



**IN THE COURT OF APPEAL**

**AT KISUMU**

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

**CRIMINAL APPEAL NO.118 OF 2012**

**BETWEEN**

**HILLARY OCHIENG OSULA Alias NDUGU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal from a Judgement, of the High Court of Kenya at Kisumu (Aroni & Chemitei, JJ.)***

***dated 6th March, 2012***

**in**

**H.C.CR.A. NO. 105 OF 2010)**

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

**JUDGEMENT OF THE COURT**

The appellant **Hillary Ochieng Osula** alias **Ndugu**, together with **Elijah Ponge Oteng** alias **Jasho** and **Fred Odhiambo Ouma** (hereinafter “**the 1st and 2nd accused**” respectively) were jointly charged before Kisumu Chief Magistrate's court with one count of robbery with violence contrary to **Section 296 (2)** of the Penal Code.

The 1st accused faced a second count of rape contrary to **Section 3** of the **Sexual Offences Act No 3 of 2006, Laws of Kenya**. The appellant and the two accused persons were convicted on the first count and sentenced to suffer death. The 1st accused person was also convicted on the second count of rape and was sentenced to twenty (20) years imprisonment. That sentence was however held in abeyance.

They each appealed to the High Court (**Ali-Aroni & Chemitei JJ.**) but their appeals against conviction were dismissed. The learned Judges of the High Court however, interfered with the sentence imposed upon them on the first count. The sentence of death was accordingly set aside and substituted with a sentence of imprisonment for twelve (12) years. The sentence of twenty (20) years imposed upon the 1st accused for rape was affirmed.

The appellant was still dissatisfied and therefore lodged the appeal before us. As the appellant before us was not charged with the offence of rape, the second count which faced the 1st accused is not relevant to this appeal and we shall not discuss the same herein.

It was alleged in the 1st count that the appellant and the 1st and 2nd accused persons on 11th January, 2010 at 12.20 am., at Karombo village, Korando A. sub-location in Kisumu East District within Nyanza Province, jointly with others not before the court and while armed with offensive weapons namely panga, a hack saw and iron bars, robbed **Rebecca Adipo Siso** of her television set- make "Samsung" DVD player – make Sony, a lap top, mobile phone-make Nokia 6020, an Orange phone, a cash sum of Kshs.8,000/= and other house hold valuables all valued at Kshs.43,000/=, the property of the said Rebecca Adipo Siso (hereinafter "**the complainant**") and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said complainant.

The appellant on his own, filed various grounds of appeal and when learned counsel, **Mr. Wamwayi**, was instructed, he filed a supplementary memorandum of appeal citing some eleven (11) grounds.

When the appeal came up for hearing before us on 17th June, 2013, Mr. Wamwayi abandoned the first ground in the supplementary memorandum of appeal which ground challenged the competence of the charge which faced the appellant and the 1st and 2nd accused persons. Counsel further submitted, with respect to the rest of the grounds, that the substance thereof is the challenge made against the purported identification of the appellant, which, according to counsel, was far from positive.

But what were the facts?

On the material date and time, the complainant was asleep in her house at Otonglo in Korando A. sub-location in Kisumu East District of Nyanza Province, when she heard some strange sound. The strange sound awakened her and she put on lights. Two men entered her bedroom. One of them was armed with a panga and placed it on her neck warning her not to scream. He demanded from her money, her mobile phone, cupboard keys, her ATM Card and a laptop. She told them she had no money and when the men heard that, they threatened to kill her. Her hand bag was under her bed and she asked the men to fetch it for her. They did so and she took from that hand bag Kshs.8,000/= and gave it them. Then two other men entered the room. The attackers removed various items from the house including a Samsung TV set, a Sony DVD, a Panasonic DVD, CD cassettes, hand bags, her daughter's suit case, two brief cases etc. The people demanded to know where her children were. The complainant said she identified the appellant who, she stated, was standing by the entrance to the sitting room and was armed with a hack-saw. She further testified that the attackers had themselves put on lights in the sitting room and the area outside was lit by security lights. She also stated that she had known the appellant for 12 years prior to her testimony in court.

From her house, the attackers took her to where her daughter **P.D,A** (PW 2) slept. The complainant told her that there were people who wanted her mobile phone. At that juncture the 1st accused demanded that PW 2 opens her door which she did. When they entered her room, they demanded money but PW 2 said she had none but that the complainant had some.

The attackers, the complainant and PW 2 went to the complainant's house amid threats of beating the latter. The complainant was ordered back to her bedroom and the assailants took PW 2 with them. She (PW 2) returned to the complainant's bedroom after about twenty (20) minutes and reported that she had been raped.

After molesting the complainant the attackers left. That is when the complainant and PW 2 screamed. PW 2 supported the complainant's testimony. She too saw the appellant at the entrance to the complainant's house. There were lights in the complainant's bed room and also in the sitting room. She had known the appellant for three (3) years prior to the incident. She testified that she lost her Orange mobile phone, suit case, identity card, birth certificate, TV, DVD, 1 hand bag, curtain etc.

As the robbery was in progress, **B.O.O** (PW 3), one of the complainant's children, woke up from his sleep. He heard the complainant ask PW 2 to hand over her mobile phone and strangers demanding opening of the door. He peeped through a window and saw the 2nd accused armed with a panga. He also identified the 1st accused.

The screams of the complainant and PW 2 attracted their neighbours including **Zacharia Odera Obiero** (PW 6). When he opened his door at about 1.00 am that night the complainant informed him, of the robbery. PW 6, went inside complainant's house and found house hold goods strewn all over. He then called the police. CPL **Siagi Godana** (PW 7) was one of the police officers who received a report of the robbery. He visited the scene on the material night at 2.30 am. He found a window grill having been cut and clothes scattered all over the complainant's house. He was informed of the suspects and of several items having been stolen including a DVD, TV and other things. A search yielded nothing and he went back to the police station and booked the report. On further investigation, the suspects were later arrested who included the appellants.

The next morning after the robbery, the complainant gave details of the robbery and PW 2 went for treatment at New Nyanza General Hospital where **Dr. Peter Ayugi** received her and completed a P3 form in respect of the injuries she had sustained. That P3 form was produced by **Dr. Clarice Onyango** (PW 8) who was familiar with Dr. Ayugi's handwriting and signature. CPC **Robert Okalo** (PW 4) then of Scenes of Crime at Kisumu, visited the scene on 26.1.2010 and took photographs of the scene which he produced at the trial.

IP **Samuel Maosa** (PW 5) was requested by (PW 7) to conduct an Identification parade at which the appellant was identified by the complainant.

The appellant gave a sworn statement that he spent the material night at his house with his wife and children but was arrested on 14th January, 2010 and taken to Central Police Station and informed that he had been involved in a robbery at the complainant's homestead. On 15th January, 2009 he participated in an Identification Parade at which the complainant identified him while her daughter didn't. He denied committing the offence.

He called his wife, **Silviane Odoyo Awacho** (DW 1) who testified that the appellant spent the material night at home with her and their four (4) children.

After evaluating the evidence adduced at the trial the learned Principal Magistrate (**Muneeni**) concluded that the prosecution had proved, beyond reasonable doubt, that the appellant was one of the people who robbed the complainant. In his own words:

*“On identification of the robbers the complainants said they knew the accused long Before the robbery. Accused have stated as much-these (sic) was a case of recognition. Accused were known to the victims. During the robbery lights were on all through the ordeal. Lights were on in the sitting and bedroom of PW 1 – Adipo. Security lights were on (in) the compound. Electricity (sic) lights were on as Diana PW 2 was lead to her room to be raped by the intruders.*

.....  
*It appears accused 3 – **Ochieng** was only identified by PW 1 – A. I have already warned myself of the danger of relying on such evidence.....*

*The circumstances were favourable for recognition, There were lights and the robbers were persons previously known to them... The two main complainants mentioned the names of the robbers to the police ...”*

On the appellant's defence the learned magistrate said as follows:-

*“.... In any event both women attended the court proceedings and the value of their evidence false (sic) far below that of independent witnesses. The same case applies to the Accused Ochieng who stress (sic) that he spent the night with his wife. His wife admitted she had attended all the court proceedings. Her evidence must be considered with caution.*

*I appreciated the fact that the onus is on the prosecution on discharging alibi. As the court said in **Lwengele -Vs- Republic** (Supra) the identification (read recognition) of the accused persons was overwhelming. Theories of bad blood between them on the key witnesses is (sic) without disturbance (sic)...*

*The defence of alibi raised by the accused does not create any doubt in my mind as to their identification, recognition.”*

The learned trial magistrate concluded that the appellant and the co-accused persons had committed the offence of robbery with violence against the complainant. He therefore proceeded to convict them as already stated.

