



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 212 OF 2011

BETWEEN

ERICK OLUOCH OUMA.....1ST APPELLANT

PETER ODHIAMBO OBUONDA.....2ND APPELLANT

AND

REPUBLICRESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisii, (Makhandia & Sitati, JJ.) dated 7th April, 2011

in

H.C.C.R.A. NOS. 241 & 241B OF 2009(CONSOLIDATED))

JUDGMENT OF THE COURT

1. **ERICK OLUOCH OUMA**, the 1st appellant and **PETER ODHIAMBO OBUONDA**, the 2nd appellant, were, with one Daniel Ngore Kiboye who died in the course of the trial (the deceased), charged with five counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The deceased was separately charged in count 6 with being in possession of public stores contrary to **Section 324(3)** of the Penal Code. The offences were allegedly committed at or around Rodi Kopany Township of Homa Bay County on 15th and 19th December 2006. After trial the appellants were convicted on counts 1, 3 and 5 of the robbery charges and sentenced to death. The High Court allowed their appeals against the convictions on counts 1 and 3, but dismissed the ones on count 5. This is therefore a second appeal against the dismissal of the appellants’ appeals on count 5.

2. The appellants’ main ground of appeal is on the issue of their identification by PW5. Mr. Jamsumbah, learned counsel for the appellants, submitted that the conditions at PW5’s house were not suitable for a positive identification. The intensity of the hurricane lamp at PW5’s house was not given. There is also no evidence of any light in the neighbour’s house which would have enabled PW5 to see the appellants. Counsel also took issue with PW5’s claim that he had previously known the appellants by appearance as he did not say for how long he had known them. In the circumstances, counsel urged us to allow this appeal.

3. Mr. Ketoo, learned Prosecution Counsel, conceded this appeal on the ground that the conditions were not suitable for a positive identification.

4. As this Court has repeatedly stated, courts are not bound by State counsel's concessions in criminal case. Courts are obliged to do justice to both the accused persons and the victims of crime.

5. Against this understanding, we have carefully considered this appeal. As we have stated, the appellants were initially charged with 5 counts of capital robbery. After trial, they were acquitted of counts 2 and 4 but convicted on counts 1, 3, and 5. The High Court allowed their appeals on counts 1 and 3 but sustained their conviction on count 5. The evidence supporting the appellants' conviction on that count was that of PW5. This is the evidence of a single visual identification witness.

6. As the High Court, on the authority of **Karanja & Another v. Republic**, [2004] 2 KLR 140, **Wamuga v. Republic**, [1989] KLR 424 and **Etole & Another v. Republic**, Cr. A. No. 24 of 200 (CA), quite correctly stated, unless it is handled with great care, evidence of visual identification can occasion a miscarriage of justice.

7. In **Wamunga v. Republic**, supra this Court warned that:

“... where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.”

In **R v. Eira Sebwata** [1960] EA 174, and **Kiarie Vs Republic** [1984] KLR 739, this Court was even more categorical on reliance on such evidence: it has to be “absolutely watertight.”

8. In this case, PW5 testified that he had previously known the appellants by appearance. Although evidence of recognition is more satisfactory and more reassuring than that on identification of a stranger — **Anjononi & Others Vs R.** [1980] KLR 59—mistakes are sometimes made in the identification of even close relatives. See **Wamuga v. Republic**, supra.

9. We have considered the evidence of PW5 against these established principles. He testified that at about 2.00 am on the material date, people who claimed to be police officers knocked his door. He lit a lamp but he did not say what type of lamp it was. As he opened the door a gun was trained at his face. The intruders claimed he was peddling in bhang and selling fake radios which allegations he denied. He was then robbed of cash of Kes.700/= and taken to neighbours' houses. He claimed he was able to see the 2nd appellant (1st accused in the trial court) with the aid of the light from the lamp he had lit. He did not see the 1st appellant (accused 2 in the trial court) at his house. He said he saw him when they were in a neighbour's house with the aid of light from the house of that neighbour's children.

10. Having given due consideration to the evidence of PW5, we agree with counsel on both sides that his identification of the appellants was not reliable, leave alone watertight as the law requires. The witness did not describe the intensity of the light in his house or that of the lamp in the neighbour's children's house. He also did not say whether the door or window to the neighbour's children's house was open to shed light into the neighbour's house where he was with the appellants. Although he claimed he recognized both the appellants as people he had known before, he never gave their descriptions to the police. Before the identification parade held at Homa Bay Police Station, the witness conceded in cross-examination that he had seen the 2nd appellant under arrest at Rodi Police Station. That vitiated the witness' purported identification of the appellants.

11. Consequently, we find that the appellants' conviction on count 5 cannot be sustained. We therefore allow their appeal, quash their conviction on count 5 and set aside the death sentence meted out to them. The appellants shall be set free forthwith unless otherwise lawfully held.

DATED and delivered at Kisumu this 21st day of April, 2016.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR