



IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 263 & 264 OF 2011 (R)

BETWEEN

MICHAEL ONYANGO OBONDO.....1ST APPELLANT

DUNCAN OUMA OCHIENG.....2ND APPELLANT

DUNCAN OUMA ANGANG'O.....3RD APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Karanja & Aroni, JJ.) dated 19th October, 2010) in H. C. Cr. A. No.181, 182 & 189 of 2007)

JUDGMENT OF THE COURT

Michael Onyango Obondo, Duncan Ouma Ochieng and Duncan Ouma Angang'o, (the appellants) were charged with one count of robbery with violence contrary to *section 296 (2)* of the *Penal Code*, four counts of breaking and committing a felony contrary to *section 306 (a)* of the *Penal Code*, that is count 2, 3, 4 and 5, and single count of stealing contrary to *section 304 (2)* of the *Penal Code* and *section 279 (b)* of the *Penal Code* that is count 6, and a charge of handling stolen goods contrary to *section 322 (2)* of the *Penal Code* that is count 7.

The particulars of count 1 are that on 12th December 2005 at Muhoroni location, jointly with others not before the court while armed with a dangerous weapon namely, a knife, robbed Bernard Ouma of one bicycle make Hero Jet valued at Kshs 4000/-, the property of the said Bernard Ouma, and at the time of such robbery used actual violence on the said Barnard Ouma.

The particulars of counts 2, 3 and 4 were that on the night of the 11th and 12th December 2005 at Muhoroni Township, jointly with others not before the court, broke and entered the shops of Margaret Anyango, Roselyn Akinyi Ogado and Rose Apondi Okoth with the intent to steal and did steal from therein various items belonging to the said persons respectively.

The particulars of count 5 were that on the night of 4th December 2005 at Muhoroni, Nyando, jointly with others not before the court, broke and entered into the store of Eunice Akinyi Shikuku with the intent to

steal and did steal assorted items belonging to the said person.

The particulars of count 6 were that on the 29th/30th September 2005 at Muhoroni Township, Nyando, jointly with others not before the court, broke and entered into the dwelling house of Alice Auma Ouma with the intent to steal and did steal assorted items belonging to the said person.

The particulars of count 7 were that on 12th December 2005 at Border 11 sub location in Nyando District within Nyanza province, Duncan Ouma Ochieng, otherwise than in the course of stealing, dishonestly received and retained one radio cassette make Panasonic, the property of Alice Auma knowing or having reason to believe it to be stolen property or unlawfully obtained.

The appellants pleaded not guilty to all the counts.

On 12th December 2005, **Bernard Ouma Manga, PW 1 (Bernard)**, the complainant in Count 1 set out for work on his bicycle at about 6.45 am. As he was riding in the Muhoroni area, he saw two men approaching him also on a bicycle. One was the rider, and the other a passenger sitting on the bicycle frame in front of the rider. There were cushions on the passenger seat behind. As they approached Bernard, another man with a bicycle and cushions on the back passenger seat emerged from the sugarcane. As Bernard made to pass them, the rider who was the 3rd appellant with the passenger, the 1st appellant, blocked his path and proceeded to cut him on the head with a panga. The 3rd appellant grabbed his hand, and twisted his arm until it broke. The man who emerged from the sugar cane plantation, the 2nd appellant joined the assault on Bernard, after which the 3rd appellant snatched his bicycle. During the attack, Bernard bit the 3rd appellant's finger. The robbers left him after also robbing him of his bag and panga. By this time Bernard was almost unconscious, and was taken to the Kisumu District Hospital by some good Samaritans, where he was admitted for two days.

At about 2pm, on the same day, **PC Joash Barasa (PW 9)**, testified that one Mbita came to the station and informed him that he had met some suspects carrying luggage. And, he had also met with Bernard who was bleeding. PC Barasa, his colleagues PC Chira and PC Muchiri went with Mbita to the 1st appellant's house. He was not home, but upon searching the house they found a mountain bike, 2 sufurias, and 2 kettles. While they were still there they received a call from an Assistant Chief Ogango of Border 2 who told them that the 1st appellant was in the area. At that point, the 1st appellant was seen peeping from the cane plantation. The 1st appellant was arrested, and agreed to take PC Barasa and his colleagues to the houses of the other two appellants. They found the 3rd appellant sleeping in his house nursing a freshly injured finger on his left hand. A dagger was recovered from his house.

The 1st and 3rd appellants took PC Barasa and his colleagues to the 2nd appellant's house, where they found his wife. Several items were recovered from the house including 3 cushions, a radio, 7 sufurias, 2 basins, a woman's dress and blouse. They arrested the 2nd appellant's wife and took her to the police station. Later, the 2nd appellant came and surrendered himself and his wife was released.

Prior to this, on the night of 11th and 12th December 2005, a series of robberies and thefts had occurred in the Muhoroni area where the residential and business premises of **Margaret Anyango (PW 2)**, **Roseline Akinyi (PW 3)**, **Maurice Anyango (PW 4)** and **Rose Apondi (PW 5)** were broken into and various items stolen. The complainants all related how they had woken up on the morning of 12th December 2005 to find the items in respect of Counts 1, 2, 3, 4, and 7 listed on the charge sheet stolen. When they reported to Muhoroni police post they were able to recover some of their items.

Eunice Akinyi Shikuku, (PW 5), the complainant in Count 5, testified that when she woke up at 4am on the morning of 4th /5th December 2005 at Muhoroni, Nyando, she found that her store had been broken into and a mountain bike, boots and three pairs of shoes were missing. On 15th December 2005 she received information from a clan elder to the effect that the stolen items had been recovered. Upon visiting the Muhoroni Police post, she found that her mountain bike had been recovered. She identified

the bike from a welding mark on the front of the bike.

Alice Auma Ouma, (PW 8), the complainant in count 6, stated that on the 29th/30th September 2005, her house was broken into and the items listed on the charge sheet stolen. Following information that she received that stolen items had been recovered, she went to the police post and found her radio. She identified it by the markings “AOO” that she had made in the battery compartment.

In his defence, the 1st appellant said he was surprised to see people entering his home including Mbita. He testified that he owed Mbita an amount of Kshs. 3000/- and that his arrest was so as to secure settlement of the debt.

The 2nd appellant stated that he had gone to the police post to retrieve his bicycle that had been taken by the police, and that he was arrested on arrival.

The 3rd appellant testified that he was injured on 4th December 2005 and had gone to the hospital on the material day for treatment. He produced hospital treatment notes showing that his finger had been dressed in the hospital. He stated that on 12th December 2005, he had visited his brother's house only to be arrested. He was aware that a dagger was recovered from his house.

Upon consideration of the entire evidence, the learned trial magistrate having found the charges against the appellants proved to the required standard, convicted and sentenced them to death by law prescribed.

The appellants being aggrieved by the decision of the trial court filed an appeal in the High Court against both the conviction and sentence.

The appeal came up for hearing in the High Court and was heard by (Karanja and Ali-Aroni, JJ,) who were satisfied that the prosecution had proved its case, dismissed the appeals and upheld the conviction and sentence.

The appellants were further aggrieved by the decision of the High Court and lodged this appeal which is before us.

The 1st appellant filed a memorandum of appeal on grounds that he was not properly identified, given that the prevailing circumstances at the time were unfavourable; that the High Court failed to adequately evaluate the evidence; and that the High Court upheld the death sentence in spite of the availability of other sentencing options.

The 2nd and 3rd appellant's grounds of appeal were that they were not properly identified given the unconducive, strenuous and difficult circumstances; that an identification parade was not conducted as required under **Police Rule 46** of the **Standing Orders**; failing to summon key witnesses and therefore failing to establish a nexus between the appellants and the stolen goods; that the High Court failed to reevaluate the evidence and draw its own conclusions; and failing to reconsider the sentences which were manifestly harsh and excessive.

Mr Odeny, learned counsel for the 1st appellant, commenced his submissions with the issue that identification was not free from error as the prevailing conditions were unsatisfactory for identification. Counsel submitted that the 1st appellant had applied for the Occurrence Book (OB) to be produced. A ruling was made for the production of the OB, following which the 1st appellant requested that Bernard to be recalled. The court declined to recall him, and in so doing violated the 1st appellant's rights to a fair hearing; that crucial witnesses namely, Mbita, was not called to testify; that Bernard did not identify the 1st appellant prior to the proceedings, but identified him in the dock; the trial court erred by turning identification into recognition; that there ought to have been an identification parade; there was no indication as to the intensity of light.

On sentencing counsel contended that in the trial court's pronouncement of the sentence, that the 1st appellant's would "suffer death by hanging" was inhumane and contrary to **Article 25** of the **Constitution**. Counsel further argued that under **section 25** of the **Penal Code** other forms of punishment were specified, and the court did not only have to order the death sentence.

Mr. Indimuli, learned counsel for the 2nd and 3rd appellants, argued grounds 1 to 4 and 6 of the memorandum of appeal together, and abandoned ground 5 and argued grounds 7 and 8 together.

On the issue of identification, counsel submitted that Bernard stated that he had reported the incident to Mbita who subsequently did not testify; that the 2nd and 3rd appellants were strangers to Bernard, and yet no identification parade was conducted; that the two appellants were identified through dock identification; that one Ibrahim, the good samaritan did not participate in an identification parade and neither did he testify.

Mr Ogoti, learned counsel for the State, opposed the appeal, and submitted that the lower court re-evaluated the evidence and came to its own conclusion. Counsel submitted that no reasons were provided for production of the OB; that the appellants did not demonstrate how the failure to recall Bernard was detrimental to their defence.

On identification, counsel submitted that the offence took place in broad daylight, and the conditions were favourable. Bernard saw the appellants and identified them. Counsel further submitted that the 1st appellant pointed out the 2nd and 3rd appellants to PC Barasa and that the appellants were found in possession of various stolen items. The 3rd appellant was identified by a bitten finger which was seen by the court. As such, the appellants were properly identified.

On sentencing, counsel contended that under **section 296 (2)** of the **Penal Code**, death is the only sentence prescribed. Counsel concluded by stating that the evidence placed the appellants at the scene of the crime, and there is nothing to warrant interference with the findings of the courts below.

The case of ***M'Riungu vs Republic [1983] KLR 455*** sets out our duty as the second appellate court which is stated thus,

"Where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding of fact and law and it

should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached the same conclusion, which would be the same as holding the decision is bad in law."

From the submissions of counsel, we consider that the issues for determination are whether the appellants' rights to a fair hearing were violated; whether the appellants were properly identified; whether recent possession was correctly established and the sentence as pronounced by the learned trial magistrate was in accordance with **Article 25** of the **Constitution**.

We will begin with the issue that the appellants' rights were violated for reasons that the OB was not produced, and that the court declined to order Bernard's recall.

On 6th July 2006, though no reason was advanced, the court ordered that the OB of Awasi Police Station of 12th December 2006 be made available to the appellants. A further request was made on 17th August 2006. By 23rd March 2007, the OB had yet to be availed. On 12th July 2007, the OBs were produced in court. At this point, the 1st appellant requested that Bernard be recalled as he intended to cross examine him on "*the issue of the OB*". The prosecution objected, and in a ruling on 19th July 2007, the trial magistrate declined to recall Bernard for reasons that the request was made as an afterthought.

Undoubtedly, the OB was produced, and a request made to recall Bernard. **Section 150** of the **Criminal Procedure Code** provides that a court may, at any stage of a trial or proceedings, summon or call any person as a witness, or examine any person in attendance or recall and reexamine a person already examined. From this provision, the recall of a witness is not a mandatory procedure, and it is within the trial magistrate's discretion to determine whether or not to make such an order. On 19th July 2007, the trial magistrate delivered a ruling declining to issue an order for recall of Bernard, a matter that was within her discretion. In so doing, the issue of violation of the appellants' rights could not be said to arise. Consequently, this ground fails.

On the issue that crucial witnesses, namely one Mbita and Ibrahim were not called to testify, we agree with Mr. Ogoti that, the prosecution was not mandated to call them as witnesses, and nothing prevented the appellants from calling them as their own witnesses.

We turn to the central issue of this appeal which was whether each of the three appellants was properly identified. Upon analyzing the evidence on the identification the High Court stated,

***“The main issue for determination was that of identification of the three robbers. The offence occurred in broad daylight at about 7.00 a.m. The complainant had already encountered the assailants prior to the incident. He therefore had adequate opportunity to see and identify them. Indeed, he recognized one of them called Onyango Obando and pointed him out as the first appellant. He said that it was the first appellant who cut him on the head with the panga. He said that it was the first appellant who was the passenger on a bicycle on which the third appellant was a rider.*”**

***The complainant also said that the second appellant was the cyclist who joined the first and third appellant. Further, the complainant indicated that he was the one who inflicted an injury on the third appellant's finger as he resisted the robbery.*”**

In the case of the 1st appellant, clearly, identification was by way of recognition. In addressing the parameters for identification by way of recognition this Court in ***Peter Musau v. Republic (2008) eKLR*** stated thus:-

***“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him, and thus to put a difference between recognition and identification of a stranger. He must show for example that the suspect had been known to him for sometime is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness in serving the suspect at the time of the offence, can recall very well having seen him before the incident in question.”*”**

Bernard testified that he saw and recognized the 1st appellant, who was someone that was known to him. He was the passenger on the front of the bicycle, who had cut him on the head with a panga. Bernard knew him as ***Onyango Obando***. He also stated,

***“I had known 1st accused for about 3 years as he was staying near me at Muhoroni.”*”**

On cross examination by the 1st appellant, he maintained that position and further stated,

***“I have known you as you were staying in Muhoroni with your sister and brother in-law for the last 3 years. You are Michael Onyango Obando. You were there. It is 3rd accused who was cycling and you were sitting on the frame right in front of the person who was cyclist while the goods were behind 3rd accused. It is the three of you who were there and myself. By the time the incident occurred, you had stopped as you blocked my way. I*”**

went to the hospital. I reported that I had been attacked. I was not able to speak because of the injuries. When I was able to speak, I stated to police at Awasi and I explained my assailants. Barasa Inspector told me to go back to the hospital. I told Barasa that Onyango Obondo and his group assaulted me.”

The attack took place in broad daylight which enabled Bernard to see the 1st appellant without difficulty. He realised that he was someone known to him. In view of the evidence of recognition, there was no requirement for an identification parade, which in the circumstances would have been superfluous.

Like the courts below, we are satisfied that the 1st appellant was recognized by Bernard as one of the assailants who violently robbed him on the material day.

An analysis of the evidence shows that the 2nd and 3rd appellants were not previously known to Bernard. On cross examination by the 2nd appellant, Bernard did not state that he knew him but merely pointed him out in the dock. When the 3rd appellant cross examined him, he stated that he had not known him prior to the attack, and saw him for the first time that morning. As such, their case was not one of recognition, but of identification. Since no identification parade was conducted, at best the identification of the two appellants was dock identification.

But having said that, we do not consider that the failure to carry out an identification parade was fatal, as, both the trial court and the High Court found that the conditions at the time of the robbery were favourable for identification of the 2nd and 3rd appellants. As seen earlier, the offence occurred in broad daylight at about 7.00 a.m. and Bernard had already happened upon the assailants prior to the attack. He observed that the 3rd appellant was the rider of the first bicycle where the 1st appellant was a passenger, and the 2nd appellant was the cyclist of the second bicycle, who emerged from the sugar plantation, carrying a load. And that it was the 2nd appellant who joined the 1st and 3rd appellants in assaulting him.

The 3rd appellant was further identified by the injury on his left ring finger, which Bernard testified resulted from his having bitten the 3rd appellant in the ensuing struggle during the attack. The injury was apparent in court. Though, the 3rd appellant claimed that he was injured by a hammer on 4th December 2005 and that he was treated for a **“cut wound”**, we take the view that the injury to his finger was more consistent with a bite wound, than an injury inflicted by a hammer, and that the injury was inflicted by Bernard.

Lending further credence to identification of the 2nd and 3rd appellants was the fact that it was the 1st appellant, who was recognized by Bernard that led the police to the houses of the 2nd and 3rd appellants, and in so doing, conclusively linked them to the morning attack on Bernard. Given the circumstances, there could not have been any mistake in the identification of the 2nd and 3rd appellants.

Accordingly, we are satisfied that, Bernard saw and identified his assailants as the conditions were favourable, and further, there was ample opportunity within which to do so. We find the prosecution’s case was proved against the appellants, and there is no reason to interfere with the concurrent findings of the courts below in that regard. As a consequence this ground also fails.

Regarding counts 2 to 7, we are satisfied that the courts below arrived at the correct conviction and sentence on the basis of recent possession, more so for the reason that in their defence the appellants did not provide any explanation as to how the stolen items came to be in their possession. In the circumstances, we find that the appellants’ conviction on the doctrine of recent possession was well founded.

The final issue was the legality and severity of the sentence. Under **section 296 (2)** of the **Penal Code**, the death sentence is the only sentence prescribed. The sentence was therefore lawful. On the severity, by dint of **Section 361(1)** of the **Criminal Procedure Code**, this Court has no jurisdiction to entertain appeals on severity of sentence, See ***Macharia v R*, [2003] 2 EA 559**.

Regarding counsel's complaint that the trial magistrate's pronouncement was inhuman, **Article 25** of the **Constitution**, advocates for "*freedom from torture and cruel, inhuman or degrading treatment or punishment*". In the context of this provision, reference would be to the carrying out of actions or techniques aimed at subjecting a person to inhuman treatment. In our view, the trial magistrate's pronouncement cannot be equated to such actions, and as such would not fall within the meaning of **Article 25 (a)** of the **Constitution**. Consequently, this ground is devoid of merit.

In the result we, uphold the lower courts findings and convictions, and dismiss the appeals.

These are our orders.

DATED and delivered at Kisumu this 6th day of November, .2015.

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