



IN THE COURT OF APPEAL
AT KISUMU

(CORAM: TUNOI, WAKI & AGANYANYA, J.J.A)
CRIMINAL APPEAL NO. 290 OF 2009

BETWEEN

DENIS OTIENO OGINGAAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ.) dated 27th October, 2009

in

H.C.C.R.A. NO. 66 & 67 OF 2008)

JUDGMENT OF THE COURT

The appellant herein, *Denis Otieno Oginga alias Allan*, was one of three accused persons before Siaya Principal Magistrate's Court charged with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the charge were that:

“On the 14th day of January 2008 at Kombewa sub-location in Siaya District within Nyanza Province, jointly with others not before court, while armed with dangerous weapons namely pistols robbed of (sic) BENJAMIN OMONDI NDEGE one motor cycle make Hommy, Cash Ksh.500/=, one pair of Shoes and one mobile make Motorola F3 all valued at Ksh.85,500/= and at immediately before or immediately after the time of such robbery threatened to use actual violence to the said BENJAMIN OMONDI NDEGE.”

After hearing six prosecution witnesses, two of whom were declared hostile and therefore their evidence was of no probative value, the trial magistrate (G.K. Mwaura, P.M) acquitted one of the three accused, but convicted the appellant and one *Martin Oduor Wadenya* alias *Rasta* thereafter sentencing them to death. On appeal to the superior court in Kisumu (Mwera and Karanja, JJ) Martin Oduor Wadenya's appeal was allowed and he was acquitted while the appellant's appeal failed. He now comes before us on this second and last appeal which may only lie on matters of law (**section 361** Criminal Procedure Code).

The only issue of law raised by the appellant through his learned counsel Mr. Pascal Odhiambo Abungu was identification which the two courts below relied on to uphold the conviction of the appellant. Mr. Abungu abandoned and did not argue the other seven grounds listed in the memorandum of appeal drawn and filed by the appellant in person.

The concurrent findings of fact made by the two courts below were that the complainant (PW1) was a motor cycle operator at Ugunja market. As he waited for potential customers at 11 a.m. on 14th January, 2008, the appellant approached him and negotiated the hire of his Hommy Motor Cycle Reg. No. KBA 862M, to take him to Ngonga market. They agreed on the fare which the appellant paid. On arrival at Ngonga market, the appellant directed that he be taken further towards a river. Near the river, the complainant noticed a Subaru vehicle parked behind a bush and a second person standing beside it. He

sensed danger and tried to turn back but the motor cycle skidded and landed in a ditch. The two men, one of whom was armed, got hold of him, removed his helmet and blindfolded him. Before they did so he had seen and noted the registration number of the Subaru car. They took him to the car and drove off for some distance before dropping him off near Nzoia River. He removed the blindfold and found that his mobile phone, shoes, and some Shs.500/= had been stolen by the robbers. He was not injured.

With the help of some members of the public, the complainant followed the Subaru tracks to Awelo area of Siaya. On the way they met and reported the incident, the Subaru registration number, and the description of the robbers to **C.I. Mutuota Kariuki** (PW4), the OCS, Siaya Police Station. On information received, C.I Kariuki traced the Subaru vehicle to a home in Bar Olengo where they found an old woman and the motor cycle. They also found the Subaru hidden in a bush, close to Yala River swamp wherein they found the complainant's shoes. The recovered motor cycle, the car and shoes were handed over to one of the investigating officers, **Pc Dennis Muheso** (PW6), who on information received three days later, made arrests of three persons. An identification parade was organized by **IP Jane Muriuki** (PW5) and the complainant positively identified the appellant before he was charged with the offence referred to earlier.

In his finding that the identification of the appellant was free from the possibility of error, the trial magistrate stated as follows: -

“From the complainant's evidence, it is clear that he had not seen the accused persons before. Since he saw the robbers for the first time during the robbery incident which is by no means a difficult situation. I am required to carefully consider the evidence of identification carefully bearing in mind the possibility of mistake and warning myself accordingly.

Regarding the first accused, the complainant testified that he is the passenger who hired him at Ugunja market. He negotiated the fare with him and was with him for about 30 minutes. He says that he saw him all this time. He later saw him at the identification parade and identified him.”

The superior court made the same finding after re-evaluating the evidence afresh. The court dismissed the appellant's defence that he was simply arrested from his place of work and taken to a police station where the complainant was taken to see him and thereafter was invited to an identification parade to touch him. The court stated: -

“His allegation that he was identified in the identification parade by a person who had earlier seen him in an office was discredited by evidence of the officer who conducted the parade i.e. I. P. Jane Muriuki (PW 5) and who produced in evidence the necessary identification forms which did not raise any suspicion that the parade was improperly conducted. The complainant, indicated that he had given the description of the robbers to the police. This was confirmed by C. I. P. Kariuki, the O. C. S. (PW 4).

Although the identification of the second appellant was by a single witness (i.e. the complainant) the learned trial magistrate duly warned himself of the need to treat the evidence with care and caution. Besides, the identification was made in favourable circumstances and with existence of adequate opportunity.”

Those are the findings attacked by Mr. Abungu who submitted that there was no positive identification at the scene or a valid identification parade. In his view, despite the complainant having been with the passenger for 30 minutes, they were not facing each other as the passenger was sitting behind on the motorbike. The sole evidence of the complainant could not therefore sustain a conviction. As for the identification parade, Mr. Abungu submitted that it was not held in accordance with the Force Standing Orders and was therefore a nullity despite the endorsement by the appellant that he was satisfied. The reason was that the appellant was placed in a line which had four short men and therefore the appellant was easily identifiable. In his submission, the parade members should have been of the same or similar height and on that ground alone the parade was of no probative value.

In opposing the appeal learned Assistant Deputy Public Prosecutor Mr. Gumo submitted that the robbery was committed in broad day light and both the complainant and the appellant were together for a long time. There was thus every opportunity for proper and positive identification. The identification parade was also endorsed by the appellant as proper and on the evidence of the parade officer he was placed amongst seven other persons of similar height.

We have considered the issue raised by the appellant but we find no compelling reason to reverse the findings made by the two courts below. It is clear from the evidence of the complainant that he was approached in broad daylight by the appellant who was not disguised in anyway and they negotiated the fare to Ngonga Market which they agreed at Shs.120. There is no reason to suggest that they were facing different directions as they did this. All in all they were together for 30 minutes and we are satisfied that there was enough opportunity to make a positive identification. There was also evidence that the complainant soon after gave the description of his attackers to CI Kariuki. As for the identification parade we are satisfied that it was organized in accordance with the Force Standing Orders and no complainant was raised before the parade officer who testified as follows: -

“I then changed the members of the parade and after reorganizing, I called the third suspect known as Dennis Otieno Odinga. I told him his rights during the exercise. He agreed to take part and stood between member No. 3 and 4. I brought the same witness to the parade. The witness went ahead to identify the suspect. The suspect indicated he was satisfied with the exercise. He signed and I countersigned the parade form. I now exhibit the form [5].”

The officer was believed by the trial magistrate and we have no basis for impeaching that assessment on credibility as the trial court was best placed to make it. The allegation that the appellant was shown to the complainant in advance was therefore correctly rejected by the superior court.

All in all we find no merit in the appeal as the appellant was convicted on sound evidence, and we order that it be and is hereby dismissed.

Dated and delivered at Kisumu this 28th day of July, 2011.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR