give their description to the police. His evidence was total contradiction, insufficient and unreliable.

On the identification parade, Mr. Onsongo, argued

that the same was conducted by PW2 in a manner which contravened the Forces Standing Orders in as much as PW2 called PW6 and told him “**try to identify this suspect**” and in as much as PW6 talked of two parades and stated that in one parade he saw a suspect from a group of people who were not of the same size.

On the issue of the judgment, learned counsel argued that the same does not comply with Section 169 of the Criminal Procedure Code in that the points for determination and the reasons for the decision were not set out and also that the evidence was not analysed. Learned counsel contended that the trial court merely set out the summary of the case and held the appellants guilty as charged. This amounted to a fatal omission.

Learned counsel also contended that the identification evidence was of a single witness but was not considered with care by the trial court.

To fortify his arguments, learned counsel, referred this court to two decisions of the Court of Appeal viz:- **OLUOCH =vs= REPUBLIC [1985] KLR 549 and OSIWA =vs= REPUBLIC [1989] KLR 469.**

The respondent, represented by the learned Senior Principal State Counsel, Mr. Musau, conceded the appeals and adopted the submissions made by the appellants’ learned counsel, Mr. Onsongo.

Mr. Musau stated that the evidence upon which the appellants were convicted in the first court was that of PW6 and it was suspect in as much as PW6 was disowned by PW1 yet he PW6 said that he was employed by PW1. Mr. Musau, further stated that it appeared that the appellants were arrested for other offences rather than information from PW6 who was the key witness.

On the second count effecting the first appellant Richard Ochieng Ogendo, Mr. Musau, argued that the evidence of PW3 and PW5 in connection thereto was sufficient to support a conviction. Learned counsel for the appellants, disagreed on this point and argued that the drug was recovered in a house used by more than one person. Therefore, there was insufficient evidence to show exclusive possession or constructive possession.

So much for the arguments, this being a first appeal, our primary obligation is to re-examine and re-evaluate the evidence afresh with a view to arriving at our own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (**See, GABRIEL NJOROGE =vs= REPUBLIC [1982-88] IKAR 1134 and OKENO =vs= REPUBLIC [1972] EA 32**)

It was the prosecution’s case that on the material 6th May 2006 at about 10:45 a.m. the complainant, Mahesh G. Patel (PW1), a distributor of general commodities at the Kibuye Market Kisumu had collected a total sum of Kshs. 690,000/= from his customers and was driving to the bank. He was alone driving a motor vehicle registration number KAS 099 U. He had kept the money in the socks and pockets and on reaching the Star hospital road he noticed a person in the middle of the road twenty feet away pointing a long gun. He became confused and stopped his vehicle in the middle of the road. The person with the gun approached and entered the vehicle having been joined by two others. They commandeered the vehicle towards the Kakamega road. He was ordered to remove all the money which was taken away together with two mobile phones and a wrist watch. He was abandoned on the way as the offenders drove away with his vehicle which was recovered after the incident had been reported to the police. In the course of investigations, the two appellants were arrested and charged accordingly.

The case for the first appellant was that he is a sugarcane farmer resident of Kisumu where he owns

rental house. He was arrested on the 9th May 2006 while attending court in connection with a different case. He was taken to the office of the O.C.P.D and questioned. He took the police to his house on 11th May 2006. The police searched his house and took away a microwave. His brother was detained and on the 22nd May 2006 he (appellant one) was charged in court. He had no knowledge of the allegations made against him and was attending a funeral at Kano on the material date of the robbery.

The case for the second appellant was that he lives in Kisumu and operates a small general manufacturing plant. He was arrested on 9th May 2006 at Nakumatt and taken to the police station where he was charged along with people unknown to him. He was attending a clan meeting for a funeral service a day after the material robbery.

The basic issue that arose and arises for determination is whether firstly, the offence of robbery was committed against the complainant (PW1) and if so, whether the appellants were positively identified as having been among the offenders. Secondly, whether the first appellant was found in possession of one kilogram of cannabis (bhang).

In his evidence, the complainant (PW1) established without any particular dispute that he was way-laid in broad daylight by a lone gunman who was joined by two others. His vehicle was then commandeered by the assailants who ended up abandoning him and stealing his vehicle, mobile phones, a wrist watch and money. We are satisfied on the basis of the foregoing evidence that an offence of robbery with violence was committed.

The elements and ingredients of Section 296 (2) of the Penal Code were duly established (See JOHANA NDUNGU =vs= REPUBLIC CR/APP NO. 116 OF 1995 (unreported.))

With regard to identification of the offenders, the complainant (PW1) stated that the offence occurred at 10:45 a.m. on a Saturday. He therefore implied and indeed established that conditions favourable for positive identification of the assailants or any one of them existed at the time. The offence occurred in broad daylight. However, the complainant was unable to make any positive identification of the offenders. He said:-

“ I was informed some people had been arrested. I do not know them. I was confused, I could not see them”.

The sole evidence of identification against the appellants was that of **Thomas Odoyo Awuor** (PW6). He said that he was an employee of Pranukh Enterprises opposite Victoria Hotel and on the material date at 2:00 p.m. was sent to Kibuye to deliver monies to a shop. He was on a bicycle and past the Star hospital he saw one of their vehicles registration number KAS 099 U in which there was the complainant and some strangers. He stopped so that he may hand over some money to the complainant. He at that point saw a gun and retreated. He said that one of the strangers was on the driver's side of the vehicle, another behind the vehicle and yet another was standing on the driver's side of the vehicle. He said that the stranger on the left had a rifle. He said that he was able to identify two of the strangers by seeing their faces. He thereafter returned to his place of work and later on the 17th (presumably 17th May 2006) was called to an identification parade in which he identified the appellants. The identification parade was conducted by I. P. Andrew (PW3). He said that he conducted two separate parades to cover the two suspects i.e. the appellants.

“ It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such witnesses especially when it is shown that conditions favouring a correct identification were difficult. Further, the court has to bear in mind that it is possible for a witness to be honest but to be mistaken”.

(See, OGETO =VS= REPUBLIC [2004] 2 KLR 14, MARUBE & ANOTHER =VS= REPUBLIC [1986] KLR 356 AND KIARIE =VS= REPUBLIC [1984] KLR 139).)

Herein, conditions favouring positive or correct identification were not difficult as may be deduced from the complainant's evidence as well as that of Thomas (PW6) who indicated that it was 2:00 p.m. when he came across the assailants who were at the time with the complainant (PW1). The question that we may ask ourselves is whether the evidence of identification by Thomas (PW6) was credible and free from the possibility of error and/or mistake notwithstanding that favourable conditions for identification existed at the time.

Regarding the said evidence the learned trial magistrate observed:-

“ PW1 maintained he was robbed by three men. PW6 who happened to be nearby and saw three (3) men in PW1's motor vehicle registration number KAS 099U. PW6 saw the faces of the people inside the motor vehicle. It was still early in the morning with plenty of sunshine to see the culprits. No wonder it was an easy task to identify them. The identification was most positive. Defence could not shatter PW6's highly credible evidence”.

The trial magistrate saw and heard the witnesses testify and was in a more suitable position to make appropriate finding respecting their credibility. He considered the evidence of Thomas (PW6) to be credible and acted upon it to convict the appellants.

However, in our view, the trial magistrate may not have arrived at that conclusion had he treated that evidence of identification with great care and more so in the light of what was stated by Thomas (PW6) while under cross – examination.

In the cited case of **OSIWA =vs= REPUBLIC [1989] KLR 469**, the Court of Appeal held that where the only evidence against an accused is, as here, evidence of identification or recognition, a trial court must examine such evidence carefully to be satisfied that the circumstances of the identification are favourable and free from possibility of error before it can safely make it the basis of a conviction.

In cross –examination, Thomas (PW6) stated that his eyes were dazzled because of the reflection from the vehicle. He said that he was riding his bicycle in slow motion and thus required to concentrate on it more. He said that the assailants were not facing him but concentrated on his director. He also said that he was seized by fear when he saw the gun.

If the eyes of Thomas (PW6) were dazzled by the vehicle's reflection and that he put more concentration on his bicycle and also that the assailants were not facing him, could he really have made a positive identification of the assailants?. We think not. He did not have adequate opportunity for positive identification. He was in fear and therefore unable to fully register the facial features of the people he saw. In any event, these people were not facing him. He could not see their faces. His evidence of identification of the appellants was not cogent. It was more of dock identification than anything else.

Our answer to the question we posed earlier is that the evidence of identification by Thomas (PW6) was not in our opinion credible and free from the possibility of error and/or mistaken identity.

The trial magistrate erred in both fact and law in giving undue reliance to that evidence. We therefore hold that the appellants were not positively identified as having been some of those people who robbed the complainant (PW1). There being no identification of the appellants at the scene of the offence their purported identification at identification parades conducted by PW2 was a fallacy and an exercise in futility.

The identification parade whether conducted rightly or wrongly went on to fortify PW6's inability to identify the assailants. If the offence occurred in broad daylight and PW6 was able to see and identify the appellants the need for identification parades did not arise whatsoever.

The learned Senior Principal State Counsel conceded the appeal with regard to the first count of robbery with violence. He was perfectly correct in so doing.

The appeal on the first count is indeed merited. The appellants' conviction in respect thereof was unsafe.

With regard to the second count of possession of narcotic drug, the evidence by the Government Analyst Richard K. Langat (PW3) confirmed that the drug plant substance recovered by P. C. Hussein Ibrahim (PW5) was cannabis and would be included in the Narcotic Drugs and Psychotropic Substances (control) Act 1994.

The report (PEX 4) by the said analyst was not disputed.

P. C. Hussein Ibrahim (PW5) of the flying squad Kisumu stated that in the course of interrogating the first appellant Richard Ochieng Ogendo, they took him to his house at Kondele where a search was carried out and the cannabis recovered underneath his bed.

P. C. Ibrahim (PW5) further said that the house had been locked but the first appellant had the keys and opened it. He also said that the first appellant was the only person occupying the house comprising two bedrooms. This evidence by P. C. Ibrahim (PW5) was not substantially disputed.

The first appellant admitted that he took the police officers to his house which was searched. He did not say that he lived in the house with others. He said that his microwave was taken away and that his brother was detained. He avoided mentioning the cannabis and only said that he has never dealt with such stuff. We do hold that the prosecution did tender adequate evidence to establish that the first appellant was found in actual possession of the material narcotic drug. It was found in a house in which he had exclusive control and occupation. His conviction in the second count was proper and lawful. We uphold the same as well as the sentence of eighteen (18) months imprisonment imposed hitherto erroneously, at the time by the trial court.

In the end result, the appeal succeeds in respect of count one and fails in respect of count two.

The conviction in count one is quashed and the sentence of death set aside.

The second appellant Joseph Otieno Alanya shall be set at liberty unless otherwise lawfully held.

The first appellant Richard Ochieng Ogendo shall serve eighteen (18) months imprisonment for count two.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 14th day of October 2008.

J. W. MWERA

J. R. KARANJA

JUDGE

JUDGE

JRK/aao