Being aggrieved with the learned magistrate's findings, the appellant lodged an appeal to the High Court where *Ali-Aroni and Chemetei JJ* re-evaluated the evidence and came to the same conclusion as did the learned trial magistrate. They stated inter alia:

*“PW 1 & PW 2 stated that they gave the names of 3 of their assailants to the police on reporting the incident. PW 7 stated that details of the suspects were given to him on 11th January, 2010. He repeated this on cross examination. PW 7 was the investigating officer. He came across this matter in the cause of his duty. He corroborated the evidence of PW 1 and PW 2 .....*

*We do agree with the trial court that there was overwhelming evidence against the appellants for the charges facing them. We do affirm the conviction on both counts I and II against the 1st appellant and the conviction on count 1 against the 2nd and 3rd appellants.”*

Still aggrieved the appellant is before us on a second appeal as already stated. As we have observed, the substance of this appeal is the challenge made against the two courts' findings on the issue of identification. Mr. Wamwayi, learned counsel for the appellant, addressed us at length and placed reliance on various authorities. He pointed out that the conditions of identification were not favourable for a positive identification. He took us through the stressful circumstances at the time caused by the robbers who were armed and indeed placed a panga on the neck of the complainant who was the sole, identifying witness. Counsel submitted that the complainant was so traumatised that she could not mention the names of her attackers to her neighbours who answered her distress call. That failure to mention the appellant to her neighbours, in counsel's view, cast doubt on her identification of the appellant.

Counsel further submitted that even the OB of the next day did not have the names of the appellant which suggested that the complainant did not know the people who robbed her. There was, in counsel's view, the possibility of mistaken identification. Counsel invoked various decisions of this court to buttress that argument including **Matianyi -Vs- Republic [1988 – 1992] KLR 75**, **Karanja & Another -Vs- Republic [2002] 2 KLR 140** and **Erick Osoro Omari and Another -Vs- Republic [Cr. Appeal No.197 of 2008]**.

Mr. Wamwayi also submitted that the appellant's alibi defence should have been believed as it was given at the very first opportunity and was also supported by his wife. That defence, according to counsel, was not considered by the High Court judges.

Mr. Mongare, learned Prosecuting counsel supported the conviction of the appellant contending in the main that his identification was positive given the prevailing circumstances such as the security lighting at the scene and the length the incident took coupled with the fact that the appellant was known to the complainant. In counsel's view, the defence of alibi was displaced by the evidence adduced by the prosecution.

We have anxiously considered the judgment of the trial court, that of the High Court, the appeal before us the able submissions of learned counsel for the appellant and the learned Senior Prosecution Counsel. We have also given due consideration to all the authorities cited and the law applicable. Having done so we

take the following view of the matter.

There is no dispute that the complainant was robbed of her property on the material date. What the appellant is vigorously disputing is his identification as one of the robbers. Through his counsel, he says that the conditions of identification were difficult and further that the complainant was terrified and could not possibly positively identify the appellant. According to counsel, it was because of those difficult circumstances that the complainant could not give the names of her assailants to her neighbours who were the first to respond to her distress call and also fail to mention any names when her report of robbery was booked. That is a powerful argument. Indeed we have several cases in which this court has held that in cases where allegations are made against an accused person as having been identified as one of the robbers when he denies the same, the court has a duty to exercise great caution in considering the evidence of identification of the accused before conviction. The caution is even more important when conditions for a positive identification were difficult and the identifying witness is a single one. The appellant's counsel indeed invoked the decision of this Court in some of those cases. For instance in **Karanja & Another -Vs- Republic [2004] 1KLR140**, this Court held,

inter alia, as follows:-

***“1. 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.***

***2. Whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification.***

***3. Recognition may be more reliable than identification of a stranger but even when a person is purporting to recognize someone he knows, it should be borne in mind that mistakes of recognition of close relatives and friends are sometimes made.”***

Cited with approval in that case was the case of **Maitanyi -Vs- Republic [1986] 2 KLR** where it was held, inter alia, as follows:-

***“ 1. Although a fact may, subject to well known exceptions be proved by the testimony of a single witness, it was necessary to test the evidence of a single witness respecting identification with the greatest care, especially when the conditions favouring a correct identification were difficult.”***

In the case before us, the complainant knew the appellant prior to the robbery. Hers was therefore a case of recognition rather than identification of a stranger. In her own words:-

***“I managed to identify Ndugu (Accused 3). He was standing by the entrance of my sitting room when our eyes met he wanted to crawl outside. Accused 3 had a hack saw.....***

***I have known accused 1 for more than 10 years. Accused 2 went to school with my children (over 12 years ago). Also accused 3 for 12 years”***

So, her evidence was more satisfactory more assuring and more reliable than identification of a stranger as was stated in the case of **Anjoni and others -Vs- Republic [1980] KLR 59**.

Both the learned trial magistrate and the learned judges of the High Court were satisfied that the appellant was positively recognized. The learned trial magistrate said as follows:-

***“Robbers were identified by more than one person. For instance, PW 1 (A) and PW 2 (D)***

testified that they both positively identified at the scene Accused 1 – **Ponge** and accused 2 – **O**. Both PW 1 – A and B.O allegedly identified only accused 1 – P and accused 2 – O. It appears Accused 3 – Ochieng was only identified by PW 1 – A. I have already warned myself of the danger of relying on such evidence...”.

And the High Court said as follows:-

*“The trial magistrate found this to be a case of recognition. We totally agree with him as PW 1, PW 2 & PW 3 said they were known to the appellants. The appellants confirmed that they too knew PW 1, PW 2 & PW 3 ...”*

So, the two Courts below agreed on the recognition of the appellant.

In **Kiarie -Vs- Republic [1984] KLR 739**, this Court held as follows:-

*“The Court of Appeal on a second appeal may upset a finding of fact by the trial court where there is a misdirection but such misdirection must be of such nature and the circumstances of the case must be such that if it were a trial by jury, the jury would not have returned their verdict had there been no misdirection.”*

Our own independent consideration of the proceedings before the two lower courts does not disclose any misdirection of fact or law. We must, in the circumstance, be loyal to their findings on facts as stated in the case of **Mriungu -Vs- Republic [1983] KLR 455**. In that case this Court stated:

*“Where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as findings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent on the evidence that no reasonable tribunal could have reached that conclusion which would be the same as holding that the decision is bad in law **Martin -Vs- Glyneed Distributors Ltd t/a Mrs Fastings – (The times of March 30 1983)**”*

The above analysis, also answers the appellant's complaint regarding alleged failure to consider his defence of Alibi. The learned trial magistrate had the following to say on that defence:-

*“I appreciate the fact that the onus is on the prosecution on discharging alibi. As the court said in **Lwengele -Vs- Republic (Supra)** the identification (read recognition) of the accused persons was overwhelming....*

*In any case accused were arrested with the help of police officers. The date complainants gave the police their names even before they were arrested. The defence of alibi raised by the accused does not create any doubt in my mind as to their identification, recognition....*

*I therefore dismiss the alibi raised as a futile attempt to hide truth. I find that all the three accused committed the offence of robbery with violence as alleged in count I...”*

We have already, in this judgment, set out portions of the learned judges' analysis of the evidence which was adduced before the learned trial magistrate. They did not, expressly state that the appellants alibi defence was untenable but that was the result of believing the evidence of PW 1 which was that of recognition. We have on our own independently considered the same evidence and indeed found the evidence of recognition overwhelming.

Our conclusion is that the evidence of recognition at the scene of crime clearly displaced the appellant's alibi defence and his complaint that his defence was not considered lacks merit.

The sum total of what we have discussed above clearly points at the conclusion that we find no reason to

interfere with the decisions of both the subordinate court and the High Court.

This appeal is without merit and is dismissed in its entirety.

**Dated and Delivered at Kisumu this 26th 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**