



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED J.J.A.)

CRIMINAL APPEAL NO. 616 OF 2010

BETWEEN

PAUL OUMA OTIENO 'alias' COLLERA.....1ST APPELLANT

PAUL OTIENO OMBOGO 'alias' NDEJWE.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisii, (Musinga & Karanja, JJ.) dated 28th April, 2009

in

H.C.C.R.A. NO. 197 OF 2006)

JUDGMENT OF THE COURT

[1] This is an appeal against the judgment of the High Court dismissing the appeal of each appellant against conviction and sentence for robbery with violence contrary to **Section 296(2)** of the Penal Code.

[2] The two appellants were charged that jointly with others not before the court while armed with pistols and swords they robbed **Gilbert Oluoch Nyandiega** of his motor vehicle registration No. KAD 858L, Nissan Sunny, cash Shs. 2,500/=, mobile phone and Sonny Radio speaker. The 1st appellant herein **Paul Ouma Otieno alias Collera** was the 2nd accused at the trial and the 1st appellant in the High Court. The 2nd appellant herein, **Paul Otieno Ombogo alias Ndejwe** was the 1st accused at the trial and the 2nd appellant in the High Court. For avoidance of confusion of names, we refer to the 1st appellant as **Ouma** and the 2nd appellant as **Ombogo**.

[3] The prosecution case against the appellants was briefly as follows. On 5th April, 2004 at about 10 pm, Gilbert Oluoch Nyandiega, the complainant, drove to his house in Awendo in his motor vehicle registration No. KAD 858 L, Nissan Sunny. He stopped at the door and knocked the door for his wife to open. Four people went towards him and told him that they were his visitors and he should not make noise. **Cavin Akinyi Owino**, the complainant's wife who was watching T.V switched on the lights and opened the door. Ombogo who was armed with a pistol entered into the bedroom which had lights and directed that the complainant be brought into the bedroom. Ouma who was also armed with a pistol took the complainant to the bedroom. The two demanded money and were directed to where the money was and took Kshs. 2,500/=. The robbers also took a mobile phone and sonny speaker. They also demanded the car keys and the complainant gave the keys to them. Thereafter, the complainant and his wife were led outside, forced inside the car and driven off to a sugar cane plantation where they were abandoned. The robbers drove off in the complainant's car. Thereafter the two reported at Awendo police station.

[4] On the same night between 10 – 11 pm, a motor vehicle bearing registration No. KAD 858L was driven into the compound of **Joshua owino Osambo, (Joshua)**, made a U-turn, faced the house and hooted several times. Joshua came out. The people inside the vehicle told Joshua that they were police officers and asked him to go to the vehicle. The headlights of the vehicle were switched on. One of them interviewed Joshua and asked him to take them to the house of his father which he did. The people had guns and introduced themselves as police officers from Migori police station to Joshua's father and told him that they had been sent by OCS to take him to the police station. Joshua and his father were put in the boot of the car and driven to a bridge near Kuja River where the vehicle stopped and the two were removed from the boot. Joshua's father was tortured and shot dead and his body thrown over the bridge.

Joshua was also shot but the gun failed to fire and he was tied and thrown over the bridge. Joshua managed to save himself, slept in a house in the neighbourhood and reported to the police the next morning. Joshua testified that he identified the two appellants and that Ouma was his cousin. The murder of Joshua's father is the subject of a murder case No. 38 of 2005 before High Court, Kisii.

[5] On 2nd June, 2004, at 5.30 am, **P.C. Obiero (PW4)** attached to CID Keroka and police officers acting on information went to a house in Homa Bay, Sofia Estate, where they arrested Ombogo and recovered a sonny speaker from the house.

On 6th April, 2004, the complainant's motor vehicle was found abandoned and recovered and thereafter Ouma was arrested. On 8th June, 2004, **I.P Alfred Ouko (PW5)** conducted an identification parade where the complainant identified Ombogo. The complainant also identified the motor vehicle and sonny speaker as some of goods that were stolen from him.

[6] Ombogo gave sworn evidence at the trial and stated that he did not commit the robbery and that the charge is fabricated. In his evidence in cross-examination, he stated that Joshua was his brother and a friend. Similarly, Ouma gave sworn evidence at the trial and stated that he was at Chemelil on 3rd April, 2005, and that the charge is framed-up.

[7] The trial Magistrate was satisfied that Ouma (*1st appellant*) was identified by two witnesses namely, the complainant and his wife. The trial Magistrate further made a finding that Ombogo, the 2nd appellant, was identified by three witnesses that is; the complainant, his wife and Joshua. The trial Magistrate stated in the judgment;

“I have considered the circumstances of this case, that there was enough lighting in the house of PW1 and PW3, no attempt was made to switch off the lights, they were not asleep, yet PW1 was watching T.V., the visitors pretended that they were policemen and my finding is that they had ample time to observe the visitors.

In fact they were not beaten save for the presence of guns. I am of the view that a condition for favourable identification was available. I have warned myself and I am unable to resist the belief that there was correct identification.”

[8] The High Court, evaluated and reconsidered the evidence and made findings that the two appellants were identified by the complainant and his wife, that Joshua also recognized Ombogo (*2nd appellant*); that Ombogo, was in possession of the complainant's motor vehicle a few minutes after it had been stolen and also in possession of the complainant's sonny speaker.

The High Court said in part:

“We find no reason to fault the conviction considering that the evidence by the complainant (PW3) and his wife (PW1) showed that although the offence occurred in dark hours, the availability of electric light provided favourable conditions for identification of the appellants who actually entered the complainant's house which was well lighted-- The complainant confirmed his identification of the 2nd appellant (Ombogo) in an identification parade-- which parade was, in our view properly conducted.

Even in the absence of identification parade, the evidence of identification of the appellants at the scene of the offence was credible and reasonably sufficient.”

[9] There are two main grounds of appeal in the consolidated memorandum, namely; that the High Court erred in law in failing to take into consideration that the appellants were not properly identified and also in failing to review the evidence in full and in particular the appellants' sworn statements. In addition, the appellants state in the memorandum that the sentence meted out was unconstitutional and unlawful.

Mr. Tom Adiso, the learned counsel for the appellants submitted amongst other things, that the complainant and his wife did not give evidence about the lighting; that there was no evidence that the investigating officer visited the scene and found electricity; that no identification parade was held for 1st appellant and that there was no independent evidence to corroborate the evidence of the complainant and his wife.

Ms. Nyamosi, the learned counsel for the Republic opposed the appeal and submitted that the lights were on; that there was no need for an identification parade in respect of the 1st appellant and that the 2nd appellant was in recent possession of the speaker.

[10] The two courts below appreciated that the prosecution case was mainly based on the identification of the appellants and made concurrent findings of facts, amongst others, that, the conditions for identification of the appellants by the complainant and his wife were favourable, that there was enough lighting, that the two witnesses had adequate time to observe the robbers, that the identification of the appellants was not mistaken. The High Court in particular made a finding that the identification parade was properly conducted and that the identification of the appellants at the scene of the robbery was credible and reasonably sufficient.

According to the evidence of **PC Simon Simiyu**, the investigating officer, the complainant reported that he could be able to identify the suspects if arrested and mentioned one **Ogolla** as one of the robbers that he recognized. There was evidence that Ogolla was killed by the members of the public.

[11] There was concrete evidence from the complainant and his wife to support the concurrent findings of facts relating to the identification of the appellants and we do not find any misdirection either of law or facts by the two courts below.

[12] Joshua testified that when he and his father were removed from the boot of the car at the bridge he saw the face of the 2nd appellant

after torchlight was flashed on his face by his accomplices as he was questioning the deceased and that he knew the 2nd appellant before. The finding of the High Court that the 2nd appellant was in recent possession of the complainant's stolen motor vehicle was therefore supported by the evidence of Joshua. There was also the concurrent findings of fact by the two courts below that the complainant's stolen speaker was recovered in the house of the 2nd appellant.

[13] From the foregoing, we are satisfied that there was ample and credible evidence of the complainant and his wife that they positively identified the two appellants at the time of the robbery, and, that there was no possibility of mistaken identification. In addition, and, in respect of the 2nd appellant, he was in recent possession of the complainant's stolen motor vehicle and music speaker. Accordingly, we find no merit in the appeal of each appellant.

[14] As regards sentence, the appellants were sentenced to death as provided by **Section 296(2)** of the Penal Code. In **William Okungu Kittingy V Republic – Kisumu, Court of Appeal Criminal Appeal No. 56 of 2013**, the Court applied the decision of the Supreme Court in **Francis Karioko Muruatetu & Another V Republic – Petition No. 15 of 2015** and held, in essence, that the death penalty prescribed by **Section 296(2)** of the Penal Code is a discretionary maximum punishment. When the appellants were given an opportunity to mitigate before the trial Magistrate they reiterated their innocence and failed to make any mitigation. Nevertheless, that should not be a reason to deny them equal benefit of the law.

The offence was aggravated because the appellants were armed with guns. However, the killing of the father of Joshua is the subject of pending criminal proceedings and therefore irrelevant in assessing the appropriate sentence. In all circumstances, we are of the view that a sentence of 20 years imprisonment will adequately serve the interest of justice.

[15] In the premises, the appeal of each appellant against conviction is dismissed. The appeal against sentence is allowed, to the extent that the sentence for death is set aside and in substitution therefor, each appellant is sentenced to twenty **(20)** years imprisonment with effect from 5th September, 2006 when they were sentenced.

Orders accordingly.

Dated and Delivered at Kisumu this 15th day of March, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.