



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL CASE NO. 90 OF 2019**

**DAVID OTIENO OTIENO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal against the conviction and sentence in Chief Magistrate's court at Makadara in Makadara Chief Magistrate's court Criminal case number 3297 of 2015 delivered by Hon. A. R. Kithinji (SPM) on 11.12.2018)*

**RULING**

The appellant herein DAVID OTIENO OTIENO was charged in the lower court on 2.11.2015 with upto 7 counts. On Count I, he faced a charge of attempted murder contrary section 220(b) of the Penal Code. He faced a similar charge on Count II, with an alternative charge of grievous harm contrary to section 234 of the Penal Code. As Count III, he faced another charge of attempted murder, while at Count IV, he faced a charge of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. Count V, VI and VII, where all of unlawful use of firearm by a public officer contrary to section 26A(ii)(a) of the Firearm Act, Cap 114. After pleas of Not Guilty were entered for accused on all the 7 counts, the case against the appellant proceeded to full trial 13 witnesses giving evidence for the prosecution side. On being put to his defence, the appellant chose to give an unsworn evidence in his defence. He called no witness. At the conclusion of the trial, the appellant was convicted on all the 7 counts. On Counts I, II and III, he was sentenced to serve 10 years' imprisonment on each count. On Count IV, he was sentenced to serve 20 years' imprisonment. Lastly on counts 5, 6 and 7 appellant was sentenced to serve 7 years imprisonment on each count. All the sentences were ordered to run concurrently.

Being aggrieved with both the conviction and sentence of the lower court, the appellant filed a petition of appeal herein on 17.4.2019. in the said petition the appellant listed a total of 8 grounds of appeal basically as follows:

1. That the learned magistrate erred in law and in fact in finding that the appellant had been positively identified as being one of the assailants who committed the offences he was charged with.
2. That the learned trial magistrate erred in law in failing to draw a clear cut connection between the commission of the offence and the involvement of the Appellant.
3. That the learned magistrate erred in law and fact in failing to accord the Appellant the benefit of doubt arising from the uncorroborated, inconsistent, uncredited and insufficient evidence adduced by the prosecution witnesses.
4. That the learned trial magistrate erred in law and fact in finding that the appellant had been known and even contacted by some of the prosecution witnesses, hence painting at a positive identification.
5. That the learned trial magistrate erred in law and fact in finding guilt in all the offences against the appellant had been proved beyond reasonable doubt.
6. That the learned trial magistrate erred in law and in fact in finding that the appellant had stolen a motor vehicle arising from a robbery with violence incident.
7. That the learned trial magistrate erred in law and fact in failing to find that the failure by the prosecution to call some crucial witnesses (competent) weakened the prosecution case.
8. That the learned magistrate erred in law and fact in failing to find that the appellant raised a credible and plausible, defence capable of dislodging the prosecution's case.

The appellant has pleaded that this court be pleaded to quash the conviction and sentences meted out by the trial court. The prosecution has

opposed this appeal. Following agreement by the parties, the court ordered on 15.10.2019, that the appeal be canvassed by way of written submissions. Both sides have accordingly filed their respective set of the submissions. I have carefully considered the 2 sets of submissions. From the submissions of the appellant, the issues for determination in this appeal can be summarized as follows:

- i) The issues of identification
- ii) The defence of the appellant.
- iii) Whether the case against the appellant was proved beyond any reasonable doubt as required by the law.
- iv) The sentence.

Indeed the counsel for the appellant has condensed the 8 grounds on the petition of appeal into the above 4 issues for determination. I shall consider the said issues as submitted (above).

On the first issue of identification, it was submitted by the appellant that the prosecution witnesses did not see the appellant at the scene crime. That there were some witnesses who claim to have identified the appellant by his voice, and that they saw him dressed in police attire with his face covered with a masai shuka. The facial identification was difficult. That whereas PW2 only heard the voice of the appellant, PW3 did not see him or hear him make the statement "Toka hapo ama nikuuwe"! further, that whereas PW2 and PW3 had told the court that the appellant had earlier been to their house dressed in police uniform and masai shuka, PW7, the security guard did not testify as to this. Counsel submitted that PW1, PW2 and PW3 may have colluded to fix the appellant given that the appellant and PW1 had been romantically related. Counsel supposed the existence of a love triangle in the relationship.

As to the robbery charge, it was submitted that PW5 did not state how the person who robbed him was dressed. Counsel also challenged the evidence of PW2 that he even called out "Oti, kwani kuna nini", and that there is no evidence that appellant was known by that name. He otherwise stated that both PW1 and PW2 made this statement.

Counsel relied on Wamunga Versus Republic (1989) KLR 424, on the fact that a trial court ought to consider the evidence of identification or recognition very carefully and be satisfied that the circumstances of identification were favourable. Also the case of John Nduati Versus Republic A Criminal Appeal no. 121/2014, that the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.

The case of Choge Versus Republic (1985) KLR was also relied on on the fact that the evidence of identification is admissible, but that the court must satisfy itself that there was no mistake in the said identification. The same position was postulated in the case of Mbelle versus Republic (1984) KLR 624 quoted by the appellant.

With respect to Count II and the alternative charge, it was admitted by the appellant that PW2 was injured during the incident questions were only raised as to whether it was by the appellant. Again, the submissions revolved around the question of identification.

Regarding Count IV, it was submitted that PW5 did not identify the man who had robbed him, while PW4 only stated that the man had a Masai Shuka and a police cap. That the witnesses did not give evidence on the lighting. Counsel otherwise referred to the evidence of PW8 that appellant, whom he knew, entered while on a boda boda, and was allowed in because he is a police officer. That he then heard gun shots. He did not see by whom.

And on Count V, VI and VII, regarding the firearm, counsel challenged the evidence of PW6 that he had issued appellant with G-3 rifle Serial Number 6047851A with 60 rounds of ammunition but which he had mistakenly recorded as 581A. He also submitted on the evidence of PW9, the ballistics expert, who confirmed that he tested firearm Serial number 6047851A which had 3 magazine with 52 rounds of ammunition and that there had been 6 spent cartridges. Counsel maintained that appellant had been issued with Serial Number 581A. He relied on the Danson Ongunya Versus Republic (2106)eKLR, on the issue of proof of the fact that the shots were fired by the appellant (actus reus) and from which firearm. Also the case of Joseph Kimani Njeu Versus Republic (2014)eKLR on the fact there must be proof of both actus reus and mens rea for Criminal liability to be established.

On the sentences, counsel only submitted that the same were excessive and urged that that the appeal be allowed.

For the prosecution side, it was submitted that the ingredients of attempted murder were all proved i.e the intention to kill shown by the indiscriminate manner in which the appellant shot at the house. That he was also properly identified by PW1, PW2 and PW3. Counsel relied on at least 3 cases, being Hamisi S/O Tambi (1953) 20 EACA 176, Cheruiyot Versus Republic (1976 – 1985) EA 49, and Ahmed Mohamed Saeed Versus Republic (1957) 23 EACA 396.

Further, that the 3 ingredients of robbery with violence were also proved. And whether the appellant was armed with a dangerous weapon, whether he was identified and also on the unlawful use of a firearm. On the question of the serial number of the firearm, it was submitted that PW6 explained this and the fact that on recovery, the firearm did not have 12 rounds of ammunition confirms further that the appellant had been issued with the relevant firearm. Counsel also challenged the defence of alibi since the appellant gave an unsworn evidence that was not tested. She urged that the sentences do stand.

From the onset, it must be declared that this court is sitting on this matter as an appeal court of the first instance. As directed by the Court of Appeal in David Njuguna Kariuki Versus Republic (2010)eKLR.

*"The duty of the 1<sup>st</sup> appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its*

own conclusions.”

From the old case of Nelson Versus Republic (1970)EA, 599, it has severally been directed that the appellate court will ordinarily not interfere with the discretion of the trial judge unless it is evident that the judge has acted upon some wrong principles or overlooked some material factors. And on sentence, unless the same is manifestly excessive in view of the circumstances of the case.

The first issue raised in this appeal is whether the prosecution proved that it is the appellant who was responsible for this incident. Or rather, whether the appellant was truly identified as the perpetrator of the crime. In determining this matter I have considered a number of circumstances and evidence in this case. It is not in dispute that the complainants herein were attacked on the fateful night, leaving at least one of them with injuries. It is also clear from the evidence that at least a firearm was used during the attack. The 2 sides are also in agreement that the appellant and PW1 had an intimate relationship over a long period of time. The only variance is that whereas PW1 maintains that they had differences in their relationship with the appellant, the appellant on his part seems to have maintained that the flames were still on and their relationship was still good. It is also conceded that the appellant was still known to the other members of the family of PW1, including PW2 and PW3.

From the evidence of PW1, Franciscar Munyiva Nyamai, the attack had been shortly after she came home at midnight. Both her bedroom lights and the security lights outside were on. Shots came through the bedroom window and shattered the bathroom sink. She heard her son Crispus (Chris) ask, “Oti kuna nini?” she also heard the response from outside “Toka hapo ama nikuuwe”. She knew the voice and recognized it as that of the appellant. Several shots were fired through the other windows. In the process her son got shot. Her evidence was that their relationship had turned sour. She otherwise confirmed that she never saw the appellant as the attacker. And this was the evidence of PW1 which remained intact even on cross examination.

PW2 Chrispus Makau Katee is son to PW1. His evidence was that he knows the appellant well as they had interacted severally. That on the material date, the appellant whom he called David Otieno went to their house on the material night on 31.10.2015 at about 8:00pm. He was in jungle green uniform and Masaai shawl. That the appellant a police officer at Airport, had a demanding voice as he asked where his mother was before banging the door and leaving just as the house girl came.

That at around midnight their bell rang continuously. Then he heard sounds of breaking glass in his mother’s bedroom. His evidence was that the court lights and the security lights were on. He saw it was the appellant still in police uniform and masaai shawl. He asked him “Oti ni nini?” and appellant answered, “Toka hapo ama nitakuua”. He saw him with a big gun. The gunshots continued. He got shot at the hand. On cross examination, he said he saw the person waiving the curtain and that the security lights were a meter and half away from the window.

And PW3 Christine Kirinya, the house help at the house of PW1, also gave evidence that on the material night on 31.10.2015, at about 7:00pm, she saw the accused, whom she knew well as Otieno when he came to their house. He was wearing jungle green and jacket and a masaai lessa. After failing to get PW1 on phone, the appellant allegedly took water and left. She was later to be woken up at night. She then heard the voice of the appellant warning PW2 to leave or he would kill him. She confirmed hearing many shots and that PW2 was shot in the process. She knew the appellant as Oti, the first name of Otieno.

The 4<sup>th</sup> witness, PW4, was Ambrose Mburi Musyoli, a resident in the same block. His testimony was that on the material night at about 12:00am, he heard gunshots and on checking through the window, he saw a man from the 2<sup>nd</sup> block in jungle uniform and carrying a gun. The security lights were on. He later helped take PW2 to hospital.

From the evidence of the 4 witnesses above, it is clear that the appellant was well known to PW1, PW2 and PW3. He was a common visitor in their house. Out of such engagements, these witnesses gave firm, well corroborated and unchallenged evidence that they knew the appellant both physically and through his voice. At least 2 of the witnesses, PW2 and PW3 testified that appellant had been in their house earlier that evening and they even talked. He was dressed in police uniform and Masaai shuka. At least 3 of the witnesses, PW1, PW2 and PW3 identified the voice of the appellant later in the night during the attack as he ordered PW2 to move away or he would kill him. For PW2, he again saw the appellant through the bedroom window of PW1. He even spoke to him as he asked the appellant what the problem was. The undisputed evidence that comes out is that the appellant was properly identified on the material evening in the house of PW1 while in the police jungle uniform and Masaai shuka. PW2 later in the night again identified him in the same attire. PW1, 2 and PW3 also identified him by his voice which they knew well.

On how he was identified by PW2 during the incident, all these witnesses confirmed that there were both the court lights and security lights on. The security lights (PW2) were about 1.5 meters from the window of PW1 where the appellant was firing from. An independent witness, PW4 confirmed the position of the lighting at the scene.

In Wamunga versus Republic (1989)KLR 424 cited by the defence:

*“where the only evidence against the defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”*

The case relied on by the trial court and also the appellant in his submissions of John Nduati versus Republic, Criminal Appeal No. 121/2014 is also relevant to the extent that it gives directions that the court ought to warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. This the trial court duly did and rightly so.

In the said Counts, I, II and III, the circumstances of this case are such that the conduct of the appellant clearly pointed to an attempt to murder. He had gone looking for PW1 at her house. He later came back to the said house in the dead of the night armed with a rifle. The shooting were sporadic and through the various windows and openings of the house. And on being asked by PW2 what the problem was, he answered “Toka hapo ama nitakuua”. In the process he indeed shot PW2 on the hand. Even after this the shootings continued. He must have

intended to kill as rightly discerned by the trial magistrate in the analysis of section 206(a)(b) of the Penal Code.

Regarding count IV of robbery with violence, the prosecution case was based on the evidence of PW5, Titus Gathume Kibuya, that on the material night, he was driving home in his motor vehicle KBL 188P when a man pointing a gun stopped him on the road. The vehicle was later recovered. Though he could not identify the man who robbed him, his testimony was that the man had boots and a masai kiko and a police cap. PW7 John Onyango, on his part gave evidence on how on the material night, the accused whom he knew well went through the gate on a motor cycle, which left. That shortly thereafter he heard gun shots. He saw accused in a kiko and with a gun. It is his colleague who later told him that accused had passed the gate while driving Mercedes Benz KBL 188. He himself did not see accused drive the said vehicle. The colleague at the gate with PW7 was Elisha Onyango (PW8). His evidence was that the appellant whom he knew well appeared on that night on a boda boda and was allowed in. This motor cycle shortly exited the gate. He then heard gunshots in the estate. In his evidence, appellant then appeared driving a Mercedes Benz KBL 188P and ordered him to open the gate, which he did. Then a man came and reported the loss of his vehicle. This witness testified as to being the appellant in police uniform. He also saw a rifle as he drove past the gate.

The descriptions given of the appellant as he entered the gate by PW7, filled the descriptions of the same man given by PW8. The same descriptions were given by PW5 who had been robbed of his motor vehicle. In my view the descriptions and evidence of these 3 witnesses corroborated each other, leaving no doubt that it was the appellant, whom PW7 knows well, who entered the gate on a motor cycle that fateful night. And that shortly after the motor cycle rider had exited the gate, gunshots reigned the air. Further shortly thereafter another witness who knows the appellant well, PW8, also saw and identified him well as he drove past the gate in the Blue Mercedes Benz car. This must have been after he had robbed of the same from PW5.

The case of Oluoch Versus Republic (1985)KLR 549 gives this court guidance on the ingredients of the offences of robbery with violence thus,

*“Robbery with violence is committed in any of the following circumstances;*

*(a) The offender is armed with any dangerous or offensive weapon or instrument, or*

*(b) The offender is in company of one or more person or persons; or*

*(c) At or immediately before or immediately after the time of robbery, the offender wounds, beats, strikes or uses other personal violence to any person.”*

And the case of Daniel Muthoni Versus Republic (2013)eKLR, the court held that, “proof of any of the elements of the offence of robbery with violence would be enough to sustain a conviction under section 296(2) of the Penal Code.

In our instant case, the witnesses, PW5, PW7 and PW8 clearly proved that the appellant was armed with a firearm which is an offensive weapon. This alone would constitute robbery with violence. Another element was similarly proved since at the time of the robbery, the appellant threatened to use violence on PW5.

The trial court, relying on the 2 cases of Oluoch Versus Republic (1985)KLR 549 (above) cited and Dima Denge Dima & others Versus Republic CRA 300/2007, correctly applied the law regarding this issue.

Otherwise the court agrees with the submissions of learned counsel for the appellant on both visual identification and voice identification as postulated in the 2 cases of Chege Versus Republic (1988)IKLR, and Mbelle Versus Republic (1984)KLR 624. The 2 cases, however, in fact support the case of the prosecution. First this court has already determined that there was sufficient light at the scene enabling at least PW2 to see well the appellant. His voice was also clearly known to PW1, PW2 and PW3. PW4, 5, 7 and also 8 within short intervals saw him exactly in the same clothing's and for PW4, 5 and 7, he even spoke to them as he ordered them around.

The appellant faced counts V, VI and VII of unlawful use of a firearm by a public officer contrary to section 26A(II)(a) of the firearms Act 114. That on the material night, he unlawfully used a G-3 rifle serial number 6047851A to aim and shoot at PW1, PW2 and PW3. The circumstances of this have already been narrated above, being the evidence of PW1, PW2 and PW3. The main witness regarding these counts was PW6PC Joseph Maina, whose evidence was that on the evening of 31.10.2015 he had issued the appellant with a G-3 rifle with 60 rounds of ammunition, which the appellant duly signed for. That the following day, the appellant failed to return the firearm and ammunition as he had been arrested and locked in at Embakasi Police station. He duly updated his Firearm Movement Register to reflect that the same had been detained. He otherwise noted that 12 rounds of ammunition were never returned to him. And PW9 Inspector Reuben Kiptum Bett, confirmed that the firearm (Exh-4) was in working order upon its being subjected to test firing. And PW10 PC Geoffrey Mwangi, was one of the arresting officers who also recovered the rifle from the appellant. He had also gone to the scene where he had recovered 6 spent cartridges from the various spots in the house of PW1.

The appellant raised an issue as to whether the appellant had been issued with the G-3 rifle serial number 6047851A that is recorded on the Firearms Movement Register and signed for and later recovered from the appellant or a forearm whose serial number ends with 581A as shown in the witness statement of PW6. This issue was taken up with the witness who explained it to be an error. That at the time he wrote his statement, he had not received back the firearm he had issued to the appellant.

A number of factors came up during that could assist the court in determining whether or not the appellant had been issued with a G-3 rifle serial number 6047851A and that it is the same rifle that was used in the attack at the house of PW1. The arms movement register (Exh.10) clearly shown the Firearm issued to the appellant and duly signed for by the appellant. It is the same firearm recovered from the appellant by amongst others PW10. The same firearm was never returned to PW6, the armorer since the same had been detained upon the arrest of the appellant. The appellant had been issued the firearm with 60 rounds of ammunition. On recovery however, according to PW10, same had

only 52 rounds of ammunition. The appellant gave no explanation about the missing 8 rounds of ammunition. Finally, at least 6 empty cartridges (PW10) were recovered at the scene at the house of PW1. These factors put together convinces this court that the appellant had been issued with the G-3 rifle with 60 rounds of ammunition and that it is the same rifle he used to attack the complainants herein on the night of 31.10.2015. It is the same rifle recovered from him in the morning of 1.11.2015 and which was tested by PW9 to be in good working condition.

As to whether the appellant put to unlawful use the firearm issued to him, the trial court duly considered the relevant circumstances before arriving at the correct decision. The unprovoked and sporadic shootings at the complainants at every available window, the threats to both PW5, PW6 and PW7, all clearly show an intent to kill or cause harm to these witnesses. Indeed, PW2 sustained serious injuries as a result of the appellant's intention and reckless actions. In all this, the appellant clearly intended to kill, at least, PW1. I therefore do not agree with the submissions that he did not have the mens rea.

Another issue raised by the defence is that the prosecution did not prove the element of motive in the acts of the appellant. With respect this submission is not convincing. Under section 9(3) of the Penal Code.

*“Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility”.*

The prosecution in criminal cases, is therefore placed with the burden of proving the guilt of the defendant (accused). It is under no duty to prove the motive behind the action or the inaction of the defendant and failure to discharge this cannot lead to a failure of the prosecution's case.

And this was the holding by the Court of Appeal in William Wekhulo Toroni and another Versus Republic (2020)eKLR, that;

*“The is no requirement that one must have motive in order to commit the offence of murder and the prosecution is not required to prove the same. However, evidence of motive is admissible in instances where it is relevant to the facts in issue”.*

The appellant has also raised the defence of alibi, that he was in fact at his duty station at the time of the offence. That his colleague with him, PC Ongeri was also never called to give evidence. To me, this defence of alibi was a mere denial. The appellant made the claim in his unsworn defence and therefore the same claim was not subjected to the test of cross-examination. In any case, this claim cannot in any way challenge the well corroborated evidence of PW1, 2, 3, 4, 5, 6 and 7 that placed the appellant squarely at the scene of crime. The evidence on record shows he moved into the estate on a motor cycle and after the incident, went away in the stolen motor vehicle.

I am persuaded on this position by the decision of the Hon. Justice J. Ngah in Gerald Wathiu Kiragu Versus Republic (2016)eKLR where the Honourable Judge held;

*“However, I am also aware that not every alibi displaces what is otherwise a watertight prosecution case that has been proved to the required standard. To displace the prosecution case, an alibi must create some doubt that the appellant was at the locus in quo”.*

In our instant case, the evidence placing the appellant at the scene of crime was so strong that his denial that he was away at work clearly lacks any merit.

As to whether the prosecution discharged its burden of proof, the trial court, applying the finding in Abond Rogo Mohamed and 3 others Versus Republic (2005)eKLR rightly applied the principle in holding that indeed the prosecution had proved the charges against the appellant beyond any reasonable doubt as required by the law.

This court is therefore convinced beyond any doubt that the prosecution side proved the 7 charges against the appellant before the trial court beyond any reasonable doubt as required by the law and that the determinations of the trial magistrate on each of the 7 counts were properly, legal and according to law. I find this appeal lacking merit and the same must fail in its entirety.

On sentence, the appellant was sentenced to serve 10 years' imprisonment on Counts I, II and III. The law prescribes a maximum of life imprisonment with regard to these charges. On count IV, he was sentenced to a term of 20 years' imprisonment whereas the law provides for up to death sentence. And lastly, on Counts V, VI and VII, appellant was sentenced to serve 7 years' imprisonment on each. The sentences were ordered to run concurrently. And due considerations was taken of the period the appellant spent in custody awaiting determination of his case.

I have considered the circumstances of this case in totality and I am convinced that the sentences meted out above are fair. I therefore find the same proper and I accordingly uphold the same.

**D. O. OGEMBO**

**JUDGE**

**17.7.2020**

Court:

Judgment read out in open court (Zoom) in the presence of Ms. Kibathi for the state, Mr. Mathenge for the appellant and Mr. Mwalimu for the complainant. Appellant is also present.

**D. O. OGEMBO**

**JUDGE**

**17.7.2020**

Mr. Mathenge:

We apply for the typed proceedings and judgments.

Mr. Mwalimu:

We too.

Court:

Typed proceedings and judgment to be prepared and supplied to the parties herein as required, same may be mailed to the addressed of parties.

**D. O. OGEMBO**

**JUDGE**

**17.7.2020**