



**IN THE COURT OF APPEAL  
AT KISUMU**

**(Coram: ONYANGO OTIENO, KIAGE, & KANTAI, JJA)**

**CRIMINAL APPEAL NO. 280 OF 2010**

**BETWEEN**

**NORMAN KEPHA ORACHA .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(An appeal from a judgment of the High Court at Kisumu before (Hon. Justices J. R.**

**Karanja and A. Aroni) dated 8th June, 2010**

**in**

**H.C.R.A. NO. 170 OF 2009)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant **NORMAN KEPHA ORACHA** was tried and convicted by the Senior Principal Magistrate at Kisumu on four counts of robbery with violence contrary to **Section 296(2)** of the Penal Code in connection with a robbery that occurred on 11th March 2008 at Neighbours Pub in Kisumu City. Various items were stolen from the four victims of the robbery in which one of them, Dr, John Opondo Onyango, was shot dead. The appellant was said to be in the company of others not before the court and armed with dangerous weapons namely pistols, pangas and rungus. The appellant was duly sentenced to death on all counts but with the last three being held in abeyance.

The appellant was not satisfied and filed an appeal at the High Court at Kisumu. His appeal was heard in full and the learned Judges of the High Court (J. R. Karanja and A. Aroni JJ.) dismissed it in entirety in a judgment delivered on 8th June 2010 thus provoking this appeal.

The appellant's grievance are captured in the Memorandum of Appeal filed by the firm of S. M. Onyango & Associates, Advocates which raises four succinct grounds of appeal, namely:-

- 1. That the superior court erred in law in failing to appreciate that the evidence on identification was so weak as to be insufficient in being a basis for a sound identification.**
- 2. That the superior court lowered the standard of proof in regards to identification to the prejudice of the Appellant.**

**3. The superior court erred in law in failing to analyze the evidence as a whole in arriving at its conclusions and findings.**

**4. The superior court shifted the burden of proof."**

The fulcrum on which the fate of the appellant's appeal turns is that of identification and **Mr. Indimuli**, the appellant's learned counsel did well to condense the four grounds into that single issue. Counsel's submission on the issue, quite simply put is that the conditions and circumstances obtaining at the time of the incident did not conduce to a positive identification of the appellant at the scene free from the possibility of error. He weaved this submission with the argument that there were such glaring contradictions and inconsistencies in the identification evidence tendered by prosecution that the learned Judges' ought to have quashed the appellant's conviction and their failure to do so was indicative of a failure to forthfully discharge their duty as a first appellate duty to reevaluate and reanalyze the evidence before arriving at their own independent conclusions.

The evidence as was presented by the prosecution was that on the material night, some five friends were at a Bar called Westway in Kisumu in the small hours of the morning between 1.00 and 2.00 a.m. drinking beer. They were **FREDRICK NYAWANA (PW1)**, **SAMUEL NYABINDA (PW2)**, **MIRIAMNYAKUNDI (PW4)**, **Dr. OPONDO** and an unnamed lady. They were being served and attended to by a waitress named **JOSEPHINE ABONDO (PW3)**. At 2.00a.m or thereabouts, a young man entered the bar and sought to purchase coke soda in a plastic container. PW3 told him that they did not stock that kind of soda whereupon the young man left.

Barely five minutes later, the little drinking party was disrupted by a sudden command that the patrons lie down. The command was from a gun-totting young man claiming to be a policeman. He had walked into the bar followed shortly afterwards by three other young men, his accomplices. The gang ransacked the patrons' pockets which they emptied of money and other valuables. They also relieved them of their watches and cell-phones. For food measure they helped themselves to some six tusker beer cans.

When the command went out for the patrons to lie down, they all complied and this saved their lives. Dr. Opondo, on the other hand, quested the order wondering which police officer was disturbing the revellers at that hour. By way of response the gun wielding gangster twice pulled the trigger from point blank range. Dr. Opondo fell from the bar stool. Those shots proved fatal. PW2 who first turned to see who had commanded them to lie down was also shot in the mouth and lost three teeth thus escaping death by the skin of his teeth, literally.

The incident took but a few minutes after which the robbers exited the bar. The serving patrons put Dr. Opondo in PW1's car and drove him to the Agha Khan hospital where he was pronounced dead on arrival.

