



**Odhiambo & another v Republic (Criminal Appeal 91 of 2015)
[2023] KECA 710 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KECA 710 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 91 OF 2015
FA OCHIENG, LA ACHODE & WK KORIR, JJA
JUNE 2, 2023**

BETWEEN

FREDRICK ODHIAMBO ODHIAMBO 1ST APPELLANT

JUMANNE LOLUSU MOLLEL 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal against the conviction and sentence of the High Court of Kenya at Nakuru
(Ongeri & Kiarie, JJ.) delivered on 21st July, 2015 in HC. CR. A. No. 35 of 2014)*

JUDGMENT

1. The appellants, Fredrick Odhiambo Odhiambo and Jumanne Lolusu Mollel were convicted for the offence of Robbery with Violence contrary to section 296(2) of the *Penal Code*.
2. The particulars of the charge were that on August 3, 2023, at Ntulele Market, Narok North District within Narok County, the appellants, jointly with other persons who were not before the court, while armed with offensive weapons robbed Dominic Yiapan.
3. The particulars of the offensive weapons were given in the charge sheet, as being a toy gun and a panga. The further particulars were that at the time of the robbery, the appellants used personal violence on Dominic Yiapan.
4. After a full trial, the trial court convicted the appellants, and thereafter sentenced them to suffer death as by law prescribed.
5. Being dissatisfied with both the conviction and the sentences, the appellants challenged the same, by an appeal which they lodged at the High Court. They raised 4 grounds of appeal, which can be summarized as follows:-



- i. There was insufficient evidence to warrant conviction.
 - ii. The circumstances prevailing at the locus in quo did not suit proper identification.
 - iii. The prosecutor who lead the majority of witnesses, was unqualified.
 - iv. The sentence handed down was unconstitutional.
6. At the time when the appeal came up for hearing, the law required that appellants who had been sentenced to death, would each have their appeal heard by a bench of 2 Judges.
 7. After giving a hearing to the appeal, the said bench herein, dismissed it, in its entirety.
 8. In this second appeal, the appellants have raised 3 grounds, which largely mirror those that they had raised at the High Court. Both the appellants and the respondent filed written submissions.
 9. On the hearing date, Mr. Omondi Ogwel Advocate represented the appellants, whilst the learned State counsel, Mr. Ondimu represented the respondent.
 10. By dint of the provisions of section 361 of the *Criminal Procedure Code*, the jurisdiction of this court is limited thus, as was stated in the case of *Hillary Ndugutho Mwai & another vs Republic* [2021] eKLR;

“This is a second appeal which, by provisions of Section 381 of the Criminal Procedure Code, requires us to consider only matters of law, and also not to interfere with the decisions of the courts below on matters of fact, unless it is demonstrated that they considered matters they ought not to have considered or that they failed to consider matters they should have considered or that, generally speaking, they were plainly wrong in their decisions.”

We will be guided accordingly, when giving consideration to this appeal.

11. It is common ground that at all times material to this appeal, the provisions of section 85(2) of the *Criminal Procedure Code* expressly stipulated that;

“The Attorney General, by writing vide his hand, may appoint any advocate of the High Court or person employed in the public service not being a Police Officer below the rank of Assistant Inspector of Police to be a public prosecutor for the purpose of any case.”
12. From the record of the proceedings, it is evident that on 30th December 2013 and again on January 3, 2014 the prosecutor was Police Constable Haji. By virtue of his rank, PC Haji was doubtlessly an unqualified prosecutor because he was below the rank of an Assistant Inspector of Police.
13. In the light of that fact, the appellants submitted that the trial was a nullity, in respect to the witnesses who testified whilst the unqualified person was performing the prosecutorial function.
14. It is well settled that the prosecution has the legal duty to prove the guilt of the accused person. The said legal burden must be discharged in respect to each and every ingredient constituting the offence which the accused was charged with. Therefore, if there should be any reasonable doubt on the guilt of the accused, the court was obliged to give the benefit thereof to the accused.
15. The appellants submitted that if the evidence of PW6 and PW7 was excluded, the remaining evidence would be insufficient to prove the case against them. But the respondent held the view that even if the evidence of those 2 witnesses was expunged from the record, the remaining evidence was still sufficient to sustain the conviction of the appellants.



16. This court is obligated to give due consideration to the evidence of PW6 and PW7, and to determine if its exclusion would render unsafe, the conviction based on the remaining evidence.
17. PW6, Inspector Charles Mwai Nyagah, conducted the Identification Parades for the 2 accused persons. Therefore, we will have to ask ourselves what the impact would be on the case presented by the prosecution, if the court excludes the testimony about the parades.
18. PW7, PC Henry Kiboma, was attached to the Scenes of Crimes Support team of the CID, Narok. He produced in evidence, the photographs taken at the scene of crime. The court has to consider whether or not the absence of the 10 photographs would so diminish the prosecution's case, that the convictions cannot be sustained.
19. PW5, Abraham Kinaiya, testified that on the material day, he was at Ntulele Bus Park when PW2 was robbed. He saw the 3 men jump into a car and take-off, when PW2 screamed, during the robbery.
20. Later that day, when he alighted from a matatu, as he reached his home area, he saw the same 3 men who he had seen earlier at Ntulele. PW5 also saw the vehicle which the 3 men had used to escape. Its windscreen was smashed.
21. According to PW5, the windscreen and windows of the vehicle were smashed by the members of the public, at Ntulele.
22. PW5 alerted elders who were addressing a baraza. Thereafter, he trailed the 3 men, and together with members of the public, they arrested the 2 appellants. The third man managed to escape.
23. PW3, Moses Karatina Kinaiya, was a brother of PW5. He testified that some 3 men were stopped by their father when the men were passing through the homestead of their said father.
24. When the men told the father of PW3 that they had lost their way, whilst they had gone to visit a friend of theirs, PW3 was told by his father, to show them the way to the main road.
25. Shortly after PW3 has shown them the way, PW5 arrived and asked PW3 if he had seen some 3 men. PW3 testified that PW5 told him that some 3 men were robbers. PW3 followed the route to which he had directed the 3 men; and before long, he caught up with them. He, together with other members of the public, raised an alarm, to which more persons responded.
26. The members of the public arrested 2 of the 3 men, after PW5 told them that the said 3 men are the persons who had fled from the scene of crime at Ntulele.
27. Clearly, therefore, the arrests were not done due to the identification by the complainant. At the time of arrest, the complainant was receiving treatment at the hospital. He had been injured, by being slashed with a panga, at the time of the robbery.
28. The complainant, PW2, had been robbed of his mobile phone, a Nokia.
29. PW4, PC Jackson Magori, was the arresting officer. He re-arrested the appellants after they had been arrested by members of the public. When PW4 searched the appellants, he recovered the complainant's mobile phone from the 1st appellant.
30. PW2 produced a receipt, to prove that the recovered phone belonged to him.
31. In the circumstances, we find that the appellants were connected to the offence through means other than the Identification Parade and the photographs. Indeed, as PW7 said in his evidence, none of the



photographs had the image of any of the appellants. Therefore, even though the evidence of PW6 and PW7 be expunged from the record, there is no doubt in our minds that the remaining evidence was sufficient to prove the culpability of the two appellants.

32. Contrary to the contentions of the appellants, they were not arrested simply because they were strangers in the area.
33. In the result, we find no merit in the appeal: the same is therefore dismissed. We uphold both the conviction and the sentence in respect to each of the appellants.

DATED AND DELIVERED AT NAKURU THIS 2ND DAY OF JUNE, 2023.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

