



REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL NO. 64 OF 2016

BETWEEN

SAMSON OKINDA OBONYO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. M. Obiero, PM dated 14th June 2016 at the Principal Magistrate's Court at Bondo in Criminal Case No. 795 of 2015)

JUDGMENT

1. Before the subordinate court, the appellant, **SAMSON OKINDA OBONYO** together with his co-accused, faced a charge of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars were that on 13th August 2015 at around 1.10am at Obaga Village at Akom Sub-location in Rarieda Subcounty within Siaya District, while armed with pangas and knives they robbed **DAVID OTIENO OGENGO** of cash money amounting to Kshs. 30,000/-, two Samsung mobile phones valued at Kshs. 41,000/-, one Toshiba Laptop valued at Kshs. 48,000/-, two briefcases with assorted items valued at KShs. 17,000/-, one laptop bag valued at Kshs. 3,500/-, two portable hard drives valued at Kshs. 25,000/- and two Barclays Bank ATM Cards all valued at Kshs. 164,500/- and before such time of the robbery wounded the said **DAVID OTIENO OGENGO**.

2. After a full trial, the appellant was convicted and sentenced to death. The appellant's co-accused was acquitted. He now appeals against the conviction and sentence on the basis of the petition of appeal filed on 28th June 2016. He attacked the judgment principally on the grounds that the prosecution failed to call a crucial witness and that the offence was not properly investigated. He further contended that the identification of the assailants was not conclusively proved. The appellant supplemented the grounds with written submissions amplifying the grounds.

3. The respondent opposed the appeal. The thrust of the respondent's submissions was that the prosecution proved the offence to the required standard and as regards evidence of identification, the respondent submitted that the circumstances under which the appellant was identified were favourable for positive identification and that the subsequent identification parade carried out confirmed that the appellant was one of the assailants.

4. This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced so as to reach its own independent conclusion as to whether or not to uphold the appellant's conviction bearing in mind that it neither heard nor saw the witnesses testify (see *Njoroge v Republic [1987] KLR 19*). In order to proceed with this task, it is necessary to set out the material evidence emerging before the trial court.

5. The circumstances of the case were that on 13th August 2015, at about 1.10am, David Otieno Agengo (PW 3) was sleeping at home with his wife Lindah Awino Otieno (PW 4). He heard a loud bang on the door whereupon three men with spotlights rushed into the house. He was hit twice on his hand. The men demanded money from him and threatened his wife with a panga while at the same time flashing their spotlights on each other. The assailants took his Samsung phone, his suitcase, two computer harddrives. One of the assailants, who was close to him, took the phone and asked him how to operate it. After a while, the assailants left and his neighbours responded to the alarm.

6. PW 3 was treated at Bondo District Hospital. Harun Chebon (PW 1), the clinical officer, confirmed that PW 3 was treated the hospital at about 1.30am on 13th August 2015. He had multiple bruises on the left shoulder, a tender swollen wrist and hip joint. PW 1 concluded that the injuries were caused by a blunt object. He prepared a medical report, the P3 form, to record his findings and produced it in court.

7. The incident was duly reported at Aram Police Station and PC Benard Ndhiwa (PW 2) was instructed investigate the matter. He went to PW 3's homestead on the morning of 13th August 2015 and confirmed that the house door had been broken by a stone. Since PW 3 had given a description of the suspect, he went to search for him and he was arrested on 23rd August 2015 by members of the public. After his arrest, the appellant was subjected to an identification parade by the Deputy Commanding Officer of Aram Police Station, Chief Inspector, Francis Ngugi (PW 4) where both PW 3 and PW 4 pointed out the appellant as one of the assailants who was at their home on the night of the robbery.

8. In his unsworn statement, the appellant denied committing the offence. He told the court that on 13th August 2015 at about 1.10am, he was in Kisumu where he was working and that he came to Bondo on 19th August 2015 for a funeral and where he was arrested on 22nd August 2015. He stated that while he was at the police station, he saw PW 3 and PW 4 who are the people who identified him.

9. The facts, as I have outlined above, disclose that several assailants entered PW 3's house while taking the items particularised in the charge sheet, inflicted violence on PW 1. This evidence is clear and undisputed. What was really in issue before the trial court and this court is whether the appellant was the person identified by PW 3 and PW 4 as the assailant.

10. The central issue before the trial court and before this court is whether the appellant was one of the assailants. On this issue, several decisions among them *Anjononi v Republic* [1980] KLR 54, *Regina v Turnbull* [1976] 3 ALL ER 549, *Maitanyi v Republic* [1986] 2 KLR 75, *Karanja & Another v Republic* [2004]2 KLR 140 and *Wanjohi & Others v Republic* [1989] KLR 415 set out the general principle that evidence of identification must be weighed with greatest care. The court must establish the circumstances of identification and if the incident took place at night as in this case, the court must inquire into the nature of lighting, its brightness or intensity, whether the witnesses view was impeded, the size of the room, the distance of from the light and the time spent with the assailant. This is not an exhaustive list and the court must examine all circumstances and weigh the evidence in order to determine whether the identification is free from error. In addition, the court ought to inquire whether the witness was able to give some description or identification of the assailant to the police or to other persons in order to aid in identification of the assailant. This description and when it was made enables the court to weigh all the evidence in order to come to the conclusion as to whether the identification is free from error.

11. It is in light of these principles that I shall now consider the evidence that was before the trial court. According to PW 3, the three assailants who came into the house had spotlights which they were pointing at him but also flashing at each other. They took some time to ransack house and take the items set out in the charged. In the confined space of the room which was 12 X 10 feet, there was sufficient proximity for PW 3 to identify the appellant whom PW 3 stated was the ringleader. Further, when cross-examined by the appellant, he stated that incident took about 45 minutes.