The arrest of the appellant was apparently instigated by an informers' report that he was involved in the robbery in question. Police officers including P.C EVANSMACHOKA (PW 5) and **P.C FELIX KIMUTAI (PW 9)** proceeded to the Mamba Hotel on Moscow Road where they arrested him. They ordered him to take them to his house which they searched before taking with them some safari boots as well as some brown and black shoes before taking him into custody. The shoes were taken on account of the police having been told that one of the suspects was wearing safari boots. The evidence regarding the shoes was however found by the learned Judges to be shaky and not capable of being relied on for a conviction and we shall say no more on them.

The great sticking print of this appeal, as was in both courts below is whether the appellant is the trigger happy gangster who walked into the bar, ordered the patrons to lie prostrate and shot two of them, are fatally. Both prior Courts found that he was, and the question we must determine is whether in all circumstances of the case, there was a credible basis for so finding. We embark on the enquiring with a keen cognizance of the fact that as a second appellate court, we are extremely slow to interfere with the concurrent findings of fact by the trial and first appellate courts considering that

appeals to us are, by dint of Section 361 of the Criminal Procedure Code, confined to matters of law only and exclude matters of fact. See also **NJOROGE -VS- REPUBLIC [1982] KLR 388**. This Court does have a greater leeway when sitting on a second appeal to interrogate the factual basis for the conclusion of law arrived at when at issue is the question of identification. This is because identification is a matter of mixed law and fact as has been held by this Court on numerous occasions. In **BONIFACE OKEYO -VS- REPUBLIC [2001] eKLR**, for instance, Chief Justice Chunga, sitting with Tunoi and Shah JJA (as they were then), put it thus, and it bears repeating:

***"The law on identification cannot be in dispute in our courts. The evidence must be scrutinized carefully and the court must be satisfied that identification is positive and free from the possibility of error. All surrounding circumstances, particularly circumstances under which identification was made must be scrupulously considered. In this appeal we have considered all [these] matters.... We are mindful of the fact that we are dealing with a Second appeal and, as such, we must not re-open issues related to facts. Nevertheless, identification is always an issue of mixed law and fact. Where, therefore, a submission is more that the lower courts have failed to fully evaluate [the] circumstances and conditions of identification, we think such submission leads to an issue of law which would justify our intervention even in a second appeal such as this."***

The case for our intervention, strong enough when identification is raised, is strengthened in our view, when, as here, it is tied to the twin submission that the first appellate court failed in its duty of re-hearing the case but always with the rider that it lacks the advantage of observing the witnesses giving live testimony. With that duty on the part of the court comes a concomitant and legitimate expectation on the part of an appellant that the court would discharge that duty. This Court has pronounced on this before including in **NJOROGE -VS- REPUBLIC [1987] KLR 19** where it made two holdings germane to the point under discussion:

1. It is the duty of the first appellate court to remember that the parties are entitled, as well on questions of fact as a question of law, to demand a decision of the court and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions. The court should however bear in mind that it has neither seen nor heard the witnesses and it should make due allowance in that respect.
2. If the first appellate court fails to carry out that duty, it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Misdirection's and non-directions on material points are matters of law.

Bearing those principles in mind, we have on consideration of the entire record come to the unhesitating conclusion that the identification evidence presented against the appellant was not free from the possibility of error and does not lend any assurance that the conviction, based solely on that identification evidence, was safe. Whereas PW 1 and PW3 stated that the appellant is the same young man who had earlier asked to buy soda who returned some five minutes or so later, gun in hand, there are co-existing circumstances that militate against any great confidence that their identification of the shooter, a total stranger to them, was iron-clad. Moreover, there are some salient differences and inconsistencies in the evidence of these two witnesses which go to cast doubt on the accuracy of their accounts. First PW1. Even though he says he saw a young man come and ask for soda in plastic bottles who was black, lean, of moderate height and wearing black boots," which to our mind sounds quite a generic and non-distinguishing description, there is no indication as to how long PW1 observed the young man. We also note that the brief conversation the young man had was with PW3 at the counter, and not with PW1 and the other patrons inside the bar. When the young man returned, according to PW1, it was to order everyone to lie down an order with which PW1 complied meaning there was no ample time to further and better observe the gunman. It is also noteworthy that PW1 had been drinking alcohol for a number of hours before the robbery incident occurred.

