IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 159 OF 2010

BETWEEN

WILLIAM OCHIENG OTIENO ALIAS OCHIPO ……..1ST APPELLANT

DAVID OCHIENG OKELLO …….....…...2ND APPELLANT

MALCOM ODHIAMBO OWINO ALIAS TAIL.. .....3RD APPELLANT

ANDREW OTIENO OTEMA …….....4TH APPELLANT

NICHOLAS ONYANGO OMONDI …….....…..5TH APPELLANT

KENNEDY OMONDI OYUGI …….....…..6TH APPELLANT

AND

REPUBLIC …….....…..... RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisumu (Karanja & Aroni, JJ) dated 23rd March, 2010

in H.C.CR.A. NOS. 138, 139, 140,141,142,143 & 144 OF 2007)

****

JUDGMENT OF THE COURT

1. The appellants and three others were charged with the offence of robbery with violence contrary to **Section 296(2)** of the Penal Code. The particulars of the charge against them alleged that on 26th November 2006 at around 8.30 pm at Karuoth Village of the then Siaya District within Nyanza Province, they robbed Alloys Owino Odhiambo (the complainant) of Kes.35,000/= in cash and two mobile phones (a Nokia 1110 and a Siemens A35) all valued at Kes.50,000/=. It was further alleged that at or immediately before or immediately after that robbery they subjected the complainant to actual violence.

2. The appellants pleaded not guilty but after trial before the Principal Magistrate at Siaya, two of their confederates were acquitted but the appellants were convicted and sentenced to death. On

appeal to the High Court, the appeal of one of their confederates was allowed but those of the appellants were dismissed thus provoking the present appeal.

3. The gravamen of the appellants' appeals is that their identification as being among the people who robbed the complainant was flawed and that the evidence against the 4th and 5th appellants on recent possession was unreliable.
4. Messrs Jamsumbah and Karanja, learned counsel for the appellants, argued that the High Court, having dismissed the evidence of the identification parades at which the appellants were purportedly identified, no other evidence remained to support the appellants' conviction. Mr. Karanja added that PW7 who testified on the 4th and 5th appellants' recent possession of the complainant's Siemens mobile phone was an accomplice whose evidence should have been dismissed.

5. Mr. Ketoo, learned Prosecution Counsel, conceded the appeals of the 1st, 2nd, 3rd and 6th appellants. He agreed with the High Court that the identification parades at which the appellants were identified were improperly conducted thus rendering the testimony of PW1 worthless. He, however, supported the conviction of the 4th and 5th appellants on the basis of the doctrine of recent possession. He argued that PW7 to whom the 4th and 5th appellants sold the Siemens phone was a credible witness whose testimony the two courts below found no fault in.

6. Having considered these submissions and carefully read the record in this appeal, we agree with counsel for the parties that the High Court having dismissed the identification parade evidence, no credible testimony remained to support the conviction of the 1st, 2nd, 3rd and 6th appellants.

7. The 1st, 2nd, 3rd and 6th appellants were strangers to all the prosecution witnesses. This was therefore not a case of recognition but one of mere visual identification.

8. The law is clear on a case based solely on visual identification. As was stated in **Wamunga Vs Republic [1989] KLR 424 at p. 426:-**

> "It is the law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction."

9. Applying this principle to this case, it was the testimony of Esther Awuor, PW4, that a day after the robbery she saw the 6th appellant hawking at Ukwala market. She informed PC Dennis Miheso, PW8, of that and the 6th Appellant was soon thereafter arrested.

10. PW8 contradicted himself on the arrest of the other appellants. He claimed that PW4 had also informed him of having seen the 1st appellant at Ukwala market and on the basis of that information, he also arrested the 1st appellant. PW4 never gave any such information to PW8. PW8 also testified that upon the arrest of the 5th appellant, the latter led him to the arrest of the other appellants. However, in cross-examination he said it was an informer who proffered the information that led to the arrest of some of the appellants.

11. PW4 also said that at one stage (she did not say after how long) the robbers switched off the solar electric light in their house. She also testified that the parade members were "identical".

12. This evidence, to say the least, was far from being watertight as required in such cases. We therefore agree with counsel that the High Court erred in upholding the conviction of the appellants based on their dock identification by the prosecution witnesses.
13. We also agree with Mr. Karanja that the evidence on recent possession was unreliable for two reasons. First, there was contradiction on the identity of the Siemens phone recovered from PW7.

Whereas the charge sheet and the complainant described it as a Siemens A35, PW7 talked of having been sold a Siemens C35. Secondly, PW7 was clearly an accomplice. He did not give any plausible reason why he accepted to buy the phone without any documents proving that it belonged to either the 4th or 5th appellants.

14. For these reasons, we find that the appellants' conviction cannot be sustained. In the circumstances, we allow this appeal, quash the appellants' convictions and order that they be set free forthwith unless otherwise lawfully held.

DATED and delivered this 17th day of December, 2015.

D. K. MARAGA

……

JUDGE OF APPEAL

D. K. MUSINGA

…….……..…..

JUDGE OF APPEAL

A.K. MURGOR

……..…….

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR