REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 8 OF 2018

KEVIN OTIENO OLUOCH .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the Senior Resident Magistrate's Court at Tamu (Hon. P.K. Rugut SRM) dated the 9th October 2017 in Tamu SRMCRC No. 189 of 2017)

JUDGMENT

1. The Appellant, **KEVIN OTIENO OLUOCH**, was convicted for the offence of **ROBBERY WITH VIOLENCE** Contrary to **Section 296(2)** of the **Penal Code.**

2. After giving due consideration to the mitigation put forward by the Appellant, the trial court sentenced him to suffer Death as by law prescribed.

3. By his Amended Grounds of Appeal, the Appeal, the Appellant raised the following 2 issues;

> **"1. That the trial magistrate erred in law while failing to re-evaluate the evidence of single witness on identification and dismissed the necessity of first report which was not tendered on the record also failed to interrogate the evidence of PW1 which was doubtful.**
>
> **2. That the trial magistrate erred in law and fact while failing to appreciate that vital witnesses were not called to support the circumstantial evidence, while further no inventory was prepared by the police after the alleged recovery, which same was not displaced as per Section 212 of the CPC Cap 75 of the Laws of Kenya."**

4. When canvassing the appeal, the Appellant pointed out that the Complainant had testified that he had not identified any of the 2 persons who had robbed him on the material night.

5. It was submitted that the Complainant ought to have described the physique of the Appellant when the Complainant lodged his first report at the Muhoroni Police Station.

6. In the absence of such a description in the first report, the Appellant submitted that the trial court had no way of assessing whether or not the alleged identification by the Complainant was reliable.

7. It is well settled that if an accused person was identified at the scene of crime but was arrested later, the most reliable way of ascertaining the efficacy of the alleged identification is by way of an Identification Parade.

8. Of course, it is not mandatory that there must be Identification Parades in each and every case, but if the conviction or acquittal of an accused was largely dependant on identification, the failure to conduct an Identification Parade would probably have a negative impact on the prosecution case.

9. In most instances, suspects are identified by way of their facial appearance; and their height and body size. Sometimes, the focus might be on the nature and style of hair.

10. But there are instances where the suspect was identified either by their voice or other specified item such as the texture of their hands.

11. When identification is based on some specified item, the Identification Parade would be mounted in such a manner as would enable the

identifying witness to have the opportunity to see or hear the members of the parade display their voices or such other specified item which the witness had noted at the time when the witness first identified the accused.

12. In this case, if the Complainant had identified the Appellant because of his "*unique walking style*" and his "*rough hands*", the Complainant ought to have been given an opportunity of picking out the Appellant from a parade, after seeing the members' hands and their walking styles.

13. In this case, the Complainant identified the Appellant before the said Appellant was arrested by the police.

14. The Complainant saw the Appellant at the weighbridge at the Muhoroni Sugar Factory.

15. The Appellant was removed from the weighbridge, and was taken inside the factory.

16. It is at that time that the Complainant saw the Appellant walking in a "*unique style*".

17. Having seen the said unique walking style, the Complainant asked the Appellant to hold his hand.

18. The reason for that request was that the person who had robbed the Complainant, had held the Complainant's hand during the robbery.

19. When the Appellant held the hand of the Complainant, at the factory, the Complainant felt the same roughness as he had felt at the time of robbery.

20. As the police officers were only called in after the Appellant had been arrested by members of the public, (who included the complainant), it was not open to the police officers to conduct an Identification Parade thereafter.

21. Therefore, the failure to conduct an Identification Parade in the prevailing circumstances cannot be faulted.

22. I also note that when the Complainant allegedly identified the Appellant at the factory, the Complainant had been led to the factory by, he was in the company of a mob.

23. The said mob was led to the factory by "Okemwa". By that time, the Complainant had not told anybody that he could identify one of his 2 attackers.

24. After the Appellant had been interrogated "and agreed", the complainant;

> ***"knew he was the one who had a unique walking style."***

25. The Complainant further testified thus;

> **"Muhoroni police officers were contacted and they came for them; the one who was identified by Okemwa, the one with rough hands said he was Kevin Otieno."**

26. In effect, it was Okemwa who identified the Appellant. Therefore, such identification cannot be attributed to the Complainant.

27. The second ground of appeal was based on the assertion that the prosecution failed to call Vital Witnesses to testify at the trial.

38. Omondi, who had accompanied the Complainant, to recover the stolen property, was said to have been a vital witness, but he did not testify.

