



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 45 OF 2011

BETWEEN

KENNEDY OCHIENG OKOMBO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment and Orders of the High Court of Kenya at

Kisii (Asike Makhandia & R. Sitati J) dated 15th March, 2011

in

KISII HCCRA No. 55 OF 2010

JUDGEMENT OF THE COURT

The appellant, **Kennedy Ochieng Okombo**, was charged with another person before the Principal Magistrate's Court, Oyugis, on three counts of robbery with violence contrary to Section 296 (2) of the Penal Code. Particulars of the first count were that on the 22nd day of December, 2008 at Masogo area of the then Rachuonyo District, he with the others while armed with dangerous weapons namely a pistol, a knife and a panga robbed Broderick Odhiambo Ogange of cash Kshs. 18,000/=, mobile phones, a United States of America dollar, jewellery, CDS, DVDs, a speaker and ATM cards all valued at Kshs. 159,000/= and that at or immediately before or immediately after the time of such robbery they threatened to use actual violence to the said person.

Particulars of the second count were that on the same day with the other person while similarly armed and with threat of violence they robbed Beatrice Obura Ogange of cash Kshs. 17,000/=, two mobile phones and an ATM card all valued at Kshs. 54,000/=.

Particulars of the third count were in similar fashion the robbery being upon Albert Maji who was robbed of cash Kshs. 750/=, a mobile phone and a jumper all valued at Kshs. 7,750/=. A trial took place before the acting Principal Magistrate (R. Ngetich) who in a judgment delivered on 11th March, 2010 convicted the appellant and sentenced him to death. That conviction and sentence provoked an appeal to the High Court of Kenya at Kisii (Asike-Makhandia, J (as he then was) and Ruth Nekoye Sitati, J) but the appeal

failed in the judgment delivered on 15th March, 2011. Those findings provoked this appeal premised on the four grounds of appeal set out in the homemade Memorandum of Appeal drawn by the appellant. Being a second appeal we are constrained by Section 361 (1) (a) Criminal Procedure Code to consider only issues of law but not matters of fact which have been tried and retried by the two courts below. On the jurisdiction of this court on a second appeal such as this one it was stated in **John Gitonga alias Kados v Republic Nyeri Criminal Appeal No. 149 of 2006 (ur)** that:-

“This being a second appeal, we are reminded of our primary role as the second appellate court namely to steer clear of all issues of facts and only concern ourselves with issues of law...”

See also **M’Riungu v Republic [1983] KLR 455.**

What, then, are the issues of law raised in this appeal that may call for our consideration?

In the first ground of appeal the first appellate court is faulted for finding that identification was proper when, according to the appellant, conditions for identification were not favourable. In the second ground it is stated that it was wrong for the first appellate court to rely on the results of the identification parade when the complainants had not made a first report to the police on the description of attackers. Ground 3 was abandoned at the hearing while in the last ground the High Court is faulted for relying on the doctrine of recent possession when there was a long span of time between the robbery and recovery of a mobile phone, an item said to be easily disposable.

Our journey through the facts of the case is purely to establish whether the two courts below handled the case according to their mandate and to see whether there are issues of law raised calling for our consideration.

The prosecution case was that on the 22nd day of December, 2008 at about 7:40 p.m **Broderick Odhiambo Ogange (PW1) (Odhiambo)**, who was the District Coordinator of the Electoral Commission of Kenya in the then Migori District, was in the table room of his house at Oyugis. He was with his sons **Ogange Ricky Omondi (PW3) (Ricky)** and **Tony Ogange (PW7) (Tony)** and were joined by their relative **Albert Muzee Maji (PW4) (Albert)**. **Beatrice Obura Ogange (PW2) (Beatrice)** was in bed in the bedroom as she was feeling unwell. Three people suddenly entered their house and declared themselves to be **“wajambazi”**. There was light through a four foot fluorescent tube in the table room and there were energy saving bulbs in the other rooms. The people were armed, one with a long knife, the other a panga and the last one a pistol and two of them wore masks. The appellant wore a cap which partially covered his face. The attackers ordered the family to lie down and proceeded to forcibly take mobile phones, money and other items from them as they told Odhiambo that they had been tracking him for days as they had been sent to kill him. They then demanded the keys to Odhiambo's car which they were given and they drove away in the car. According to Odhiambo he could identify the appellant as the appellant was very close to him during the robbery.

On 26th January, 2009, a month and 4 days after the incident, Odhiambo and his family were called to attend an identification parade at Oyugis police station where Odhiambo identified the appellant as the attacker who had a panga during the robbery. He stated of the appellant in testimony before the trial court:

“...He had a scar just above the left ear. He had a cap but it was not covering the whole (sic).”

Beatrice also picked the appellant at the identification parade as one of those who attacked and robbed them.

On 31st December, 2008 **George Otieno Odira (PW5) (Otieno)** a driver at Rongo market, was approached by three boys Ochieng, Boy and Charles who told him that

Vinuis Ochieng Alan (PW6) (Vinuis) was selling a mobile phone which could hold two sim cards. Otieno walked to the place where Vinuis was and enquired about the phone. Vinuis showed him a Samsung D880 which went for Kshs. 24,000/= at Nakumatt, Kisii, but offered it at Kshs. 7,000/=. Otieno accepted this price which he paid but thereafter realized that the phone was locked but Vinuis could not unlock it because he did not have its PIN. The phone was apparently opened by an operator in Kisii town because Otieno commenced using it and did so until 2nd January, 2009 when he was arrested at Rongo. He told police that the phone had been sold to him by Vinuis who was also arrested. Vinuis told police that on 26th December, 2008 he was approached by a boy called Ben who told him that Ben's friend called Ken had a phone which he wanted to sell to use proceeds thereof to resolve a financial problem. Vinuis bought the phone at Kshs. 5,000/= but only paid Kshs. 4,000/= promising to pay the balance upon delivery of the phone charger and a receipt which were not delivered. He later decided to sell the phone and sold it to Otieno at Kshs. 7,000/=.

On 6th January, 2009 **Evans Atingo Auko (PW8) (Evans)** was at Rongo when he requested Otieno to let him use his phone to call his employer. Since Otienos' phone had no credit they fitted Evans sim card into the phone and Evans made the call. On 22nd January, 2009 he was arrested and he told police that he had used Otienos' phone to make the call.

No. 219971 CIP Mohammed Bakuli (PW9) (the Inspector of Police) arranged and conducted the identification parade already referred to where Odhiambo and his wife Beatrice identified the appellant as one of the persons who had attacked them.

No. 84303 PC Dan Ombogo (PW10) (the Police Constable) of Oyugis police station accompanied other police officers to Odhiambos' home upon receiving a report of a robbery. They did not find suspects at all. He booked the report at the police station and recorded statements. He was given a description by Ricky and that is how the appellant was arrested about a month later. The police constable also received phone serial number details from Odhiambo and the phone was tracked by Special Crime Prevention Unit, Kisumu, and found to be in use in Rongo by Evans and Otieno who were arrested as was Vinuis. On cross-examination the police constable admitted that no description of suspects had been indicated in the investigations diary.

Upon being placed on his defence the appellant elected to give an unsworn statement in which he stated that on 23rd January, 2009 he was arrested by police officers while on the way to get a weighing machine. His house was searched but nothing was recovered. An identification parade was conducted some four days later where the appellant demanded that masks worn by attackers during the robbery be produced but this was not done. He wondered why two other people who were also identified at the parade were not charged before the court.

In an unusual turn of events the police constable who had testified for the prosecution was called as a defence witness. He confirmed that the Occurrence Book entry in respect of the robbery had not indicated whether attackers wore masks.

The appeal came up for hearing before us on 8th December, 2014 and was urged by learned counsel for the appellant Mr. Nyamweya but was opposed by the learned Principal Prosecuting Counsel Mr. Sirtuy. Learned counsel for the appellant faulted the judges on the first appeal who, according to him, did not analyse evidence on identification properly thus reaching wrong conclusions on the issue. Counsel also faulted the manner the identification parade was conducted wondering whether memories of identifying witnesses were fresh when the identification parades were conducted over one month after the robbery incident.

In any event, urged counsel, why did the police not take measures to conceal the obvious scar that the appellant had above one of his ears? Learned counsel for the appellant also faulted the learned judges on the first appeal for upholding the finding on recent possession when the subject mobile phone had not been found on the appellant but was recovered from someone else who could very well have been the robber or an accomplice.

In opposing the appeal the learned counsel for the Republic reminded us that this was a second appeal where our mandate was limited to issues of law. Counsel believed that identification had been properly re-evaluated by the first appellate court and that witnesses had had adequate time to identify the appellant because the robbery took nearly one hour and there was sufficient time and light to allow for proper identification of the attackers by the prosecution witnesses. Counsel however conceded that it was wrong for the two courts below to uphold hearsay evidence where the courts took into account the fact that Ben, who handled the recovered mobile phone, was not called as a witness yet the fact of his having sold the phone to one of the witnesses was considered.

We have considered the record of appeal, Memorandum of Appeal, submissions by learned counsel and the law.

On the issue of identification the trial court and the first appellate court paid a lot of significance to the fact that Odhiambo and Beatrice identified the appellant at the identification parade because they had seen a scar above the appellants left ear. Odhiambo testified before the trial court that:

“...As the panga man was ransacking my pockets I could see him very close and I identified his physical features. I was able to see a scar on the left of the head just above the ear. He was also mustached...”

and that:

“... The one I identified is A2 in the dock. He is the one who hit me with a panga twice. He is also the one who stepped on my head in the bedroom. He had a scar just above the left ear. He had a cap but it was not covering the whole...”

He also testified that during the identification parade he was looking for a man with a moustache, a scar and dark in complexion. His wife, Beatrice, testified as much.

The police officer testified that no issue of disfigurement had been brought to his attention before he arranged and conducted the identification parades. He said:

“...Before the ID parade I had seen A2 at the police station. No disfigurement was brought to my attention. Complainant never brought to my attention any disfigurement on the suspect. They never told me of any masks..”

The first appellate court considered the issue of the identification parades and was satisfied that although the parades were conducted over one month after the robbery that was not a long time to cause witnesses memory to fade. The court held:

“The police identification parade was carried out on 26th January, 2009. This was about a month or so after robbery. This was not such a long period of time after the incident as to cause the witnesses' memory to fade. We have perused the police parade forms in respect of the appellant. There is no complaint at all by the appellant with the manner in which the parade was conducted contrary to what he stated in his defence and also in his submissions. We therefore take his submissions on the issue of the identification parade as an afterthought. He never insisted that the parade should consist of people with similar scars. And even if he was to so insist, where would the police have found such people. Further he did not insist that all parade members should wear caps. To our mind therefore, the police identification parade was properly conducted.”

On the issue of identification parades Rule 6 (iv) (d) of The Force Standing Orders requires that:

“the accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused / suspected person be suffering from a disfigurement, steps should be taken to ensure that it is

not especially apparent.”

The appellant had in his defence raised the issue of the manner the identification parade was conducted even asking that masks worn by attackers be provided. This was ignored by the police. The two courts below appear to have dealt with that issue casually and with due respect, it was a misdirection for the courts to hold that people with similar scars as that carried by the appellant could not be found. The police were required in law to take steps to ensure that the scar was not especially apparent as failure to do so prejudiced the appellant and the identification parade was therefore not properly conducted.

The two courts also relied on the doctrine of recent possession and held that it had been proved to the required standard that although the mobile phone was not found on the person of the appellant constructive possession had been proved. The High Court stated in the judgement appealed from:

“In the instant case it is common ground that the mobile phone was not found in the physical possession of the appellant. It was found in the possession of PW6. However, this witness gave the trail of the phone which ended up at the doorsteps of the appellant. There is nothing on record to suggest that PW5 and PW6 who at one time or another came into contact with the phone deliberately ganged up to testify falsely against the appellant so as to fix him. In his own defence, the appellant makes no reference at all to the phone. There is nothing on record to suggest that the evidence of PW5 and PW6 should not be believed. They stood to gain nothing by falsely accusing the appellant. They explained how they came by the phone. The appellant too was duty bound to do so. He failed the test. Constructively therefore the appellant was in possession of the phone. The phone was positively identified by PW1 and PW2 through the serial number. The evidence is galore that among the items stolen during the robbery was the mobile phone aforesaid. It had been stolen on 22nd December, 2008 and recovery made a month later on 22nd January, 2009. The mobile phone had by then gone through two hands. These two hands traced the mobile phone back to the appellant.”

The evidence before the court was that Otieno bought a mobile phone from Vinuis who had bought it from Ken upon being approached by a boy called Ben. Ben was not called as a witness. We agree with learned counsel for the appellant that there was a break in causation as Bens' evidence was vital to link the chain on how the phone exchanged hands. In any event without the evidence of Ben the two courts below erred in relying on what amounted to hearsay evidence. That demolishes the evidence on recent possession.

The totality of our findings is that this appeal succeeds and is hereby allowed. The appellant shall be set free forthwith unless otherwise lawfully held.

Dated and Delivered at Kisumu this 12th day of February, 2015.

D. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR