



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEALS NOS.203, 214 & 217 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. Wachira – PM delivered on 22nd October 2013 in Kibera CM. CR. Case No.3046 of 2012)

COLLINS OMONDI.....1ST APPELLANT

VICTOR OTIENO OMONDI.....2ND APPELLANT

KENNEDY ONYANGO.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Collins Omondi (1st Appellant), Victor Otieno Omondi (2nd Appellant) and Kennedy Onyango (3rd Appellant) were jointly charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 22nd June 2012 at Kware Area in Ongata Rongai Township, Kajiado County, the Appellants, jointly with others not before court while armed with an offensive weapon namely, a panga robbed Ken Njenga Gathungu of cash Kshs.14,000/- and immediately after the time of such robbery threatened to injure the said Ken Njenga Gathungu (complainant). When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, they were convicted as charged. They were sentenced to death. They were aggrieved by their conviction and sentence. Each Appellant filed a separate appeal to this court challenging his conviction and sentence.

In their petitions of appeal, the Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the basis of the evidence of identification that did not stand up to legal scrutiny. They took issue in the manner in which the trial court received the evidence of identification when the circumstances favouring positive identification were absent. In particular, they were aggrieved that the trial court had relied on the evidence of a single identifying witness without warning itself of the danger of convicting them on the basis of such evidence. They were aggrieved that the trial court had relied on contradictory and inconsistent evidence of the prosecution to convict them. They faulted the trial magistrate for failing to consider their respective defences before arriving at the decision to convict them. For the above reasons, the Appellants urged the court to allow their respective appeals, quash their conviction and set aside the death sentence that was imposed on them.

During the hearing of the appeal, the three separate appeals lodged by the Appellants were consolidated

for the purpose of the hearing of the appeal. The Appellants presented to court written submission in support of their respective appeals. In summary, they urged the court to allow their appeals as the prosecution had failed to establish to the required standard of proof that they had committed the robbery in question. Ms. Nyauncho for the State opposed the appeals. She submitted that the prosecution had adduced sufficient culpatory evidence to connect the Appellants to the robbery. She urged the court to dismiss the appeals and confirm the conviction and sentence of the trial court.

Before giving reasons for its decision, it is imperative that the facts of this case be set out, albeit briefly. The complainant in this case testified as PW1. He told the court that on 22nd June 2012 at about 9.00 p.m., he was going home at Rongai with his friend PW2 Hilary Mwangi. He told the court that when he reached the gate to his plot, he was accosted by a gang of six men who were armed with a panga. One of them swung the panga at him in a bid to cut him. He ducked. He raised alarm. He struggled with two of the assailants and managed to overpower them. The neighbours came to his rescue. By that time, he had been robbed of Kshs.14,000/- which was in his pocket. Four of the robbers ran away. He managed to subdue two of the robbers. He left them under the watch of the neighbours as he went to his house to get a rope to tie them with. When he returned, he realized that the two robbers had made good their escape. PW2 who had responded to the complainant's cry for help told the court that he was at the scene when one of the robbers whom he identified as the 1st Appellant managed to escape from the scene. He testified that he held onto the shirt of the 1st Appellant as he was running away. He left the shirt behind. The panga which was used in the robbery was also left at the scene of the crime. Both the complainant and PW2 testified that, although they did not know the names of the Appellants, they had seen them a week prior to the robbery incident working within the village. In that regard, their evidence was also corroborated by PW3 Samuel Chege Gakuru who testified that he had seen the Appellants prior to the robbery incident and recognized them during the robbery incident when he responded to the call of distress made by the complainant. PW1 and PW2 testified that although it was at night, they were able to identify the Appellants by the security lights that had been switched on at the time.

The complainant testified that after the incident, he did not report the robbery to the police. He decided to conduct his own investigations to establish the whereabouts of the Appellants. After a couple of days, he was able to know where they lived. He did not find them at the house. He informed the neighbours to alert him if they return to the house. Four days later, on 26th June 2012, the complainant was informed that the 2nd and 3rd Appellants had been apprehended by members of the public. PW1 went to the scene. He found the 2nd and 3rd Appellants being beaten by members of the public. They interrogated them and asked them to disclose the whereabouts of the 1st Appellant. It was at that point that PW4 APC Samuel Mwanza, an Administration Police Officer based at Ongata Rongai District Officer's Office arrived at the scene with his colleague Sgt Marete. He rescued the 2nd and 3rd Appellants from the mob. The 2nd and 3rd Appellant escorted him to the house of the 1st Appellant. He arrested the 1st Appellant. He saw that the 1st Appellant had injuries on his head and face. The injuries were healing. He surmised that the 1st Appellant had sustained the injuries from the beatings that he got during the robbery incident. On his part, the 1st Appellant denied that he had sustained the injuries from the robbery. He explained that he got the injuries from the beatings that he incurred from the mob. PW4 escorted the Appellants to Ongata Rongai Police Station where they were detained. The case was investigated by PW5 Cpl. Mwanaliko. After concluding his investigations, he reached the conclusion that indeed a case had been established to have the Appellants charged with the offence for which they were convicted.

When the Appellants were put to their defence, they denied robbing the complainant. Other than narrating the circumstances of their arrest, they did not adduce any evidence regarding their whereabouts on the night of 22nd June 2012. They pleaded their innocence to the charges.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced by the prosecution witnesses so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court must bear in mind the fact that it neither saw nor heard the witnesses as they testified and therefore will defer to the trial court in regard to the question of the demeanour of witnesses (see **Njoroge –Vs- Republic [1987] KLR 19**). The issue for determination

by this court is whether the prosecution proved its case against the Appellants to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the submission, both written and oral, made before this court during the hearing of the appeal. It was clear from the evidence adduced by the prosecution witnesses that the prosecution relied solely on the evidence of identification to secure the conviction of the Appellants. According to the complainant, the robbery incident took place at about 9.00 p.m. He told the court that he was accosted by a gang of six robbers. He struggled with two of them before they escaped. He was robbed of Kshs.14,000/-. He told the court that he was able to identify the Appellants because he had seen them a week prior to the incident. They were working in a building within the vicinity. He did not tell the court the distinguishing features of the Appellants that made him to be certain that he had seen them before. He did not know their names. He did not know where they lived. The robbery incident took place at night. Although the complainant testified that he was able to identify the Appellants by the security lights that were lit at the time, he did not tell the court the distance that he was in relation to the security lights at the time the robbery took place.

The sum of Kshs.14,000/- that was robbed from him was not recovered. There was nothing stolen during the course of the robbery that was recovered in the Appellants' possession. After the robbery incident, the complainant's conduct was curious. He decided not report the incident to the police. Rather, he decided to conduct his own investigations to establish the whereabouts of the robbers. This court therefore, did not benefit from the description that would have been given of the robbers in the first report that was made to the police. During his entire testimony before court, neither the complainant nor his two witnesses was able to explain how they were certain that it was the Appellant who had robbed the complainant. The said witnesses did not give the physical description of the Appellants that would enable the court to be certain that indeed it was the Appellants who had been identified as the persons who robbed the complainant.

Upon re-evaluation of the evidence of identification, this court is not satisfied that the Appellants were identified as the persons who robbed the complainant during the night of the robbery. The circumstances prevailing at the time were not conducive for positive identification. Further, the trial court did not warn itself of the dangers of relying on the sole evidence of identification to convict the Appellant especially when such alleged identification was made at night. The fact that the complainant did not report the robbery incident to the police immediately after the robbery had taken place, raises reasonable doubt in the mind of the court that the complainant and his two witnesses may not have told the court the whole truth regarding their evidence on how they were able to identify the Appellants. This court is of the considered view that the Appellants were victims of suspicion of robbery which was not based on actual evidence. Suspicion alone cannot form a basis for conviction of the accused. The evidence of identification that was adduced by the prosecution witnesses cannot exclude the possibility that the Appellants were victims of mistaken identity.

The upshot of the above reasons is that the appeals lodged by the Appellants have merit and are hereby allowed. The Appellants' conviction is quashed. The death sentences imposed on them is set aside. The Appellants are ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF OCTOBER 2016

L. KIMARU

JUDGE