



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: WAKI, ONYANGO OTIENO & NYAMU, JJ.A.)

CRIMINAL APPEAL NO.249 OF 2007

BETWEEN

PETER ODUOR LUKAS.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Dulu & Ojwang, JJ.) dated 17th July 2007

in

H.C.C.R.A.NO.166 OF 2005)

JUDGMENT OF THE COURT

In the trial court, the appellant was charged with two counts of robbery with violence contrary to **section 296(2)** of the Penal Code.

The prosecution case was that the appellant was in a gang of robbers who broke into the complainant's house at night on 21st December, 2003 at **Kawangware Muslim Village** in Nairobi Province and while armed with dangerous and offensive weapons namely pangas, clubs and axes, robbed the complainant, **Benjamin Wabwire** (PW1) of cash and household items all valued at Kshs.17,500 and at or immediately before or immediately after threatened to use actual violence to the complainant. Following a full trial, the Chief Magistrate Court, Kibera convicted the appellant on 11th March 2005 and sentenced him to death. Aggrieved by the said verdict the appellant appealed to the superior court against both conviction and sentence but the superior court dismissed the appeal on 17th July 2007 and it is the said dismissal which provoked this appeal.

A brief outline of the prosecution case was that the complainant (PW1), together with his wife, were asleep at their home on 21st December, 2003 when at 3.30a.m. they were awakened by a knock on the door. The stranger claimed to be part of a Police patrol and the couple was ordered to open the door. Before the couple could figure out what to do in the circumstances, the door was hit with a heavy stone and it gave way. The appellant together with two other men entered the house while the other

accomplices stayed on guard outside the complainant's house. The armed thugs stole the complainant's coloured television, a radio cassette and a suitcase containing family clothes. When the robbers broke in, they ordered the complainant to switch on the lights. With the assistance of the lights, the complainant together with his wife, (PW2) were able to recognize the appellant as a person who used to visit the complainant's neighbour **Roselyn Adhiambo**, who in turn used to refer to him by the nickname "**Odu**". The following morning when this name was given to the Chief's Camp at Kawangware the officers at the camp had no difficulties in recognizing him and thereafter the appellant was arrested in a local garage. He was handed over to the police who re-arrested him and at that point, upon being alerted the complainant and his wife identified him at the police station. The defence of the appellant was that he knew nothing about the offence charged and that he had not been identified by the complainant but by other persons who were not called as witnesses.

During the hearing of the appeal **Mrs Nyamongo** learned counsel represented the appellant and the State was represented by **Mr Monda**, learned Senior State Counsel.

Mrs Nyamongo in her submission, relied wholly on the seven grounds set out in the supplementary grounds of appeal filed in Court on 6th July 2010 which were as follows:-

- 1. That the appellate Judges erred in law by failing to analyse and re-evaluate the evidence on record and draw their own conclusions based on record (sic) as required by law.**
- 2. That the appellate Judges erred in law by upholding my conviction on the basis that I was positively identified and recognized at the locus in quo by PW1 & PW2 without considering that their evidence in (sic) respect to their first report was not made as per law requires (sic) in section 165 of the Evidence Act.**
- 3. That the appellate Judges erred in law while being impressed with mode of arrest without a need to consider that the adduced evidence by PW3 & PW4 was not supported by PW1 & PW2 as regards to the circumstances of my arrest and being identified at police station without an identification parade.**
- 4. That the appellate Judges erred in law when they upheld conviction and sentence yet failed to note that the prosecution failed to avail essential witnesses to prove their case beyond reasonable doubt.**
- 5. That the appellate Judges erred in law by failing to note that after section 200 of the CPC was complied with PW1 changed his testimony which was contrary to section 163 of the Evidence Act.**
- 6. That the appellate Judges erred in law by highlighting the contradictions and inconsistencies in the prosecution case but failed to rule them out (sic) in my favour.**
- 7. That the appellate Judges erred in law by failing to analyse and investigate my defence and submissions which were cogent and plausible to displace the prosecution case.**

Mrs Nyamongo stated that the two identifying witnesses, PW1 and PW2, who were husband and wife had not immediately after the incident given to the police any description of the appellant and were not present when the appellant was arrested and therefore they did not identify him before his arrest; those who first arrested the appellant had not been called as witnesses and therefore the identification was not free from error; that there was no evidence of the injuries sustained and consequently the offence had not been proved; that there were serious contradictions on whether the attackers were armed and it was therefore doubtful that any violence was perpetrated and consequently the offence of robbery with violence had not been established; that the appellant's defence was not taken into account by the two courts below; that the provisions of **section 211** of the Criminal Procedure Code were not complied with; that essential witnesses were not called; that the appellant did not understand what was going on during the trial and finally the learned counsel drew the court's attention to the holdings in the cases of **Osiva v Republic 1989** KLR 469 on the point concerning the need to have watertight evidence of identification and **Hassan Mohamed Katana v Republic C.A. No.48 of 2000** on the point that it is unlikely that a

robber who had just been chased away an hour before, can return to the same neighbourhood without running the risk of being recognized and arrested, a situation which he contended is similar to the circumstances before the Court because the appellant was arrested within the vicinity of the scene of crime.

Mr Monda for the State in opposing the appeal submitted that it was not in dispute that there were at least three robbers at the material time who included the appellant who in turn was known to the complainant and his wife as “Odu” and when the complainants gave the name of the appellant to the Chief’s Camp the police were able to trace the appellant’s whereabouts and also knew the appellant as a panel-beater and in the circumstances the appellant’s identification was by recognition; that since there was ample proof that the appellant was accompanied by others the requirement of proof of violence as urged by the appellant counsel had no basis since, company of more than one was in itself one of the specified ingredients of the offence as charged; that the principal grounds upon which the appellant’s appeal turned was one of credibility of PW1 and PW2 and the trial court did specifically find that it had believed the two witnesses and similarly the superior court, after evaluation of the evidence, did express the same view and therefore in the face of the concurrent findings of fact by the two courts this Court is in law required to uphold the position taken by the two courts and cannot reassess the facts again as it is being urged to do by the appellant’s counsel; that as regards compliance with **section 211** of the Criminal Procedure Code concerning the appellant’s mode of defence, it is clear that although the trial court did not make a note of the right having been explained to the appellant, the record did all the same reflect that the appellant did choose to give unsworn statement and that it is apparent from the record that the entire proceedings were conducted in Kiswahili, a language which the appellant understood and consequently there was in the circumstances no miscarriage of justice.

We think that the heart of the appellant’s appeal is the issue of identification and on this we agree with Mr Monda’s submissions that the appellant was sufficiently identified by recognition and in view of the concurrent findings of fact on the issue by the two courts below, we would have no basis for any intervention. In particular the two witnesses were consistent in their descriptions of the appellant. Similarly the appellant’s counsel did not show any material contradiction of the evidence of PW1, and that of PW3 and PW4. Concerning the uncalled witnesses, we agree with the lower courts that the prosecution evidence as presented met the required standard and for this reason further evidence was unnecessary and therefore no adverse inference in the circumstances could have been made by the courts below. We further agree with the superior court that failure to note that **section 211** of the Criminal Procedure Code had been complied did not occasion a miscarriage of justice because the appellant’s choice of defence is apparent on the face of the record.

This being a second appeal this Court is only concerned with matters of law and on this we uphold the learned Senior State Counsel’s submissions. After the recall the evidence was in our view on matters of substance not different from that given in the earlier sittings. The second trial magistrate did clearly direct her mind to the requirements of **section 200** of Criminal Procedure Code. We find no substance in the complaint with respect **section 200**.

The upshot is that this appeal has no merit and the same is dismissed.

DATED at Nairobi this 8th Day of April 2011.

P.N. WAKI
.....
JUDGE OF APPEAL

J.W. OYANGO OTIENO
.....
JUDGE OF APPEAL

J.G. NYAMU

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR