REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 121 OF 2010

MUSA ONYANGO ALANGO………………..………………………………APPELLANT

VERSUS

REPUBLIC……………………………………………………………..RESPONDENT

(Being an appeal from the original conviction and sentence by the Senior Principal Magistrate's Court at Migori (S.M. Shitubi) in Criminal Case No. 674 of 2009 dated 4th June 2010)

JUDGMENT

Background

1. The appellant Musa Onyango Alang'o was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code before the Senior Principal Magistrate's Court at Migori (S.M. Shitubi) in which he pleaded not guilty to the charge. The Particulars of the offence were that on the 5th day of October 2009 at Wuoth Ogik village, Maridi sub location in Migori district within Nyanza province jointly with others not before court and while armed with offensive weapons namely pangas robbed Samuel Philip Omondi of kshs.4000/=, three suit cases containing assorted clothes and at or immediately before or immediately after the time of such robbery wounded the said Samuel Philip Omondi.

2. After trial in which six (6) prosecution witnesses testified and the appellant gave a sworn statement, the learned senior principal magistrate S.M. Shitubi found the appellant herein guilty as charged and convicted him under section 215 of the Criminal Procedure Code and sentenced him to death after considering the mitigation and the fact that he was a first offender.

Grounds of Appeal

3. Being aggrieved with the decision the appellant appealed against the whole said conviction and sentence on the following grounds:-

1. That the learned trial magistrate erred in placing her decision on the evidence on record convicting him without considering that he the appellant pleaded not guilty to the charge.
2. That she grossly erred in finding that the respondents had proved the offence of robbery with violence contrary to section 296(2) of the penal code in the absence of any credible evidence.
3. That she erred in convicting and sentencing him on the basis of a charge that was patently framed up and thus null-ab initio.

4. That she misapprehended the tenor extent and nature of the offence consequently the judgment is with errors of omission and commission rendering it unsafe.
5. That she erred in convicting and sentencing him on the basis of uncorroborated evidence and she failed to see the failure of the prosecution side to call the crucial witnesses to testify consequently the judgment is illegally untenable.
6. That she erred in failing to properly and/or at all evaluate or analyze the evidence on record and consequently arrived at an erroneous decision contrary to the weight of the evidence on record.
7. That she misapprehended and/or misconceived the nature of the offence charged and thus failed to warn herself on the dangers of the alleged recognition that was not withstanding to the evidence on record e.g. O.B as first report.
8. That she erred in both law and facts in her judgment which is wrought and/or fraught in sentence meted out with illegalities.

On the basis of these grounds the appellant prayed for orders that the appeal be allowed, conviction and sentence dated 4th June 2010 quashed varied and/or set aside and that he be set free and at liberty forthwith.

Submissions for the Parties

4. The Appellant has filed written submissions, which he highlighted orally citing the decisions of *Norman Ambichi Miero and Henry Kisina Anjili vs. Republic,* Court of Appeal at Nairobi, Cri. Appeal No. 279 of 2005, reported in ***The Standard,*** March 5, 2012. The appellant's principal submissions were that:

a. The case against him was a frame up, the Appellant having been arrested on 7/10/2009 and hearing on 25/11/09, the police took all that time to frame him up. Moreover, the charge sheet is defective as the same does not indicate the O.B number. The OB was produced before this Court with leave of court to adduce additional evidence.
b. The prosecution's case is based on recognition and if this was so the complainant (PW1) should have given appellants names and description to the police with the first report. Further the witnesses did not mention source and distance of light at scene of crime that could have enabled positive identification.
c. Findings of the trial court on recognition were not well founded since it is shown that 2 boys who were arrested were later released. Thus his arrest and eventual arraignment in court was not proper.
d. It was alleged there was no need for identification parade since it was a case of recognition yet complainant said he does not know how the appellant was arrested.
e. There were serious inconsistences of the prosecution witness. PW3 had stated that PW1 had told him on phone loud speaker that he would be coming by taxi which contradicts PW1 statement that he did not know that the appellant had been arrested.

He therefore urges the court to find that the trial court reached the wrong conclusions and prays that the appeal be allowed, conviction quashed and the sentence set aside.

5. Counsel for the State, Mr. Mutuku, in response supported both the conviction and sentence of death passed by the trial court. On the issue of the alleged defective charge sheet, Mr. Mutuku submits that the same was not defective simply because the Occurrence Book (O.B.) number was not included. There was nothing wrong with the Statement and the Particulars of offence and there was no objection made in court about the same. He added that there was a proceeding before the court for additional evidence upon request by the appellant when O.B No. 13 of 6/10/2009 was produced as an exhibit.He argued that O.B. number on a charge sheet is purely an administrative matter meant for the assistance of the records officer at the Police Station in tracking files and the omission did not cause any miscarriage of justice and there was no prejudice to a fair trial.

6. On the issue of identity of appellant, Mr. Mutuku maintained that this was not in doubt. He reiterated that on the material day, the 5/10/2009, PW1 and PW2 gave a lift to the appellant who

alighted at their gate. Later on at night the couple was attacked by among others the appellant. They PW1 and PW2 were able to recognize the appellant by way of security lights outside and there was moonlight although they did not give strength and distance of source of light.He submitted that any doubts as to the identification of the appellant using the security and moon lighting were put to rest by the subsequent events of 07/10/2009 when the appellant went to the school where the complainant (PW1) worked as a driver and asked after him. The appellant was referred to the School head-teacher (PW3) when the appellant asked of the whereabouts of the complainant (PW1) whom he knew was attacked and hospitalized. The head-teacher (PW3) telephoned the complainant on loudspeaker and on hearing the voice of the complainant indicating that he was coming by taxi, the appellant started running away prompting PW3 to become suspicious of the appellant and to cause his (appellant) arrest. The conduct of the appellant, counsel submitted, clearly connected him to the robbery of PW1 and PW2. The State Counsel agreed with the trial court that the conduct of the appellant was not that of an innocent man, submitting that the only inference the court can make is that appellant's visit to school was to confirm that PW1 was dead and therefore evidence against him was buried. He submitted that the complainant (PW1) had received serious grave injuries and the attacker after inflicting the injury thought the victim was dead and wanted to confirm by visiting the school. Counsel concluded that the conviction was safe based on the evidence placed before court.

7. Mr. Mutuku sought to discredit the appellant's evidence that he had gone to St.Clavers school on the 7/10/2009 to look for a place for his child when he found 6 people discussing a matter of a person who had been attacked. Counsel submitted that PW3 and PW4's evidence shows that no one was attacked at the school on 7/10/2009 as is alleged by appellant. This is supported, he argued, by the appellant's cross-examination of PW1 and PW2 when he avoided mentioning his presence at the gate of the school on 5/10/2009. Counsel supported the trial court's finding that the appellant's contention that he had gone to the school to seek a place for his child but was thought of a spy, was an afterthought.

8. Mr. Mutuku submits that identity of appellant was not in doubt and his conduct on 7/10/2009 was inconsistent with an innocent person and he urges the court to dismiss the appeal. Further that failure to name suspect does not necessarily mean that he did not commit the offence.

<u>The Evidence</u>

9. As restated by the Court of Appeal in ***Muthoko and Anor. vs. Republic***(2008) KLR 297, it is the duty of a first appellate court to analyze the evidence and come to its own independent conclusion bearing in mind that it did not hear or see the witnesses and making allowance for that. It is our duty therefore to re-evaluate the evidence on the record and make our own independent conclusion and only thereafter determine whether the conclusions reached by the trial should stand.

<u>Prosecution evidence</u>

10. PW1 Samwel Philip Omondi narrated what had happened on the 5/10/2009 at 11.00p.m. He was at home with his family asleep when they heard a loud knock at door and people demanding that they open claiming they were Police. He looked through the window and saw 5 people at his door, one of whom was the appellant. He testified that he met him at Namba as he dropped children at around 6.00p.m. on the same day i.e 5/10/2009 as the appellant asked him whether PW1 could assist him in getting a school for his child". PW1 also testified that he gave the appellant a lift and dropped him at his gate. PW1was together with his wife during this time. He said he saw the thugs through the help of the light outside and he called PW2 to help identify the people and she identified and confirmed that it was the appellant. They then decided to hide.The door was broken and he saw the appellant but did not recognize the other four attackers. The thugs carried pangas and rungus, with the appellant carrying a panga and wearing a huge jacket. PW1 further states that when the thugs entered his house, they demanded for money and when PW1 said nothing they started to cut him. PW1 showed the court where he was cut and stated that it was the appellant who had cut him. He testified that there was security light outside and some moonlight. He struggled with them and managed to escape to a neighbour's house who took him

to hospital where he was admitted and discharged the following day. The thieves took 3 suitcases with clothes and documents that were inside and moneyKsh.4, 000/=. After being discharged from hospital, he found that his wife PW2 had already reported the incident. Nothing was recovered. He told the police that, he knew the appellant who had robbed them. He produced the treatment notes, P3 form which had been filled at Migori District Hospital. He later came and recorded a statement at the police station.

11. PW2 Everlyne Akinyi Omondi testified that on the 5th October 2009 at 11.00pm they were attacked by some people who came to their house ordering them to open as they were police officers. They woke up and her husband (PW1) checked through the window to confirm whether they were police officers, and he asked his wife to confirm the same.Since there was some moonlight she saw many people including the appellant. She had seen the appellant earlier during the day when her husband (PW1) picked him as he dropped the children from school. She could recall that he had a bald head. Appellant had come to them as a parent requesting for a place for his child in school. The appellant had been given a lift by the couple and he was dropped at the junction entering the couple's home. She testified that she was able to identify him that night. The attackers stole brief cases which had clothes and kshs.7, 000/= and the same were not recovered. The appellant was arrested at PW1's school when he went looking for him.

12. PW3 Dickson Okoth Nyangor, a teacher at St. Clever's Victoria Academy where PW1 works testified that on 7th October, 2009 at 10.30am the appellant came to his office asking for the whereabouts of PW1. On being asked why he wanted to see PW1 he explained that he had heard that PW1 had been attacked by thugs and was being treated at Akiaira Hospital.PW3 then decided to call PW1 so that they could communicate with the appellant. The appellant could not communicate but was informed that PW1 was on his way with a taxi. On hearing this, the appellant started to run away and PW3 became suspicious and raised an alarm whereupon they managed to arrest the appellant. They took him to the police station where he (PW3) recorded a statement.

13. PW4 Everlyne Mikidas Okoth a teacher at St. Clever's Academy testified that on the 7th October, 2009 she directed the appellant to PW3's office and that after about 30 minutes she heard some commotion, some people were chasing somebody. When they got him, she realized that it was the appellamt, the person she had directed to the headmaster's office.

14. PW5 Maruti Lawrence, a clinical officer at Migori District Hospital testified of completing the P3 form for complainant PW1 after examining him. He explained the complainant's nature of the injuries and assessed the degree of injury as maim. He signed the P3 form which he produced together with treatment notes from St. Akidira Memorial Hospital.

15. PW6 Stephen Chebor No. 55842, the investigating officer, who is based at Migori Police Station Crime Branch told the court that on the 6th October 2009 at 9.00am he received a report from PW2 that some thugs had attacked her husband at about 11.00pm the day before.He booked the report in the O.B., informed the Officer Commanding Station (OCS) and then visited the scene of crime. He found that the door was smashed, some mattresses were scattered all over and there was blood stain outside the said house. He visited the victim, found him in stable condition but with deep cuts on both hands and forehead. Thereafter he went with PW2 to their offices and recorded her statement. The same day he got information from villagers that some suspects had been seen he went and arrested 2 boys who were later released for lack of evidence.On the 7th October, 2009 PW3 accompanied by village elders had arrested the appellant. They explained the circumstances under which the appellant was arrested. He charged the appellant and gave PW1 the P3 form which was filled by the clinical officer. The appellant was charged with robbery with violence as particularized in the charge sheet. He was told that the complainant was able to identify the appellant but nothing was recovered.

Appellant's defence

16. When put on his defence, the appellant gave a sworn statement that on the 7th October 2009, he left his house for Migori to look for a school for his child going to St. Clever's Academy among 3 others. At the said school, he met 6 other people who were saying that they had beaten a person the previous day who had been taken to the District Hospital for treatment.He then told them of his mission, and since they looked busy he decided he would return on Monday. They started saying that they were suspicious of him and that he had come to spy on them. They wanted to lynch him so he ran out of the office. They caught up with him and took him the police station. The investigation officer said he could release him if he had something small. His finger prints were taken and he was then charged with the offence.

Issues for determination

17. It is not disputed that a robbery did take place on the 5th October, 2009 at Wouth Ogire village. As stated by Court of Appeal in ***Ganzi vs. Republic 2005)1 KLR 52*** the offence of robbery with violence under section 296 (2) of the Penal Code is committed in any of the following circumstances, namely:

a. **The offender is armed with any dangerous or offensive weapon or instrument; or**
b. **The offender is in company [of] one or more other person or persons; or**
c. **At or immediately before or immediately after the time of the robbery the offender wounds, beat, strikes or uses other personal violence to any person.**

See also ***Oluoch –vs- Republic*** (1985) KLR 549.

In this case, the evidence is that there were five (5) assailants who were armed with pangas and rungus which they used to cut PW1. Violence was actually visited on PW1 and this fact of injury has been clearly corroborated by the evidence of PW5 the clinical officer who produced the complainant P3 form. The clinical officer found that the complainant suffered cuts on the forehead and hand injuries which were assessed as maim. All the ingredients of the offence of robbery with violence have been proved.

18. The only issue that arises for determination is whether the charge is a frame up as is being alleged by the appellant or whether the appellant was properly identified as one of the assailants so that his guilt for the offence had been proved beyond reasonable doubt.

The Law

20. It is the duty of the court to weigh the evidence presented by the prosecution and the defence as a whole bearing in mind that the burden of proof lies always with the prosecution and that the accused person, no matter how implausible the story of his defence appears, must not be required to prove his innocence. It is therefore no reason to convict an accused that his statement is an 'afterthought', whatever that means, because he could very well, within his constitutional Article 50 rights, have remained silent. The statement by an accused, upon being placed on his defence, has the important object of raising a reasonable doubt in the prosecution's case but it is the prosecution that must prove the guilt of the accused to the required standard.

21. On the issue of identification of the appellant, the Court of Appeal in ***Karanja & Another –vs- Republic*** (2004) KLR 140 approved the statement of the law as regards identification in difficult circumstances as settled in the case of *Cleophas Otieno Wamunga –vs- Republic*, Court of Appeal No. 20 of 1989 at Kisumu where the court stated as follows:-

> "[The] witnesses testified that they recognized the appellant among the robbers who attacked and robbed them ….what we have to decide now is whether that evidence was reliable and free from possibility of error as to find a secure basis for the conviction of the appellant. ***Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends***

wholly or to a great extent on the correctness of one or more identifications of the accused, which he alleges to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification.

The way to approach the evidence of visual identification was succinctly stated by Lord Widgery L. C in the well-known case of ***Republic –vs- Turnbull*** (1976) 2 ALL ER 549 AT 552 where he said ***"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made".***

22. Again, in the Eastern African *locus classicus* on the issue of identification by a single witness, ***Abdalla Bin Wendo –vs- Republic*** (1953) 20 E.A.C.A 166 the former Eastern African Court of Appeal stated:-

"…subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct, pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error…".

Analysis of the Evidence

23. It is on record that PW1 and PW2 recognized the appellant because of the moonlight and the security light that was outside their house. There was however no evidence as to the distance from the lighting to where the assailant and the two eye-witnesses, PW1 and PW2, were. The brightness of that source of light and of the moon (quarter-moon, half-moon or full moon) was not given. The appellant we are told met with PW1 and PW2 at 6.00pm and the robbery incident occurred at 11.00pm but the duration that the witnesses were allegedly with the accused through the length of the journey from the school to the PW1's gate is not given: it has not been shown how long the appellant was with PW1 and PW2; and the distance from where the appellant was given a lift to the junction of PW1's house was not given. Moreover, no description of the appellant was given to the police when the first report was made and nothing recovered from the appellant. The investigation officer never made efforts even to search the appellant's house. The appellant has also raised issue with the failure of the prosecution to mount an identification parade. Such a parade was necessary as to confirm that he prosecution witnesses truly knew their assailant and could recognize and identify him as such. Such is the caution dictated by the decision in ***R s. Turnbull,*** supra, that ***"Recognition may be more reliable than identification of a stranger; but even when the witness purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made".*** We accept this proposition of law which was also adopted by the Court of Appeal in the ***Norman Ambichi Miero's*** case, supra, cited by the appellant.

24. We think that the lack of a first report description of the accused; the non-description of the source and intensity of the alleged lighting; the lack of evidence as to the duration prior to the robbery that the two eye-witnesses had been with the appellant for them to be able to later recognize him at the Robbery; and the failure to conduct an identification parade in the circumstances of this case rendered the identification evidence on its own to be unreliable. According to the holding in the ***Abdalla Bin Wendo vs. Republic***, supra,that ***"when it is known that the conditions favouring a correct identification were difficult….what is needed is other evidence whether it be circumstantial or direct, pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error…"*** we set out to confirm whether such

other evidence, circumstantial or direct, pointing to the guilt of the accused existed.

25. We think that such other evidence pointing to the guilt of the appellant existed in the testimony of PW3 that the appellant ran away on hearing that the complainant PW1 would be coming to the school by taxi. The evidence of PW3 is supported by that of PW4 the teacher who testified that she had referred the appellant to the head-teacher (PW3) when the appellant approached her asking after the school driver (PW1) and that after 30minutes she heard noise, people chasing somebody whom she realized was the appellant whom she had directed to the head-teacher's office. PW3 who clearly described himself as the school head-teacher at p.15 of record of proceedings testified as follows:

> **"On 7/10/2009 at 10.30 am somebody knocked and entered my office. I asked if I could assist him. He said he wanted the school driver by name Philip Omondi. I asked him why. He said that he had heard that the driver had been attacked by thugs and was at Akidiva hospital. I asked him why he was in school if he knew that the driver was at Akidiva. He kept quiet and insisted that I assist him. I told him that if Omondi was his friend and if he had heard he had been attacked by thugs then he could call him as we did not know his whereabouts then. He said he did not have the driver's phone number. I had Philip's number. I called him and made him talk to the person. Philip could not communicate. I asked for the phone back. The driver told me to tell the person that he was coming in a taxi. The phone was on loud speaker. On hearing that, the person dashed out and started running out school. I raised alarm as I got suspicious. We chased and got him near River Migori. We brought him to the Police station for further investigations to why he was running away. "**

We accept the testimony of the two witnesses (PW1 and PW2) which we find consistent and unchallenged on cross-examination. It is clear that the appellant wanted to ascertain the status of the PW1 whom he had together with others attacked on the night of 5th October 2009. Hence, the haste in running away to avoid identification by PW1 when he heard that the PW1 was coming to the school by Taxi.

26. The appellant in his sworn statement on the other hand stated that he had gone to seek a place in the School for his child and, finding six people conversing about a person they had beaten the previous day thought they were busy and told them he would come back the following week on Monday when -

> **"One man started saying that I had just gone to spy on them. I said I had just gone for a school chance. They held me by force ordering me to sit. I ran out of the office. One started screaming 'thief, thief'. I stopped. Children came out of classes and plus people in the neighbourhood, they surrounded me. People wanted to lynch me. They were asked what I had stolen. One said I was a thief. They decided that it be a police case. I was taken to the police station.**"

The appellant's defence raises more questions as to the reasonableness of the story than create any doubts in the prosecution's case. Why did the appellant run away out of the office even before anyone said he was a thief, if his mission was pure – to seek a place for his child? Why didn't he explain his mission? Or, if he did, to what result?

27. The arrest and release of two boys when no sufficient evidence was found against them does not aid the appellant's case as that is exactly what the police would be expected to do upon realizing that no sufficient evidence lies against a suspect. Such release does not exonerate an accused who is later arrested and charged on the basis of evidence obtained against him. There is no inconsistency in PW1's evidence that he did not know how the appellant was arrested because the appellant was arrested after ***not before*** PW1 had spoken to PW3 who led the arrest team.

28. By reason of the foregoing, we find the appellant guilty of the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

29. The Senior Principal Magistrate's Court by its Judgment dated 4th June 2010 ruled that:

> **"The evidence on recognition appeared candid and consistent. It was not shaken. I have no reason to doubt the couple. The court was told of Accused's strange question when he appeared in the school that the complainant worked – looking for him yet at the same time saying that he had been attacked and was at Akidiva Hospital. His conduct of taking flight when the complainant said on phone that he had taken a taxi and was on his way to school to see him. This is not conduct of an innocent man searching for a vacancy for his child at school. I have considered what he said in his defence. The witnesses he encountered at school that day testified before court. The claim that they wanted to detain him for being a spy causing him to run never featured. At most I would describe it as afterthought… I have no doubt that the prosecution has proved beyond reasonable doubt that the accused was properly identified that night. I find him guilty as charged and convict him under section 215 of the CPC."**

30. Although we have found that it would not have been safe to convict on the sole basis of the identification or recognition evidence of the witnesses, we find that the additional evidence of the appellant running away when the complainant said he was on his way to the school pointed to his guilt and which in addition to the evidence based on identification made it safe to convict. The conviction by the Senior Principal Magistrate though not expressed to have been based on both the identification evidence and such other evidence as is described in her judgment was therefore safe and we uphold it.

31. Accordingly, the appellant's appeal against conviction and sentence filed on 16th June 2010 is dismissed.

Dated, Signed and Delivered in open court at Kisii this 9th day of May 2013.

..……………………………… ………………………………

RUTH N. SITATI **EDWARD M. MURIITHI**

JUDGE **JUDGE**

In the presence of: -

…………………………............................ for the Appellant

...for the Respondent

... Court Clerk

..……………………………… ………………………………

RUTH N. SITATI **EDWARD M. MURIITHI**

JUDGE **JUDGE**