



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 411 OF 2008

TOM ACHIENG OUMA1ST APPELLANT

FREDRICK OMUHUMBUA NYIKULI2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NUMBER 4054 OF 2006 IN THE CHIEF MAGISTRATE'S COURT AT MAKADARA – MRS. E. USUI (SRM) ON 24/11/2008)

JUDGEMENT

1. The two appellants **Tom Achieng Ouma** and **Fredrick Omuhumbua Nyikuli**, faced three counts for the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**, in **Nairobi CM Cr. Case no. 4054 of 2006**, before Mrs. E. Usui, Senior Resident Magistrate as she then was. They were convicted in one count and sentenced to suffer death as by law prescribed, and acquitted on the other two counts.
2. The particulars in the charge in which they were convicted were that on the 9th day of July 2006, at Ruai Gatuoro village Ruai location in Kayole division within Nairobi Province, jointly with others not before court, while armed with dangerous weapons namely a pistol and pangas, they robbed Francis Njuguna Muriithi of cash Kshs.6500/=, and one mobile phone make Nokia 3310 valued at Kshs.3500/= and at, or immediately before, or immediately after the time of such robbery used actual violence against him.
3. They have filed an appeal against both conviction and sentence, advancing grounds that the charge sheet was defective, the trial court did not observe **Section 50(2) (c)**, of the Constitution, and **Sections 163 (1)** and **107** of the **Evidence Act Cap 80**. They also attacked the weight of the evidence and in particular that of identification, and also contended that they were not given a chance to defend themselves.
4. Miss Njuguna, learned state counsel, replying on behalf of the respondent, supported the convictions and sentences of the two appellants. She admitted the fact as stated by the appellant that the charge sheet reads 9th July 2006 as the date of the offence, while **PW4** stated that the offence occurred on 9th June 2006, but submitted that it was either a typographical error or an error on the part of **PW4**, since all other witnesses including **PW1** had confirmed the date in the charge sheet as the date of the offence.

5. Miss Njuguna also urged that the evidence showed that when the appellants requested for the proceedings, and the trial court gave an order for them to be supplied with the said proceedings, they did not raise the issue again. On identification Miss Njuguna argued that **PW1** testified that there was sufficient light from a neighbour's house, and therefore, he could properly identify his attackers. Further, that the police conducted an identification parade where **PW1** identified the appellant by the way he was dressed, and that the Forensic Expert's report on DNA showed that the blood that was on the jackets taken from the appellant matched that of **PW1**.
6. We have scrutinized and re-evaluated the evidence on record bearing in mind that the duty of the first appellate court is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusion, but to make our own findings and draw our own conclusions, in line with **Boru & Anor V Republic Cr. App No. 19 of 2001 [2005] 1 KLR 649.**
7. Upon such re-evaluation we are satisfied that the appeal can be disposed of by analysing the weight of the evidence in regard to identification. **PW1** testified that he was walking home with his brothers on 9th July 2006, at 9.30 p.m., when they were accosted from behind by a gang of six men. The robbers set upon him with pangas and a knife inflicting injuries on his head, hips and limbs before they took his torch, mobile phone and cash Kshs.6000/= and disappeared.
8. According to **PW1** the police were called to the scene of the attack whereupon they told him that they already had the suspects in police custody. He went to hospital and later on to the police station where he was shown the two appellants. He identified them as his assailants.
9. The offence occurred at night and the lighting at the scene came from solar lights in a neighbour's house. The court was not told how far the solar lights were, nor how bright the scene was. **PW1** did however, aver that his attackers were strangers to him but that he was able to identify them from their manner of dressing. He described the jacket worn by the 1st appellant as black with white stripes, but that due to the serious injuries he had sustained he could not recall the second appellant's manner of dress.
10. **PW2** who was also attacked and robbed in the same evening at 6 p.m. on his way home on the same road, ran to the police station at Ruai and lodged a complaint. On his way back to the scene of the robbery accompanied by the police, they came upon two men whom the police arrested. He did not identify any of them as his attackers. **PW4**, P.C. Ng'eno who made the arrest corroborated the evidence of arrest. In his testimony he told the court that he arrested the two appellants because the complainant was **suspicious** that they were among his assailants. From the foregoing evidence it would appear that the two appellants were arrested even before the robbery against **PW1** occurred.
11. Lastly, there was the perplexing question of the jacket, upon which **PW1** pegged his identification of the 1st appellant, and which he purported to have identified at the scene. **PW1** referred to a **black** and white striped jacket in his examination in chief, while in cross-examination he referred to a **blue** and **grey** striped jacket. The court noted that the jacket produced in court had **yellow stripes**. A fourth jacket emerged in the evidence of **PW4**, and it was **green**.
12. The Government Analyst examined another set of three jackets which included one **green**, one **blue** and one **black** jacket; and which appear to have no relationship to the jackets referred to above. In the circumstances of this case therefore, we find that there was no proper identification.
13. We therefore allow the appeal, quash the conviction, and set aside the sentence. We order that the appellants be set at liberty forthwith, unless they are otherwise lawfully held.

SIGNED DATED and DELIVERED in open court this **6th day of November 2013.**

MUMBI NGUGI

JUDGE

L. A. ACHODE

JUDGE