As for PW 3, she was the waitress who first spoke to the young man who entered wanting to buy soda. Her account was to the effect that five minutes later, "the young man returned and held a customer who

was standing at the door and pointed a pistol at the customers to lie down". The customer allegedly taken captive was neither named nor called as a witness. On this point there is a huge variance between the account of PW3 and that of PW1 as well as that of PW4, the other eye witness to which we shall return. PW3 did not get much time to observe the gun-wielding gangster for the moment the order to lie down issued, in her own words;

***?I retreated into the counter and locked its door and ran to the staff toilet behind the bar. While there I heard 2 gunshots. I locked myself until when the owner of [the] bar raised alarm. I found Dr. Opondo had been shot dead."***

It is highly doubtful, from our own consideration of the record, that there was sufficient opportunity for PW3 to have properly observed the intruder sufficiently to lend assurance that the appellant was the "short and slightly black" without any peculiar mark, gangster.

Added to that state of uncertainty about the appellant's identification is the fact that PW2, who was with PW1 in the bar, was categorical that he was not able to identify the attackers. In fact, he described the robbery incident as "an ambush" and made no reference whatsoever to the appellant as the person who shot him. All PW2 could say was the rather unhelpful "He was 5' and some feet."

Finally there was the eye witness testimony of PW4 which is fully exonerative of the appellant. She testified in relevant part, as follows;

***"At 2.00 a.m a young man entered the bar and asked for coke in plastic bottles and he was told it was not available. He left and another in a black jacket entered wearing black jacket and fired a bullet. We were ordered by others to lie down and produce phones and money. We obeye ..... I was able to identify the young man who entered first and asked for soda. He is in Court-Accused 1 [the appellant] identified..... The one who entered and started shooting wore black jacket and I was not able to identify him due to shock and because he shot and ordered us to lie down."***

Later on when cross-examined by the appellant's then advocate, PW4 was emphatic that PW1 was not the gangster who wore a black jacket and was not the one who carried a pistol.

Given that state of the evidence, we find the learned Judges' treatment of the evidence erroneous in material respects. Said the Judges:-

***"There is no doubt from the evidence before court that robbery with violence took place where patrons were robbed with one [of] them being fatally wounded. It is also true that the evidence adduced by the prosecution had some trace of confusion as to whether the person who went out is the one who returned wearing a black jacket. However PW1, PW3 and PW4 all identify the appellant as the one who came back wielding a pistol. The confusion by PW4 does not in our view go to the root of the evidence as to water down the same."***

We respectfully disagree. As we have stated, PW4 was categorical and firm that the appellant was not the gun-wielding robber. It was a manifest error for the learned Judges to hold and proceed from the premise that she said he was. As to the admitted confusion, we are unprepared to minimize it and term it, as did the learned Judges, as merely a "trace". We think it was not mere confusion, but rather a major contradiction. PW4's evidence actually favoured the appellant and taken with the totality of the evidence adduced and the circumstances surrounding the robbery, amounted to a reasonable doubt. At any rate, it is confusion or contradiction that should have been resolved in favour of the appellant.

We are not satisfied that the two courts below subjected the evidence of visual identification under the far from ideal circumstances obtaining to the test of greatest care propounded by this Court and its predecessor in a long line of authorities including **ABDALLA BIN WENDO -VS- R 20 EACA 166; RORIA -VS- REPUBLIC [1967] EA 583** and **NJOROGE -VS- REPUBLIC** (Supra). We apprehend that this is a case where PW1 and PW2 may well have been honest but mistaken in believing that the appellant is the same young man who returned to the bar gun in hand. It indeed presents a

classic case of possible unconscious transference where the witnesses, in particular PW1 and PW3 possibly mistook the robber-with-gun for the appellant who had been to the bar previously. See **SILAS MUNENEMWAURA -VS REPUBLIC [1999] eKLR; SHADRACKMUTETIMAWEU -VS- REPUBLIC[2001]eKLR**. There was also no evidence that the first young man was in company with the man identified by PW4 as the one who pulled the trigger. The risks of a miscarriage of justice in a case based wholly on visual identification as have been recognized by courts for long time before and since the Englishof **R -vs- TURNBULL [1976] 3 ALL ER 549** were very present in the instant case and we come to the conclusion that his conviction was not safe and cannot be allowed to stand.

In the result we allow the appeal, quash the conviction and set aside the sentence.

The appellant shall be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Kisumu this 4<sup>th</sup> day of July 2014**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**