REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Criminal Appeal 129 of 2009

BETWEEN

DANIEL OWIGO APIYO …….. APPELLANT

AND

REPUBLIC …….……..…… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kisii (Musinga & Karanja, JJ) dated 12th May, 2009

In

H.C. Cr. A. No. 271 of 2006)
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JUDGMENT OF THE COURT

Daniel Owigo Apiyo, the appellant herein, was tried and convicted on a total of four counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. Upon his being so convicted, the Senior Resident Magistrate at Homa Bay sentenced him to death. The particulars of the charges were that on the night of ***5th October, 2005***, at Rodi Kopany in Homa Bay District of the then Nyanza Province, the appellant jointly with others not before the court and while armed with dangerous weapons, namely, a firearm, pangas and rungus, robbed Maurice Okelo Warada (count 1), Samwel Otieno Nyaliech (count 2), Maurice Omondi Mbai (count 3) and Asenath Atieno Nyalala (count 4) of various items named in each charge and during the robberies, they used or threatened to use violence on the victims of the robberies. Following the convictions and sentence, the appellant appealed to the High Court, but by its judgment dated and delivered on the 12th May, 2009, the High Court (Musinga and Karanja, JJ)

dismissed the appeal as regards the convictions and confirmed the sentence of death imposed upon the appellant. The appellant now comes to this Court by way of a second appeal and the grounds upon which he does so are set out in the "*Memorandum of Appeal*" lodged on his behalf by his learned counsel, Mr. Kisera. Those grounds are that:

"1. The superior court erred in law and fact in finding that the appellant was properly identified by way of recognition.

2. The superior court erred in law and fact in finding and confirming that the admitted contradictions were of no evidential value when such admitted contradictions created apparent doubt in the prosecution case to fall short of the standard of proof required by law.

3. The superior court erred in law and fact in failing to appreciate that the entire prosecution evidence was not safe for a conviction.

4. The superior court erred in law and fact in finding that the evidence of Coletta who was a compalable (sic) witness but not brought to court was not necessary."

These grounds were filed by M/s Omonde Kisera & Co. Advocates on 17th November, 2011. But the appellant himself had also filed "*Memorandum of Appeal*" on the 2nd August, 2011 and while not specifically abandoning these grounds, Mr. Kisera concentrated largely on the grounds filed by him.

In his submissions before us, Mr. Kisera first argued that the two courts below erred in accepting the evidence of the four victims of the robberies, namely Maurice Okelo Warada (PW1), Maurice Omondi Mbai (PW2), Asenath Otieno Nyalala (PW3) and Samuel Otieno Nyariech (PW5), that they each recognized the appellant during the robberies. These witnesses stated that they each knew the appellant who was or had been their neighbour at Rodi Kopany. Maurice Omondi Mbai said the appellant was his clansman while Asenath said the appellant was a son to one of her in-laws. All the four witnesses swore that during the robberies, the appellant was armed with a pistol and Maurice said the appellant hit him with a metal bar on the head. All the four witnesses said the appellant was the one in charge of the group of some seven robbers and that the appellant ordered them to call him "*Afande Daniel Owigo*." The robbers claimed to be police officers and were dressed in police attire. The witnesses were each robbed from his or her house, all of which neighboured each other, and each victim was used to lure the others to open the door for the robbers. The robbers were with the victims for a considerable period of time, nearly one hour or so. But Mr. Kisera submitted that there were glaring inconsistencies in the evidence of the witnesses. Among the inconsistencies the counsel pointed out were that Maurice (PW1) said the appellant had on a jungle jacket and was armed with a pistol while Maurice (PW2), while confirming the jungle jacket said the appellant had a short-gun which is not the same thing as a pistol, and that the appellant also had a metal bar which he used to hit Maurice. Samuel Otieno (PW5) for his part said the appellant had on a blue jacket and a beret on his head. In Mr. Kisera's views, these contradictions were fatal and the appellant ought to have been acquitted. There was also the question whether Maurice jumped through his window to open the door of his house in which the robbers had locked their victims and a large number of people who had been taken captive and locked in the same house or whether it was the children of Maurice who came and opened the door for them.

For her part, the trial Magistrate had no doubt that the witnesses knew the appellant before and recognized him as the leader of the gang of robbers. The Magistrate said in her judgment:-

"It is therefore obvious that PW1 – 3 and 5 positively identified the accused. It cannot be a coincident (sic) that one by one described him vividly by voice, appearance manner of dressing, acquaintance and how he was armed without distortion. All this clearly demonstrates the consistency in identification of the accused as one of the robbers who attacked the complainants and I wholly uphold the same."

On the appeal to the High Court, that court correctly recognized its duty on a first appeal, specifically citing the case of OKENO **VS. REPUBLIC [1972] EA 32** and thereafter proceeded to fully set out the

evidence for the prosecution and the unsworn statement of the appellant. The court then proceeded to deal with the issue of identification or recognition of the appellant by the witnesses and once again the court specifically cited the case of **REGINA VS. TURNBULL [1976] 3 KLR 455** and having done so, the High Court concluded:-

"We are satisfied that the learned trial Magistrate carefully considered the identification evidence against the appellant and ruled out the possibility of mistaken identification. In the circumstances, we uphold her findings on the identification of the appellant as having been among the group of people who committed the concurrent acts of robbery."

Before us, Mr. Gumo, the Assistant Deputy Public Prosecutor, submitted that even if there were inconsistencies, as pointed out by Mr. Kisera, they (i.e. the consistencies) were minor and cannot be fatal to the prosecution case. We agree with Mr. Gumo on this point. There can be no doubt from the recorded evidence that all the four complainants knew the appellant before the night of the attack. Maurice (PW2), knew him as his clansman and Asenath (PW3), knew him as the son of an in-law. The appellant himself suggested to two of the witnesses in cross-examination that there was a land dispute between them. Maurice (PW1) was taken to the house of Asenath to lure her into opening the door for the robbers and in Asenath's room Kshs.10,000/- was strewn on the floor and therobbers had to direct their torch-lights on the floor to enable them to pick up the money. Both Maurice and Asenath said that in the process the appellant's head-covering fell off and they were able to see him clearly. Maurice had seen him earlier before his lantern had been put off. It was Maurice who had opened the gate for the robbers to get into the compound and in order to do so, he had to use a lamp. Police Constable Richard Limo (PW4) visited the scene of the robbery and according to that officer, the witnesses gave him the name of "*Daniel Owigo Opiyo*" and it was this witness who after looking for the appellant in vain at Rongo, eventually arrested him in Mbita. The appellant did not say why the witness arrested him; the witness did not know him before.

In these circumstances, we do not think the inconsistencies pointed out by Mr. Kisera could ever be fatal to the conviction as Mr. Kisera contended. Those inconsistencies were of a minor nature and did not affect the recognition of the appellant by the four witnesses. The inconsistencies were and are curable under ***section 382*** of the Criminal Procedure Code.

The other matter argued by Mr. Kisera was that a girl mentioned in the evidence as Coletta, was not called to testify. Maurice Omondi Mbai (PW2) was robbed of a bicycle. It would appear from the evidence of the witnesses that coletta was a maid in the appellant's house and that she had reported to some of the witnesses that she had seen the appellant with Maurice's bicycle. However, no such bicycle was ever recovered and none was produced in evidence. In those circumstances, we do not see what relevant evidence Coletta could have given in the case. The Magistrate's conclusion on this point was that:-

"The evidence of that young girl, in my view, would not have added any value to the already concrete evidence of prosecution's witnesses."

The High Court concurred with that conclusion. We can find no basis for disagreeing with the two courts on that point.

These are the issues of law raised before us. We have rejected both of them and it must follow that the appeal against the four convictions recorded against the appellant must fail. The sentence of death imposed upon him was and is still lawful. The appeal wholly fails as to convictions and sentence and we order that it be and is hereby dismissed.

Dated and delivered at Kisumu this 22nd day of March, 2012.

R.S.C. OMOLO
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JUDGE OF APPEAL

P.N. WAKI
…….
JUDGE OF APPEAL

ALNASHIR VISRAM
…….
JUDGE OF APPEAL

I certify that this is atrue copy of the original.

DEPUTY REGISTRAR.