



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

HIGH COURT CRIMINAL APPEAL NUMBER 132 OF 2013

WILLIAM DAMSON ONGORE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Appeal against conviction and sentence in Criminal Case Number 667 of 2012*

*in the Senior Principal Magistrate's Court at Mumias delivered*

*by Hon. L.Nafula (SPM) on 11<sup>th</sup> July, 2013)*

#### JUDGMENT

#### Background

1. **WILLIAM DAMSON ONGORE**, the appellant herein has filed this appeal against conviction and death sentence on a charge of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code.

The particulars of the charge are that:-

*“On the 28.7.12 at about 8.00 pm at Kamashia Village, Ekeru location in Mumias District within Kakamega County jointly with others not before the court while armed with dangerous weapons namely pangas and knives robbed Faraj Osinga of Kshs. 2,000/- and at the time of such robbery used actual violence on the said Faraj Osinga*

#### The prosecution's case

2. The prosecution called 5 witnesses in support of the charges. **PW1, Faraj Osinga**, the complainant herein stated that on 28.7.12 at about 7.30 pm while he was riding home on his motor cycle, the appellant from whose father he had bought land waved him down and demanded money from him,. That before he could comply, the appellant slashed him on the head with a panga and on the right hand as he struggled to snatch the panga from him. That in the process, two persons that he did not identify emerged and one cut him on the right leg as the other cut him on the thighs. He said he lost consciousness and came to at St. Mary's hospital where he was admitted for 2 weeks. He stated that he lost Kshs. 50,000/- in the attack but recorded Kshs. 2,000/- in his statement. **PW2 Peter Omollo Oluoch** stated that he was the first person to arrive at the scene of crime and that he did not see the attackers. **PW3 Benson Walubayo** stated that he arrived at the scene of crime after the attackers had escaped and escorted complainant to hospital. **PW4 George Watiliah** a clinical officer examined complainant on 7.9.12 and filled his P3 form (PEXH. 1) which shows that complainant suffered fracture of right leg and injuries to legs and head which eh assessed as grievous harm. **PW5PC John Munyao**, the investigating officer testified that on 29.12.12, complainant's wife reported that complainant had been attacked and was admitted at St. Mary's Hospital. He stated that he visited complainant in hospital and complainant stated that one William the son of his neighbor was one of the persons that attacked and robbed him. It was his evidence that the appellant was arrested and handed over to him after which he charged him

3. When put on his defence, the appellant gave sworn testimony in which he denied the offence. He stated there was a grudge between him and complainant because he had complained after his father sold land to the complainant.

4. *In a judgment* 11.7.13, appellant was convicted and sentenced to suffer death.

#### The Appeal

5. The conviction and sentence provoked this appeal. In his grounds of appeal filed on 3.7.17, appellant raised 10 grounds of appeal which I have summarized into 3 grounds as follows:-

**1) That the prosecution case was not proved beyond reasonable doubt**

**2) That there was no evidence of proper identification**

**3) That his defence was not considered**

6. When the appeal came up for hearing on 4.9.18, Ms. Siminyu advocate for the appellant relied wholly on the grounds of appeal and submissions filed on 13.8.18.

7. Mr. Juma, learned State Counsel opposed and relied on submission filed on 13.8.18.

### **Analysis and Determination**

8. This being a court of first appeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal's decision in the case of **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 of 2005** where the court stated as follows:-

***“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.***

10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for both parties.

11. In dealing with this appeal, I will address the 3 grounds summarized above as follows:-

### **Was complainant robbed?**

12. Complainant stated he was robbed. It is however not clearly evident what he was robbed because while he reported to the police that he was robbed Kshs. 2,000/-, he told court that he was robbed Kshs. 50,000/-.

### **Did complainant identify the robbers or anyone of them**

13. It is on record that the appellant was well known to the complainant since they are neighbors. Complainant told court that the incident occurred at about 7.30 pm and that he identified the appellant by way of his motorcycle head lights. The significance of accurate visual identification was underscored in the case of **R v Turnbull, (1976) 3 All ER 551** where Lord Widgery CJ observed as follows on identification:-

***“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance”.***

14. This position was restated in the recent case of **John Muriithi Nyagah v Republic [2014] eKLR**, where the Court of Appeal held: -

***“In testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”***

15. In his initial report complainant reported to PW5 PC John Munyao, the investigating officer that he was robbed by one William and it was on that basis that the appellant was arrested.

16. The evidence on record shows that neither the investigating officer nor the court made an inquiry of the relevant circumstances such as the nature of the headlight, the strength of the light, its size and its position relative to the appellant.

17. The learned trial magistrate in her judgment ruled that there could not have been possibility of mistaken identity since complainant and the appellant had lived together for over 10 years. In the case of **Maitanyi –vs- Republic (1986) KLR 198** the Court of Appeal stated: -

**“.....That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.**

18. From the foregoing decision, I find that the trial court failed in its duty to make an inquiry of the relevant circumstances relating to light, its size, and its position that may have enabled complainant to identify the appellant. Consequently, I find that the complainant's evidence of identification was not free from the possibility of error. The quality of identification evidence was critical and the trial magistrate erred in placing reliance on identification that was flawed.

19. In the case of John Omondi Okoth & Another V Republic [2009]eKLR cited by the state where the court stated: -

**“Where the evidence is by a single witness, the standard of care would even be greater. However, it is instructive to note that a court may convict on the evidence of a single witness even if it is uncorroborated so long as there is certainty of the truth and reality of that evidence.”**

20. The holding in the above cited case undoubtedly supports the need for there to be certainty of truth and reality before a conviction of a single witness can be said to be safe. In view of the fact that identification of the appellant was not free from error, the evidence by the complainant remains unsafe to sustain a convict.

**Was the appellant's defence considered?**

21. In his defence, the appellant denied the offence and stated that there was bad blood between him and the complainant. Contrary to the submission by the state, the appellant did not raise an alibi and I will therefore not belabor the issue.

22. The learned trial magistrate rejected the appellant's defence on the ground that he had been properly identified. From what is stated hereinabove however, I find that had the learned trial magistrate carefully considered the totality of the prosecution case especially on the identification of the appellant; she might have had no reason to dismiss the defence as a general denial.

23. As a result, it is clear to this court that the prosecution did not discharge its burden to prove the case against the appellant beyond any reasonable doubt.

24. From the above analysis, I have come to the conclusion that this appeal has merit. Accordingly, the appellant's conviction is quashed and the sentence set aside and unless otherwise lawfully held, it is ordered that appellant shall be released and set free forthwith.

It is so ordered.

**DATED AND SIGNED AT KAKAMEGA THIS 7<sup>th</sup> DAY OF September 2018**

**T. W. CHERERE**

**JUDGE**

**In the presence of-**

Court Assistants - George & Erick

Appellant - Ms Masakwa/Mr Kondu

For the State - Mr. Juma