



IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 298 OF 2012

BETWEEN

DAN OLUOCH OTIENO .....1<sup>st</sup> APPELLANT

KENNEDY OTIENO DALMAS .....2<sup>nd</sup> APPELLANT

AND

REPUBLIC .....RESPONDENT

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

*Kisii,(Makhandia & Sitati, JJ) dated 30<sup>th</sup> September, 2011*

in

HCCRA NO. 207 & 208 OF 2010)

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JUDGEMENT OF THE COURT

This is a second appeal from the conviction and sentence of the appellants, **Dan Oluoch Otieno and Kennedy Otieno Dalmas**, by the Principal Magistrate at Migori (S. M. Shitubi) in the original Criminal Case No. 870 of 2009. The charge was robbery with violence contrary to Section 296 (2) of the Penal Code particulars being that on the 10<sup>th</sup> day of September, 2009 at Ogwedhi Sub Location in Migori District in Nyanza Province the appellants while armed with offensive weapons namely panga and rungu robbed Noah Onyango Okoth of cash Kshs. 30,000/= and immediately before and immediately after the time of such robbery they wounded the complainant. The first appeal was heard and dismissed by the High Court (Asike – Makhandia J ( as he then was) and Ruth Sitati, J ). The appellants were aggrieved by those findings and preferred this appeal.

The appellants, represented in this appeal by learned counsel D. Ondego filed 2 home-made Memoranda of Appeal citing similar and identical grounds as follows:-

**“1. That the appellant pleaded not guilty to the charge.**

2. That the High Court erred in law and facts for upholding the conviction of the appellant without noticing that the charge sheet was fatally defective.

3. That the High Court erred in law and facts for upholding the conviction of the appellant placing reliance on the evidence of identification by recognition yet the source of light and circumstances at the time of the alleged offence could not warrant a positive identification.

4. That the High Court erred in law and facts for upholding the conviction of the appellant placing reliance on the evidence of identification yet the complainant did not give the names or description of the attackers in the first report.

5. That the High Court erred in law and facts for upholding the conviction of the appellant without re-evaluating the trial court proceedings to come to an independent conclusion.

6. That the High Court erred in law and facts for upholding the conviction of the appellant for not noticing that the appellant's rights were violated”.

Being a second appeal we are enjoined by Section 361 (1) (a) of the Criminal Procedure Code to entertain only legal issues and avoid findings of fact already tested and re-tested by the two courts below. This position has been stated in many decisions of this court like that of John Gitonga alias Kados v Republic Nyeri Criminal Appeal No. 149 of 2006 (ur) where it was held that:-

**“This being a second appeal, we are reminded of our primary role as the second appellate court namely to steer clear of all issues of facts and only concern ourselves with issues of law...”**

See also M’Riungu v Republic [1983] KLR 455.

The prosecution case was related by five prosecution witnesses and can be summarized as follows:-

On the night of 10<sup>th</sup> September, 2009 Noah Onyango Okoth (PW1) (Noah) was asleep in his house at Ogwedhi. He was with his wife Millicent Akoth (PW3) (Millicent). In the bedroom was their 3 month old infant child and because this child was afraid of darkness the couple left a hurricane lamp on. At 2:00 a.m the couple was woken up by a loud bang at the door. Noah observed a huge stone that had been used to break the door which stone now lay in the middle of the room. Before he could react in any way 3 people entered the room. He knew all of them by appearance and by name – Oluoch, Otieno and Amin – who resided in the same village with him. Millicent testified that she grew up with the 3 attackers. Oluoch held a knife by Noahs' breast and demanded money. Amin stood on the right side of the bed while Otieno stood on the left side of the bed. A vicious attack then occurred where Noah was cut up so badly while he put up a spirited fight in defence. According to both Noah and Millicent the attackers decided that since they had been recognized they should kill Noah. So Oluoch used a panga to cut Noahs' neck. One of the attackers decided to finish off the job by hurling the stone that had been used to break the door. The stone fell on the bed somehow missing Noah who was by now unconscious. During this whole incident that went on for 30 minutes Millicent attempted to scream and had to stop because she was also badly injured by the attackers.

Fred Odhiambo Guda (PW4) (Fred) was an immediate neighbour of the Noahs'. He was woken up by the commotion. He could not leave his house as the outer door had been locked from outside. He opened a window and flashed a torch. He recognized Oluoch who he knew before. Oluoch had a panga, bow and arrows which he used to threaten Fred.

Noah had Kshs. 30,000/= in a jacket in his room. The attackers took the money and dropped the jacket which was later recovered in the compound. Noah and Millicent were assisted by neighbours who took them to hospital.

Maruti Lawrence (PW2) (Lawrence), a Clinical Officer at Migori Hospital, received Noah and Millicent, attended to them and completed P3 Forms which he produced in court as part of the evidence. Lawrence confirmed the serious injuries suffered by the complainant and the injuries suffered by Millicent.

