REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 132 of 2010

GEORGE OCHIENG ONYANGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of SRM Hon. Z.J. Nyakundi dated and

delivered on 31st December 2009 in Rongo SRMCRC NO.311 of 2009)

JUDGMENT

1. The appellant herein, George Ochieng Onyango was arraigned before the Senior Resident Magistrate's court at Rongo on one single count of robbery with violence contrary to **section 296 (2)** of the **Penal Code**. The particulars of the offence are that on the 28th day of April 2009 at about 7.30 p.m. at Sony area in Rongo District within Nyanza Province, he robbed Morris Samwel Ongudi of mobile phone make Motorolla C113, charger, cap, T-shirt, long trouser, shoes and cash Kshs.2290/= all valued at Kshs.6000/= and at or immediately before or immediately after the time of such robbery wounded the said Morris Samwel Ongudi. The appellant pleaded not guilty and the case went to trial during which the prosecution called 6 witnesses.

2. From the testimony of these 6 witnesses, the facts of the case emerge.

On 28th April 2009 at about 7.30 p.m., the complainant herein, Morris Samwel Ongudi (Ongudi), a resident and Pastor of Awendo was on his way home from Awendo shopping centre where he had gone to charge his phone. When he got to Sony Complex, near a water pump he saw someone emerge suddenly infront of him. The person again suddenly disappeared. Ongudi walked on a bit, and then saw another person emerge from the sugar cane plantation. Fearing for his life, Ongudi screamed as he raised his hands. The assailant chopped off Morris' left thumb, even as Ongudi made a plea for his life, but before he knew it, he was cut on the elbow and he fell down. The assailant ordered him to take off everything he was wearing. As he did so, a phone charger he was carrying fell down. The assailant asked for the phone which had also fallen on the ground. He was ordered to stand up and look for the phone.

3. After about 30 minutes one Michael Oyunga, PW2, who worked at Sony Sugar Company, appeared. When Ongudi called out to PW2 (Michael) the assailant threatened to cut him (Ongudi), so Michael ran off and went to report the incident to Sony Sugar. As Michael ran off, the assailant slapped Ongudi on the cheek and shoulder, as he also took Ongudi's shoes, mobile phone and a wallet which contained Kshs.2290/= and then disappeared. Ongudi went home at about 8.00 p.m.

4. On arrival at his home, Ongudi called out to his son, Elvis Scot, PW3 (Elvis) and asked him for clothes to wear since he had lost all his clothes to the robber. Elvis handed him a T-shirt and trouser and called for a motor bike from a neighbour to take Ongudi to hospital. Elvis saw that Ongudi had cuts on the left thumb, elbow and shoulder. Ongudi was taken to Awendo Sub-District Hospital but was later referred to Raficom Hospital in Awendo where he was admitted for one day. Thereafter he went and reported the matter to Awendo Police station.

5. At the station, Ongudi saw his pair of brown shoes. He identified his shoes in court – **PMF1-1**, and the red T-shirt. He also identified a woolen hat which the assailant wore during the attack and the panga that he sued to attack Ongudi. Ongudi also identified his universal charger – **MF1-4** and the mobile phone Motorolla C113 – **MF1-5**. Ongudi testified that the person who attacked him on the material night was the appellant and that he was able to identify the appellant with the help of electricity from the water pump. He also said that the struggle with the appellant lasted about 30 minutes.

6. During cross examination, Ongudi stated that the electricity light was bright and that one could see over a large area using that light. Ongudi also testified that when he made his report to the police, he informed the police that he could identify his assailant if he saw him again, and that when he saw the appellant at the cell at Awendo police station, he was able to identify him.

7. Michael Wayamba testified as PW2. His testimony was that on 28th April 2009 at about 7.30 p.m., he was walking to work at Sony Sugar Company. As he approached a water pump which was lit with electricity light, he saw a person with a panga and the person asked him where he was going. Fearing for his life, Michael ran away and as he did so, he heard a voice calling him and telling him that he was being killed. Michael ran to Sony and reported the incident. He said he recognized the voice of one calling him to be that of Ongudi whom he had known for over 21 years. Michael was not able to identify Ongudi's attacker.

8. The report made to Awendo police station was received by Number 55937 Police Constable George Bett, PW4. After recording his statement, Ongudi was able to identify some shoes which were at the station. The appellant had been arrested with those shoes. On cross examination, PC Bett told the court that when the appellant was arrested in connection with a house breaking offence, he was found wearing the pair of brown shoes which Ongudi identified as the pair stolen from him on the night of the attack.

9. PW5 was Number 69643 Police Constable Kipyegon Kirui of Awendo Police station. He testified that he was the Investigator in a burglary case involving the appellant. On the 9th May 2009 at about 9.00 a.m., PC Kipyegon received information that the appellant who was a suspect in the burglary case and was at large had been sighted at Awendo. PC Kipyegon proceeded to Matopeni Estate where he found the appellant and arrested him. The appellant was in possession of a panga. He was disarmed, arrested and taken to Awendo Police station.

10. Upon searching the appellant, he was found to be in possession of a charger and mobile phone motorolla C113. The appellant was also wearing a pair of brown shoes. Ongudi later identified the shoes, the charger and the phone as his items which had been stolen from him on the evening of 28th April 2009 when he was robbed. The shoes, marvin cap belonging to the appellant, the phone charger, the mobile phone were all produced in evidence as **P. Exhibits 1-5**.

11. During cross-examination, PC Kirui told the court that all the exhibits produced in court were recovered from the appellant at the time of arrest on 29th April 2009. He also testified that when Ongudi made his report, he confirmed that he could identify his assailant if he saw him.

12. PW6 was Julius Mokaya, a clinical officer attached to Awendo District Hospital. He testified that he examined one Morris Ongudi on the 14th July 2009. On examination, Ongudi was found to have a stitched cut wound on the left elbow and a cut thumb. PW6 opined that the injuries had been caused by a

sharp object. He filled and signed the P3 form which he produced as **P. Exhibit 1**.

13. At the close of the prosecution case, the trial court ruled that the appellant had a case to answer and put him on his defence. The appellant gave sworn evidence, but had no witnesses to call. His case was that on the 28th April 2009 he woke up early and went for duty as a cane cutter and remained on duty until 4.00 p.m. He returned home at about 5.00 p.m., took a shower and then rested until about 7.00 p.m. when he took supper and went to sleep until the next morning. On that next morning, he took breakfast and thereafter went to work in his shamba. He was in the shamba until 10.00 a.m. when police officers went to him and asked him if he was smoking bhang. He denied the suggestion but the police officers insisted that he was doing so. He was arrested and taken to a changaa den from where the police arrested 4 other people. He was then taken to Awendo police station where he was booked and put in cells for 3 days.

14.On the 4th May 2009, he was taken out of the cells and asked if he knew anyone else who was at the police station. On 9th May 2009, the appellant was taken to court for plea. He denied the charge. He stated that the complainant's allegation that he knew him could not possibly be true because even when he (complainant) went to report the matter to the police, he could not give the appellant's name. He also stated that the police officers did not arrest him with anything.

15. During cross examination, the appellant confirmed that he was arrested on 29th April 2009 and taken to the police station. He also stated that he was arrested from his shamba and that at the material time, he had clothes and shoes on. He denied that the exhibits produced in court were recovered from him.

16. Upon careful consideration of all the evidence that was placed before him, the learned trial magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt. He thus found the appellant guilty as charged and convicted him accordingly. The appellant was subsequently sentenced to suffer death as by law established. The learned trial magistrate based the appellant's conviction on the doctrine of recent possession and concluded that having been found in possession of items which appellant had lost in a robbery just the previous night was a clear indication that the appellant was the one who attacked the complainant at the time of the robbery on 28th April 2009 at about 7.30 p.m. as the complainant walked home from Awendo shopping centre.

17. The appellant was aggrieved by the conviction and sentence and has brought his appeal before us on the following homemade grounds:-

1) *That the learned trial magistrate erred in law and infact in failing to appreciate that the charge sheet was defective and that the evidence adduced in court did not support the particulars of the charge sheet.*

2) *That the learned trial magistrate erred in both law and fact in basing the appellant's conviction on evidence of identification when it was clear that the circumstances prevailing at the material time were not*

conducive to error-free identification.

3) *That the learned trial magistrate erred in law and fact in failing to* appreciate that the doctrine of recent possession was not applicable in the circumstances of this case.

4) *That the learned trial magistrate erred in both law and fact in failing to appreciate the weight of the entire evidence which clearly gave the benefit of the doubt to the appellant.*

18. The appellant prays that his appeal be allowed, conviction quashed and sentence of death set aside.

19. When this appeal came up for hearing before us on 21st February 2012, the appellant tendered his

written submissions.

20. We have carefully read and considered the said submissions in which the appellant has urged us to allow his appeal as prayed. We also heard submissions from Mr. Mutua, learned State Counsel. Counsel submitted that the appellant's complaints touching on the charge sheet which allegedly does not say the hour at which the offence was committed is baseless. He urged the court to find that the appellant has not disputed the hour at which the alleged offence took place. Counsel also dismissed the second ground of appeal and submitted that the offence was committed at a well lit place within Sony Sugar premises and that accordingly the complainant was able to clearly identify the appellant with the help of the bright security light situated at the nearby water tank. Counsel also submitted that the 30 minutes during which Ongudi struggled with the appellant was sufficient time to allow Ongudi ample opportunity to identify the appellant.

21. Touching on grounds 3 and 4, counsel for the respondent submitted that the evidence on record clearly shows that the appellant was arrested in possession of the items which Ongudi had lost to his assailants the previous evening and that therefore the learned trial magistrate was perfectly in order to apply the doctrine of recent possession in convicting the appellant. Counsel submitted further that the appellant had failed to explain how he had come into possession of Ongudi's stolen mobile phone, universal charger, shirt and shoes.

22. As for the sentence, counsel submitted that the learned trial magistrate had no choice in the matter since the law provided for the mandatory death sentence upon conviction of a robbery offence under **section 296 (2)** of the **Penal Code**.

23. In reply, the appellant contended that he was not a thief; that he never stole from Ongudi as alleged or at all and that the goods allegedly found in his possession were not recovered from him otherwise the O.B report would have shown so.

24. This matter is before us as a first appeal. On this appeal, we are under a duty to reconsider and evaluate the evidence afresh with a view to reaching our own conclusions in the matter. We are also under a duty to carefully consider and weigh the judgment of the learned trial magistrate with a view to establishing whether the conclusions reached by that court in the matter can be supported. See generally **Pandya –vs- R. [1957] EA 336**; **Okeno –vs- Republic [1972] EA 32**and **Ngui –vs- Republic [1984] KLR 729**.

25. After analyzing the evidence afresh, three issues arise for determination. The first one being the question of identification of the appellant and whether the circumstances prevailing on the evening of the attack were such that Ongudi clearly saw and identified the appellant. The second issue is whether the doctrine of recent possession was properly applied in the instant case. The third issue is whether the evidence placed before the court was in tandem with the particular in the charge sheet.

26. On the first issue, the evidence of Ongudi was that as he walked home from Awendo shopping centre, and near the water pump within Sony Complex, the appellant, who was armed with a panga emerged from the sugar cane plantation. On seeing the appellant, Ongudi raised his hands in surrender as he also screamed. The appellant chopped off his left thumb and when Ongudi pleaded that the appellant may spare his life, the appellant cut him on the elbow and Ongudi fell down. The appellant ordered him to remove all his clothing as he also asked for the phone. The appellant also ordered Ongudi to stand up and look for the phone, a command which Ongudi obeyed. Though Ongudi does not clearly state what followed after the appellant ordered him to stand up and look for the phone, some 30 minutes passed while the two men were in the same place. It was at that time that Michael came by and when Ongudi called to Michael for help, the appellant raised his panga again to cut Michael so Michael ran away and the appellant slapped Ongudi on the cheek and shoulder. By this time, Ongudi had taken off all the clothes and the shoes. The appellant gathered all these, including the phone and the charger and the purse containing Kshs.2290/= and took off.

27. From the above evidence, we are not satisfied that Ongudi clearly saw and identified the appellant. He does not say how far the light at the water tank was from where the attack took place, nor does he say how bright the light was. Nor does he say whether he and the appellant looked each other in the face and whether the appellant's face was disguised. In the case of **Paul Etole & another –vs- Republic, Criminal Appeal No.24 of 2000**at Nairobi, the Court of Appeal stated the following in part of its judgment:-

"---- 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."

The case of**Wamunga –vs- Republic [1989] KLR 424**is also relevant on the question of identification of an accused person under difficult circumstances.

28. In the instant case, we agree with the appellant that the complainant was not able to clearly identify him. If Michael had stopped and taken a good look at the appellant and also confirmed that he saw him, the issue of identification would have been more settled.

We therefore agree with the appellant that the findings of the learned trial magistrate on this issue of identification cannot be supported.

29. We now move on to the issue of whether the doctrine of recent possession was properly applied in this case. Ongudi testified that his assailant ordered him to remove all his clothes, which included a red T-shirt, a long trouser, blue shirt and brown shoes. Ongudi also had on him his motorolla mobile phone C 113 and a universal charger. He stated that the assailant, after injuring him took these items and walked away. PW5, Number 69043, PC Kipyegon Kirui testified that he arrested the appellant at a drinking place on 9th May 2009 and that after arresting him and taking him to the Awendo Police station, he recovered from him a charger and mobile phone motorolla C113. The appellant was also found wearing a pair of brown shoes which Ongudi identified alongside the other items which were stolen from him during the attack on the previous night. Though the appellant contended that no item was recovered from him at time of arrest, we are satisfied with the testimony of PW5 and that of PW4, Number 55937 - PC George Bett that the appellant had in his possession goods that had been stolen from Ongudi on the evening of 28th April 2009. The appellant was found in possession of these items only some hours after the said robbery. Because the appellant failed to say how he had come to be in possession of the said items the trial court rightly concluded that the appellant must have been the one who robbed Ongudi. On the basis of the above, we are satisfied that the defence of alibi put forward by the appellant has been displaced by the evidence on record.

30. Finally, we have considered the appellant's complaint about the charge sheet, but we find that there is no substance in the said complaint. We also find that the sentence passed upon the appellant was in accordance with the law.

31. In the premises, we find that the appellant's appeal on both conviction and sentence lacks merit and the same is accordingly dismissed. R/A within 14 days from today.

Dated and delivered at Kisii this 1st day of November, 2012.

RUTH NEKOY SITATI **R. LAGAT KORIR**

JUDGE. **JUDGE.**

In the presence of:

Present in Person for Appellant
Mr. Mutua (present) for Respondent

Mr.Bibu - Court Clerk

RUTH NEKOY SITATI **R. LAGAT KORIR**

JUDGE. **JUDGE.**