



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 989 of 2003

(From Original Conviction and Sentence in Criminal Case No. 636 of 2003 of the Chief Magistrate's Court at Kibera: Siganga SRM)

RAMADHAN OTIENO OBUKAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, **RAMADHAN OTIENO OBUK** was charged in the subordinate court with one count of Robbery with Violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge were that on the 13th day of August 2003 at Asoka flats within Nairobi Area, jointly with others not before court while armed with runigus and hammers robbed **DAVID SYEUNDA OLUNGA** of Kshs.3,000/=, mobile phone make Nokia, Eight pairs of shoes, assorted clothes and several bed sheets all valued at Kshs.57,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **DAVID SYEUNDA OLUNGA**.

The prosecution case was that on the night of 12th and 13th August, 2003 at about 2 a.m. a gang of robbers broke into the complainant's (PW1) house. The complainant and his nephew – Philip Wesonga (PW2) were in the house sleeping in different bedrooms. Three of the robbers one of whom they identified as the appellant then entered PW1's bedroom. They switched on the electricity light and ransacked his bedroom and took all the items listed in the charge sheet. Thereafter they proceeded to PW2's bedroom leaving one robber though guarding PW1 after having had his hands tied. The appellant it is alleged then took the complainant's Somali sword as they proceeded to PW2's bedroom. They switched an eclectic lights and proceeded to tie PW 2's hands as well. The complainant started shouting "thief", "thief". On hearing this the robbers ran away. In the process the complainant armed himself with iron box and managed to hit one of the robbers on the face repeatedly with the iron box until it broke into pieces. According to PW 1, this robber was the appellant. All the robbers nonetheless managed to escape.

Police were alerted and within 20 minutes they were at the scene. They were led by PW3, P.C. Kilonzo. They started tracking down the robbers. They caught up with the appellant who was in the company of another person as they were walking along Haile Selassie Avenue. Following interrogations, the duo were arrested and taken to the scene of crime, where the complainant identified the appellant as one of the robbers, even though nothing stolen from the complainant was recovered from him. The appellant was subsequently charged with the offence.

When put on his defence, the appellant elected to give a sworn statement of defence. He claimed that on the material day, his colleague, one James Mwaura, had been hit by a motor vehicle and the appellant together with a security guard had taken the said colleague to Kenyatta National Hospital for treatment. The colleague was admitted and as the two walked back to town, they were arrested by the police officers who took them to the scene of crime. That the police officers took the appellant's Kshs.350/=. The security guard arrested with the appellant was released under mysterious circumstances but the appellant was charged for an offence he knew nothing about.

On the basis of the foregoing evidence, the court found the appellant guilty, convicted him and sentenced him to death. The appellant was aggrieved by the conviction and sentence. He consequently lodged this appeal. In his petition of appeal, the appellant has faulted, his conviction on three grounds; identification, rejection of his defence and failure by the prosecution to prove its case beyond reasonable doubt.

In support of the aforesaid grounds of appeal, the appellant submitted written submissions that we have carefully read and considered at length.

The appeal was opposed by the state. Miss Gateru learned state counsel submitted that the prosecution proved its case against the appellant to the required standard and further that the ingredients for the offence of robbery with violence were met. That PW 1 and PW 2 gave similar consistent and corroborative evidence regarding what transpired during the incident. Counsel submitted that there was sufficient light in the house that enabled the two witnesses to identify the appellant. That there was evidence that one of the thugs was injured on the face after having been beaten repeatedly with an iron box by the complainant. That when the appellant was taken to the scene of crime upon arrest by PW3 he had a swollen face. To the learned state counsel therefore there was sufficient evidence regarding the identification of the appellant.

Regarding contradictions, learned counsel submitted that there were no such contradictions in the prosecution case and even if there were, they were minor and incapable of shaking the prosecution.

With regard to failure by the trial magistrate to consider the appellant's defence, the learned state counsel submitted that the appellant defence was duly considered and found to be misleading.

In conclusion the learned state counsel submitted that there was strong evidence on record linking the appellant to the crime. Consequently the appeal lacked merit and ought to be dismissed.

We have carefully re-evaluated the evidence tendered in the lower court in line with the decision in **REPUBLIC VS OKENO (1972) EA 32**. The conviction of the appellant was pegged on his alleged identification by PW 1 and PW 2 at the scene of crime. The appellant takes the position that the circumstances at the scene of robbery were not favourable for any positive identification and the possibility of mistaken identity cannot be ruled out; the offence having been committed deep into the night.

The Court of Appeal in the case of **CLEOPHAS OTIENO WAMUNGA VS REPUBLIC CRIMINAL APPEAL NO. 20 OF 1989 at KISUMU (unreported)** stated

“.....Evidence of visual identification in Criminal cases can bring about Miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by LORD Widgery, C.J. in the well known case of REPUBLIC VS TURNBULL (1976) 3 ALL E.R. 549.....”

As the offence was committed at night, the prevailing conditions have to be considered. If there was

light, then its intensity and its source in relation to the appellant has to be considered.

PW 1 and PW 2 testified that on the material day when they were both in the house sleeping, their house was invaded by 3 people who turned out to be robbers. That at the time of the attack, there was no light in the house. PW 1 stated thus:-

“.....My lights were not on by then.....”

As for PW 2, he stated:-

“.....On 13th August 2003 at 2 a.m. I was sleeping in my uncle’s house (PW 1). My bedroom door open, the electric lights were switched on and two people entered the room.....”

It would appear therefore that the robbers gained entry into the house in darkness. It was only after they had gained entry that they switched on the electricity lights as they ransacked the house. The trial court ought to have taken the trouble to carry out the necessary inquiries as to the intensity of the light, and its source in relation to the robbers, the length of time, if any, that these witnesses had the robbers under observation so as to be able to identify them at any of them subsequently. It did not. Failure to make these inquiries automatically results, in the prosecution evidence of identification being rendered doubtful.

In our view, the brazen manner in which the robbery was executed left very little room for these witnesses to observe the robbers sufficiently to be able to identify them subsequently. The robbers entered the house in darkness, and using the only source of light then i.e. their torches, they went about their business. It would appear the robbers only switched on the lights to assist them ransack PW1’s bedroom. When doing so, they constantly harassed PW1 and tied him up. When done with PW1 they moved to PW2 bedroom and subjected PW2 to the same treatment. However as two of the robbers, proceeded to PW2’s bedroom, they left one guarding PW1 in his bedroom. This is the robber that the complainant was with for sometime. However he was unable to identify him at all. To our mind therefore, and as already stated the circumstances obtaining were so difficult as to make any positive identification impossible.

Furthermore, though these same witnesses testified that they could identify those who robbed them, none of them could describe the robbers to the police officers who came to the scene immediately after the robbery. This fact is confirmed by PW 3 in his testimony when he stated:-

“.....The complainants did not know your names neither did he give us your description prior to our arresting you.....”

In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance. Such evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given (**See REPUBLIC VS KABOGO S/O WAGUNGU 23 (1) KLR 50.**)

In our view the omission on the part of the two witnesses to describe their attackers to the police goes to show that they were not sure of the attackers identity. That being the case, how then were the Police officers, PW3 included, expected to pursue the robbers whose description they did not have. In those circumstances can the possibility of the said officers arresting an innocent person be completely ruled out? We do not think so.

It is also in evidence that once the police officers arrived at the scene, and without being given any description regarding the robbers, they started pursuing them. After sometime, they came back with two people. According to PW3:-

“.....we decided to arrest them and take them back to the scene to see if the complaint would

identify them. At the scene 2 complainants identified only one person.....”

In our view the act of PW 3 taking the suspect to the scene of crime so as to see whether the complainant would identify him was wrong and rendered the purported identification by PW 1 and PW 2 worthless. What PW 3 ought to have done was to take the suspects to the police station and subsequently conduct a proper identification parade to test whether really the two witnesses had been in a position to identify the robbers. Faced with similar scenario, the Court of Appeal in the case of **PAUL MWANIKI KITILI VS REPUBLIC CR APP NO 270 OF 2002** stated:-

“.....The proper procedure would have been for the two Police officers and PW7 to take the Appellant straight to the Police Station arrange for any identification parade and see if the Mousleys would have been able to identify the Appellant at a properly organized parade. The kind of identification alleged by PW1, PW2 and PW3 though strictly not dock identification can have very little value to the Prosecution case..... It is very likely and very natural that if the Police confront Complainant with an individual arrested soon after a robbery on them the witnesses would say the person so arrested was among those who robbed them.....”

In the light of the foregoing, we are of the view that the trial magistrate was wrong in relying on the evidence of identification to convict the appellant. It was worthless.

It is also instructive to note that according to PW 1, the appellant was arrested a few minutes after the incident and that is why he was able to identify the appellant. However according to PW 3, they arrested the appellant and his colleague and brought them to scene after about 50 minutes. It is clear that PW 1 & PW 2 were not present at the time of the appellant's arrest. This cannot be said within a short time. Indeed considering where the appellant was arrested; a long Haile Sellassie Avenue, it cannot be said that the appellant's arrest was immediate as PW 1 wanted the court to believe. What were the circumstances of the appellant's arrest? According to PW 3:

“.....We decided to look for the robbers, we drove toward community and on reaching Haile Selassie Avenue, we saw 2 people walking along the road, towards city center. We stopped and interrogated them. One of them wore securicor guard uniform while the other one wore civilian clothes, they both said they were from Kenyatta National Hospital where they had taken a patient who was an accident victim and had been admitted there. They however produced no documents to this effect. They had no identity cards. We decided to arrest them and take them back to the scene to see if the complainant would identify them.....”

The appellant, it does appear to us that he was arrested on mere suspicion which had nothing to do with the robbery incident. Nobody had connected the appellant to the robbery. The police officers had no description of the appellant nor was the complainant present during the arrest. PW 1 having just undergone a harrowing experience at the hands of the robbers could easily have identified anybody brought to the scene by the police as one of the robbers as it seems to have happened in the instant case.

PW 1 further stated that he had hit one of the robbers with an iron box which broke into pieces. However pieces of the alleged iron box were never produced in court as exhibits. It was the evidence of PW 1 that he had injured the appellant on the face in the process. The court did not note any alleged injury on the face of the appellant in its record in the instant case. In our view, the evidence relating to the broken iron box and injury to the face of the appellant remained mere allegation which ought not to have been relied upon to find a conviction. Still on the issue of the iron box, we find it incredible that PW 1 would have hit the robber whilst his hands were still tied. Nowhere in the evidence on record did PW 1 state that he untied himself before getting the iron box with which he hit one of the robbers. PW 2's evidence on record seems to back our concern. For he testified:

“..... I untied the belt tying my hands and I untied my uncle's of hands which had been tied with a belt and the iron box electric cord. The people ran away.....”

The appellant was not arrested within the vicinity of the robbery. Indeed he was arrested somewhere

along Haile Selassie Avenue. This was shortly after the robbery according to some of the witnesses. He was arrested with none of the stolen items. What happened to them? There was no suggestion that they were taken away by the other robbers. The robbers were further said to have been three in number. What happened to the other robbers? When arrested the appellant was with another person in a securicor uniform. Both PW 1 and PW 2 in their evidence did not at all allude to the presence of any robber with securicor uniform during the robbery. All the foregoing concerns should have been uppermost in the mind of the trial court. They should have raised the possibility that perhaps the appellant was a victim of mistaken identity

The appellant raised a defence which in our view was plausible. Considering the manner and the circumstances of his arrest, we think that his defence was more believable than the prosecution case. The trial court should have carefully considered and evaluated the defence. It did not do so in our considered opinion before reaching the conclusion that the defence was misleading. As stated in the case of JANE NYAMUTHI VS REPUBLIC (1953) EACA 21,

“.....It is not enough only to set out the defence but it must be considered in light of all evidence before court and the court has to explain why the defence is unacceptable.....”

In the instant case the trial magistrate did not give any explanation as to why she found appellant’s defence misleading. This was an error too.

We have said enough to show that we are not persuaded that the conviction of the appellant was safe. His appel must therefore succeed. Accordingly, we allow the appeal, quash the conviction, and set aside the sentence of death imposed. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 9th day of May, 2006.

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LESIIT

JUDGE

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MAKHANDIA

JUDGE