No. 55477 P. C. Vincent Muswagi (PW5) received a report from Noahs' other wife about the incident either the same night or the next morning. He in the company of another police officer visited Noah and Millicent in hospital and later arrested the appellants.

That was the case for the prosecution which the learned trial magistrate considered and thereafter required the appellants to defend themselves.

In a sworn statement the 1<sup>st</sup> appellant, Dan Oluoch Otieno, denied the charge stating that he was at home on the night of the robbery and did not leave home at all. He attributed his arrest to an incident where he bumped into his wife making love with the chief of their area in a sugar plantation. Upon such discovery he did not take any action but just went home. The 1<sup>st</sup> appellant called as witness his wife Rose Adhiambo who stated that her husband did not leave home on the night of the robbery.

The 2<sup>nd</sup> appellant, Kennedy Otieno Dalmas in a sworn statement denied the charge stating that he was arrested because he was found by police carrying sucrose for which he had no receipt. He called as a witness his wife Lencer Achieng who stated that he did not leave home on the night of the robbery. He also called as witness his father Dalmas Otieno who had no useful information relating to the matter before the court.

The learned Magistrate found that the charge against the appellants had been proved beyond reasonable doubt, convicted the appellants and sentenced them to death.

As already stated the High Court analysed the evidence and dismissed the first appeal.

The appeal came up for hearing before us on 24<sup>th</sup> June, 2013 when the learned counsel for the appellants, relying on the said Memorandum of Appeal submitted that evidence of identification by recognition was unreliable as mistakes could occur in situations of recognition. Counsel wondered why an identification parade was not held and why the complainant did not mention the names of attackers to police immediately.

In opposing the appeal the learned Assistant Deputy Public Prosecutor, Mr. Abele submitted that conditions for recognition were favourable because there was a lamp in the room which remained on; Noah and Millicent knew the attackers, attack went on for 30 minutes; a neighbour Fred flashed a torch and recognized the 2<sup>nd</sup> appellant; Noah and Millicent described the attack in graphic terms and that there was no need for an identification parade because Noah and Millicent and in respect of the 1<sup>st</sup> appellant Fred knew the attackers.

The evidence on record as regards identification was that the complainant, Noah knew the attackers. Noah is recorded as stating:-

**“..... Suddenly 3 people entered. They were people I know – they were Oluoch, Otieno and Amin.....”**

Noah then proceeds to describe in detail how the attack took place including who stood where in the room, who had which weapon and how the weapons were used in the attack.

The first appellate court in reviewing and re-evaluating the evidence as it was duty bound to do and as was held in **Okeno v Republic [1972] E. A. 32** on the issue of identification and recognition, reviewed the various authorities on the issue like **Karanja & Another v Republic [2004] 2 KLR 140** and **Cleophas Otieno Wamunga v Republic [1989] 1 KLR 424** where it was held that in certain

circumstances recognition is more preferable to identification. This position had been stated even earlier in such decisions as Anjononi & others v The Republic (1976 -8) 1 KLR 1566 where the court had this to say:-

**“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions of identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of assailants, recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a**

**stranger because it depends upon the personal knowledge of the assailant in some form or other. We draw attention to the distinction between recognition and identification in Siro Ole Giteya v The Republic (unreported).”**

In the instant case Noah and his wife Millicent knew the appellants before. They resided in the same village. Millicent in fact testified that she grew up with the appellants. A neighbour of the Noahs, Fred, upon being woken up by the commotion and with the aid of a torch recognized the 2<sup>nd</sup> appellant whom he knew before.

The whole robbery incident took over 30 minutes in a small room well illuminated by a hurricane lamp that remained on throughout. Noah and Millicent described in graphic details which robber had which weapon and how the weapons were used.

This was a case of neighbour attacking neighbour. The attackers made no attempt to conceal their identity. They attacked with such viciousness that it is surprising that Noah and his wife Millicent survived. The appellants were properly recognized by their victims who were their neighbours and this ground of appeal has no merit at all.

The submission by counsel for the appellants in respect of alleged failure by police to conduct an identification parade cannot hold water at all. The complainant and his wife had recognized the assailants who included the 1<sup>st</sup> and 2<sup>nd</sup> appellants who were people they knew very well. The record indeed shows that when the assailants entered the bedroom Noah spoke to them in friendly terms wondering what they wanted from him. There was no need for an identification parade in the circumstances.

The appellants further complain that Noah did not give names of the attackers to the police. This may well be so but we note that a report was made to police by Noahs' other wife the very day of the incident or the next day. In any event considering the brutal nature of the attack where Noah was literally being butchered and the length of stay in hospital there is no valid complaint on this ground.

Both the trial court and the first appellate court properly considered the alibi defence raised by the appellants and disbelieved it in view of the strong evidence proved by the prosecution

The appeal has no merit and it is hereby dismissed.

***Dated and Delivered at Kisumu this 27<sup>th</sup> day of September 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**