



IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 103 OF 2014

BETWEEN

EVANS OMONDI OGOLLA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at Kisumu, (J. W. Mwera & J.R. Karanja, JJ.) dated 22<sup>nd</sup> day of December, 2009*

in

H.C.CR.A. NO. 45 OF 2008)

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JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court, **(Mwera & Karanja, JJ.)** dismissing the appellant's appeal against conviction and sentence.

[2] The appellant was charged with two counts of robbery with violence contrary to **Section 296(2)** of the Penal Code before the Chief Magistrate's Court at Kisumu.

In the 1<sup>st</sup> count, he was charged jointly with others not before the court of robbing **Kennedy Juma Ojwang** of a mobile phone and cash Shs. 4,500/= on the night of 17<sup>th</sup> August, 2007 while armed with an iron bar.

The particulars of the 2<sup>nd</sup> count stated that the appellant jointly with others not before the court and while armed with an iron bar robbed **Philip Musungu Omongo** of a mobile phone valued Shs. 600/=.

[3] The prosecution called five witnesses, namely; **Kennedy Juma Ojwang (Juma)**, the complainant in the 1<sup>st</sup> count; **Philip Musungu Musungu (Musungu)**, the complainant in the 2<sup>nd</sup> count, **Stephen Onyango (Onyango)**, **Sarah Anyango Juma (Sarah) (wife of the complainant)** in the 1<sup>st</sup> count and **P.C. Daniel Chacha**.

The prosecution case was briefly as follows:

Kennedy Juma Ojwang had a two-roomed house at Luanda Beach. He was using one room as a shop and the other room as a dwelling room. He also owned a "matatu" motor vehicle reg. No. KAH 326C.

On 17<sup>th</sup> August, 2007 at about 10.30pm and while in the company of Stephen Onyango, he met eight people who claimed to be police officers. They had torches and one had an iron rod. They led the two to the house of Juma and made him to sit down. There was a lamp in the dwelling room and in the shop. Sarah went into the dwelling room and was also made to sit down. The people hit the lamp and it broke into pieces. They demanded money and keys of the motor vehicle and Sarah gave Shs. 4,500/= to them. The people also stole Juma's mobile phone. Juma escaped and reported the robbery to the people gathered in a neighbouring house for funeral arrangement. When Juma went back to his house in the company of neighbours, he found that the robbers had escaped. He reported the robbery at Bondo Police

Station.

[4] On his part Musungu testified that on the night of 17<sup>th</sup> August, 2007 at about 10.30pm, he met a group of eight people who claimed to be police officers and who were armed with a panga and an iron rod. The people robbed him of his mobile phone and ordered him to take them to the house of Juma. On the way the people were flashing torchlights and Musungu recognized the appellant as a person he used to see at Bondo bus stage. They found Juma outside his house and he was forced into his house while Musungu remained outside under guard of the appellant who had an iron bar.

In the course of the robbery Juma escaped and the appellant told Musungu that he would be the one to drive away Juma's minibus. Musungu also escaped and on the following day he saw the appellant at Bondo bus stage and reported to the police. Later he led P.C. Daniel Chacha to Bondo bus stage where he pointed out the appellant and he was arrested. Appellant's house was searched and an iron rod which was hidden behind a sofa set was recovered. It was identified in court as one of the weapons used by the appellant during the robbery.

[6] The appellant denied at the trial that he committed the offences and stated that the iron rod produced as exhibit was not recovered from his house.

[7] The trial magistrate convicted the appellant on both counts on the basis of the evidence of identification of the appellant by Musungu and the evidence of the recovery of an iron rod from the appellant's house. The trial court said in part:

**“The strongest evidence we have here is of a single witness and I warn myself that it is dangerous to rely on it to convict but I'm convinced that PW2's evidence as to the recognition of the accused is overwhelming.”**

[8] Upon re-consideration of the evidence, the High Court upheld the conviction on the basis of the evidence of identification of the appellant by Musungu. The High Court said in part:

**“Focusing on the evidence of Musungu (PW2) we were satisfied that though a single identifying witness, his evidence was cogent and credible”**

Regarding the evidence of the recovery of the iron rod, the High Court did not give weight to that evidence saying in part:

**“Evidence is given variously about the iron rod or iron rods. But not much turned on this especially as who had which one at what time.**

**We were satisfied that the robbers carried iron rods.”**

[9] Although the memorandum of appeal filed by **Mr. Anyul** for the appellant contains four grounds of appeal, the appellant's counsel submitted on the first two grounds.

In the first ground of appeal, the appellant faults the High Court for failing to evaluate and analyse the evidence thereby failing to appreciate that the evidence tendered did not prove the guilt of the appellant beyond reasonable doubt.

In the second ground of appeal, the appellant faults the High Court for relying heavily on the evidence of a single identifying witness without verifying the truthfulness and veracity of the evidence.

In support of the grounds of appeal, Mr. Anyul endeavored to demonstrate that the evidence of Musungu and Onyango were contradictory and that there was material contradictions in the evidence of witnesses particularly on identification.

On the other hand, **Jacinta Nyamosi**, counsel for the respondent opposed the appeal and submitted that the evidence of Musungu who was a crucial witness was credible and that the contradictions were minor.

[10] It is clear from the judgment of the trial and first appellate court that the conviction of the appellant was solely based on the evidence of Musungu - a single identifying witness at night.

Before relying on such evidence, a trial court is required to exercise extreme caution in examining the evidence to ensure that the conditions favouring the correct identification were present and that there was no possibility of error on the part of the witness.

In **Kiarie v. Republic [1984] KLR 739**, this Court held that where the evidence relied on to implicate an accused is entirely on identification, such evidence should be watertight to justify a conviction and that it is possible for a witness to be honest but mistaken.

[11] According to the evidence of Musungu, the eight people who stopped him and asked him to lead them to the house of Juma had torches which they were flashing randomly. It is through the torchlight that he claimed to have recognized the appellant and this was before, they reached Juma's house. Musungu further stated that upon arrival at Juma's house, he was made to sit outside under the appellant's guard.

Onyango who was in the company of Juma testified that there was no moonlight and that on arrival at the home of Juma he remained outside the house. According to the evidence of Onyango, the robbers were using one torch and that he identified one person who was wearing akala shoes and had long combed hair and an iron rod. He stated categorically that the person he identified was not the appellant. Juma testified that he was not able to identify anybody.

[12] It is clear that the circumstances for correct identification were not favourable. It was dark and there was no moonlight. Musungu claimed to have recognized the appellant through the medium of torchlights. The evidence whether the robbers had one torch or several torches was conflicting.

The evidence relating to the circumstances under which the robbers arrived at the home of Juma was also conflicting.

According to Juma and Onyango, the robbers led them to the house of Juma. But according to the evidence of Musungu, he was alone with the robbers and he is the one who was forced to lead the robbers to the house of Juma and on arrival found Juma outside his house. The description by Musungu of the person who was armed with an iron rod and whom Musungu claimed to have recognized to be the appellant fits the description of the person that Onyango claimed was not in court.

Further, Sarah identified the appellant at the trial as the person who was inside the house and who slapped her. This evidence contradicted the evidence of Musungu that the appellant remained outside guarding him.

[13] From the foregoing analysis, we are of the view that the High Court did not adequately re-evaluate and reconsider the entire evidence relating to the identification of the appellant. Had it done so, it could have appreciated that conditions were not favourable for correct identification; that identification by Musungu was mere dock identification; the evidence of Musungu relating to identification was inconsistent with other evidence and that there is reasonable doubt that Musungu positively identified the appellant.

In the premises, the appeal is allowed, the conviction of the appellant on both counts is quashed and the sentence of death in respect of the 1<sup>st</sup> count is set aside. The appellant shall be released forthwith unless otherwise lawfully held.

**DATED and Delivered at Kisumu this 15<sup>th</sup> day of November, 2018.**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy

of the original.

**DEPUTY REGISTRAR**