REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO 305 OF 1990

CHARLES MONDO OLWENO ….....…….….APPELLANT

VERSUS

REPUBLIC……..……..…..…….RESPONDENT

(From original conviction and sentence in Criminal case No 1161 of 1988 of the Resident Magistrate's Court at Siaya, A Anambo Esq RM)

JUDGMENT

This is an appeal by Charles Mondo Olweno against his conviction and sentence in Criminal Case no 1161 of 1988 by Mr A Anambo, Resident Magistrate, Siaya Resident Magistrate's Court.

The appellant together with three other persons were faced with a charge of robbery contrary to section 296(1) of the Penal Code and the particulars alleged that on the night of 20th and 21st July, 1988 at South Ramba Sublocation, Central Asembo Location Siaya District the accused persons jointly robbed Nathan Ojuaka Ayuoya of his radio, one wrist watch, one blanket, two long trousers, four shirts, one pair of shoes, one torch, one basin, eight batteries, 4 kg of sugar, 4 packets UHT milk, 2 jericans of paraffin, one packet of tea leaves, one bunch of keys all valued at Kshs 3,366.60 and cash Ksh 4,600/- and that during that robbery the accused persons used actual violence on Nathan Ojuka Ayuoya.

The appellant was the only one who was convicted as his co-accused were all acquitted. He was accused 3 during the trial.

In this appeal the appellant has appeared in person while the state was represented by Mrs Muinde, a state counsel.

To go straight to the scrutiny of the evidence which was adduced in the trial court the conviction of A3, now appellant, based entirely on identification of the appellant by PW1, PW2 and PW3. PW1 and PW2 were sleeping in one room when robbers broke in. PW2 said to have been wife of PW1. PW3 was a tenant of PW1 sleeping in the next room. Attack said to have been in those two rooms only. But PW3 was not beaten or in any way injured.

PW1, PW2 and PW3 each claims identification through light from the torch of the robbers.

PW1 and PW2 claimed to have identified all the robbers, they alleged were four. The learned resident magistrate considered their evidence on identification and rejected it on the ground that they had never mentioned that they had identified anyone until after a period of three months from the robbery. On that

score he very much doubted the evidence of PW1 and PW2 on identification and dismissed it and as a result acquitted accused 1, accused 2 and accused 4.

But having done that the learned resident nagistrate held that that evidence was good against the appellant not for any other reason but simply because PW3 had also claimed he had identified the appellant. The magistrate was of the view that PW3 was an independent witness and that therefore since he said he identified the appellant, that corroborated the evidence of PW1 and PW2 that the appellant was one of the robbers.

The learned Magistrate did not consider the evidence that during the three months when PW1 and PW2 were not saying that they had identified anyone not even to the son of PW1, who gave evidence as PW4 Gideon Ojuang, Chief of Central Asembo Location, it was PW3 who talked to them about his having identified one of the robbers. PW3 said he did not know the name of the person he claimed he identified and that from his description of the person PW1 and PW2 knew who the person was.

The learned magistrate did not therefore realise that as at that stage PW1 and PW2 had not claimed to have identified anyone and that if they later came to claim to have identified the appellant, it most likely was from what they had heard from PW3. As such, what PW1 and PW2 told the court about their identification of the appellant was not independent but was from what PW3 had told them.

In other words the only evidence of identification which was before the court was that given by PW3 as the learned magistrate had already rejected the evidence of PW1 and PW2 and in any case what PW1 and PW2 said came from what PW3 had told them although PW1 and PW2 were careful not to reveal it.

That being the position the learned resident magistrate should have scrutinised the evidence of PW3 under two different tests. The first test should have been whether the condition under which PW3 claims to have identified the appellant were such that there was positive identification.

Was there no possibility of a mistake?

PW2 talked of five robbers instead of the four PW1 and PW2 talked about. PW3 had no source of light of his own. Light from any torch held by a robber must have been directed at seeing PW3 and the Shs 100/- PW3 said he was offering the robbers. Otherwise the light must have been directed at checking the room of PW3. Such light was not directed at identifying members of the robbery gang. In any case the light must have been very unsteady especially if it fell on any of the robbers. PW3 must have been a frightened man, especially as it appears he had heard the commotion in the room of PW1 and PW2. Another thing to be guarded against was exaggeration and unreliability PW3 appears to be talking of things which were happening in the room of PW1 and PW2 as if he was one of the people in that room. Furthermore, PW3 had not seen the appellant before. He said he saw the appellant for the first time at the robbery. Thereafter he never immediately told PW1 or PW2 or the Chief PW4 that he had identified any of the robbers. It was after some days too that PW3 started telling PW1 that he had identified someone. He did not lead to the arrest of the appellant

Although he claimed before the trial magistrate that he identified the appellant at the police station, there was no evidence of an identification parade having been conducted by the police. This emphases the point I made above about guarding against exaggeration or unreliability in the evidence of PW3.

In the absence of evidence of a police identification parade in respect of the appellant, the rest of what PW3 said regarding his identification of the appellant at the police station is not acceptable and it is no better than the dock identification PW3 was making during the time he was giving evidence.

On the other hand even if it were held that the learned resident magistrate was right to accept the evidence of PW1 and PW2 against the appellant after he had rejected that evidence against Al, A2 and A4 and that therefore he was right to hold that the evidence of PW3 supported that of PW1 and PW2, the fact remains that the evidence of each of these witnesses had to be subjected to the test whether his or her identification of the appellant was so positive as to remove the possibility of a mistake. That was not done

and as such the learned resident magistrate erred in law.

The second test to which the evidence of PW3 should have been put was whether it could be relied upon, without any other evidence, to sustain a conviction. What obtained, from the way the learned magistrate handled the evidence in his judgment was that after the evidence of PW1 and PW2 on identification had been discredited, there remained the evidence of a single witness, PW3, to rely upon to convict the appellant. Conviction on the evidence of a single witness. Was the evidence of PW3 such that it could not but be true bearing in mind the comments I have made above about that evidence?

From my own evaluation of the evidence of PW3 I do not think it passes the two tests or any of them.

On the whole therefore I come to the conclusion that there was no evidence upon which the conviction of the appellant could be sustained. The learned state counsel does not also support the conviction.

Accordingly the appellant's appeal is allowed. His conviction quashed and the sentence set aside. The appellant be set at liberty forthwith unless otherwise lawfully detained.

Dated and Delivered at Kisumu this 12th Day of July, 1990

J.M. KHAMONI

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JUDGE