



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: P. KIHARA KARIUKI, PCA, GATEMBU & M'INOT I, JJ.A.**

**CRIMINAL APPEAL NOS. 343 & 344 OF 2009**

**BETWEEN**

**MARTIN ISAIAH ASWAN *alias* BISHOP ..... 1ST APPELLANT**

**PETER OTIENO OWINO ..... 2ND APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from the judgment of the High Court of Kenya at Nairobi (Ojwang & Omondi, JJ) dated 5th November, 2009 in**

**HCCR.A NOs. 367 & 369 of 2005)**

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**JUDGMENT OF THE COURT**

The appellants, *MARTIN ISAIAH ASWAN alias BISHOP* and *PETER OTIENO OWINO alias EDGAR* were on 15th July, 2005 convicted by the Senior Principal Magistrate, Nairobi of three counts of robbery with violence contrary to *section 296(2) of the Penal Code* and sentenced to death. The particulars of the offence in count I were that on 10th January, 2004, at Kaloleni Estate, in Nairobi, jointly with another not before the court and while armed with dangerous weapons, namely pistols, they robbed *FREDRICK ODOUR ODHIAMBO* of KShs.200/- and at or immediately before or immediately after the said robbery, beat and injured the said Frederick Odour Odhiambo on his left hand.

The particulars of the offences in counts II and III were the same as those set out in count I, save that the victim in count II was *GEORGE ANYIM KRISPO* who was, at the time of the robbery or immediately before or immediately after, threatened with actual violence, and robbed of KShs.400/- and a packet of cigarettes. In count III, the victim was *JOHN DANDE ONINGO*, who was robbed of a Samsung mobile phone, Oris wristwatch, KShs.2,500/- and national identity card and was at the time of the robbery or immediately before or immediately after, beaten and injured.

Aggrieved by the judgment and sentence, the appellants filed two separate appeals in the High Court, which were consolidated and heard together. On 5th November, 2009, the High Court dismissed the appeals and upheld the conviction and affirmed the sentence. The appeal before us is the appellants' second appeal, which by dint of *section 361 of the Criminal Procedure Code* is restricted to issues of law only.

The factual background of the appeal, as settled by the two courts below is as follows. On 10th January, 2004, at about 1.00 am in the morning, the three complainants, namely Frederick Odour Odhiambo (PW1), George Anyim Crispo (PW2) and John Dande Oningo (PW6), in the company of two of their neighbours, left a gathering at Kaloleni that had been making arrangements for the funeral of another neighbour of theirs. As they were approaching their homes, also in Kaloleni, they were accosted by three men armed with pistols, who fired a shot and ordered them to lie down. The robbers then proceeded to rob the complainants of the properties set out above and threatened or used actual violence on them as particularized in the charge sheet.

The complainants maintained that the appellants were two of the robbers. It was common ground that all the three complaints were well known to the two appellants; the complainants and the appellants were all neighbours in Kaloleni and had lived together for a considerable period of time, estimated by PW1 to be up to twenty years.

The lighting at the scene of the robbery was said to have been supplied by moonlight, security lights and torches in possession of the robbers. The appellants were not arrested until almost a month later, though they continued staying in Kaloleni with the complainants. Indeed, the appellants were not arrested directly in connection with the robbery incident of 10th January, 2004. The 1st appellant had been detained at Buru Buru police station after a general police swoop and was not arrested in connection with the robbery until 9th February, 2004, when the police claimed that they had received a report that he had been terrorizing people at Kaloleni. According to the prosecution, it was the 1st appellant who led the police to the 2nd appellant.

Mrs Rashid and Mr Oyalo, learned counsel respectively for the 1st and 2nd appellant filed between them 13 grounds of appeal. In our view, this appeal turns on two issues only; firstly, the identification of the appellants and secondly the adequacy of evaluation of the evidence by the first appellate court. It is apt to point out at this stage that Mr Kivihya, learned counsel for the respondent concedes this appeal primarily on the ground of identification of the appellants.

But as this Court has stated on numerous occasions, the Court is not bound by the views of the learned prosecutor: see *NORMAN AMBICH MIERO & ANOTHER V R*, NYR CR.A NO. 279 OF 2005 (unreported).

The two courts below found that the contradictions in the evidence of the prosecution pertaining to the identification of the appellants were not material. In our view, the contradictions were significant enough to raise a reasonable doubt whether the appellants had been properly identified as the robbers and further whether the prosecution had proved its case beyond reasonable doubt. The two courts below appear to have been greatly influenced by the fact that the complainants and the appellants were known to each other. However, as we shall show below, the totality of the evidence adduced before the trial court cast serious doubt on the alleged recognition of the appellants by the complainants at the scene of the robbery.

All the five people who were attacked on 10th January 2004 gave evidence before the trial court. All of them were neighbours who knew, and were well known, by the appellants. Yet PW 4, Tacla Mutindi Mutisya, could not identify the appellants as the robbers on the material night. On cross examination by the 1st appellant, she stated that she could not see the faces of the assailants. But more profound in this respect was the evidence of PW 6, John Dande Oningo, one of the complainants. His evidence was that they were attacked by “over 8 people”, (not 3 people as stated by the other 2 complainants). The attackers had torches, but even with the light from those torches, one could not see clearly. In his evidence, he could not identify any of the appellants as the attackers, even though he knew them for a long time. This complainant was a security officer at Africa Theatre and would have been expected to have been more alert during the robbery than the other witnesses. In his own words:

*“I know the accused persons (the appellants) in court. They are like my children. Their parents and I are age mates and we grew up together, I can’t lie to the court. I did not see them the day of the attack.”* (Emphasis added).

The two courts below were confronted with conflicting evidence in which some of the prosecution witnesses were categorical that there was not sufficient light from which to identify the perpetrators of the robbery and that the appellants, who were known to them, were not amongst the attackers. If PW 4 and PW6, who were present at the time of the attack and who were known to the appellants could differ with PW1, PW2 and PW3 on the identity of the robbers, how can it be said that the identity of the appellants as the robbers was watertight?

In addition, beyond making reference to “moonlight”, “security lights” and “torches”, there was really no inquiry, even fleeting inquiry, by both courts as to the intensity of the lighting or the distance of the security lights from the *locus in quo*. In our view this was an extremely essential undertaking, granted that some of the key prosecution witnesses themselves had cast serious doubt regarding the adequacy of the lighting as well as the identity of the robbers. In KARANJA & ANOTHER V R, (2004) 2 KLR 140, this Court quashed a conviction which was based on identification by torchlight and moonlight, the brightness of which was not ascertained by the trial and the first appellate courts.

This Court has stated time and again that identification by recognition is more reliable because it is based on the witness’s familiarity with the accused person. However, that alone does not obviate the need to examine the evidence of recognition very closely. As was noted in MAITANYI V R, (1986) KLR 198, at page, 201:

*“The strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.”*

Subsequently, in WAMUNYU V R, (1989) KLR, 424 the Court, echoing R V TURNBULL, [1976] 3 All ER) 549, repeated the caution regarding reliability of identification, even when it is by recognition, in the following terms:

*“Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.”*

The case against the appellants was founded solely on their alleged identification, because they were arrested almost one month after the robbery and none of them was found in possession of the property that was stolen from the appellants or the pistols that were used during the robbery. In CLEOPHAS OTIENO WAMUNGA VS R, CR.A NO. 20 OF 1989, this Court emphasized the special caution with which the issue should be approached when the prosecution case is built exclusively on identification. The Court stated:

*“Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.”*

Lastly, in JOSEPH NGUMBAO NZORO V R, (1991) 2 KLR 212, the Court explained that before accepting visual identification as the basis for a conviction, the court has the duty to warn itself of the inherent danger of such evidence, and that a careful direction regarding conditions prevailing at the time of identification and the length of time the witness had the accused under observation together with the need to exclude the possibility of error is essential. We would add that this is even more compelling when the identification is under difficult circumstances, as was the case in this appeal. For as this Court stated in JOEL SAIYANGA OLE MWANIKI & ANOTHER V R, CR.A NO. 229 OF 2003 (unreported):

*“[T]he extra care required when considering evidence on visual identification is not confined to evidence of a single witness in difficult circumstances but the care is required in respect of visual identification in all circumstances.”*

What we find more intriguing, if not disconcerting, in this appeal is the fact that although the complainants claimed that they were robbed by the appellants who they all knew, and that they had immediately reported that fact to the police, the complainants continued to live in Kaloleni side by side with the appellants for almost a month before they were arrested, and even then, initially for matters other than the robbery on 10th January, 2004. There was no evidence that any of the appellants fled from Kaloleni. On the contrary, in his defence the 2nd appellant testified that he was operating his kerosene shop at Kaloleni as usual. The complainants PW1 and PW2 were operating a video library next to that kerosene shop. In his evidence PW1 himself told the trial court that the 1st appellant lived a mere 600 meters away from his house. Yet it took a month for the appellants to be arrested for the alleged robbery. If truly the complaints had been robbed by the appellants who lived and continued to live in their midst in Kaloleni, and they had immediately reported to the police, why then were the appellants not arrested immediately? We have not seen any rational explanation for this unfathomable state of affairs.

The evidence of PW5, PC Michael Kirwa Meli is quite illuminating regarding the arrest of the appellants. His evidence was that the 1st appellant had been arrested in a police swoop and he was detained in Buru Buru police station. He had not been arrested in connection with the robbery of 10th January, 2004. It was while so detained that he was suspected of being among the people terrorizing the residents of Kaloleni. The witness stated:

*“The 1st accused led us to the 2nd accused person’s house. We arrested the 2nd accused person and we took him to Buru Buru and later he was taken to Shauri Moyo police station and then we handed him over to the investigating officer. We had reports that they had robbed many people within Kaloleni.” (Emphasis added)*

The evidence of PW5, when considered in light of that of PW2 renders credence to the appellants’ contention that they were victims caught in the determined efforts to contain rising crime in Kaloleni. PW2 had told the court that the security situation in Kaloleni was “quite pathetic” and people were complaining loudly about that situation. So bad was the situation that the Provincial Commissioner had to visit the area to look into the situation and mollify the residents. It is in this context that PW5’s evidence that the police had reports that the appellants “had robbed many people within Kaloleni” must be seen. It leaves no doubt that the appellants were not arrested because of the robbery on 10th January, 2004 but as part of the general drive to address insecurity in Kaloleni.

We find that the trial court did not warn itself of the dangers of convicting the appellants solely on the evidence of identifications, it did not consider the conditions prevailing at the time of identification, the length of time the witness had the appellants under observation, the nature of the light, its size, intensity and position relative to the appellants. The court did not also resolve the fundamental contradictions that were inherent in the prosecution case regarding the purported identification and recognition of the appellants. The first appellate court too, erred in law by failing to subject the evidence as a whole, to fresh and exhaustive scrutiny which the appellants were entitled to expect it to do. As was stated by this Court in GABRIEL NJOROGE V R, (1982-88) 1 KAR 1134 at page 1136:

*“As this Court has constantly explained, it is the duty of the first appellate court to remember that parties to the case are entitled, as well on the question of fact as on the question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect..If the High Court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly misdirection and non- direction on material points are matters of law.”*

See also DINKERRAI RAMKRISHAN PANDYA VS R, (1957) EA 336.

We have come to the conclusion that because of the matters stated above, we are not satisfied that the appellants’ conviction for the offence of robbery with violence was sound and safe. Accordingly we allow the appeal, quash the conviction and set aside the sentence. We direct that the appellants be set at

liberty forthwith unless they are otherwise lawfully detained.

Dated and delivered at Nairobi this 4th day of April, 2014.

**P. KIHARA KARIUKI, PCA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

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