REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Criminal Appeal 352 of 2009

BETWEEN

SILAS OMWAMI OBUTO …….....…..….. APPELLANT

AND

REPUBLIC …….....……..… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at

Kisii (Musinga & Karanja, JJ) dated 4th November, 2008

in

H.C.CR.A.NOS. 93 & 94 OF 2005)

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JUDGMENT OF THE COURT

The appellant was jointly charged with Kennedy Odhiambo Odede alias Major in the Senior Resident Magistrate's Court at Oyugis with six counts of the offence of robbery with violence contrary to section 296(2) of the Penal Code. The appellant and the co-accused were convicted after trial on the six counts and each sentenced to death in each of the six counts. They both appealed to the High Court against conviction and sentence. The appeal of the appellant was dismissed. However the appeal of the co-accused was allowed and he was acquitted.

In the first trial presided over by S. Omwenga, a Senior Resident Magistrate, the appellant had been charged alone with six counts of robbery with violence. The prosecutor called nine witnesses who testified against the appellant. After the close of the prosecution case the trial Magistrate ruled that the appellant had a case to answer.

The appellant being dissatisfied with the ruling made an application for transfer of the case to another

Magistrate. The trial Magistrate rejected the application. Thereafter the appellant made an application in the High Court for transfer of the case to another Magistrate but the application was apparently dismissed by the High Court. Meanwhile, the trial Magistrate left the station and was replaced with another. When section 200 of the Criminal Procedure Code was explained to the appellant by the new Magistrate the appellant requested that the trial should begin afresh. The trial Magistrate granted the application. The appellant's case was subsequently consolidated with another criminal case in which the co-accused had been charged alone. The charge was substituted with a new charge charging the appellant and the co-accused jointly with six counts of robbery with violence.

The prosecution called nine witnesses at the trial, namely, Pamela Otieno Odero (PW1) – complainant in count IV (Pamela); Elida Atieno Odongo (PW2) – complainant in count VI (Elida); Nicko Ogwen Obonyo (PW3) – Nikko; Harrison Achoki Osero (PW4) complainant in count II (Harrisson); Meshack Onyanzi Rasugu (PW 5), complainant in count I (Meshack); Robinson Kiamba Oriku (PW6), complainant in count III (Robison), Elkana Nyamweo (Elkana), P.C Pius Amdanyi (PW7); Dr. Evans Mokaya (PW8); and PC Evans Omwenga (PW9).

The prosecution case was briefly as follows:-

On 24th March 2002 at 4.30 a.m Harrison who operates a matatu registration no. KAJ 470V belonging to Elkana between Kisii and Kisumu left his home for work in the company of Meshack the matatu conductor. He had two passengers, Robinson and Pamela. On the way three people stopped the vehicle and boarded the vehicle. One of the three people was identified as the appellant's co-accused who sat immediately behind the driver.

On reaching Ruga stage two women boarded, Pamela and Elida and sat next to the driver. On reaching Nyahera one person stopped the vehicle. Meshack the conductor opened the door for him. The person told Meshack that his money had fallen down. Meshack alighted and using a torch started looking for the money while bending down. At that juncture, a man emerged from the bush and stabbed Meshack on the left thigh from behind. Meshack cried out. When the driver – Harrison turned, the appellant's co-accused who was seated behind him pointed a pistol at him and told him to keep quiet. Another person also pointed a pistol at him. The conductor was pushed inside the vehicle. Thereafter the driver and conductor and the other passengers were pushed to the back of the vehicle and ordered to lie down. One of the robbers drove away the vehicle and on reaching Homa Bay junction, he turned towards Homa Bay. The vehicle stopped after driving for a while towards Homa Bay and the victims were ordered to alight and strip naked. Thereafter each was robbed of money and clothing. They were ordered to board the vehicle and were driven to Kodera forest where they were abandoned naked. The robbers drove off with the victims' clothes towards Homa Bay leaving them naked. Harrison who had hidden his mobile phone called the police and reported the robbery. Upon receiving the report P.C. Pius Amdanyi of Oyugis police station and other police officers drove to Kodera forest in search of the victims. They found the victims on the way walking towards the police station. The victims were driven to the police station where they recorded statements. The vehicle was found later on the same day abandoned at a primary school but it's car radio and jack were missing. The victims mentioned two suspects; "CIDI" and Dannis to police. Later the appellant who was identified by the witnesses as the person who stopped the vehicle at Nyahera and as the one known as "CIDI" was arrested. An identification parade was later conducted in respect of the appellant.

The appellant testified at the trial that sometime in the month of February 2002, he left his home at Ruga and to avoid the police who were looking for him and the co-accused and went to live with his father's sister at Nyabondo in Nyando District; that he stayed at Nyabondo until 21st April, 2002; that on 24th March 2002 he attended the funeral of his uncle at Nyabondo and that he later learnt that two suspects in the robbery had mentioned his name to the police. He called three witnesses including Roseline Aluoch (DW1) who testified that she lived with the appellant in Nyabondo from February 2002 and that the appellant assisted in the funeral of her husband on 23rd March 2002. This witness testified in cross-examination that it takes half ($^1/_2$) hour to one hour to walk from Nyabondo to Ruga and that the appellant was sleeping in a separate house.

Further the appellant's witness David Otieno Abuto (DW3) testified that he went to Nyabondo on 22nd March 2002 for a funeral and that the appellant was at the funeral on 23rd and 24th March 2002.

The trial Magistrate evaluated the evidence of Pamela, Elida, Harrison, Meshack and Robinson and made a finding that the appellant was properly identified by the five witnesses. The trial magistrate further considered the appellants defence of *alibi* and made a finding that the defence did not *"hold any water"* and disbelieved it.

On appeal to the High Court, Mr. Kemo, the principal state counsel conceded the appeals on the ground that the witnesses had not given the names or description of the appellant and of the co-accused. However the High Court after re-evaluating the evidence disagreed with the opinion of the state counsel and said:-

"In our view, the first appellant was well known to several prosecution witnesses. They saw him stopping the motor vehicle. The headlights of the vehicle were on. There were lights in the vehicle and they were able to see him clearly when they were being frisked in search of money. PW1 even identified the first appellant as the one who inserted his hand into her private parts. They gave the name of the first appellant as "C.D". It was established that the said appellant had such a nickname. The witnesses spend a considerably long period of time with the robbers. In the circumstances, we are satisfied that the first appellant was properly recognized by PW1, PW2 PW4 and PW5."

Mr. Menezes the learned counsel for the appellant submitted mainly on four broad grounds of appeal namely, failure by the High Court to re-evaluate the evidence; discrimination by the High Court in acquitting the co-accused and confirming the conviction against the appellant when the evidence of identification was virtually the same, failure by the High Court to consider the appellant's defence and shifting the burden of proof of the defence *alibi*.

Regarding failure to evaluate the evidence, Mr. Menezes submitted, among other things, that the High Court failed to consider that the witnesses had seen the appellant in the course of previous proceedings and particularly during the first trial; that the fact that the appellant was convicted of six counts of robbery with violence while only five complainants gave evidence demonstrates that the High Court did not evaluate the evidence; that the High Court failed to assess the evidence and circumstances which showed that it was dark; that everything happened inside the vehicle, that witnesses were frightened; that statements of Harrison and Meshack produced at the trial at the instance of appellant did not contain the name of the appellant and that the points raised by the state counsel when conceding the appeal were not considered.

Mr. Gumo the learned Assistant Deputy Prosecution Counsel opposed the appeal and submitted, among other things, that, this was a case of recognition where five material witnesses recognized the appellant; that the headlights of the motor vehicle were on; that the defence of alibi was displaced by evidence of recognition and that the prosecution case was considered and found to be more credible that the appellant's defence.

This is a second appeal which by law, is confined to points of law only. In such an appeal the Court has loyalty to the concurrent findings of fact by the two courts below and should avoid the temptation to treat matters of facts as matters of law or of mixed law and fact. - (See **M'Riunga v Republic [1983] KLR 455.**

The conviction of the appellant was dependent on the evidence of identification at night. This fact was appreciated by the two courts below.

It is clear from the judgment of the trial magistrate that trial magistrate considered the evidence of each identifying witness in detail as well as the defence *alibi*. Before doing so the learned magistrate said:-

"The issues which I wish to consider are whether A1 and A2 were positively identified and whether accused persons defence of alibi can stand".

The trial Magistrate proceeded to consider the evidence of each of the five identifying witnesses and concluded regarding the appellant thus:-

"PW2 was seated in front with PW1. She also confirmed that headlights were on when Accused 1 whom she had known before waved the vehicle to stop. ….. PW5's torch was on when he tried to help Accused 1 look for his money at the door. He said he had also seen Accused 1 as he waved the vehicle to stop using the headlights of the vehicle. He said that he had known the accused 1 before.

…….

From the foregoing it is quite clear that headlights of the vehicle were on at the time Accused 1 waved the vehicle to stop. PW5 also had a torch which he flashed as accused 1 was entering the vehicle.

It is also evidence the accused 1 had been known by PW1, PW2, PW4, PW5 and PW6 before the incident (sic). They said accused was their neighbour. This was not disputed by accused. They were all seated in a position where they were able to see Accused 1 as he waved the vehicle to stop. PW1, PW2 and PW4 (driver) were all seated. There was nothing to obstruct their visibility. …… From the foregoing I find that accused 1 was properly identified".

We have already quoted a portion of the judgment of the High Court which indicates that the High Court re-evaluated the evidence, considered all the relevant circumstances including the length of time that the witnesses spent with the accused. Like the trial court, the High Court was satisfied that the appellant was recognized by Pamela, Elida Harrison and Meshack.

It is true that the witnesses had seen the appellant during the first trial. That issue was not however raised in the High Court. However this was a case where the witnesses claimed to have known the appellant before as a neighbour. Thus, the fact that the witnesses had testified against the appellant before the trial started *de novo* did not affect the quality of their evidence.

We have checked the statement of witnesses. It is clear that Harrison said in his statement that he recognized two of the robbers 'Sidi' and "Dannis". Further Meshack stated that he recognized two people. Lastly, P.C. Pius Amdanyi stated that the witnesses told him that they recognized two robbers. In our view, the fact that the appellant was convicted of the offence in count V when the complainant Pamela Atieno Onyango had not given evidence in the re-trial was a mere oversight and not due to want of evaluation of the evidence.

It is true that the appellant raised a defence of *alibi* and called two material witnesses, Rosaline Aluoch and David Atieno Aguto to support their defence. However the trial magistrate observed that Rosaline Aluoch failed to produce any document to prove that her husband had died and was buried on 24th March 2003; that no burial permit was produced and that David Otieno did not produce any bus ticket to prove that he had travelled to Nyando. It is also true that the High Court did not specifically deal with the appellant's defence. We agree that the trial magistrate misdirected himself by placing a high degree of proof of the defence of *alibi*. All the appellant was required to show, as Mr. Menezes correctly stated, is that the defence of *alibi* raised a reasonable doubt to the prosecution case.

However all the trial magistrate was saying is that the defence of *alibi* lacked substance and was thus incredible. None of the two witnesses said that he was with the appellant on 24th March 2002 at 4.30 a.m. when the robbery took place. There was evidence from Rosaline Aluoch that it took a short time - about half hour to walk from Ruga – (home of the appellant) to her home. Furthermore, the two courts below had made a finding that the prosecution witnesses had recognized the appellant. In view of that finding the defence of *alibi* when considered together with the prosecution case was unreliable.

Lastly, on the issue of discrimination, it is apparent from the evidence that the prosecution case against the co-accused was different from the prosecution case against the appellant. The appellant's case was based on recognition by witnesses who knew him very well before as a neighbour. On the other hand, the case of the co-accused was based on dock identification by witnesses who did not know him

before. There was no evidence that an identification parade was held in respect of the co-accused. In the circumstances, the acquittal of the co-accused was inevitable.

In the final analysis, this is a case where the two courts below made concurrent findings of fact, among other things, that the headlights of the vehicle were on when the vehicle stopped at Nyahera, that the witnesses saw and recognized the appellant through the headlights, that upon opening the door for the appellant, the appellant claimed that he had dropped money, that the conductor Meshack flashed a torch to search for the money and recognized the appellant. The statement of Harrison shows that he mentioned the appellant to police in his statement by his nickname. Further, it is clear from the evidence that the witnesses told P.C Pius Amdanyi that they recognized two robbers. Lastly, it is clear from the evidence of P.C Pius Amdanyi that he arrested the appellant because the witnesses had mentioned his name.

From the foregoing, we are satisfied that the appellant was properly convicted in respect of counts I, II, III, IV & V. As the complainant in count V did not give evidence the conviction in respect of count V is quashed and the sentence set aside.

The sentence of death in count I will remain in force unless it has already reduced to life imprisonment by Presidential Amnesty. The sentences of death in counts II, III, IV and VI are set aside. The sentence in the said four counts shall remain in abeyance.

Orders accordingly.

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

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR