REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Criminal Appeal 193 of 2006

KENNEDY OCHIENG ARONGO ……1st APPELLANT

ESAU OTIENO AMIMO …….…….. 2nd APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

[From original conviction and sentence in Criminal Case number 12 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, Kennedy Ochieng Arongo and Esau Otieno Amimo filed separate appeals which were consolidated and heard at the same time. They had together with another appeared before the Principal Magistrate at Kisumu charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the 10th December 2006 at Nyalenda "A' Sub Location Kisumu District Nyanza Province, while armed with dangerous weapons namely bars and rungus jointly robbed Michael Ochieng

of his wallet containing Kshs. 7,950/= and a pair of shoes all valued at Kshs. 8.750/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Michael Ochieng.

After trial, appellants were convicted and sentenced to death while their co-accused was found not guilty and acquitted.

Being dissatisfied with the conviction and sentence, the appellants lodged the present appeals on the basis of the grounds contained in a petition of appeal filed herein on the 17th October 2006 by the first appellant (Kennedy) and the grounds contained in a petition of appeal filed herein on the 9th January 2007 by Messrs Otieno Ragot & Co Advocates on behalf of the second appellant (Esau).

The grounds are essentially an attack on the prosecution evidence of identification and a complaint on the insufficiency of the entire prosecution's evidence. There is also a complaint on the trial court's disregard of the defence evidence.

At the hearing of the appeal, the first appellant appeared in person and presented written submissions to augment and fortify his grounds of appeal.

The second appellant was represented by the learned Counsel, Mr. Ragot while the respondent was represented by the learned Senior Principal State Counsel, Mr. Musau who did not support the appellants' conviction on the basic ground that the prosecution's evidence of identification was not proper.

Mr. Ragot on his part took us through the evidence of the key prosecution witnesses PW1 and PW2 and contended that the same was uncorroborated, contradictory and incapable of establishing beyond reasonable doubt that appellants were positively identified as having been responsible for the offence.

He further contended that the trial Magistrate erred in his analysis of the evidence and arrived at a wrong decision. He said that the proceedings are incomprehensible and illogical.

To fortify his arguments, the learned counsel relied on the case, of **Turnbull & others =vs= Rex [1976] 63 CR.APPR 132 and Wilson Washington Otieno & Another =vs= Republic Nairobi CR. APP No. 55 of 1989.**

As a first appellate court, we are obliged 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 Okeno =vs= Republic [1072] EA 32 and Achira =vs= Republic [2003] KLR 707).**

The prosecution case was grounded on the facts that on the material date at about 7:30 p.m. the complainant Michael Ochieng (PW1) and his friend Robert Oketch (PW2) were walking towards a chief's camp when they were attacked by a group of people who emerged from all the directions. The complainant was beaten such that he fell down. His shoes and money Kshs. 7,550/= were taken away. His colleague (PW2) was struck on the back with a heavy object such that he fell down and rolled.

They both alleged that the appellants were in the group of people who attacked and robbed them.

The first appellant was arrested on the following day by APC Magaka (PW4) of Nyahera Chief's Camp.

The second appellant was arrested later on 28th December 2005 by P. C. Serena (PW7). They were handed to and charged by P. C. Anthony Baraza (PW6).

The first appellant's defence was that he lives at Nyalenda and sells clothes at the bus – stage. He was with the complainant on the material date taking chang'aa. He became drunk and left the complainant and PW2 behind. He went to his home and slept. He was arrested on the following day when police officers arrived at his home accompanied by the complaint.

The defence for the second appellant was that he lives in Nyamasaria and a casual labourer by occupation. He was arrested on the 28th December 2005 by Police officers on patrol. He was questioned and taken to Nyamasaria Police Post from where he was taken to Central Police station. He was arraigned in court and vehemently denied the charge.

From the foregoing, it is undisputed that the offence of robbery with violence was indeed committed against the complainant (PW1). It is established that he was attacked by a group of people who beat him up and robbed him of his property including shoes and money.

The necessary ingredients of the offence were duly established

(See John Kubai & Another =vs= Republic Nyeri CR. APP NO. 303 & 304 of 2006 C/A (Unreported)).

The issue that presented itself for determination is whether the appellants were positively identified as having been in the group of people responsible for the offence.

The defence raised by each of the appellants was a denial. The first appellant indicated that he was on the material date drinking chan'gaa together with the complainant (PW1) and (PW2). This was somehow confirmed by Pamela Atieno (PW3) and it implied that the first appellant was previously known to the complainant.

Indeed, the complainant indicated in his evidence that he had previously known not only the first appellant but also the second appellant. He also indicated that the second appellant was among those drinking chang'aa on that material date. He further indicated that he identified the second appellant and a person called Amedy as being part of the group which attacked and robbed him. The complainant's friend (PW2) also indicated that he identified the second appellant as having been one of the attackers.

It would appear that the first appellant was more or less implicated by some girls who mentioned him as a suspect to the complainant (PW1) and his friend (PW2).

The evidence showed that the offence occurred in the hours of darkness at about 7:30 p.m. The circumstances were therefore not favourable for positive identification of the attackers. Neither the complainant (PW1) nor his friend (PW2) indicated the presence of any source of light which enabled them identify any of the attackers. Their alleged identification of the appellants could not be said to have been free from the possibility of error or mistaken identity. It is doubtful whether they were at all able to identify any of their attackers even though the indication given by themselves was that they identified the appellants more by recognition than anything else.

Whether or not the alleged identification of the appellants was by recognition, such identification would only be possible in favourable circumstances which were lacking in this case.

It is trite law that where the evidence to implicate an accused person is entirely based on identification, such evidence should be absolutely watertight to justify a conviction and must be free from any possibility of error **(See Kiarie =vs= Republic [1984] KLR 730).**

And, although the evidence of recognition is more satisfactory more assuring and more reliable than the identification of a stranger (**See Anjononi =vs= Republic [1980] KLR 50**), such evidence should not only be credible but also should be free from any possibility of error before it can be relied on to implicate an accused person.

We are of the considered view that the evidence of identification against the appellants by the complainant (PW1) and his friend (PW2) was not credibly water tight to be free from the possibility of error.

Consequently, the conviction of the appellants by the trial court was improper and unsafe. We allow the

appeals, quash the conviction and set aside the sentence of death.

The appellants shall be released forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kisumu this 18th day of November 2008

J. W. MWERA J. R. KARANJA

JUDGE JUDGE

JRK/aao