



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 81 of 2011

MAULIDI ANWAR ANGOGA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of Hon. S.M. Shitubi, SPM, Migori

on 31st May 2011 in Migori SPM's Criminal case No.731 of 2010)

JUDGMENT

Introduction

1. The appellant herein Maulidi Anwar Angoga was charged with 4 counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code**.

2. The particulars of the first count were that on the night of 1st and 2nd day of October 2010 at Lilly estate within Migori County in the Republic of Kenya, jointly with others not before the court while armed with offensive weapons namely a panga and rungu robbed George Ochieng Olal of his mobile phone make Nokia E valued at Kshs.4,500/= and immediately after the time of such robbery wounded the said George Ochieng Olal.

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3. The particulars of the second count were that on the night of 1st and 2nd day of October 2010 at Lilly Estate within Migori County in the Republic of Kenya jointly with others not before court armed with offensive weapons namely panga and rungu robbed Jane Owuor Rori of her cash Kshs.21, 000/=.

4. The particulars of the third count were that on the 1st and 2nd day of October 2010 at Lilly estate within Migori County in the Republic of Kenya jointly with others not before the court and while armed with offensive weapons namely a panga and rungu robbed Peris Awuor Opiyo of her mobile phone make Nokia 1600 valued at Kshs.3,000/= and cash Kshs.300. The particulars of the fourth count were that on the 1st and 2nd day of October at Lilly estate within Migori county in the Republic of Kenya, jointly with others not before the court and while armed with offensive weapons namely a panga and rungu robbed Emma Akinyi Juma her mobile phone make 1110 valued at Kshs.2000/=.

The Facts and the Evidence

5. The prosecution's case was that on the night in question, all the 4 complainants namely George Ochieng Olal (PW1), Peris Awuor Opiyo

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(PW2), Jane Atieno Mbori (PW3) and Emma Akinyi Juma (PW4) were asleep in the house belonging to PW2 (Awour). PW1 (Ochieng) is a son to Awuor while PW3 (Atieno) is Awuor's sister while PW4 (Akinyi) is a daughter to Atieno. At the material time which was about 12.10 a.m., Ochieng was studying at the table in the sitting room while Awuor and Atieno were asleep in the bedroom. Akinyi was asleep in a corner in the sitting room where Ochieng was studying. Ochieng was using a hurricane lamp for reading.

6. Suddenly, there was a loud bang on the main door and 3 people entered the house, flashing torches and brandishing pangas and rungas. They were all dressed in jackets and T-shirts. As soon as they entered, one of them slapped Ochieng on the face with a panga when Ochieng tried to enquire who they were. Ochieng fell down but he was lifted up by the attackers and made to sit on the floor. The attackers asked for money and phones but when Ochieng said he had no money, he was slapped again and he fell down. Again he was lifted up and ransacked. His Nokia phone was taken as the attackers continued demanding money and beating him. Ochieng screamed and one of the attackers cut him on the hand. (The trial court was shown the scar). Though

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Ochieng screamed, the screams could not go far because of the loud music coming from the nearby Gillys Hotel.

7. As one of the attackers continued pricking Ochieng on the left eye (marks seen by the trial court) others entered the bedroom and woke up Awuor and Atieno and demanded money in whispers while they shone their torches directly into the eyes of the two ladies. Atieno was slapped. The attackers also searched the ladies' bags and took away Awuor's Kshs.300/= in cash and her Nokia phone 1600 valued at Kshs.3500/=. They also took away Atieno's Kshs.21000/= which was for her clothes' business. They also took her Nokia phone 1110 valued at Kshs.2000/= and then fled from the room.

8. When Ochieng cried out loudly that he had been cut by the attackers, Atieno and Awuor ran out of the bedroom one behind the other. The attackers then took off when the electricity lights went out, but as the appellant ran, he knocked himself against the corridor wall and fell down. Ochieng had by this time removed the bed sheet that had been tied around his face and saw an opportunity to get hold of the appellant who was trying to escape. Ochieng struggled with him until his mother Awuor and his aunt Atieno joined him. As the appellant fell in a bid to

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NO.724 escape, the panga he had also fell. Awour got hold of him but he pushed her off. Atieno then got hold of the appellant from behind as the trio screamed. The appellant also pushed Atieno and she fell. The appellant again fell as he tried to escape and Atieno who had got up fell on him and held him to the ground. By then Ochieng was bleeding profusely. Atieno held on to the appellant until people from Gilly's Hotel came to their rescue.

9. The appellant was beaten senseless until he pretended he was dead. He was pulled to Gilly's where

there were electric lights. The appellant was then identified. The police were informed and came to the scene and took him away. Atieno accompanied the police to Migori police station.

10. PW5, No.90972, PC Bonface Muli of Migori police station is the one who received the report of the robbery at about mid-night on 2nd October 2010. He was accompanied to the scene at Gilly's Hotel by Sgt. Mukhwana (not called as a witness). At the scene, they found many members of the public and the appellant who was lying on the ground and being beaten by members of the public. After listening to members of the public as to what had happened, PC Muli took the

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NO.724 appellant away to hospital. They also collected the panga which the appellant had with him during the robbery. After treatment, the appellant was taken to Migori police station.

11. On the following morning, PC Muli went to the complainants' house and established from the complainants what had happened the previous night. PC Muli produced the various purchase receipts for the stolen phones as **P. Exhibits 2** (Ochieng's phone), **P. Exhibit 3** (Awuor's phone) and **P. Exhibit 6** (Atieno's phone). The panga recovered from the appellant was produced as **P. Exhibit 1**. Dr. Odhiambo who examined Ochieng on 5th October 2010 classified the injuries suffered by Ochieng as "harm". He stated that Ochieng had a deep cut on the left parietal region of the head as well as another cut above the left ear. There was also a third cut and by 5th October 2010, all the cuts had been stitched. In Dr. Odhiambo's opinion, a sharp object had been used to inflict the injuries.

The Appellant's case

12. At the close of the prosecution case, the appellant was put on his defence. He chose to give sworn evidence and testified that he was a smuggler of farm goods from Tanzania to Kenya. On the material day

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NO.724 which was 2nd October 2010, being a Friday, he left his house at about 9.00 p.m. for Balls Bar where a Disc Jackey by the name John Junior from Kisumu was playing. He was at the bar for about 2^{1/2} hours drinking water and juice with his friend called Jack, the owner of the bar. He then left for Gilly's Hotel, but before he left Jack gave him 3 Red Bull drinks to take to Jack's friend who was a neighbour of his. On the way to Gilly's Hotel he saw a group of men standing together. They asked him where he was going and what he was carrying. They also asked him if he had met any people who were running. When he answered in the negative, he was told that he must have been one of those people who were running. The people then ordered him to be beaten. He was beaten so much that he fainted as he approached Gilly's Hotel. He came to on Monday and on Friday he was taken to court.

13. On cross examination, the appellant testified that he had no national identity card because it got lost while he was in Mombasa. He also stated that he lived with his mother after his wife deserted him. He denied attacking and robbing the complainants whom he described as liars. He also testified that the only reason why he was beaten was

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NO.724 because he was the only one found along the path near Gillys. He also testified that he did not see any woman among the people who stopped him that night as he walked towards Gillys.

The Judgment of the Trial Court and the Appeal

14. After carefully considering all the evidence that was placed before her, the then senior principal magistrate, Hon. S.M. Shitubi, was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt. The trial court proceeded to find the appellant guilty as charged and to convict him accordingly.

15. The appellant, being aggrieved by both the conviction and sentence preferred this appeal on the

following home-made grounds:-

1) That the learned trial magistrate did not evaluate all the evidence and circumstances surrounding the identification of the appellant and thus reached wrong conclusions.

2) That the learned trial magistrate erred in both law and fact by failing to appreciate that there was no light at the scene that could have made the appellant's identification free from error.

3) That the learned trial magistrate erred in law and fact in failing to appreciate that the jacket which was allegedly recovered from the appellant was not produced in court as an exhibit in corroboration of other evidence against the appellant.

4) That the proceedings herein are null and void because the trial court did not indicate the coram when the matter came up later in the day on

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NO.724 8th March 2013 when PW6, Dr. Joseph Otieno Odhiambo testified.

