



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & M'INOTI, JJ.A)**

**CRIMINAL APPEAL NO. 120 OF 2011**

**BETWEEN**

**PAUL OWUOR NDEDE )**

**SAMSON OMONDI ONGOU)..... APPELLANTS**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from Judgement of the High Court of Kenya at Kisii (Makhandia & Sitati, JJ)*

*dated 15th March, 2011*

**in**

**HCCR.A.NO. 43 & 63 OF 2010)**

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**JUDGEMENT OF THE COURT**

The appellants, **Paul Owuor Ndede** (1<sup>st</sup> appellant) and **Samson Omondi Ongou** (2<sup>nd</sup> appellant), faced one charge of robbery with violence contrary to **section 296 (2)** of the Penal Code, the particulars of which were that on the 3<sup>rd</sup> day of May, 2004 at Kokwanyo location in Rachuonyo District within Nyanza Province, the appellants, while armed with dangerous or offensive weapons namely pangas and runguis robbed **Elisha Okumu Omolo** of his Kshs.18,200/= . They pleaded not guilty, but after full hearing in which six prosecution witnesses testified and the appellants also made unsworn statements in their defence, they were convicted as charged and sentenced to death. They appealed to the High Court (**Makhandia J, as he then was, and Sitati, J.**) but their appeal was dismissed and hence this second appeal.

Brief facts of the case may be stated. On the material date (3<sup>rd</sup> May, 2004) Elisha Okumu Omolo (PW1) (Omolo) and his wife **Alice Atieno Okumu** (PW3) (Alice) were asleep in their newly constructed

house (*doors had not even been fixed thereon*), when at about 12.30 a.m., they realized that two people had entered their house. The intruders were armed with a panga and a rungu and they also had torches. They beat the couple and stole Kshs.18,200/= which Omolo had in his purse. They also took his Identity Card and digital watch. They finally tied Omolo's hands and left. Alice then screamed which screams attracted neighbours.

Omolo and Alice testified that the intruders were the appellants who they recognised as their neighbours. They recognised them with the help of light from the torches the appellants had.

Omolo and Alice reported the robbery to their Assistant Chief and to PC **Gideon Onyango** (PW5) (P.C. Onyango) of Oyugis Police Station where they were issued with P3 forms. They were treated at Rachuonyo District Hospital. **Stephen Oyule**, a clinical officer, completed and signed the P3 forms which were produced at the trial by **Dr. Peter Ogola** (PW6) on behalf of Stephen Oyule who had left the country. The injuries sustained by Omolo and Alice were each classified as harm.

During the same night of 3<sup>rd</sup> May, 2004, **Siprosa Ogutu Onyango** (PW2) (*Siprosa*) was in her house sleeping. At about midnight two people went to her house to purportedly shelter from rain. She identified the two as the appellants. The two stayed in her house until 5.00 a.m. and then left leaving their jungle jacket. Siprosa then reported to the Assistant chief about the jacket.

**Kooli Conel Aimo** (PW4) (*Aimo*) was then an Assistant Chief of Kamagak East Location. His sub-location borders the sub-location of Omolo and Alice. On 6<sup>th</sup> May, 2004 at 9.00 a.m., he was informed of the robbery upon Omolo and Alice by the appellants. Later he arrested the 2<sup>nd</sup> appellant and handed him over to Oyugis Police Station. The 1<sup>st</sup> appellant had already been arrested by PC Onyango.

The appellants were then charged as already stated. The 1<sup>st</sup> appellant in his unsworn statement stated:-

*“I am Paul Ndede Owuor. Live at Sino Kagola. I was a farmer. Police came and arrested me that I was required at police station. I knew nothing concerning this case. I was placed in cell. I know nothing about the robbery alleged that I committed.*

*I had a grudge with the complainant in this case. Complainant had earlier on chased me with a panga.”*

The defence of the 2<sup>nd</sup> appellant was also short and we reproduce it herebelow:-

*“I am Samson Omondi Ongou. I reside at East Kamagak Location, Ochieng Sub-location. On 3/5/2004 I boarded a vehicle at a centre known as Orembe. I reached a place Abida at Karambundo and sold all the potatoes I had then (a) (sic,) came back at 5 p.m. While on the way at Dida trading it started raining I waited then I went to a certain home where changaa was sold. I stayed there upto midnight then left for home. The following day in the morning our area Chief came and arrested me. I had quarreled with my step mother over a plot when I was brought to police station. I was charged with the offence of robbery. I do not know anything concerning this case complainant did not identify me. I also did not know him. I was arrested in the year 2005 while my co-accused was arrested in the year 2004. I do not know my co-accused.”*

In his judgment the learned Senior Resident Magistrate (**R. Ngetich**), as required of him, set out the evidence which was adduced before him and concluded that Omolo and Alice had indeed been robbed. As to who had robbed them, the learned magistrate concluded as follows:-

**“PW1 said he gave Accused 1 and Accused 2's names to police at the time he reported. This clearly confirms that he had seen their faces and identified them to be able to give out their names. PW1's ability to also identify Accused persons voices strengthens his identification. PW3 said he (sic) looked at Accused's face as he bend (sic) down to remove money. This provoked Accused 1 to hit him (sic) on**

*the forehead with a rungu ..... PW3 said the light from the torch accused persons had provided light which enabled her to see their faces and identify them. The fact that she gave police accused persons' names when reporting clearly confirm(s) that she identified them. PW1 and PW3's identification was corroborated by PW2's evidence. She said that Accused 1 and Accused 2 took shelter from rain in her house from 1. am to 5. am when they left. She said Accused 2 had worn a jungle jacket and that he had a torch. PW2 further said Accused 2 forgot his jungle jacket in her house. PW2 (sic) identified the jungle jacket as one which Accused 2 had worn during the attack. Accused 1 and Accused 2 never challenged evidence adduced by PW2 to the effect that they were in her house from 1. am to 5. am wearing jungle jackets. PW5 confirmed that PW1 and PW3 reported to him while giving names of the people who attacked them.*

.....  
*From the foregoing I find that Accused 1 and Accused 2 were positively identified as the people who robbed the complainant herein.”*

That was the decision which was the subject of the first appeal before the High Court which considered the entire evidence and in dismissing the appeal, the learned Judges of the High Court stated:-

*“After reconsidering and evaluating all the evidence on record, and bearing in mind that the trial court had the singular privilege of seeing all the witnesses and the appellants during the trial, we do agree with the trial court that the recognition of the two appellants by PW1, PW3 and PW2 cannot be faulted. The graphic details given by both PW1 and PW3 as to how the items were taken from them and by who cannot have been a made-up story. PW3 and PW1 were able to give a description of the clothes which each of the appellants wore that night. We are thus satisfied that though the intensity of the light from the torch(es) was not enquired into by the court, there was no error in both the voice and facial recognition of the two appellants..... We are also satisfied that they are the same 2 people who, after the robbery took refuge in the house of PW2*

.....  
*We have turned the evidence inside out and have not found any suggestion by the appellants that there was a grudge between them and the family of PW1 and his wife, PW3. Nor was there any suggestion that PW2 had any alterial motive in testifying against the appellants.*

.....  
*We, have considered the appellants complaint that there were contradictions in the evidence of the prosecution witnesses. We note that there is some slight variance as to time when PW2 was woken up by the appellant and the time of the robbery. It is our humble view however, this discrepancy is immaterial.”*

The learned Judges of the High Court proceeded to dismiss the appellants' appeal.

The appellants appeal against that decision, and of course, the decision of the subordinate court. Four grounds of appeal were filed by the appellants, in person. **Mr. Ochieng**, the learned counsel for the appellants, adobted the first of those grounds that the learned Judges of the High Court erred in law in relying on the evidence of recognition in the absence of first report description of the appellants' names in the Occurrence Book. Counsel also relied upon seven grounds of appeal in a supplementary Memorandum of Appeal filed by **M/s Nyawiri Osero Carilus** and Company Advocates. Counsel however, condensed those grounds into one by only arguing grounds 1 and 2 thereof together. In addition to those grounds, we allowed counsel to argue an additional ground to the effect that the evidence of Aimo (PW4), and PC Onyango (PW5) was not translated to the appellants in a language they understand thereby infringing **Article 77(2) (b) and (f)** of the retired Constitution now **Article 50 (2)(m) of the Constitution 2010**). In arguing this ground learned counsel emphasized that proper interpretation of evidence is a constitutional requirement and failure to do so in this case prejudiced the appellants.

With regard to the issue of failure by the police to mention the names of the appellants in the

relevant occurrence book, counsel submitted that on the appellants' application the learned trial magistrate made an order for the OB's production which never happened.

With regard to the two grounds in the supplementary memorandum of appeal, learned counsel submitted that the evidence of identification was not positive given the difficult conditions obtaining at the time of the robbery.

**Mr. Abele**, the learned, Assistant Director of Public Prosecutions, supported the conviction of the appellants and the sentence meted out to them. In his view, there was no breach of **Article 77(2) (b) and (f) (now Article 50 (2)(m))** of the Constitution. Learned counsel acknowledged that the language used at the trial should have been indicated. In his view however, failure to indicate the same was not fatal as mere failure to indicate the language used did not mean interpretation had not taken place.

On identification, Mr. Abele submitted that the appellants were indeed identified by recognition by Omolo, Alice and Siprosa who were neighbours of the appellants. Furthermore, according to counsel, Omolo and Alice gave the names of the appellants in their first report which evidence was corroborated by that of Siprosa.

We have considered the record, the grounds of appeal argued before us and the submissions of counsel. We start with the issue of identification. It was not in dispute that Omolo was robbed of Kshs 18,200/= as stated in his evidence and that of Alice. We have also ourselves, like the trial court, and the High Court, come to the conclusion that Omolo and Alice were assaulted immediately before and at the time of the robbery. Indeed Stephen Oyule, the clinical officer then stationed at Rachuonyo District Hospital indicated in their P3s that they each suffered harm. The robbery was in any event perpetrated by two assailants so, the offence of robbery with violence under **Section 296 (2)** of the Penal Code was proved on the evidence. The main question was, in our view, as to whether the appellants were the attackers of Omolo and Alice.

We are alive to the duty of courts when considering a case such as is before us which depends wholly or to a large extent on the correctness of the identification of accused persons. The court in such a case has a duty to ensure that the evidence of identification is watertight before convicting the accused. That is the law even where recognition is alleged. In **Roria - V - R [1968] EA 583 at P. 584**, Sir Clement De Lestang V.P. Stated, *inter alia*, as follows:-

***“A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner L.C said recently in the House of Lords, in the course of a debate on S. 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:***

***“There may be a case in which identity is in question and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity.”***

Courts in Kenya have been alive to the sentiments expressed by Lord Gardner for instance in the case of **Kamau - V - Republic [1975] EA 139**, this Court, differently constituted, stated:-

***“The most honest of witnesses can be mistaken when it comes to identification.”***

It is therefore important that the evidence of identification be examined carefully before a court can enter a conviction based on it. We have on numerous occasions given guidance on the way to treat such evidence whether a witness purports to identify a stranger or purports to recognize an accused person. One such case is that of **Cleophas Otieno Wamunga - V - Republic [1989] KLR 424**, where we stated:-

***“Evidence of visual identification in criminal cases can bring about 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 identification of the accused which he alleges 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. The way to approach the evidence of visual identification was succinctly stated by Widgery, C.J. in the well known case of R. vs Turnbull [1976] 3 All ER 552 where he said:***

***“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”***

In the appeal before us, the learned Senior Resident Magistrate in his judgment summarized the evidence which was adduced before him and evaluated it before coming to the conclusion that the appellants had been positively identified by recognition. The learned Judges of the High Court likewise also analyzed the evidence afresh and having carefully done so, arrived at their own independent conclusion as required of them in law (see the case of ***Okeno - vs - Republic [1972] EA 32***). The two courts reached concurrent findings on matters of fact as regards the identification of the appellants and that was that the appellants were positively identified by Omolo and Alice and further that around the same time the two were attacked, the appellants took refuge in the house of Siproso. In law, as we have said time without number, we cannot interfere with a finding of fact unless we are satisfied that there was no evidence at all to support the same or that there was serious misdirection which led to miscarriage of justice. We cannot say that in this case there was no evidence at all upon which the two courts below could conclude that the appellants were positively identified. Omolo and Alice knew the appellants prior to the attack upon them. They gave their names in their statements to police. Siproso who had not known that Omolo and Alice had been attacked the same night buttressed their evidence. She too knew the appellants prior to their seeking refuge in her house in the dead of night which, according to the two courts below, was soon after Omolo and Alice had been attacked. We have not detected any serious misdirection on the part of the two courts.

Related to the preceding ground was the issue the appellant raised regarding the failure to produce the Occurrence Book (OB). The 1st appellant asked for the OB to be produced in court but the record does not show that it was indeed produced. Counsel for the appellants submitted that the appellants were thereby prejudiced. Our perusal of the record shows that on 13th September, 2005 after the testimony of PC Onyango who was PW5, the 1<sup>st</sup> appellant asked for the OB report to be produced in court. The learned Senior Resident Magistrate then made an order standing down PC Onyango. At the resumed hearing of the case the next day (14<sup>th</sup> September, 2005) PC Onyango again took the witness stand and testified as follows in further cross-examination by the 1<sup>st</sup> appellant:-

***“Complainant made a report and gave out your name. The names are by complainant's statement. Complainant gave the name. I am the same person who booked report and recorded statements. I did not write the name in O.B. but in statements.”***

It is not clear whether PC Onyango had the Occurrence Book in court then as he was being cross-examined. It would appear however, that the 1st appellant, who had asked for the OB to be produced, was satisfied with the answer given by PC Onyango regarding the OB. We say so, because he made no further mention of the OB until he closed his defence. In any event we wonder of what further use the 1st appellant would have made of the OB given the acknowledgement by PC Onyango that he did not record the names of the appellant in the same but did so in the statements made to him by Omolo and Alice.

It is, in the premises, plain to us that the hearing of the case proceeded on the basis that production of the OB was not important given the further evidence of PC Onyango. Considering the subsequent conduct of the appellant, we are of the view that non-production of the OB did not occasion a failure of justice and did not in any way prejudice the appellants.

The only other ground which we allowed counsel for the appellants to argue was that in the cause of the appellants' trial there was breach of Article 77(2) (b) and (f) of the retired Constitution now, Article

50(2) (m). Counsel submitted that the language in which the evidence of PC Onyango and **Dr. Peter Ogola (PW6)** was given (English) was not understood by the appellants. Counsel referred us to the record of the trial court and stated that the same did not indicate that the evidence was translated to the appellants in Dholuo which was the language they understood.

Our perusal of the record of the proceedings before the trial court reveals that although interpretation from English to Dholuo is not indicated, yet when PC Onyango completed his evidence in chief, both appellants cross-examined him at some length and after Dr. Peter Ogola (PW6) completed his testimony in chief, the 1<sup>st</sup> appellant cross-examined him but the 2<sup>nd</sup> appellant had no question for him. It is also to be observed that when the appellants gave their statements they never alleged that the evidence of PC Onyango and Dr. Peter Ogola was not interpreted to them.

Our conclusion on this aspect of the appellants' complaint is that it cannot be said that the appellants did not understand what the two witnesses said and when they went before the High Court no such complaint was made. In the end the submissions relating to Article 77(2) (b) and (f) of the retired Constitution have no merit and we reject the same.

The upshot of all the above is that this appeal cannot succeed. It is dismissed in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 27<sup>TH</sup> DAY OF JUNE, 2014.**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

**F. AZANGALALA**

.....

**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**