IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 250 OF 2009 (R)

BETWEEN

EDWIN OPONDO AMBALO ……....….1ST APPELLANT

NICHOLAS ONYANGO OMONDI ...…..... 2ND APPELLANT

MOLLEM ODHIAMBO OWINO

Alias **TALL ……...……..... 3RD APPELLANT**

AND

REPUBLIC ……..…… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ.) dated 18th day of November, 2008

in

HCCRA. NOS. 133, 136 & 137 OF 2007)

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JUDGMENT OF THE COURT

1. The appellants, Edwin Opondo Ambalo, Nicholas Onyango Omondi and Malcolm Odhiambo Owino alias 'tall' were charged alongside four others with the offence of robbery with violence contrary to section 296(2) of the Penal Code, were tried, convicted and sentenced to death as by law prescribed.

2. The particulars of the offence were that on 15th December, 2006 at Got-Osimbo sub-location in Siaya County the appellants, jointly with others, while armed with dangerous weapons namely pangas and rungus, robbed Captain James Odhiambo Ouda of a laptop, digital camera, radio cassette, amongst other properties and cash, and at or immediately before or after the time of such robbery used actual violence to the said Captain James Odhiambo Ouda.

The Facts

3. The pertinent facts as established by the two lower courts on the basis of which the appellants were convicted are that on Friday 15th December 2006, Captain James Odhiambo Ouda (Captain Ouda), a captain with the Kenya Air Force, left his house at about 7.30 pm to escort his thirteen year old sister in law to his mother's house. After walking for about ten minutes, they were stopped by a crowd of men. A torch was flashed on his face. Captain Ouda also had a torch and shone it on them. He noticed that two of the men were wearing jungle jackets. One of the men wore a police beret with a crown. They ordered him to stop. Based on their manner and the trousers the men had worn, captain Ouda realized the men were not police officers but thugs posing as police officers and told his sister in law to run to the house. Together with his sister in law, captain Ouda ran back to the house, where on reaching the door they met three men. His attempt to run to the gate was thwarted. He was held, beaten up, tied with a rope by the attackers and taken into the house. Inside the house where two lantern lamps were on, he observed that the assailants were molesting his wife and children. The assailants warned them not to scream. Captain Ouda was then taken to a seat where he was beaten as some of the attackers took his wife to the bedroom. He was guarded by three of the assailants. One of the three attackers who was guarding him asked for a panga, retreated to the bedroom and emerged with his military machete. At that time, some of the other attackers were removing things from the house.

4. Captain Ouda identified the three attackers who were guarding him as the appellants. According to him, he was with them for a long time and all along the lights were on. Ultimately the thugs left and his wife untied him. Thereafter captain Ouda was treated for the injuries inflicted by the assailants. He reported the matter to the police, who after carrying out investigations charged the appellants with the offence for which they were convicted.

The appeal and submissions by counsel

5. Having failed to quash the conviction in their first appeal to the High Court, the appellants have in this second appeal challenged the conviction and sentence. In his arguments before us, Mr. G. O. Oguso, learned counsel for the appellants, referred to the supplementary memorandum of appeal presented to court on 6th July 2015 and submitted that the charge sheet was defective because of a discrepancy between the evidence tendered, and the amount allegedly stolen as indicated in the charge sheet; that neither captain Ouda nor his wife mentioned the amount stated in the charge sheet in their evidence before the trial court; and that had the High Court properly evaluated the evidence it would have acquitted the appellants.

6. Citing **Majaliwa Mohamed Maneno vs. Republic Mombasa CA Criminal Appeal No. 180 of 2002**; **Maitanyi vs. Republic [1986] 1 KAR 75** and **GMI vs. Republic [2013] eKLR** among other decisions, Mr. Oguso complained that the lower courts erred by basing the convictions on the evidence of a single identifying witness when the conditions for identification were difficult; that there was no other evidence pointing to the guilt of the appellants from which the court could reasonably conclude that the evidence of identification could safely be accepted as free from the possibility of error; that conditions in this case were not favourable for identification; that there were two lantern lamps and the intensity of the light was not indicated; that the position of the lamps was also not indicated; that it is not indicated how captain Ouda identified the appellants; that it is also not indicated what description of the appellants he gave to the police; and that when searches were conducted in the premises of the appellants, nothing was recovered.

7. Regarding the identification parades, Mr. Oguso submitted that it begs the question why the appellants were the only ones subjected to the identification parade while seven suspects who were in police custody; that as the appellants were removed from the cells on many occasions, there is a real risk that the complainants saw them as they were taken back and forth, so that and the integrity of the identification parades could have been compromised; that one of the appellants was an easy target because he has a prominent scar on his face and there is no indication other members of the line up in the parade had similar scars; and that the parade was flawed.

8. Opposing the appeal, Mr. D. N. Ogoti, Senior Assistant Deputy Public Prosecutor, submitted that though the complaint that the charge sheet was defective was not raised at the earliest opportunity and is not contained in the grounds of appeal, the alleged defect is not prejudicial to the appellants and is curable under section 382 of the Criminal Procedure Code.

9. On the issue of identification, Mr Ogoti submitted that both lower courts properly addressed the matter; the appellants were positively identified at the scene; the circumstances were conducive for positive identification as lights were on throughout the hour-long ordeal; that both courts warned themselves and found as a fact that the source of light was adequate; that the complainant, captain Ouda, did give a description of the appellants to the police and was able to pick them out from the identification parades; that the identification parades were properly conducted and that there is no basis whatsoever for interfering with the findings of both courts.

Determination

10. We have considered the appeal and the submissions by learned counsel.This being a second appeal, our mandate is confined under section 361 of the Criminal Procedure Code to considering matters of law. In **Karingo vs. Republic [1982] KLR 213**] the Court stated:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari C/O Karanja vs. R* (1956) 17 EACA 146*)"***

11. The main issue that arises for determination in this appeal is whether the findings by the lower courts regarding identification of the appellants were based on sound legal foundation.

12. The trial court was satisfied, based on the evidence presented before it, that captain Ouda saw the three men that guarded him throughout the ordeal and that the lights in his house were on throughout the ordeal. It was also satisfied that identification parades were properly conducted and that captain Ouda picked out and identified the appellants from those parades as having been part of the gang that robbed them. The learned trial magistrate proceeded with the necessary caution stating that:

> ***"Since the incident occurred at night, I am obliged to warn myself that there is a possibility that the complainant may have been mistaken. To lessen this risk, I warn myself that I have to be cautious in analyzing the testimony of PW1. I have to consider this evidence very carefully and only act on it if fully satisfied that it is reliable."***

13. The learned trial magistrate went on to consider that inside the house there were two lantern lamps that were lit; that with the assistance of that light the complainant saw the appellants who were guarding him; that the complainant's wife, who was PW 2, also confirmed in her testimony that the house was well lit with the two lamps though she was not herself able to identify the attackers because she has eyesight problems. The trial court concluded that the testimonies of the complainant and his wife were consistent; that the robbers were inside the house for a long time and the complainant had a good opportunity to see and note their features, especially of the three who were guarding him, and who he identified as the appellants; that he clearly saw them and gave their description to the police. The trial court was also satisfied that the identification parades from which the appellants were picked out were compliant with the police standing orders for conducting such parades and that there was no serious challenge to the evidence of the police officers who conducted the parades.

14. On its part, the High Court after analyzing the evidence and warning itself that caution must be exercised in relying on the evidence of a single identifying witness lest a mistake of identity occur, also concluded that the appellants were properly identified at the scene, and later at the identification parades.

The High Court had this to say:

> **"On** ***the issue of identification of the appellants as being part of the gang who robbed PW1, the learned trial magistrate took quite a while analyzing the evidence. We have done the same and concluded that these appellants were involved.***
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> ***They beat, tied and sat up the complainant in a room lit with two lanterns. The table where the lamp stood is where the appellants guarded PW1 as the thieving went on. They talked with the complainant and he well described what the three did, for instance getting in his bedroom, stealing from there and demanding that he give them a gun, threatening to kill him because he was struggling etc. All this took about an hour.***
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> ***He had ample time to observe well the 3 appellants two of whom were dressed in police uniforms. For instance PW1 sat with Edwin by the side of the table where a lantern was burning; Nicholas beat the witness badly – just a metre away from the lantern while Malcom wore his beret incorrectly and was the last to leave the house after the incident. PW1 noted their respective features and told the police."***

15. In the circumstances of this case it cannot be said, as was the case in **Majaliwa Mohamed Maneno vs. Republic** (supra) that "***the conditions favouring a correct identification were difficult***" so as to require "***other evidence***" pointing to the guilt of the appellants.

16. Based on our review of the record, we are satisfied that both lower courts proceeded on the correct legal basis regarding the issue of identification and arrived at the correct decision based on the evidence. A case has therefore not been made out by the appellants for us to interfere with the concurrent conclusions reached by the lower courts on the question of identification.

17. We turn to the complaint that there is a discrepancy between the charge sheet and the evidence to the extent that neither captain Ouda or his wife testified that Kshs. 10,000.00 as indicated in the charge sheet was stolen. It is correct that the evidence of captain Ouda was that Kshs. 1500.00 was taken from his wallet and that the robbers took from his wife Kshs. 7,000.00. Captain Ouda's wife, who was PW 2, stated that she was forced to give the robbers Kshs. 7,000.00. Based on the evidence therefore, the amount stolen was Kshs. 8,500.00 as opposed to Kshs. 10,000.00 indicated in the charge sheet. It was however not demonstrated what prejudice this error occasioned to the appellants.

18. Quite apart from the fact that this complaint was raised for the first time during the hearing of this appeal, we do not think that it is an error that occasioned a failure of justice and it is not curable by the provisions of section 382 of the Criminal Procedure Code.

19. For those reasons the appeal fails and is dismissed.

Dated at Kisumu this 9th day of October, 2015

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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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.

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DEPUTY REGISTRAR