5) That the learned trial magistrate erred in law and fact when she failed to warn herself of the dangers of convicting the appellant on evidence of identification by a stranger.

6) That the learned trial magistrate erred in law and fact in rejecting the appellant's defence without reason and instead accepted the testimonies of PW2 and PW4 who confirmed not having seen the appellant during the attack.

16. The appellant therefore prays that the appeal be allowed, conviction quashed and the sentence of death set aside.

The Duty of this Court

17. This appeal is before us a first appeal. The appellant therefore expects an exhaustive examination of all the evidence that was placed before the lower court before this court can make its own findings on the same. The court is however alive to the fact that it does not have the privilege of seeing and hearing the witnesses who testified before the trial court. That is a privilege enjoyed only by the trial court and in this regard, while this court has the duty to rehear the case, it must not disregard the judgment appealed from, but must carefully weigh and consider it and should not shy away from overruling it if it is clear from the evidence on record that the judgment is either wrong or not supported by the facts. "When the question arises which witness is to

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be believed rather than another and that question turns on manner and demeanor, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses." See **Pandya -vs- R[1957] EA 336 at page 338**. Also see **Okeno -vs- Republic [1972] EA 32**.

The Appellant's Submission

18. When this appeal came up for hearing before us, we received written submissions from the appellant and also heard submissions from Mr. Nicholas Mutuku appearing for the respondent. We have carefully read the appellant's written submissions in which he pointed out that the evidence of identification relied on by the trial court to convict him was unreliable because the circumstances prevailing at the time of the commission of the alleged offence were so difficult that none of the prosecution witnesses could purport to have identified the appellant. The appellant also submitted that since there were many people at the scene where he was arrested, with some claiming to be members of sungu sungu, it was necessary for the prosecution to sift the people with a view to determining who of those people had come to the

complainants' rescue in order to rule out possibility of mistaken identity and that the failure to do so caused a miscarriage of justice.

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19. On grounds 3 and 4 of appeal, the appellant submitted that the prosecution's failure to submit the blood stain on the panga to chemical analysis greatly reduced the probative value of that evidence and further that the court's rejection of the appellant's defence without reason caused a miscarriage of justice. Finally, the appellant faulted the trial court for allegedly failing to set out the issues for determination as required by the provisions of **section 169 (1)** of the **Criminal Procedure Code**. For the above stated reasons, the appellant urged us to allow his appeal on both conviction and sentence and to set him free.

The Respondent's Submissions

20. The appeal was opposed. After the appellant was warned of the dire consequences of proceeding with the appeal, counsel for the respondent urged us to not only dismiss the appeal but to find that there was sufficient evidence to support the offence of robbery with violence under **section 296 (2)** of the **Penal Code** and to proceed to make such a finding and to sentence the appellant to death. Counsel recounted the evidence given by Ochieng, Awuor and Atieno and urged us to find and to hold that the appellant was positively identified as one of the persons

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NO.724 who had attacked the complainants on the night of the attack. Counsel also submitted that though all the complainants did not know the appellant before, there was evidence that the appellant was arrested at the scene of crime and taken to Gilly's Hotel where he was identified and later handed over to the police when the police eventually arrived at the scene. It was also submitted that the appellant was in the company of other people before those accomplices disappeared into the darkness leaving the appellant to face the wrath of members of the public after he was dragged to Gilly's Hotel.

21. It was also submitted that when PW5 went to the scene, he found the appellant being beaten by members of the public and only saved him in the nick of time. Regarding the judgment of the trial court, counsel submitted that the trial court gave no reasons for reducing the capital robbery charge to one of simple robbery charge. At page 31 of the proceedings, the trial court said the following:-

“It comes out from evidence that the thieves were armed with pangas

and rungus. PW1 testified of her (sic) in the process they inflicted on him various panga cuts as per the P3 form produced herein (EX 1). PW3 also testified of how she was accosted by a man carrying a panga who slapped her with it ordering her to cover herself and sleep as their property was taken from the room. One of the pangas was even recovered where one of the thieves fell as he escaped. This evidence has remained unchallenged.

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I would find that the evidence adduced proves the lesser charge of robbery contrary to section 296 (1) of the Penal Code.

22. Counsel submitted that there was no basis laid by the trial court in reducing the charge of capital robbery to one of simple robbery and that the decision to do so was obviously erroneous, thereby resulting in an unlawful sentence of 15 years imprisonment.

The Appellant's Reply

23. In reply, the appellant submitted that there was nothing wrong with the sentence; that the prosecution evidence especially that of Ochieng and Awuor was contradictory; that no jacket allegedly left behind by the appellant was ever produced in evidence, that no proper identification was made of the appellant and that in the circumstances his appeal should be allowed.

Findings and Conclusions

24. We have ourselves reconsidered and evaluated the evidence on record as is required of us. We have also carefully considered the submissions made to us at the hearing of this appeal. We have also carefully considered and weighed the judgment of the trial court. From all the above, we note that the prosecution's case revolves around the proper identification of the appellant since the alleged offence occurred

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NO.724 at around 12.10 a.m. We have taken note of the decision in **Wamunga –vs- Republic [1989] KLR 424; Paul Etole & another –vs- Republic Nairobi Court of Appeal criminal Appeal Number 24 of 2000.** In the **Etole Case**, the Court of Appeal expressed itself thus in part of its judgment on the issue of identification under difficult circumstances:-

“---- evidence of visual identification, such evidence can bring about

miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of an accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true recognition may be more reliable than the identification of a stranger; but even when a witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality the greater the danger.”

25. In the instant case, we are satisfied that taking all the circumstances into account, there was sufficient evidence to connect the appellant to the commission of the offence. We have pieced together the testimonies of Ochieng, Awuor and Atieno and are satisfied that as the appellant was trying to flee, he hit himself on the wall of the corridor, fell down and was grabbed by Ochieng although

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26. The next issue for our determination is whether the learned trial magistrate exercised her discretion well in reducing the charge of capital robbery to one of simple robbery. In our view, that decision was not well founded. There is ample evidence on record that the

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NO.724 appellant was in the company of other persons; that during the attack, Ochieng was seriously wounded as confirmed by PW6 Dr. Joseph Otieno Odhiambo of Migori District Hospital. Whereas there was no evidence proving a charge of capital robbery as far as counts II, III and IV are concerned, count I was proved beyond any reasonable doubt. In the circumstances, we are persuaded that there was no basis for reducing the charge to one of simple robbery. That statement by the trial court dropped from nowhere. We accordingly set aside the conviction for simple robbery and convict the appellant of the offence of capital robbery under **section 296 (2)** of the **Penal Code** on Count I.

27. This follows that we must interfere with the sentence of 15 years imprisonment imposed upon the appellant. In the case of **Macharia vs- Republic [2003] KLR 115 at p.117**, the Court of Appeal expressed itself thus on the issue of when an appellate court may interfere with the sentence passed by a trial court:-

“The principle upon which this court will act in exercising its

jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954 in the case of Ogalo s/o Owuor [1954] EACA at page 270 wherein the predecessor of this court stated:-

“The court does not alter a sentence on the mere ground that

if the member of the Court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised

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by a trial judge unless as was said in James –vs- R.[1950] 18 EACA 147 “It is evident that the judge has acted upon some wrong principle or overlooked some material factors.” To this we would like to add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case. R.-vs- Shershewsk [1912] CCA 28 TLR 364.”

28. It is thus clear to us that the sentence passed by the trial court was based on a misapprehension of the law and the evidence and was thus erroneous. The said sentence of 15 years imprisonment is set aside and substituted with the sentence of imprisonment for life.

29. In the result, we find the appeal to have no merit and the same is accordingly dismissed Count I. The appeal on counts II, III and IV is allowed as we find no sufficient evidence to sustain those charges. R/A within 14 days.

30. It is so ordered.

Dated and delivered at Kisii this 09th day of May, 2013

RUTH NEKOYE SITATI
JUDGE.

EDWARD M. MURIITHI
JUDGE.

In the presence of:

Maulidi Anwar Angoga (P.I.P.) for Appellant

Mr. Majale (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

EDWARD M. MURIITHI

JUDGE.

JUDGE.

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