



IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 138 OF 2014

BETWEEN

ALBERT OKUMU BWIRE APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Busia, (Onyancha & Muchemi, JJ.) dated 8th November, 2011

in

HCCRA NO. 14 OF 2011

JUDGMENT OF THE COURT

1. The appellant was convicted by the Busia Senior Resident Magistrate's Court of four counts of robbery with violence contrary to **section 296 (2)** of the **Penal Code** and was sentenced to death as by law prescribed. Being aggrieved by that conviction and sentence, the appellant preferred an appeal to the High Court. The High Court upheld the convictions but with regard to the death sentence, the same was set aside and instead substituted with a sentence to imprisonment for life.

2. Being further aggrieved by the High Court decision, the appellant preferred a second appeal to this Court. In his memorandum of appeal filed through his advocates, Onsongo and Company, the appellant faulted the High Court for failing to thoroughly and carefully re-evaluate the evidence independently; for relying on insufficient evidence of identification that was inconsistent; for relying on inappropriate circumstantial evidence to uphold the conviction; for failing to comply with **section 211** of the **Criminal Procedure Code**; and for failing to consider the appellant's defence.

3. The brief facts of the case, as gathered from several prosecution witnesses, were that on 27th August, 2009 at around 9.45 p.m. the appellant was seen by several people entering Generations Hotel, Busia, and leave shortly thereafter. Later, the appellant returned to the hotel with a number of people who were armed and robbed several people of cash and various items. The appellant was arrested and several witnesses identified him.

4. Julius Emunuge, PW 1, testified that he did not know the appellant prior to the date of the robbery. On the material night and time, PW 1 saw the appellant enter the hotel. He had put on a coat and a marvin hat. He checked around and walked away after a short while. The appellant returned about 30 minutes thereafter. He was followed by someone who was armed with a rifle. PW 1 was ordered to lie down and the appellant and his accomplice robbed PW 1 of Kshs.12,200/=. The two also robbed several patrons of cash, mobile phones and laptops and then escaped. The appellant was arrested after about a week. PW 1 testified that he had struggled with the appellant at the time of the robbery and therefore he was able to see his face properly.

5. Henry Onjomi Omondi, PW 3, was a waiter at Generations Hotel and was one of the people who were robbed of cash and a mobile phone. He had not known the appellant prior to the material night but said he was able to identify him after his arrest because when the appellant walked into the hotel he had no hat on his head; had shaved his hair box style; and had a black pair of trousers and a striped shirt.

6. Nereah Musa Oralo, PW 5, a Supervisor at the hotel, also alleged that she was able to identify the appellant after his arrest because she had seen his face on the material night.

7. Corporal John Onyango, PW 10, was one of the police officers who arrested the appellant. He testified that on 28th August, 2009 he got a report that a person who was suspected to have been one of the robbers was in his house. Together with two other police officers, they proceeded to the appellant's house at about 6.00p.m. They found him with his wife and two step brothers. They searched the house but did not recover anything connected to the robbery. They however arrested the appellant and escorted him to a police station where an identification parade was conducted. The appellant was identified by PW 1, PW 3 and PW 5. However several prosecution witnesses who had also been robbed of various items were unable to identify the appellant.

8. In his defence, the appellant stated that on 28th August, 2009 at about 5.30 p.m. he saw police officers and one of his neighbours with whom they had disagreed in his compound. The police officers conducted a search in his house but recovered nothing. He was however arrested and escorted to a police station. On 31st August, 2009 the arresting officer took him to the crime office where he identified him to the Officer Commanding Station and other people who were there. Thereafter an identification parade was conducted and some people purported to have identified him.

9. Mr. Onsongo, learned counsel for the appellant, submitted, *inter alia*, that there were material contradictions in the evidence regarding identification of the appellant, that there were no favourable circumstances for a positive identification, that the circumstances leading to the appellant's arrest were unclear and that the first appellate court failed to carefully re-evaluate the evidence tendered before the trial court.

10. Ms. Nyamosi, Senior Assistant Deputy Public Prosecutor, submitted that the appellant had been properly identified by several witnesses, though she admitted that there were some contradictions as to the appellant's appearance at the time of the robbery. In her view, the High Court did proper evaluation of evidence adduced before the trial court. She urged the Court to dismiss the appeal.

11. We have carefully considered the record of appeal as well as the submissions by counsel. The gravamen of this appeal is whether the appellant was properly identified by prosecution witnesses as one of the robbers. The appellant's counsel cited, among others, the English case of **R V TURNBULL [1976] 3 ALL ER** for the proposition that identification of a stranger in circumstances that are not quite favourable for a positive identification is often fraught with danger if not carefully and meticulously addressed. That principle has been reiterated by this Court in several decisions, among them **MAITANYI V REPUBLIC [1986] KLR I 98**.

12. Although at the beginning of his examination in chief PW 1 stated that he had known the appellant prior to the date of the robbery, later on the witness said that he had not seen the appellant before but he was able to identify him. The appellant wore a coat and a marvin hat when he entered the hotel, PW 1 stated. The witness said he was able to identify him because of his appearance. PW 1 did not however

state for how long he had observed the appellant so as to be able to remember his face four days later when the identification parade was conducted.

13. The evidence of PW 3 contradicted that of PW 1 regarding his identification of the appellant. PW 3 said that the appellant did not have any hat when he entered the hotel; that he had shaved his hair box style. PW 1 said that the appellant had worn a marvin hat.

14. PW 5, like PW 1, said that the appellant had put on a hat when he entered the hotel. She said that she was able to see the appellant with the help of security lights that were at the parking yard. The witness did not explain how bright those lights were. She did not state how long she observed the appellant before she ran away when she heard the robbers ordering the hotel customers to lie down.

15. **Corporal John Onyango, PW 10**, together with **P. C. Mumo** and **P. C. Abdi** went to the hotel after they received a report of the robbery from PW 6. They found customers still lying on the floor, shortly after the robbers had left. PW 10 interrogated ten customers who had been robbed of various items, but none of them was able to identify the robbers. In fact, **Samuel Ogare, PW 1**, who claimed to have seen the appellant sometimes before the robbery, and who was also robbed of cash and a laptop, did not say that the appellant was one of the robbers, although the witness had seen how the robbers were dressed.

16. PW 10 did not state the name of the person who told him that one of the suspects (*the appellant*) had been seen at his house. However, in cross examination, he said he was led by the complainants to the appellant's house where the appellant was arrested.

17. If that was the case, it means that the complainants, who we presume included the identifying witnesses, knew the appellant's house, yet there was no evidence to that effect from any of the complainants. If the complainants knew the appellant's house, it means that they knew the appellant and therefore their identification of the appellant during the identification parade was of no value: see **AJODE V REPUBLIC [2004] 2 KLR 81**.

18. In the aforesaid decision by this Court, it was also held that before an identification parade is conducted a witness should be asked to give the description of the person sought to be identified. The record does not show that was done. And there is one other issue about the identification parade that raises grave concern to us. The parade form that was produced by PW 8 as P. Exhibit 2 shows that when the appellant was asked whether he was satisfied with the conduct of the parade, he indicated that a certain woman in the crime office had pointed him out and said: "*It is this man in a checked shirt.*" That was on 31/08/2009. When the appellant tendered his defence on 19/11/2010 he repeated more or less the same allegation. He said that Corporal Onyango identified him to the O.C.S. and some other people who were at crime office.

19. In view of the foregoing, and in the absence of any other evidence to connect the appellant to the robbery, we think the evidence regarding his identification had material contradictions, was not free from error and thus rendered the conviction unsafe.

20. Consequently, we allow this appeal, quash conviction and set aside the death sentence that was passed by the trial court and upheld by the High Court. The appellant is set at liberty forthwith unless otherwise lawfully held.

DATED and Delivered at Kisumu this 29th day of July, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR