IN THE COURT OF APPEAL
AT KISUMU

(CORAM: BOSIRE, AGANYANYA & NYAMU, JJ.A.)

CRIMINAL APPEAL NO.214 OF 2009

BETWEEN

JOSEPH OTIENO JUMA …….. APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ) dated 28th April 2009

in

H.C.CR.A.NO.246 OF 2005)
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JUDGMENT OF THE COURT

In the Chief Magistrate's Court at Kisumu the appellant Joseph Otieno Juma was charged with the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code. The trial court convicted him and sentenced him to suffer death. It was alleged that on the night of 14th and 15th July 2005 at Nyawita Sub-location in Kisumu District within Nyanza Province the appellant together with another not before court while armed with pangas robbed Hellen Anyango Ogola (PW1) of one leather handbag containing one mobile phone make Siemens A 35, cash Kshs. 470; mobile charger and one diary all valued at Kshs. 4,270 and at or immediately before or after the time of such robbery used actual violence to the said Hellen Anyango Ogolla. In the trial the evidence of PW1 was that on 14th July 2005 she came back from the local Medical Training Centre arriving home at 10.00 a.m., and when she knocked the kitchen door she saw two people approaching her carrying pangas and immediately the two people pounced on her, attacked her in turns with the pangas. In the course of the attack her handbag fell down and the assailants seized it. She testified that the security lights over the of the kitchen which she was trying to open had a an electric bulb with a capacity of 75 watts and with the assistance of the light she was able to identify the appellant who wore a t-shirt with a ***Bob Marley*** image on it but she could not identify the other assailant. In an identification parade held subsequent to the incident she identified the appellant as the person she had recognized during the attack.

In his petition of appeal filed in the High Court the appellant inter-alia contended that the evidence touching on identification was inadequate and unsafe since it was based only on a single identifying witness; that the trial court did not take into consideration the appellant's defence and finally that the informers relied on by the chief to identify the perpetrators of the robbery were not called to testify.

The first appellate court in a judgment delivered on 25th April 2009 dismissed the petition. The dismissal of the petition gave rise to this second appeal.

In the appeal the appellant was represented by Mr Ongele advocate whereas the State was represented by Mr Kiprop, a State Counsel. In his submissions Mr Ongele relied on three main grounds of appeal and an additional ground that in the circumstances and considering that the appellant was facing a serious charge the informers should have been called by the prosecution as witnesses because visual identification could not be said to have been watertight, in that in ordinary life people do resemble one another and to illustrate the point counsel humously recalled he himself had been mistaken for the Rwandan fugitive ***Kabuga*** several months ago, a story well covered in the local press although he was not "***Kabuga***"! The grounds as per the appellant's memorandum of appeal are:-

1) That the Honourable learned Judges; failed to fully evaluate circumstances and the conditions of identification of the appellant.

2) That the Honourable learned Judges erred by failing to find that there was lack of corroboration in the prosecution case that directly connected the appellant to the offence charged.

3) ***That the Honourable learned Judges failed to find and appreciate that the appellant having been arrested particularly in the village, his identity became common knowledge and the subsequent identification parade was rendered a matter of formality.***

Turning to the grounds as outlined above, Mr Ongele contended that identification of a stranger can never be foolproof and the capacity of the light was never established by PW1, and that the only identifying witness did not describe any special features of the appellant either to the police when she made her statement or at the trial court; that the police went to visit the complainant in hospital accompanied by an unidentified people; that the evidence of identification was not corroborated because the alleged informers were not called to testify and as a result this prejudiced the appellant's case; that the taxi driver who according to PW1's evidence could have had an opportunity to identify the attackers was similarly not called; that the issue of identification was on the whole not given serious consideration by the two courts below although it is a general principle of law, that serious issues demand serious corresponding judicial attention.

On the issue of the appellant's defence, counsel submitted that it was erroneous for the trial court to have dismissed the defence as an afterthought bearing in mind that it is a principle of law in many decided cases, that except in limited cases the appellant had no burden to discharge.

Finally on the usefulness of the identification parade, the appellant's counsel submitted that after the arrest of the appellant he was paraded in the village and as a result his identity became a notoriety, which could have included the complainant who subsequently picked the appellant at the challenged identification parade; that although the act of the appellant running away when confronted by the village youth was taken against him, in ordinary life, running away from a crowd in Kenya, is a normal thing, in order to avoid mob justice.

In response to the above submissions, Mr Kiprop learned State Counsel, stated that PW1 was immediately after the incident able to report that he could identify one of the attackers and he singled him out as the person who at the material time wore a T-shirt bearing a ***Bob Marley*** image and she further added that a 75 watt bulb helped her to identify that stranger. The learned State Counsel further submitted that PW1, the identifying witness was not present when the appellant was arrested and therefore was not part of the alleged "village" mob the appellant was allegedly exposed to.

Concerning corroboration the learned State Counsel stated that it was not necessary in law to prove any fact with any number of witnesses and the evidence of one witness if credible, could still be relied on as clearly stipulated in ***section 143*** of the Evidence Act.

Regarding the weight if any which the courts placed on the appellant's defence learned State Counsel

urged the court to note that the contents of the judgment suggested that due weight was placed on the defence. However the courts observed that although it was a matter within his own knowledge in terms of ***section 111*** of the Evidence Act the appellant did not explain where he was on the day the robbery took place.

Finally on the relevance of the case law cited by the appellant's counsel, the learned State Counsel urged the Court to note that the two courts below had exercised caution on the dangers of acting on a sole identifying witness.

After taking into account rival submissions as outlined above, on the issue of identification it is clear to us that PW1, the sole identifying witness was regarded by the two courts below as a reliable witness who inspired confidence in her description of the appellant including her ability to describe the capacity of the bulb constituting the security light which helped her identify him. On our part, we see no basis for interfering with the concurrent findings of fact on the point.

On corroboration we find no basis for it in the circumstances, taking into account the provisions of ***section 143*** of the Evidence Act. In the circumstances we consider that the evidence of one witness was eminently adequate.

As regards the usefulness of the identification parade, the challenge concerning its conduct was not merited because it is in evidence that the complainant had immediately after the incident stated that she could identify one of the attackers and went on to describe his attire and to express confidence that she would be able to identify him, should such a chance arise, a test she subsequently passed by identifying him. She was in hospital when the appellant was arrested and paraded in the village and therefore had no opportunity of seeing the appellant before the identification parade.

Finally, whether the informers should have been summoned to testify, we are aware of the fact that their protection springs from public interest considerations, because were they to testify, their future usefulness in the same role could be extinguished or their effectiveness in their work considerably impaired! However all the same, in the circumstances, we think there was no need for any additional witnesses to testify since the trial court had already found that the evidence of PW1 was credible and sufficient, having identified the appellant at an identification parade. The request for additional witnesses would only have arisen if there were gaps in the prosecution case or the evidence relied on was found to have been barely sufficient - see ***Bukenya & others v Uganda Criminal Appeal No. 68 of 1972***.

We are alive to the fact that the learned counsel for the appellant did raise an important point touching on when it would be necessary for them to testify and we consider it important to answer the point in full.

Concerning the failure to ask the informers to testify in this case our view is that in the circumstances of this case their evidence was not necessary to determine the innocence or otherwise of the appellant because the prosecution's other evidence served the purpose. However, we think that if the evidence of the informers was necessary to prove the guilt of the appellant it would have been necessary for them to have testified perhaps outside the glare of the public. Thus in the case of ***Kigecha Njuga v Republic*** [1965] EA 773 Sir John Ainley CJ and Madan J stated:-

"informers play a useful part no doubt in the detention and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desire the courts to hear the details of the information an informer has given to the police clearly the informer must be called as a witness."

In some circumstances, informer's evidence may be inadmissible as hearsay unless the informer testifies Thus in the case of ***Maina & 30 others v Republic*** [1986] KLR 301 where the prosecution did not offer evidence to show the mental element to constitute an offence of preparation to commit an offence contrary to ***section 308(1)*** of the Penal Code, the trial magistrate quite erroneously relied on the hearsay evidence of police officers that an informer had told them that five people had planned to commit a robbery to provide the ***mens rea*** of the offence, without which the charge could not have been

sustained. It was held:-

"Though the appellants had been armed with offensive weapons, the failure to call the police informant to testify meant that the evidence narrated to the trial court that the informant had advised the police that a robbery was about to be committed was inadmissible because it was hearsay evidence which ought to have been rejected by the court."

In this regard we consider it important to consider how comparable jurisdictions have treated informers' evidence. On this we are encouraged to note that our view of the informers' evidence as stated above is reinforced by a very persuasive observation by the Canadian Supreme Court in the case of ***R v LEIPERT [1997] 1SCR 281*** where the court noted:

"The informer privilege is subject only to the "innocence at stake" exception. In order to raise this exception there must be a basis on the evidence for concluding that disclosure of the informer's identity is necessary to demonstrate the innocence of the accused …

……..

As it was not established that the informer's identity was necessary to establish the innocence of the accused, the privilege continued in place.

The same court observed in the case of ***R v Garofoli*** [1990] 2 SCR 1421 as follows:-

"Hearsay statements of an informer can provide reasonable and probable grounds to justify a search, but evidence of an informer's tip, by itself, is insufficient to establish reasonable and probable grounds. The reliability of a tip is to be assessed by having regard to the totality of the circumstances. The results of the search cannot, ex post facto, provide evidence of reliability of the information."

To sum up and in the context of the circumstances before us the only exceptions we can think of where the informer's lid can be lifted, are where failure to do so would undermine the concept of a fair trial and where it would have a bearing on the innocence of an accused person.

As stated above, the matter before us does not fall within the exceptions and although the appellant's counsel put up quite a strong fight concerning failure of the informers to testify, nothing turns on this at all in the circumstances. As is apparent the appellant has failed in all the grounds raised.

All in all, we find no merit in the appeal and the same is hereby dismissed.

It is so ordered.

Dated and delivered at Kisumu the 4th day of November, 2011.

S.E.O. BOSIRE

……..…….
JUDGE OF APPEAL

D.K.S. AGANYANYA

……..……..
JUDGE OF APPEAL

J.G. NYAMU
……..……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR