IN THE COURT OF APPEAL
AT KISUMU

CORAM: O'KUBASU, GITHINJI & ONYANGO OTIENO, JJ.A.

CRIMINAL APPEAL NO. 156 OF 2010

BETWEEN

MOSES ODONGO ODINGA……....……..APPELLANT

AND

REPUBLIC…….……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Karanja & Aroni, JJ) dated 23rd May, 2010

in

H.C.CR.C. NO. 272 OF 2007)

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JUDGMENT OF THE COURT

This is a second appeal. The appellant ***MOSES ODONGO ODINGA*** was charged before the Principal Magistrate's court at Siaya with the offence of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code. The particulars were that:-

"On the night of 28th to 29th day of November, 2006 at Bar-Shauri Sub-location, Yala Township location in Siaya District within Nyanza Province, jointly with others not before court robbed Grace Anyango Dawa one mattress, three bed-sheets, one curtain, one mobile make sumsang and cash Kshs.240 all valued at Kshs.37,740/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said, Grace Anyango Dawa."

He denied the offence but after full hearing, the learned Principal Magistrate *(G.K. Mwaura)* found him guilty of the charge, convicted him and sentenced him to death. He was not satisfied with the conviction and sentence and appealed to the superior court at Kisumu vide Criminal Appeal No. 36 of 2009. The superior court *(Karanja and Aroni, JJ*) also, after considering the appeal, dismissed it and hence this appeal before us based on his home-made memorandum of appeal dated 14th April, 2010 and filed on 29th April, 2010 together with a supplementary memorandum of appeal also home-made and filed on a date not stated but certainly after 29th April, 2010. When the court appointed an advocate for him, that advocate *P. Ochieng Ochieng* also filed another supplementary memorandum of appeal dated 23rd August, 2011, on 6th September, 2011.

Before us, *Mr. Ochieng* abandoned grounds 3 and 5 of the original home-made grounds of appeal together with the entire home-made supplementary grounds of appeal. He addressed us on the two grounds in his supplementary memorandum of appeal and on grounds 1, 2 and 4 of the original home-

made grounds. The three grounds on the original home-made grounds read:-

"1. That both the learned judges erred in upholding the lower court's decision disregarding the unfavourable circumstances for positive identification during the incident.

2. That both the learned judges erred in law and facts in putting reliance on a first report made on 14th March, 2007 while the purported incident is alleged to have been reported on the 29th day of November, 2006.

3. ---------- (abandoned).

4. The circumstantial evidence of my disappearance relied upon by the judges lacked any factual or legal proof since there is no evidence to show that I was within the plot of incidence prior to the commission of the crime.

5. ---------- (abandoned)"

And the two grounds cited in the supplementary memorandum of appeal filed by his counsel were:-

"1. The learned Judges erred in law by relying upon evidence that was never canvassed in arriving upon their decision.

2. The learned Judges erred in law by concluding that the first court met the ***standards, set out for relying upon the evidence of a single identifying witness in difficult circumstances while convicting.(sic)"***

The facts of the entire case are simple and straightforward. The complainant ***Grace Anyango Dawa, (PW1)*** was a student at the University of Nairobi at the relevant time. Her rural house was at Yala Township. On the day prior to the night of 28th/29th November, 2006 in the morning, she arrived at her house at Yala from Nairobi. Before she got to her house, she claimed that she met the appellant, but apparently no exchanges took place. At around 3.00 a.m. of the night of 28/29th November, 2006 or to be specific, in the morning at 3.00 a.m., her door was knocked several times and she was told to open the door. She opened the door and two men entered the house. They pushed her to the bed and she fell. The two attackers then demanded money telling her that she had come with money from Nairobi. They had bright torches with them. As they were picking items from various parts of the house, they flashed torches and in doing so, Grace says, torches' lights fell on the attackers as well and through that source of light, flashed on the appellant, she was able to identify the appellant as one of the two attackers who were in the house. She recognized the appellant as he was her neighbor. She knew his name as Odongo. She told the court further, that the appellant and his colleagues dragged her from the house. There were other three men outside the house. She was left with those three men as the appellant and his colleague returned to the house. The three men threatened to kill her as they demanded money. They led her towards St. Mary's School, Yala and left her at the Railway Station. She walked back home and knocked at the door of one Nora Barack. She told Nora what had happened to her and told her that the appellant was one of the robbers. ***Barack Ochieng Otolo (PW2),*** Norah's son responded and together with other neighbours they went to her house where they found that her beddings curtains, sumsung phone and Kshs.250/= all valued at Kshs.30,000/= were missing. They all went to the appellant's house but the appellant was not there and his house was locked from outside. They proceeded to Yala Police Station where she reported the incident. Later in the morning, she went to Yala Police station and recorded her statement; of what had taken place. She also told the police the name of the appellant. ***P.C. Wilson Kiyondi (PW3)*** was assigned the duties of pursuing the matter by the OCS, Yala Police Station. He, together with Grace, visited the appellant's home at Buyango in Western Province, found his wife who told them the appellant had left for Luanda. He left a message with appellant's wife to tell the appellant to report to Yala Police Station when he returned. We need to observe here that Barack in his answer to the appellant's question in cross examination stated that on the night of the incident, the appellant, who was his neighbor at Yala also, was at his house upto about 9.00 p.m. Be that as it may, the appellant did not report to the police at Yala any time despite the message left by P.C. Wilson. We do not read much in that as there was no evidence that

the appellant's wife delivered the message left with her by P.C. Wilson. After sometime, the appellant was arrested for another alleged offence and it was then that he was eventually charged with the offence of robbery with violence the subject of this appeal. As arresting officer did not testify and as P.C. Wilson did not adduce any evidence of the appellant's arrest, all we can say and do say is that he was indeed arrested few months after the incident for another offence but having been arrested he was charged with the offence before us, as well. He himself admitted in his defence that he was indeed arrested. That defence is short and we do reproduce it herebelow:-

"When was (sic) arrested, it was over other matters, the officers were to take me to the hospital and I was injured, I was shocked when this matter was brought up. That is all."

The above were the facts before the trial court upon which that court found the appellant guilty, convicted him and sentenced him to death. They are the facts that the superior court in its duty as a first appellate court revisited afresh, analysed and re-evaluated and having done so found the appellant's appeal in that court had no merit; dismissed it and confirmed both conviction and sentence.

In finding the appellant guilty, the Principal Magistrate stated inter alia:-

"Reverting to the evidence of recognition, I note that Barrack has testified that Grace told them that she had recognized the accused. CPL Kiyondi also leads further suspect on the brightness of the torch that illuminated the accuse (sic), I can note that it was being used to illuminate items in the house and must be sufficient to clearly illuminate a person who was very close.

After carefully considering all the evidence, I have no doubt at all that the accused was seen and recognized by the complainant. His protest of innocence is not true at all and I proceed to dismiss the same. From the foregoing, I do not doubt the prosecution case at all. I find the accused person guilty as charged and proceed to convict him accordingly."

And the first appellate court, in confirming the decision of the learned magistrate had this to say:-

"We think that even in the absence of corroboration, the learned trial magistrate could wholly rely on the complainant's evidence of identification as long as he treated it with the greatest care and warned himself of the inherent dangers involved in relying on such evidence before convicting the appellant.

It is discernible from the record that the learned trial magistrate applied as he was required to do the principles set out in the case of *Roria vs. Republic* ***(supra).***

In the end result, we find no merit in this appeal and dismiss it accordingly."

In his submissions before us, *Mr. Ochieng* raised on the main three issues. The first issue was that although the first appellate court was aware of the principles that guide the courts in deciding cases of identification of a suspect under difficult condition and it cited the case of ***RORIA VS. REPUBLIC (1967) EACA 583,*** it nonetheless failed to apply the same principles in fact as it did not consider matters that were required to be considered before a single witnesses' evidence on identification under unfavourable conditions could be relied on to convict a suspect. He contended that the superior court in its analysis of the entire evidence failed to consider such factors as fear visited upon Grace at the time of the attack on her, proximity and other matters such as her state of mind all of which made it difficult for Grace to recognize the robbers. The second point *Mr. Ochieng* raised was that the first appellate court relied on extraneous matters to dismiss the appeal. He cited the superior court's summary of facts in which it stated that the appellant was dressed in a black coat and black long trousers and submitted that the record does not state that the appellant was wearing black coat and black long trousers. The third point he raised was that the first appellate court erroneously relied on alleged disappearance of the appellant soon after the offences whereas apart from one visit at his Yala house and one visit at his rural house, there was no evidence that any further visits or searches were made to lead to the conclusion that he disappeared after the offence. He thus sought that the appeal be allowed.

Mr. Kivihya, the learned Senior State Counsel conceded the appeal submitting that looking at the evidence that was adduced by the prosecution, there was nothing to demonstrate that the appellant was at the scene of incident and nothing to show he disappeared after the offence was committed.

We have anxiously considered the evidence that was adduced in this case together with the appellant's defence, the judgment of both the trial court and the first appellate court. We have also considered the entire submissions by the learned counsel, the charge, the entire file and the law. As we have stated above, the facts are fairly straightforward. The main issue is the issue of identification whether by recognition or otherwise. It is not in dispute that no stolen items were recovered from the appellant. It is also not in dispute that the only witness who allegedly identified the appellant at the scene was Grace. It is further not in dispute that the robbery with violence, the subject of this case took place very early morning of 29th November, 2006 at 3.00 a.m. or on the night of 28/29th. It thus, took place at night. The only source of light at the time of robbery upon Grace was light from a torch held by the appellant's colleague and lastly, when Grace was attacked, she was alone in the house and the two people, i.e. one she identified as the appellant and his colleague entered the house after she opened the door for them. They must have been close to her. In short, this was evidence of a single witness under conditions unfavourable for positive identification of a suspect. The guiding principles to be applied by courts when considering such evidence is well summed up in the well known case of ***ABDALLAH BIN WENDOH & ANOTHER VS. REGINA (1953) EACA 166.*** In that case, the predecessor to this Court held:-

"Although subject to certain exceptions a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of such witness respecting the identification especially when it is known that the conditions favouring a correct identification are difficult. In such circumstances other evidence circumstantial or direct pointing to guilt is needed."

And in the case of ***RORIA VS. REPUBLIC (1967) EA 583*** to which we were referred, the court stated:-

"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, LC said recently in the House of Lords in the course of a debate on S. 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts;

'There may be a case in which identify is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if they are as many as ten – it is in a question of identify.'

That danger is of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safer to act on such identification."

The above two decisions were dealing with situations where the identifying witness was a single witness. It is also important to note that they deal with identification of a stranger under difficult conditions. They emphasize the need in such a case for the court to look for other evidence direct or circumstantial to satisfy itself that the identification by a single witness, though a stranger and under difficult conditions was nonetheless correct and safe before conviction could be entered. In the case of ***MAITANYI VS. REPUBLIC (1986) KLR 198*** this Court differently constituted considered the two decisions above and having done so, set out what evidence the court required to consider before it found it safe to convict a suspect upon the evidence of a single witness under unfavourable conditions. This was a case involving a situation where there was no other evidence circumstantial or direct to supplement the evidence of a single witness. It spelt out the following principles in such a case:-

"In this case there is no other evidence circumstantial or direct. The decision must turn on the need for testing with greatest care the evidence of this single witness. Is that what the courts below really did? It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Otherwise, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true

impression being received improves. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and it (sic) position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by there would have been a careful inquiry into these matters by the committing magistrate, state counsel and defence counsel---------

There is a sound line of inquiry which ought to be made and that is whether the complainant was able to give such description or identification of his or her assailants to those who came to the complainant's aid, or to the police."

All the above decisions clearly spell out that there is a need for the courts to consider the evidence of a single witness on identification under difficult conditions with the greatest care and the case of *Maitanyi* (supra) sets out what is involved in that consideration, i.e. the matters that the court needs to consider to constitute "consideration with greatest care". As we have stated, the above cases do not touch on identification by recognition, which to some extent is different from identification of a stranger. We do agree that whether a stranger or a person previously known to the witness, the witness needs to see him first before the witness can conclude whether he is a stranger or a person he had seen before the incident. In short, whether a stranger or not, the conditions such as the source and strength of light aiding identification must exist and the court must inquire into them before feeling safe to convict on identification of a suspect whether a stranger or a person the single witness knew or had seen previously.

Again, whether the witness reported to another person or to the police that he could identify his assailants are matters of importance whether in case of a stranger or a person known to him before the offence. However, there is a difference in the standard of evidence required in cases of identification by a stranger and of a person who is recognized by the single witness. This is spelt out in the case of ***ANJONONI & OTHERS V R. [1980] KLR 59*** where this Court stated:

"Being night time the conditions for identification of robbers in this case were not favourable. This was, however a case of recognition, not identification of assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in SOIRE OLE GETAYA VS REPUBLIC (unreported)."

In the case of ***PETER OYUGI MOKAYA & 2 OTHERS V. REPUBLIC Criminal Appeal No. 353 of 2009***, this Court had this to say in appreciating the principles spelt out in the well known case of ***R. V. TURNBULL & OTHERS (1976) 3 ALLER 549*** which are similar to a large extent to the sentiments expressed in ***Maitanyi's*** case (supra).

"We do agree that as is stated in the case of R. V. TURNBULL& OTHERS (1976) 3 ALLER 549 mistakes can be made even in cases of recognition as an honest witness may nevertheless be mistaken even in case of recognition but in the case where the appellant were not only neighbours of the complainant, but also engaged in conversation with complainant and his wife and where there was still some light as the offence took place at 7.00 p.m. we see no possibilities of such a mistake."

In this case, Grace was asleep in her house when her door was knocked several times. He woke up and opened the door for the assailants herself. This in effect means she was awake by the time she opened the door. The two assailants who entered her house had torches and those were the only source of light at the time of robbery. She described the torches in her cross-examination as follows:

"The two of you had torches, the torches were very bright."

It is one of those bright torches held by the appellant's colleague which the same colleague flashed on the appellant and enabled the complainant to recognize the appellant. She said as further:-

"One of the two men then flashed his torch at his colleague when looking for items and I saw the person who was flashed. It (sic) was a neighbor. This is Odongo. He is a neighbour. I saw him well and recognized him."

Immediately after the incident, when Grace walked back from Railway Station where she was left, she did not go to her house but went to Nora Barrack's house, woke her up and told her about the incident, she disclosed at that time that her assailant was the appellant. That in our view satisfies the second requirement enunciated in ***Maitanyi's*** case that in inquiring on the evidence of a single witness on identification, it be ascertained whether the complainant informed the police or those who went to his/her aid of his or her ability to identify his/her attackers. Here Grace mentioned the appellant's name to Nora and to Nora's son ***Barrack Ochieng Otolo*** who went to her aid. It is as a result of that disclosure that both the complainant and *Ochieng* went to the appellant's home that night but did not find him although according to *Ochieng*, the appellant had been in his house upto 9.00 p.m. of that night. Further, when Grace went to the Police station, she disclosed the appellant's name as one of the assailants and that necessitated ***P.C. Wilson Kiyondi*** to visit the appellant's house and later, the appellant's rural home at Buyango. The source of light that enabled Grace to recognize the appellant as one of her assailants was from a bright torch which appellant's colleagues "beamed" on the appellant. Grace said she saw the appellant for about five minutes. They had been neighbours for six months. They met often as they were neighbours and on the day prior to the night of robbery they met in the morning when she arrived from Nairobi. That explains why at the time of attack on her, the robbers had said that she had come with money from Nairobi and, lastly, Grace must have been close to the appellant when robbery was going on. She had been pushed to the bed and she fell. After picking up some items in her house, they dragged her outside the house and left her with three other robbers as they went back to ransack the house. Clearly in pushing and dragging Grace outside they were close to her and bright torch were being flashed all over the house with beams falling on the appellant. In our view, the totality of the evidence, the consistency of Grace and the confirmation of the material facts of the evidence by ***Barrack Ochieng*** and ***P.C. Wilson Kiyundi*** lead to only one inevitable conclusion and that is that Grace could not have been mistaken. She had enough time to recognize a neighbour; did so and immediately told Nora and her son *Ochieng* the name of her assailant. In our considered judgment, all the principles in ***Matanyi*** case, (supra), in ***Roria's*** case (supra) and in ***Abdalla bin Wendo's*** case (supra) and lastly in ***Anjonini's*** case (supra) were satisfied. We cannot fault both courts in their analysis of the evidence that was before them on the issue of identity.

In stating as above, we are not oblivious of the fact that in their judgments, the learned Judges of the superior court talked of the appellant as having been seen wearing black coat and black long trouser. Of course, that was not borne out by evidence. It was an error of fact. We note however that it was made in a summary of the evidence that was allegedly adduced in the trial court. It was however not relied upon to convict the appellant. A thorough reading of the superior court's judgment reveals that that court relied only on Grace's recognition of the appellant as one of the robbers and not on what the robber was wearing. In any case, even if that erroneous assertion is ignored as we do, the evidence on record would have still been enough to convict the appellant for clearly the complainant never said anything about the dress of the appellant. She was believed on what she actually said and not on what she never said.

There is also a complaint by *Mr. Ochieng* that the superior court convicted the appellant on, among others, the allegation that he disappeared after the incident. We think, the court had some basis for coming to that conclusion. Barrack stated in his evidence in cross-examination what we have alluded to above, that the appellant was on that night prior to the incident in his house upto 9.00 p.m. He was their neighbour. They knew their house. After the incident he was not there and his door was locked from outside. Assuming he had gone out that night for whatever reason, it is not clear why he was not seen there at Yala for some time. If he was around Yala Township, then he must have heard that a group went to his house that night and police also went there on 29th November, 2006 and did not find him. In such a scenario, an honest person would have reported to the police to find out the reason for the visits. Apparently he did not do so. Further, assuming his wife told him to report to the police, he should have done so. As we have said it would not be easy to ascertain whether his wife told him to report to police but all in all his being away until his arrest for another offence in March, 2007 did point to his running away for some reason. We do not attach any importance to that complaint.

As is clear, for reasons stated above, we have not agreed with *Mr. Ochieng* and Mr. Kivihya. We are of the firm view that on full consideration, this appeal lacks merit. It is dismissed.

DATED and DELIVERED at KISUMU this 4TH day of NOVEMBER, 2011.

E.O. O'KUBASU
…….
JUDGE OF APPEAL

E.M. GITHINJI
……
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR