



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO 330 OF 1990

HEZBON OBADHA ODHIAMBO..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT OF THE COURT

The appellant, Hezbon Obadha Odhiambo, was convicted by the learned Principal Magistrate, Kisumu of the offence of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death. His appeal to this Court is against conviction and sentence.

Briefly the prosecution case was that on the night of 5th May, 1991 at about 2 am, while the complainant, Manasse Ouma Oucho (PW-1) and his wife Mary Achieng (PW-2) were sleeping in their house within Nyang'oma Kagelo sub-location, East Alego location of Siaya district, their door was suddenly banged by a huge stone and broke down. Several people then rushed into the house with pointed torches and immediately descended upon the complainant whom they started beating up as he attempted to raise up from the bed. With the aid of torch lights which the said gansters had, PW1 stated that he was only able to recognize one of the men who had entered his house. He gave the name of the said man as Odiwuor Chunga but he was never arrested by the police as he is alleged to have gone underground. The complainant however managed to run out of his house and it is then that he says that he was able to see the appellant who was well known to him standing outside the house. He was able to see him as there was bright moon light and that the appellant was only about 2 meters away from him. On seeing him, he stated that the appellant threw a stone at him and started chasing him as he ran towards his mother's house. He then escaped. The said thugs later killed the complainant's mother and when he went back to his house he found when they had made away with his Sanyo radio, a radio-gram, a handbag, torch and some packets of cigarettes, none of which were ever recovered. He then made a report to the area Asst Chief and at Siaya Police Station giving the name of the appellant as one of his attackers. The appellant was later arrested and charged.

The appellant denied any involvement in the said robbery saying that at the time of the said incident he was deep asleep in his house and did not hear anything at all till the following day when he heard of the alleged robbery at the complainant's home. Later in the same day, he was arrested by the police. Nothing was found on him. He was later released by the police on p 22 and it was not until the 11th of September, 1991 that he was finally arrested and charged.

The conviction of the appellant was based on single witness identification by the complainant. The learned trial magistrate properly warned himself of the dangers of convicting on such evidence and we believe that he had well in mind the well known case of *Abdallah Bin Wendo –v- R* (1953) 20 EACA 166

although it was not specifically cited.

He considered that favourable conditions for proper identification existed and he believed the testimony of the complainant regarding his identification of the appellant at the scene of crime notwithstanding the fact that prior to this incident they have had strained relationship due to a land dispute.

As we have already pointed out, identification of the appellant in this case was by means of moon light which the complainant stated was quite bright. At the time he allegedly saw the appellant standing outside his house, he was fleeing away for the thugs that were already in his house and were attacking him. If the appellant was only some 2 meters away from the door, we doubt whether in such a rush for the safety of his life the appellant had sufficient time to see those who were outside his house even if there was bright moon light. The situation in which the complainant found himself was quite scaring because as he was being chased from his house towards his mother's house where he thought of seeking refuge, he found his mother already under attack and was being clobbered by other gangsters and he tried continued running away till he escaped.

On our own assessment of the recorded evidence we are not satisfied that there existed favourable circumstances for proper identification and that the complainant's alleged identification of the appellant cannot altogether be regarded as having been free from any possibility or error or mistake: See *Roria -v- R* [1967] EA 583. Learned state counsel does not support the conviction of the appellant and we think that she is right in doing so for reasons already given.

We are unable to uphold the conviction of the appellant. We allow this appeal, quash the conviction of the appellant and set aside the sentence that was imposed. We order that he shall be set free and be released forthwith unless otherwise lawfully held.

Dated and Delivered at Nairobi this 14th day of May, 1993

A.MSAGHA MBOGHOLI

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JUDGE

S.O. OGUK

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JUDGE