29. Wycliffe was also described by the Appellant as a vital witness.

30. A third vital witness was the lady who had taken the Complainant's stolen phone to PW3, who was supposed to "flush" the said phone.

31. In my understanding, a witness is deemed to be vital if the absence of his testimony would leave a gap in the case which the prosecution has sought to prove. In effect, if an acquittal would definitely or more probably that not be the result, unless the witness testified, such a witness would be deemed as being vital.

32. However, it must always be borne in mind that proof does not require a multiplicity of witnesses. Even one witness may tender sufficient evidence to prove a fact.

33. In this case, I have carefully re-evaluated all the evidence on record.

34. In my considered view, the lady, who was allegedly a girlfriend to "Okemwa" would not have shed any more evidence about the incident at which the Complainant was robbed.

35. At the very most, she could have helped complete the chain through which the Complainant's phone moved from one person to the other.

36. Of course, there might be circumstances in which the chain is incomplete, and therefore fails to link the stolen item to the accused. In such an instance, there would be a need for the evidence that would make the chain complete.

37. However, in this case the Appellant acknowledged receipt of the phone. He said that it is Wycliffe who had given him the phone.

38. When Mr. Anyumba, the learned Advocate for the 3 accused persons gave his final submissions, he said;

> **"The accused were not properly identified. PW1 was only able to identify the 1st accused, the doctrine of recent possession is applicable. The phone was traced to the 1st accused and the bag to the 2nd accused. They have both given reasonable explanations how they got the items from Wycliffe. No rebuttal was done by the prosecution."**

39. First, that confirms that the Appellant was in possession of the Complainant's phone.

40. He, however, believed that he had tendered a reasonable explanation about how he had got the phone.

41. I note that it is the Appellant who said that the phone was given to him by Wycliffe. In the circumstances, I hold the considered view that the said Wycliffe may have been a useful witness for the Appellant. I cannot see how Wycliffe could have advanced the case for the prosecution.

42. I find that the failure by the prosecution, to call Wycliffe as a witness did not leave any gap in the case.

43. Incidentally, all the evidence tendered shows that Wycliffe was a suspect, and that he escaped before the police could arrest him.

44. As he had escaped, there was no way that the prosecution could have made him available, as a witness.

45. Meanwhile, I note that both PW2 and PW3 testified that they had accompanied the Complainant (PW1) when they were tracking down the suspects.

46. Even though the Boda Boda rider who accompanied them did not testify, I find no basis for concluding that the said Boda Boda rider was a vital witness. In my considered view the Boda Boda rider could have increased the number of witnesses, but without adding to the evidence.

47. Therefore, the Boda Boda rider was not a vital witness in this case.

48. Meanwhile, as regards the explanation tendered by the Appellant, I note that he allegedly received the phone as a form of security, for a loan which he gave to Wycliffe.

49. He allegedly gave to Wycliffe the sum of Kshs.1,500/=, which the latter required for the purposes of according medical treatment for his sick mother.

50. As the phone was, allegedly, being held as a security, it should have been available for return to Wycliffe. However, the Appellant said that he had given the phone to Dennis, who gave Kshs.500/= to the Appellant. The funds from Dennis were used by the Appellant for the purposes of treating his sick child.

51. The Appellant clarified that the person named Dennis, who he gave the phone to, was the 3rd accused in the case.

52. The 3rd accused confirmed, in his testimony, that the Appellant had given him the phone as security for the Kshs.500/= which the Appellant borrowed from the 3rd accused.

53. Having re-evaluated the explanation, I find that it is most improbable. I so find because it is inexplicable how the Appellant was only holding the phone as a security for a loan he gave to Wycliffe, yet the Appellant also gave away the same phone.

54. Having parted with the security, the Appellant would have been unable to return it to Wycliffe.

55. By giving away the phone as security, the Appellant's said action was more akin to someone who lay claim to an entitlement to the phone.

56. In the result, I find that the Appellant was in possession of the Complainant's phone, albeit not literally. I further find that the Appellant failed to provide a reasonable explanation about how he came to be in possession of the phone in issue.

57. As the possession was fairly proximate to the time when the Complainant was robbed, it can be described as having been "recent".

58. In the result, the conviction of the Appellant was well founded; and I therefore uphold it.

59. The appeal is dismissed.

DATED, SIGNED and **DELIVERED** at **KISUMU this 20th day of September 2018.**

FRED A. OCHIENG

JUDGE