12. On her part, PW 4 stated that the assailants were flashing each other with their spotlights and that they were in the house for about 45 minutes. She told the court that the appellant sat next to her on the bed and that he was armed with a panga and had a spotlight. He even told her to soothe the baby when he began to

cry.

13. The totality of the testimony of PW 3 and PW 4 is that in the close confined space of the one room, the use of flashing spotlights and that fact that the assailants were in the house for a sufficiently long period interacting with the PW 3 and PW 4 all negative the possibility of mistaken identity.

14. Furthermore, both PW 3 and PW 4 were able to report and describe the assailant to the police on the same morning of the incident. The suspect they described had a very distinctive feature namely, a missing tooth on the lower jaw. PW 3 also stated that he was talking fast. The trial magistrate, who saw the appellant, stated that;

I had the opportunity of observing the appearance of the two accused persons herein. I noted that the 1st accused [the appellant] had one tooth missing on the front part of the lower jaw and it is so conspicuous that he is unable to hide it.

15. After arrest, the appellant was subjected to an identification parade carried out by PW 5. PW 5 testified that he conducted the identification parade on 29th August 2015. He lined up 12 persons on the parade and when PW 3 identified the appellant he was between No. 8 and 9. PW 4 also identified the appellant when he was placed between No. 5 and 6. PW 5 recalled that the appellant refused to sign the parade form on the ground that all the members of the parade were from Aram market.

16. I have evaluated the manner in which the parade was conducted and I am satisfied that it was scrupulously fair to the accused. One of the complaints raised by the appellant is that he had very distinctive features and would not be identified by mere touching as stated by PW 5. In this instance, I would do no better than follow what the court said in **Ramadhan Ali v Republic MSA HCCRA No. 317 of 2002 [2005]eKLR**;

This point came out particularly in the light of the argument by the appellant that he alone had a gap in his teeth and that that made him stand out particularly to be picked out by PW1. We do not think so. Members of a parade cannot be 100% look – alike. There are bound to be minor variations. But for this particular case, the gap(s) in the appellant’s dental arrangement were recalled by PW1 when he asked the appellant to open his mouth on the parade. He picked him out right there. It was nothing outwardly physical, which the learned trial magistrate would take, or we take that it obviously distinguished the appellant from the other parade members. Thus the parade identification, to us, was proper and valid.

17. The sum of the prosecution evidence was that the appellant was clearly identified by PW 3 and PW 4 when he was part of the group of assailants that robbed them. In the close confined room, where the assailants were shining torches at each and the length of time spent with the witnesses diminished the chances of mistaken identity. The appellant’s distinctive features described to the police after the incident and his identification at a parade provided assurance that the appellant was among the people who robbed and assaulted PW 3. The appellant’s alibi defence when considered alongside clear evidence of identification at the scene of the incident could not withstand the weight of prosecution evidence. I therefore affirm the conviction.

18. The appellant complained the prosecution failed to call the neighbour who responded to the alarm after PW 3 and PW 4 had been attacked. As I understand the prosecution is not required to call all possible witness under **section 143** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**. In **Keter v Republic [2007]1 EA 135** the court held inter alia that, “*The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.*” In light of the evidence and conclusions I have reached, the testimony of neighbours would not assist the court as they only came after the incident had taken place.

19. I now turn to consider the issue of the sentence. At the time the appellant was convicted and sentenced, the only sentence prescribed upon conviction for the offence of robbery with violence was the death penalty. On 14th December 2017, the Supreme Court declared **section 204** of the **Penal Code** was

unconstitutional and invalid to the extent that it provides for mandatory death sentence for murder in **Francis Karioko Muruateru & Another v Republic SCK Pet. No. 15 OF 2015 [2017]eKLR**. The appellant in the present appeal was charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** which also attracts a mandatory death penalty. Although the Supreme Court case was about the mandatory death penalty for murder, there is no reason the mandatory death penalty for the offence of robbery with violence should continue to survive hence I hold that the decision of the Supreme Court in the **Muruatetu Case** applies with equal force to **section 296(2)** of the **Penal Code** to the extent that the same prescribes a mandatory death sentence and the mandatory death penalty for robbery with violence is for the same reasons given by the Supreme Court unconstitutional.

20. Having so held, what should happen then in this case? In the **Muruatetu Case**, the Supreme Court gave the following guidance in respect of certain matters:

We agree with the reasoning of the Courts in the authorities cited and the submissions of the 1st petitioner, the DPP and the amici curiae. Comparative jurisprudence is persuasive and we see no need to deviate from the already established practice. The facts in this case are similar to what has been decided in other jurisdictions. Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.

It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners.... In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case.

21. In the **Muruatetu Case** the Supreme Court was dealing with a constitutional petition filed after the petitioners had exhausted the rights of appeal after conviction. This is an appeal against conviction and sentence and this court is expected to apply the law as pronounced by the Supreme Court as part of its duty to determine the appeal. I have two options; to remit the matter back to the trial court to sentence the appellant afresh or alter sentence in line with **section 354** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)**. The former option may not be practical as the appellant may opt to pursue a second appeal to the Court of Appeal. It would lead to an untidy situation, if parallel proceedings were going on at the same time bearing in mind that the appellant would still have a right of appeal to the High Court against the new sentence imposed by the subordinate court.

22. In light of what I have stated, I affirm the conviction but I quash the sentence of death imposed on the appellant. I direct the appellant to make his plea in mitigation before I consider the appropriate sentence.

DATED and DELIVERED at SIAYA this 2nd day of February 2018.

D. S. MAJANJA

JUDGE

Appellant in person.

Ms Odumbe, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.