Otondi & another v Republic (Criminal Appeal 75 of 2017)
[2023] KECA 641 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 641 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 75 OF 2017

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

MAY 26, 2023

BETWEEN

LAWRENCE OMBUNGA OTONDI ..... 1ST APPELLANT

DOUGLAS RIOGI OTONDI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Migori (Mrima, J.) dated 20th July, 2016 in HC.CR.A Case No. 64 of 2015)

JUDGMENT

1. In three of the four robberies that took place in Migori County on September 8, 2011, November 18, 2011, December 22, 2011 and January 3, 2012, the victims were temporarily disabled with pepper spray to their eyes. Three of the robberies involved the theft of motor cycles. There was a commonality in the robberies.

2. Lawrence Ombunga Otondi (the 1st appellant) and Douglas Riogi Otondi (the 2nd appellant) were charged in connection with the robberies in Senior Resident Magistrates Court at Rongo in Criminal case 5 of 2012 under the following charges:

> Count I. Robbery with violence contrary to section 296 (2) of the *Penal Code*. Particulars of the offence are that Lawrence Ombunga Otondi and Douglas Riogi Otondi on the January 3, 2012, at 8.30pm, at Awendo township in Migori County jointly robbed Hezron Odhiambo Obongi of Kshs 4000/= (Four Thousand Shillings Only) and at the time of such robbery struck the said Hezron Odhiambo Obongi with a 'Rungu'.
>
> Count II. Robbery with violence contrary to section 296 (2) of the Penal Code. Particulars of the offence are that Lawrence Ombunga Otondi and Douglas Riogi Otondi on the

December 22, 2011 at Awendo township in Migori County within the Republic of Kenya jointly robbed Sevenson Okinyi Ochieng motorcycle registration xxxx Base Boxer red in colour valued at Kshs 87,000/= and at the time of such robbery struck the said Sevenson Okinyi Ochieng with a rungu.

Count III. Robbery with violence contrary to section 296 (2) of the Penal Code. Particulars of the offence are that Lawrence Ombunga Otondi and Dauglas Riogi Otondi on November 18, 2011 at Awendo township in Migori County within the Republic of Kenya jointly robbed Nicodemus Okoth Odongo motorcycle registration xxxx Bajaj Boxer red in colour valued at Kshs 85,000/= and at the time of such robbery struck the said Nicodemus Okoth Odongo with a rungu.

Count IV. Robbery with violence contrary to section 296 (2) of the Penal Code. Particulars of the offence are Lawrence Ombunga Otondi and Douglas Riogi Otondi on the September 8, 2011 at Awendo township in Migori County within the Republic of Kenya jointly robbed Victor Odhiambo Oloo motorcycle registration xxxx make Bajaj Boxer blue in colour valued at Kshs 85,000/= and at the time of such robbery struck the said Victor Odhiambo Oloo with a rungu.

3. At trial, the prosecution constructed its successful case around the evidence of eight witnesses.

4. The complainant in count 4 was Victor Odhiambo Oloo (PW3). At the time of the robbery, he was a boda boda rider operating his mother's motor cycle Registration xxxx in and around Awendo. While at work on the evening of September 8, 2011, at about 7 pm, two people, holding themselves out as genuine customers, asked him to ferry them to F-37, an estate within the compound of Sony Sugar Company. The two were the appellants. The 1st appellant sat right at the back and the 2nd appellant in the middle, between the 1st appellant and the rider. Having boarded the motorcycle at Rapogi stage, they made their way to the estate. At Sare Bridge, the 1st appellant told PW3 that he was asthmatic and asked him for a helmet, presumably to protect him from the cold.

5. Very quickly, however, the persons riding pillion began to execute the next phase of their plan. The 1st appellant removed a rungu studded with metal nuts and hit PW3 on the right shoulder. Soon, the motorcycle went off. The 1st appellant and PW3 engaged in a physical tussle but the 1st appellant became more aggressive and brandished a knife. On seeing this, PW3 ran away. All this while, the 2nd appellant sat on the motorcycle. The 1st appellant then got onto the motorcycle and rode away with the 2nd appellant as a pillion passenger.

6. PW3 reported the incident to Awendo Police Station and it was not until four (4) months later, on January 6, 2012, that there was a development in the matter. On that day Hezron Odhiambo Obongo (PW1) called him and informed him that there was an identification parade that was to be conducted at the police station involving robbery suspects. He attended the parade and was able to pick out and identify the two appellants as the persons who had robbed him.

7. Nathan Oduor Odienya (PW7) is the owner of motorcycle Registration xxxx. He had given it to Nicodemus Okoth Odongo (PW6) to operate as a boda boda. At noon of November 18, 2011, PW6 was at Awendo stage waiting for customers, when a small bodied, dark skinned and red eyed man hired him to look for a boda boda operator who had apparently made away with his change. The two took the factory route (the name of the factory was not disclosed). Enroute, they came across the supposed operator who also had a pillion passenger. PW6 waited for his passenger to ask for his change but suddenly the passenger on the other motorcycle sprayed pepper into his eyes. As he fell,

his customer slapped him and threatened to assault him with a panga. The assailants then made away with his motorcycle.

8. On January 6, 2012, PW6 received information that the people who had stolen his motor cycle had been arrested while robbing another motor cyclists using the same modus operandi. He visited the police station where he attended an identification parade and was able to identify the 2nd appellant as the passenger who had turned robber.

9. Swenson Okinyi Ochieng (PW2) was a farmer who doubled up as a boda boda rider. On December 22, 2011, while on his way back from Luara School, he was flagged down by a person who told him to take him to the labour camp at Sony and he boarded. On the way they met an oncoming motorcycle with a passenger on it.

   PW2's passenger asked him to stop as the other motorcycle had the person he was looking for. After the two motorcycles stopped, the two passengers spoke but in an unexpected turn of events, the other motorcyclist sprayed pepper into PW3's eyes. On realizing what the plot could possibly be, he tried to remove the motorcycle key but the rider produced a knife and together with the others assaulted him and robbed him of the motorcycle. He made a report of the incident at Awendo Police Station. Twelve or so days later, on January 3, 2012, he got information that some thieves had been caught and on January 6, 2012 he attended an identification parade at the station where he identified and picked out the 1st appellant as the rider who had sprayed him with pepper.

10. John Okeyo Odoll (PW4) was a security Guard with Gilley Security who had been contracted to provide security at Awendo Sony Factory. He was on duty on January 3, 2012 when at about 8 pm he heard screams. Accompanied by fellow guards he made his way to the direction of the screams where they found a mob of people chasing two people. The mob caught up with the two and beat them up, and were about to lynch them when PW4 and his colleagues intervened and using a tractor took the two to Awendo police station where they were re-arrested.

11. At the scene was Hesbon Odhiambo Obongo (PW1) who was teary and lamenting that the two suspects had pepper sprayed his eyes. He too is a boda boda operator. He owned and operated motorcycle xxxx. His evidence was that on January 3, 2012 at around 8.30 pm. the 2nd appellant, a person he had not seen before, hired him for a ride to Sony D60 Estate. Although initially alone, the 2nd appellant asked him to carry another person. With the two pillion passengers, PW1 made his way to the requested destination. But before they reached there, the passengers ordered him to stop, sprayed his eyes with pepper and the 2nd appellant threatened to assault him with a club. He later discovered that he lost Kshs 3000. He screamed in distress and a mob of people including John Okeyo Odoll (PW4) came to his aid.

12. The task of investigating the complaint by PW1 fell to Corporal Stephen Nyamai(PW5). A substantial part of his testimony was a narration of what PW1 told him. Important, however, is that in the course of the investigations, he requested Chief Inspector Abdi Maalim (PW8) to arrange two identification parades in which the complainants were able to identify the two appellants.

13. At the close of the prosecution's case, the trial court (PK Rugut SRM) delivered a ruling of a case to answer. The defence case comprised evidence of three witnesses. The 1st appellant is a farmer from Gucha Nyabera village. He and his brother, the 2nd appellant, decided to spend a night at the home of their father John Otondi Riogi (DW3) who worked in Sony. The two took a motorcycle from Awendo to Sony. They were shocked when the rider stopped at a traffic light and began to scream. The 2nd appellant gave a similar testimony adding that after the rider started screaming, they alighted from the

motor cycle but were arrested by a mob. The evidence of DW3 was that before the appellants were arrested, his sons had informed, through telephone, that they would be spending the night at his house.

14. The trial court convicted both appellants on counts 1 and 4; convicted the 1st appellant on count 2 and the 2nd appellant on count 3. The appellants were sentenced to death on each of the counts. Unhappy with the decision both appellants preferred a first appeal in Migori High Court Criminal Appeal No 64 of 2015. The High Court (Mrima, J) identified three issues for determination; whether the appellants were properly identified as the assailants; whether the offences were proved as required in law; and whether the appellants' rights under Article 50(2) of the *Constitution* were violated.

15. The answers given to the three questions posed by the learned Judge led the Court to following conclusion:

    a. The appeal against the conviction and sentence in count I succeeds. The conviction is hereby quashed and the sentence set aside.

    b. The appeals against counts II, III and IV are unsuccessful and are hereby dismissed. The convictions and death sentences on counts II, III and IV are hereby affirmed.

    c. Since a person can only die once, the death sentences in counts II and III shall in the first instance be held in abeyance.

    The appellants fashioned the appeal before us around three issues, which are not dissimilar to whose framed by the High Court:

    a. Whether the offences were proved as required by law.

    b. Whether the appellants were properly identified as the assailants.

    c. Whether the appellants' rights under the *Constitution* and entire criminal trial were violated.

16. The arguments made by the opposing sides on these three issues are discussed and determined within our restricted remit as a second appellate court which is to consider matters of the law only (see Section 361of the *Criminal Procedure Code*).Where we are urged, as here, that matters of facts take on the complexion of a controversy in law, we do so bearing in mind that, as a general rule, we are slow to interfere with concurrent findings of fact reached by the two courts below unless it is shown that they were based on no evidence or are reached on a manifest misapprehension of the evidence.

17. An affirmative answer to the last issue may well be decisive and dispositive of the entire appeal because if we were to find that the trial was conducted in breach of the appellants' constitutional rights under Article 50(2)(h) then we may have to allow the appeal even without considering the other grounds. This is where we begin.

18. Article 50 (2) (h) provides:

    (2) Every accused person has the right to a fair trial, which includes the right-

        (b) To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.'

19. It was submitted by Mr Bw'Ondika counsel appearing for the appellants that the State failed to provide legal representation for his clients at the State's expense and neither were they informed of this right. The first appeal court is assailed for having failed to observe the minimal participation by the appellants at trial as well as their inability to understand the charges preferred against them. The appellants assert that the learned judge misdirected himself by relying on the position in *Julius Kamau Mbugua Vs*

Republic Criminal Appeal No 50 of 2008 on the basis of a farfetched and ill-founded presumption that the appellant had the ability to secure legal representation at trial as they did on appeal despite a five-year lapse between the time of trial and the first appeal. We are asked to follow the decision of this Court in *David Njoroge Macharia Vs- Republic [2011] eKLR.*

20. Mr Okango appearing for the respondent proposed that the following holding by the learned Judge satisfactorily dealt with the matter:

> ' 92. From the above analysis, I do find that since the appellants have demonstrated their ability to, and indeed engaged a Counsel in this appeal, it is sufficiently clear that they had the ability to so afford legal representation during the trial but opted not to. They further actively participated in their trials and subjected witnesses to intense examination. I hence find that no injustice was occasioned to them by the State's failure to accord them legal representation'

22. The learned Judge reached the decision after considering the various decisions of this Court in the matter and appears to have been specifically inspired by the decision of this Court in *Karisa Chengo & 2 others –Vs- Republic (2015) eKLR*.

23. In the case of Karisa Chengo, this Court elaborates on what amounts to substantial injustice:

> ' It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The *Constitution* is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result' and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.'

24. We agree and just to recap; substantial injustice in the context of Article 50(2)(h) occurs where an accused is charged with an offence whose potential penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another. Only where all the three elements are present can it be said that an accused who is not given State paid legal representation has suffered curtailment of his right to legal representation. The framers of Article 50(2)(h) would be aware that at certain points in the economic development of our Country, the obligation of the State to provide paid legal representation even to those who have the ability to pay for their own would not feasible. As of now, anyone who alleges infringement of this right must as a first step demonstrate financial inability to pay for legal representation.

25. We have carefully read the submissions made by counsel for the appellants and have to conclude that the appellants got out of the gates on a wrong footing. Not once do the appellants argue that they were unable to pay for legal representation. While, unlike the learned Judge, we will not draw a conclusion that 'the appellants have demonstrated their ability to, and indeed engaged a counsel in this appeal',

we have no doubt that the appellants failed to demonstrate financial inability and still reach the same outcome.

26. We also add that although counsel for the appellants contends that there was minimal participation by the appellants at trial and that his clients were unable to understand the charges and were generally confused at trial, there is no attempt to flesh out those contentions. It is true that some witnesses were hardly cross- examined by the appellants yet equally true that there was robust cross-examination of others and the questions posed attempted to exonerate the appellants from the crimes. Not all witnesses need to be cross-examined. Indeed, is it not the teaching of good court room advocacy that a question that need not be asked should not be asked? On our analysis of the questions posed in cross examination, the appellants understood the charges they faced and were vigorous in defending themselves. Their conduct at trial does not evince any confusion.

27. We answer the constitutional issue in the negative.

28. The second issue revolves around facts which we are urged nevertheless raise a matter of law. The appellants make the argument that they were not properly identified by the witnesses. It is contended that the offences in counts II, III and IV had been committed long before the arrest of the appellants and the complainants in these three counts were told of the arrest and came with a picture of whom to expect and identify as some of them had the opportunity of seeing the appellants before the identification parade.

29. We are also told that none of the witnesses knew the appellants before the incident and so the evidence was that of identification and not of recognition. Regarding the offence in count IV a further argument is made, that it was committed at night when the factors for recognition were difficult. This Court was asked to consider the principles set out in *Republic Vs- Turnbull & Others (1976) 3 AII ER 549* and *Cleophas Otieno Wamunga Vs- Republic (1989) eKLR* and urged to find that, against the care called for in those two decisions ,the identification evidence in support of count IV could not be free of error because; the evidence was that of identification and not recognition; no description of the physical appearance of the suspects was given at the time PW3 recorded his statement; the identification parade which was to cover all existing gaps was further marred with incurable inconsistencies as to the number of persons lined for identification.

30. The superior court below is charged with misdirecting itself on the manner in which the identification parade was conducted. The holding of that court that such parades are usually held according to Police Force Standing orders had the effect of tilting the burden placed on the prosecution thus causing prejudice to the appellants' defense.

31. In response, Mr Okango submitted that the first appellate court appraised itself of the law of identification as stated in Turnbull (supra), Wamunga (supra), and Nzaro –Vs- Republic [1991] KAR 212, distinguished recognition from identification and correctly found this to be a case of identification. This Court is urged not to accede to the invitation by the appellants to re-exam the evidence already properly examined by the two courts below.

32. And we agree with the respondent. In an impressively detailed judgement, the learned Judge reappraised the evidence of each of the witnesses and drew various conclusions:

    i. In Count II and III, the offences were committed in the day while in counts I and IV they were committed at night.

    ii. None of the cases was based on recognition.

iii. He was duty bound to examine the evidence in respect of each count with the care advocated in Turnbull (supra) and Wamunga (supra).

iv. the witness properly identified the appellants as confirmed in the identification parade carried out.

33. It is of course true that identification parades should be arranged and conducted in accordance with the Force Standing Orders (now known as Service Standing Orders). These are administrative orders previously issued by the Commissioner of Police (now by the Inspector-General) for the general control, direction and information of the Force (now the Service). The administrative orders in respect of arrangement and conduct of identification parades have for a long time received judicial endorsement by our Courts (see *Njihia v Republic [1986] eKLR*. and *David Mwita Wanja & 2 others v Republic [2007] eKLR*). And the learned Judge cannot be faulted for stating the law correctly. This did not lessen the burden that the prosecution bore of proving that the identification parade was arranged and conducted in compliance with the law. The learned Judge analyzed the prosecution evidence in that regard and came to the conclusion that the identification parade complied with the law. It was the prosecution that carried the responsibility of proving compliance and as we show presently, did so successfully. Not for a moment was the onus shifted to the appellants.

34. Only two specific complaints are raised against the arrangement and conduct of the parade; that no description of how the suspects looked like was given by PW3 before the parade was arranged and that the witnesses had seen the suspects before the parade was conducted. In respect to the latter, the evidence is clear; none of the witnesses had seen members of the parade prior to the exercise and that argument simply falters in the face of the evidence. As to the contention that the identification parade was faulty because PW3 had not given a description of the suspects prior to the arrangement and conduct of the parade, this was not argued in the first appeal and may not be available to the appellants at the forum before us.

35. Yet even if there was such omission, it cannot alone make the outcome of identification parade unworthy. One simply has to look at Standing Order 6 of Chapter 46 of the Force Standing Order (issued by the Commissioner of Police under section 5 of The Police Act (Chapter 84) (now repealed) and which at the time material to this case had been saved by section 131 of the *National Police Act* (Act 11A of 2011) on identification parades to see the plethora of requirements that must be met. There are no less than 16 requirements which must be met for a parade to be flawless. This detailed prescription serves a purpose. Because the outcome of such a parade can be a basis for conviction it must be arranged and conducted in a manner that ensures fairness and credibility. That said, the outcome of an identification parade should not be invalidated simply because a requirement has not been met or scrupulously observed. What matters is the overall effect of such non-observance. Only substantial or crucial departure from the prescribed procedure which patently prejudices the suspect or makes the outcome uncertain or unsafe should lead to a rejection of the parade and its outcome.

36. In this matter the trial Judge observed as follows:

> ' This Court has carefully perused the Identification Parade Form which was produced in evidence. It is true that the form has very clear guidelines on how parades are to be conducted. From the evidence on record it is clear that the appellants participated in the parade voluntarily and they also signed the parade form as required. The appellants never objected to the manner in which the parade was conducted in any way. It is this Court's finding that the parade was properly conducted.'

37. These findings have not been faulted. The High Court affirms that the identification parade was arranged and conducted in a manner that substantially complied with the law and its outcome was credible evidence of identification. Both appellants gave written consents to appear in the parade. Both, again in writing, signified their satisfaction as to how the parade was conducted even after they had been picked out by the witnesses as the perpetrators of the robberies. When the officer who arranged and conducted the parade testified, the appellants did not attempt to discredit the voluntary nature of the parade or the signatures they had appended on the parade form. It seems to us, as it was to the two courts below, that there was substantial compliance with the rules. We therefore reject the invitation to invalidate the outcome of that parade simply because PW3 had not given a description of the suspects to the police before the parade was arranged. We shall not be the first, and dare say the last, in rejecting such a proposition (see for example this Court in *Nathan Kamau Mugwe Vs. Republic (2009) eKLR*). In so holding we do not dilute the importance of prior description of the suspect. It makes identification parades more secure but its absence does not invalidate them.

38. There is the last set of arguments by the appellants which can be broadly said to be; that in all counts there was no medical evidence led or documents produced to confirm that the complainants ever sustained any injury; in regard to count II, there was no logbook or photograph of the motorcycle said to have been stolen or extract of the police station occurrence book reporting the theft. These arguments were made to demonstrate that the ingredients of robbery with violence were missing.

39. The offence of robbery with violence is created by section 295 and 296 (2) of the Penal Code which read:

> ' 295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.'
>
> '296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.'

40. The ingredients of the offence as correctly restated by the High Court are:

    a. The offender is armed with any dangerous or offensive weapon or instrument, or

    b. The offender is in the company of one or more other person or persons, or

    c. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

41. The two courts below believed the witnesses in their testimony that the motorcycles had been stolen and the reports they made to the police in that respect as confirmed by the investigating officer. We see no reason to depart from those concurrent findings. Of course, production of the logbooks or other documents of ownership would have improved the quality of the prosecution evidence but still the fact of theft was proved in other ways as correctly held by the two courts below. As to absence of evidence of injuries sustained by the complainants by production of medical documents, there was overwhelming evidence that the assailants were armed with dangerous or offensive weapon or instruments, to wit, pepper spray on all three occasions, a knife in two and a club on another, enough to establish a feature

of the offence of robbery with violence. Moreover, in each case the assailants were more than one. As the elements of the offence are disjunctive and not conjunctive, the same was well-proved in each case.

42. Enough has been said by us to show that we do not think that this appeal has merit. We hereby dismiss it.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF MAY, 2023.

P.O. KIAGE

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.