IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 183 OF 2010

BETWEEN

DAVID ODHIAMBO ORIEMA ….....APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Kisumu, (Mwera & Mugo, JJ) dated 18th September 2007

in

HCCRA NO. 108 OF 2005)

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JUDGEMENT OF THE COURT

This is a second appeal from the conviction and sentence by the Senior Resident Magistrate (H. I. Ongudi) where the appellant, David Odhiambo Oriema, was sentenced to suffer death. The first appeal to the High Court (J. W. Mwera and M. G. Mugo, JJ) was dismissed.

The charge facing the appellant was that of robbery with violence contrary to Section 296 (2) of the Penal Code particulars being that on the 1st day of May 2005 at around 11:00 a.m. at Sije market, Manyatta, in Kisumu with others not before court the appellant while armed with a knife robbed David Karani Mogaka of cash Kshs. 950/= and while doing so threatened to use violence on the complainant.

The prosecution called two witnesses in support of the charge. **David Karani Mogaka (PW1)** testified that at 11:30 a.m. while on a road in a motor vehicle that had broken down he was confronted by four people who demanded money for **"... registration for road use..."** When he resisted he was threatened with a knife and robbed of the money in his pocket. The threat consisted of the knife being pointed at his stomach. PW1 testified further that he waited for his driver and after relating the events to the driver, he, PW1, reported the matter at Kondele Police Station. He was thereafter accompanied by police officers to Sije market where, upon arrival, PW1 saw the robbers boarding a motor vehicle. Police officers gave chase and blocked that vehicle. Three people left the vehicle and fled. One person who was among those who remained in the vehicle was arrested. This person was the appellant who PW1 alleged to have been

one of the robbers. There were no recoveries.

Then there was the evidence of **PW2 P. C. Dennis Marunga.** He testified that upon receipt of information from PW1 he in the company of other police officers and PW1 went to Sije market where they blocked a matatu alleged by PW1 to have been boarded by robbers. Three people fled from the matatu. The appellant remained in the matatu and was arrested. The trial magistrate was satisfied that this evidence established a prima facie case and put the appellant on his defence. The appellant elected to give sworn evidence in which explained that on the material day he was in a matatu at Sije market which was stopped by police. There were passengers in the matatu who fled upon seeing the police. He the appellant remained in the matatu. He was arrested and charged on an offence he knew nothing about. He testified that he had never met the complainant before. The trial magistrate found the prosecution evidence credible and after disbelieving the defence convicted the appellant. The High Court on appeal reviewed the evidence and dismissed the appeal.

In the Memorandum of Appeal before us three grounds of appeal are taken. These are in essence that the judges erred in finding that the charge was proved; that the judges did not re-evaluate the evidence and that the judges erred in failing to find that the police had done a **"shoddy investigation".**

The appeal came before us for hearing on 30th April, 2013 when learned counsel Mr. Onyango Jamsumbah appeared for the appellant while the learned Assistant Deputy Public Prosecutor Mr. C. A. Abele appeared for the respondent. Learned counsel for the appellant submitted that the charge had not been proved beyond reasonable doubt. He submitted further that there were glaring contradictions in the prosecution evidence which should be resolved in favour of the appellant.

Learned counsel for the respondent supported the appellants conviction, arguing that the necessary ingredients of an offence under Section 296 (2) of the Penal Code were satisfied in that there were more than one attacker, the attackers were armed and actual robbery took place. Counsel submitted that the whole incident from robbery to sporting of the matatu took 3 hours which, according to him, was a short period and PW1's memory could not have faded.

Being a second appeal we are by dint of Section 361 (1) (a) of the Criminal Procedure Code constrained to deal only with matters of law as issues of fact dealt with by the trial court and re-evaluated by the High Court are settled. This position is well settled as will be seen from the many decisions of this court such as in **Njoroge v Republic [1982] KLR 388** where it was held that:

"On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal, the court was bound by the concurrent findings of fact made by the lower courts, unless those findings were shown not to be based on evidence..."

In **Thiongo v Republic [2004] 1 EA 332** it was held that:

"..A second appellate court could not interfere with concurrent findings of fact unless the findings were bad in law for being perverse ie no reasonable tribunal could on the evidence have arrived at such findings ..."

What, then, are the matters of law that the appellant has raised that would clothe us with jurisdiction to entertain the appeal? These are two whether the offence was proved to the required standard and whether the judges of the High Court on the first appeal re-evaluated the evidence to the standard required of them.

The prosecution case was supported by the evidence of two witnesses, the complainant and a police officer. The complainant(PW1) testified that he was, while alone in a motor vehicle that had stalled on the road, confronted by 4 people who threatened him with a knife and ran away after robbing him of money. This money comprised the days' collections. PW1 waited for the driver of the motor vehicle to return and it was thereafter that PW1 decided to report the matter to the police. He was thereafter accompanied by police officers, including PW2, to Sije market, which was near the scene of crime, and

they came upon a matatu that took off upon seeing police. People in the matatu fled but the appellant and the driver of the matatu remained in the matatu. The appellant as part of his defence stated on oath that he remained in the matatu with 2 women. The trial magistrate expressed herself thus in the judgment:

"...I am convinced that PW1 is not mistaken about his identification of the accused. He picked the accused among those in the matatu. I see no reason why he would pick on the accused as one of the culprits. I dismiss the accused's defence as an afterthought..."

The High Court on the first appeal satisfied itself thus:

"...Like the learned trial magistrate , we are not inclined to believe the evidence adduced by the appellant at the trial, which we note was contradictory. At one time he alleges that there were people hanging on the motor vehicle in which he was found, who fled on seeing police, and under cross – examination he says that only a conductor ran away...."

The evidence recorded by the magistrate from PW1 was that:

".... The police motor vehicle blocked them. The vehicle stopped and 3 of them took off. One person was arrested..."

And PW2 was recorded as stating:

"... we followed the matatu and blocked it. Three people ran away ..."

The driver of the motor vehicle where PW1 was a conductor was not called by the prosecution neither was the driver of the matatu from which three people fled on seeing the police. The evidence before the trial magistrate and before the High Court was that the appellant was arrested in the matatu. He did not attempt to flee while others did. Was this the conduct of a person who had just participated in a robbery?

The passage of time – from the time of the robbery to the time the matatu was stopped by police was about 3 hours. There was only one identifying witness, PW1. PW1 had not given any description of the attackers to anybody and there is no evidence that he had given it to the police upon reporting the incident to them. Section 143 of the Evidence Act permits identification of a person or proof thereof by the evidence of a single witness. Such evidence must however be treated with the greatest care particularly where conditions favouring correct identification may not be favourable – See **Matianyi v Republic [1986] 2 KAR 75.**

In the particular circumstances of this appeal where the identification of the appellant was by a single witness, no description was given at all, the appellant did not flee from the matatu as others did and compounded by the obvious misdirection of both lower courts which ignored obvious contradictions in the evidence and appeared to shift the burden of proof to the appellant we are of the considered opinion that the conviction was unsafe and should not be allowed to stand. We allow the appeal and set aside the conviction and order that the appellant shall be set free forthwith unless otherwise lawfully held.

Dated and Delivered at Kisumu this 14th day of June 2013

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR