**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: VISRAM, MARAGA, & KANTAI, JJ. A)**

**CRIMINAL APPEAL NO. 46 OF 2013**

**BETWEEN**

**ELLY ODONGO MBWA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Appeal from a Judgment of the High Court of Kenya at Kisumu***

***(A. O. Muchelule & H. K. Chemitei , J) dated 26th March , 2013***

**in**

**KISUMU HCCRA NO. 129 OF 2010)**

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**JUDGMENT OF THE COURT**

This is a second appeal and by dint of Section 361 (1) (a) of the Criminal Procedure Code such an appeal can only be considered if points of law are raised. There are various judicial pronouncements on this point such as **John Oluoch Otieno & Anor v Republic (Kisumu) Criminal Appeal No. 298 of 2012 (ur)**. It was stated by this Court 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..."**

The appellant, **Elly Odongo Mbwa**, was charged before the Principal Magistrate's Court, Nyando, with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code. Particulars of the first count were that on the 12th day of December, 2008 at Onyongo area along Katito – Sondu road in the then Nyando district, jointly with others not before the court while armed with dangerous weapons namely pistols robbed Chacha Mberu of a Nokia 1600 phone valued at Kshs. 6,000/= and that immediately before or immediately after the time of such robbery he used actual violence to the said person.

Particulars of the second count were that on the said date at the same place again with others not before court while similarly armed he robbed Manyengo Rioba of a mobile phone make Nokia 1112 valued at Kshs. 4,000/= and that, as in the first count, he used actual violence against the said persons.

A trial took place before the learned Principal Magistrate ( D. Chepkwony) who in a judgment delivered on 17th August, 2010 convicted the appellant and a sentence of death was pronounced by the said magistrate on 13th September, 2010. A first appeal to the High Court at Kisumu (A. O. Muchelule and H. K. Chemitei, JJ)failed on conviction but the learned judges reduced the sentence to one of twenty years imprisonment for reasons recorded in the learned judges' judgment dated 26th March, 2013. Those findings provoked this appeal.

In the Memorandum of Appeal drawn by counsel for the appellant M/s Marcella Onyango three grounds of appeal are taken. The first ground attacked the learned judges who it is said erred in law and fact for convicting the appellant when the evidence on record is said to have showed that the prosecution had not proved the case beyond reasonable doubt.

In the second ground the learned judges are faulted for failing to put weight to the evidence tendered by the appellant while the last ground takes constitutional issues as it is alleged that the judges erred in failing to note that the appellants' constitutional rights under Section 72 (3) of the retired Constitution had been violated.

What was the case made out by the prosecution and how was it reviewed by the first appellate court and are there issues of law calling for our consideration?

The prosecution case was that on the 12th day of December, 2008 **Chacha Mberu (PW1) (Chacha**) was driving an oil tanker from Kisumu headed to Kehancha. He was accompanied by **Manyienga Rioba (PW2) Rioba)**. When they reached a place called Onyuongo they saw a vehicle which they thought to be a Datsun saloon which overtook them at high speed and it stopped ahead of them. They continued driving but as they climbed a hill that same motor vehicle appeared again, aligned itself with the oil tanker and two occupants of that vehicle produced pistols which they pointed at Chacha and Rioba but Chacha was brave enough to continue driving and in the process he smashed that vehicle using the tanker forcing it into a ditch. The tanker stopped and the pair fled the scene leaving their tanker unattended. They also left their mobile phones in the tanker. As they ran on the road they found police who they reported to and upon return to the scene the occupants of the saloon had fled the scene leaving their damaged vehicle behind. The oil tanker was intact but two mobile phones were left by the driver and conductor were missing. Upon inspection it was found that the saloon's registration mark had been altered using masking tape. Neither Chacha nor Rioba identified any of the 5 – 6 people they said were in the saloon car.

**Gilbert Omune (PW3) (Omune)**, a mechanic who also operated a taxi business testified that on 9th December, 2008 when leaving for a safari he entrusted his taxi registration mark KRY 871 on the appellant who he knew as Odongo. Upon his return to Kisumu on 12th December, 2008 he could not find either the appellant or his taxi so the next day he reported the matter to Central Police Station, Kisumu, where he was informed that his motor vehicle had been impounded for being involved in criminal activity. He was arrested and locked up at the said station. Questioned by the appellant he said:-

> **"... It is true you were working for me. You had driven this vehicle for less than a month.... You told me you had no work documents".**

**Bernard Ochieng Olunga (PW7) (Olunga)**, A brother of Omune, testified on 9th February, 2010 that he knew that his brother had left his motor vehicle in the hands of the appellant but his brother had been arrested upon return from a visit home because the taxi had been involved in crime. Yet the record also shows that on 6th July 2009 the trial court had recorded that:

> **"...I note that one Bernard Ochieng has been called by the prosecution and he has stood up from the Court. It is clear he was in court while PW4 was testifying and in the circumstances, he is disqualified."**

**No. 230543 CIP Stephen Kemboi(PW4) (the Inspector of Police)** took photographs of the damaged taxi and produced them as exhibits in the case.

**No. 65184 P. C. Philip Kimeli (PW5) (the police constable)** testified how he and other police officers had laid ambush on the material night when Chacha and Rioba reported that car jackers had robbed them – they all went to the scene where it was decided that the oil tanker be released to continue with its journey while the saloon car was towed to the police station. He produced as part of the evidence several items which he said he recovered from the taxi.

**No. 79090 P. C. Painto Ingosi (PW6) (the investigations officer)** took over investigations from the police constable. He arrested the appellant on 19th December, 2008 in Kisumu and charged him with the said offences.

That was the case put forth by the prosecution upon which the appellant was called upon to answer and in a sworn statement the appellant while denying the charges testified that the police officers who had arrested him had informed him that he was suspected of being a bhang seller. He had freely opened his business and house to the police for inspection and no bhang had been found. He was held in custody for twelve days and later charged in court. He stated that he was a businessman at Kisumu bus-stage where he owned a stall from which he was arrested and he denied being a taxi or any driver at all. He further stated that he did not know either Omune or his brother Olunga and the trial magistrate recorded of the appellant:-

> **".... he avoids answering why they picked on him from the whole stage and had him fabricated and charged him with the offences before court..."**

The trial magistrate believed from the evidence that Chacha and Rioba had been robbed of mobile phones and that it was the appellant who was the robber.

The High Court, on first appeal, while agreeing with the trial magistrate stated:-

> **"...We consider that PW1 and PW2 did not identify their attackers and when the appellant was arrested he was not found with any of the phones that had been taken from the lorry in the attack. The prosecution case was therefore wholly circumstantial. It is trite that in a case depended (sic) on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused, or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than the guilt of the accused..."**

The High Court found that the evidence of Omune was corroborated by that of his brother Olunga and observed of the findings of the trial magistrate that:

> **"....The court considered the evidence of PW7 as providing corroboration to the evidence of PW3. It also considered that there was no reason why PW3 and PW7 would want to frame the appellant.... The result was that the appellant was the driver of the car. The car was used in the robbery and abandoned at the scene after the tanker crashed it. The occupants of the car disappeared after taking phones from the tanker..."**

Mr. Jamsumbah, learned counsel for the appellant, in submissions before us, faulted the learned judges who, according to him failed to notice that the case by the prosecution had not been proved to the required standard as no items were recovered from the appellant who was not arrested at the scene but was arrested upon a report by Omune who had himself been arrested as a suspect for the same offences. Learned counsel also faulted the learned judges who, to counsel, should have noted that there was no

evidence that there was an oil tanker at all at the scene as its ownership was not established by the prosecution. Counsel also thought that the elements of a robbery with violence had not been established as no evidence had been led to prove that the complainants had the phones allegedly stolen after they abandoned the tanker and fled.

Mr. Sirtuy, learned Principal Prosecution Counsel, in opposing the appeal satisfied himself by submitting that no issues of law had been raised in the appeal.

We have considered the record of appeal, the grounds of appeal, the submissions made before us and the law.

One point of law that clearly arises in this appeal is whether there was any or any proper identification of the appellant as the robber who perpetuated the offences set out in the charge sheet.

The High Court, on first appeal, properly recognized that the complainants in the two counts had not identified the appellant or any of the robbers and that since no stolen items had been found on the appellant the whole issue revolved around circumstantial evidence. That court properly recognized the principle laid down in various decisions like **James Mwangi v Republic [1983] KLR 327** that in order to justify an inference of guilt in a case wholly dependent on circumstantial evidence the incriminating facts must be incompatible with the innocence of the accused, or the guilt of any other person and incapable of explanation upon any reasonable hypothesis than the guilt of the accused.

The High Court after analysing the evidence recorded by the trial magistrate particularly that part of the evidence that stated that Omune had left his taxi with the appellant as corroborated by Omunes' brother Olunga accepted those findings and held that the facts pointed to the appellant as the person who attacked the complainants and robbed them of their phones. Omune, in evidence as recorded by the trial magistrate testified that he had engaged the appellant, who he knew as Odongo, only a few days before the incident and that upon employing the appellant he had no identification or other documents of any sort at all and that he gave him his taxi purely upon trust.

The appellant, in sworn testimony in his own defence denied knowing Omune at all and stated that he was not a taxi driver or any driver at all and he had never learned how to drive . He also testified that he did not know Omunes' brother Olunga.

The investigations officer while being cross-examined by the appellant who maintained that he was innocent all through the trial testified that:-

> **"... I do not remember recording Vincent Odhiambo in my statement. All I know is that your employer Gilbert Omuna confirmed to me that he had employed you as his taxi driver. Gilbert never gave me any document to show he had employed us (sic). It was you he had employed. There was no document to confirm you were his driver.... He reported the name correctly as Elly Odongo Mbwa. There is a difference between Odongo and Adongo but it could be a clerical error...."**

The appellant, in cross – examination by the Court prosecutor stated of his alleged employer Omuse:

> **".... I do not know Gilbert Omune Okongo (PW3). He did not say that I was his driver. He said one Adongo and not Elly Odongo Mboya. He pointed and identified me as the (sic) Adongo but I am not Adongo. I am not a driver. I carry out business at the bus stage in Kisumu.... He only gave one of my names …. They called me Adongo and I am not Adongo..."**

The trial magistrate believed that Chacha and Rioba had indeed been attacked and their mobile phones stolen from the oil tanker which they abandoned and fled the scene after smashing the saloon car. The trial magistrate further believed that Omuse had left his taxi with the appellant when he travelled from Kisumu and that the taxi had been used in the robbery. That piece of evidence, found the trial

magistrate, had been corroborated by Omuses' brother Olunga. But the record shows that on 6th July, 2009 the trial magistrate had recorded that:

> **"COURT: I note that one Bernard Ochieng has been called by the Prosecution and he has stood up from the Court. It is clear he was in court while PW4 was testifying and in the circumstances, he is disqualified."**

The trial was thereafter adjourned on many occasions and it was not until 9th February, 2010 that the prosecution produced its last witness, the same Olunga who the trial magistrate had disqualified as a witness on 6th July, 2009. The High Court, on first appeal, while re-evaluating that part of the evidence concluded that:

> **"....The trial court was faced with that scenario and accepted the version of PW3 who called his brother Bernard Ochieng Olunga (PW7) to say that he knew the appellant to be PW1's taxi driver in respect of this car. The court considered the evidence of PW7 as providing corroboration to the evidence of PW3. It also considered that there was no reason given why PW3 and PW7 would want to frame the appellant..."**

So that the trial magistrate failed to notice that he had disqualified the witness (Olunga) whose evidence was now the crucial link offering corroboration to the evidence of Omuse who had himself been arrested as a suspect in the case. The High Court on first appeal, with respect, failed to notice that the evidence of Olunga needed to be treated with care . Had the High Court carried out its duty of analysing the evidence and re-evaluating the same to reach their own conclusion it would have noted that the prosecution had not established a case against the appellant to the required standard to reach a conclusion that the appellant was the perpetrator of the alleged offences. The prosecution did not even lead any evidence of the presence of the alleged oil tanker on the fateful night as the owner of the same was not called as a witness in the case.

No evidence was led to show that the complainants had any phones which they allegedly left in the oil tanker and found to have been stolen. There were too many missing links in the case laid out against the appellant and the conviction was totally unsafe. The investigations officer did not even lead evidence on how the appellant was arrested - this is a case where the arrest took place when Omuse was himself in custody as a suspect. We agree with learned counsel for the appellant that the High Court erred in not properly re-evaluating the evidence to reach its own conclusions and we have reached the conclusion that the appeal has merit and it is hereby allowed. The appellant shall be set free forthwith unless otherwise lawfully held.

***Dated and Delivered at Kisumu this 25th day of March , 2015.***

**ALNASHIR VISRAM**

**….....**

**JUDGE OF APPEAL**

**D. MARAGA**

**….....**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**….....**

**JUDGE OF APPEAL**

I certify that this is a true

copy of the original.

***DEPUTY REGISTRAR***