IN THE COURT OF APPEAL
AT KISUMU

(CORAM: O'KUBASU, ONYANGO OTIENO & VISRAM, JJ.A.)

CRIMINAL APPEAL NO. 30 OF 2009

BETWEEN

FREDRICK OSIEMO ……..…..……..…. 1ST APPELLANT
STEPHEN ONDILO MAINA ……..……..…… 2ND APPELLANT
JOHN OSIEMO OYAGI ……..……..…… 3RD APPELLANT

AND

REPUBLIC ……..…… RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisii (Musinga & Karanja, JJ). Dated 18th December, 2008

in

H.C.CR.A.NO.182 OPF 2006)
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JUDGMENT OF THE COURT

On the night of 24th May 2006, at about 10.00 a.m. ***Bernard Osugo Manani (PW1),*** his wife ***Lydia Nyasuguta Osugo (PW2),*** were asleep in their house at ***Matongo Sub-location***, in Kisii Central District, and his brother ***Wycliffe Ontegi Manani*** apparently referred to by Bernard as ***Wycliffe Murauni Osugo (PW3)*** was in the same house but in another room. They were ordered to open the door by people who were outside. Wycliffe also heard that order. The people claimed they were police officers. Bernard rose from the bed, went to the sitting room, lit a wicker lamp, placed it on a table and opened the door. The men entered the house. With the help of the wicker lamp, both Bernard and Lydia who tried to join Bernard in the sitting room, readily identified the three men as the appellants before us. Wycliffe who heard the three intruders order the door to be opened also opened the door to his room and opened the door leading to the sitting room and standing at that door, saw the three people and also identified them as the appellants. They all said the appellants were previously known to them and were coming from the neighborhood. Bernard had known the appellants ever since they were children. He knew each of them by name and identified them as we have said by way of the wicker lamp. Lydia knew them as they were neighbours and she had known them for three years prior to the incident. She also knew each of them by name and claimed to have identified them by name by the wicker lamp. Wycliffe knew the first and second appellants ever since they were young children whereas he had known the third appellant for ten (10) years prior to the incident. According to Bernard, the first and second appellants had pangas and torches while the third appellant had somali sword and a torch. The first appellant assaulted Bernard on the face with a panga and the second appellant assaulted him on his back with the flat side of the panga. The third appellant stood-by and ordered him not to raise alarm. He was beaten for about 10 minutes and his Kshs.1,000 which was in his trouser pocket was taken away by the first appellant. They

then entered the other room and Bernard ran away. Bernard described the appellants as wearing trench coats which were black in colour in respect of all of them. As Bernard was being beaten, he was sitting down on the floor as he had been commanded to do. Lydia, on seeing what was going on in the sitting room, rushed back to Wycliffe's room and laid there under Wycliffe's bed. Wycliffe escaped through the window so as to call their uncle. Bernard had in the meantime escaped to the maize farm. The robbers went away. Bernard reported the incident to the Assistant Chief of the area and later to Riana Police station. He was issued with a P3 form. On 29th October, 2006, he was examined by ***Jackson Murauni (PW4)*** a clinical officer based at Kisii District Hospital who, on examination found that he had been assaulted and had been treated earlier on 25th May 2006 and saw the treatment notes. On 28th May 2006, four days later, ***I.P. Jovenalis Baraza, (PW5)*** received a phone call from the Assistant Chief Matongo Sub-location to the effect that the same Assistant Chief had arrested all the appellants. He proceeded to the chief's office and re-arrested the appellants. He carried out further investigations and as a result of those investigations, he charged the appellants with the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code, the particulars of which were that:-

"On the 24th May 2006 at Matongo sub-location in Kisii Central District within the Nyanza Province jointly with others not before the court being armed with dangerous weapons namely pangas, and a sword robbed Bernard Osugo Manani cash Kshs.1,100/- and at, immediately before or immediately after the time of such robbery wounded the said Bernard Osugo Manani."

They pleaded not guilty to the charge and in their various sworn defences at their trial in the Chief Magistrate's Court at Kisii they each raised alibi with the first appellant saying that on 24th May 2006 he was in his house as he had earlier on spent the day at his shop. The next morning, he heard that a person had been assaulted the previous night and he was later arrested by youth-wingers. He admitted in cross-examination that he knew Bernard's house and contended that the charge against him was a frame up on ground that Bernard had refused to pay him Kshs.200/- which he was to pay to him but again conceded that he did not raise that line of defence in his cross-examination of Bernard. The second appellant's defence was that on the material date, he was at his home as he was unwell. The following day he heard that somebody had been assaulted. The third appellant claimed he was also at home on the night of the incident and knew nothing to do with the allegations in the charge. He only heard that a person had been assaulted and he heard of it the following morning. The learned Senior Principal Magistrate, after hearing the entire case, found the appellants guilty as charged, convicted each of them and sentenced each to death. On appeal, the superior court (D. Musinga and J.R. Karanja, JJ) agreed with the subordinate court's verdict and dismissed the appeal which were Criminal Appeal Nos. 182, 183 and 184 all of 2006 but were consolidated and heard together under Criminal Appeal No. 182 of 2006. In dismissing the appeals, the learned Judges of the superior court addressed themselves thus:-

"The appellants were no strangers to the three witnesses (PW1, PW2, and PW3) and none of them (appellants) denied having previously been known to the said witnesses.

Accordingly, we do find that the appellants were identified by recognition as the people who attacked, injured and robbed the complainant. Their defence was considered by the trial court and rejected on the basis of credibility. We may not in that regard fault the trial court. Even in the absence of a finding on credibility, the prosecution evidence of identification was cogent and corroborative for any reasonable tribunal to arrive at the irresistible conclusion that the appellants were the persons involved in the commission of the material offence."

The learned Judges then cited the well known case of ***R vs Turnbull*** (1976) 3 ALL ER 455 and having done so, stated further:-
"Having the above legal principles in mind we hold that the appellants' conviction was safe. The present appeals are devoid of merit and are hereby dismissed."

That is the decision which the appellants are now challenging by way of this appeal. Each appellant filed his own home made Memorandum of Appeal together with supplementary Memorandum of Appeal. Later after they were assigned a counsel, by the Court Wesley *M.R. Gichaka* filed a composite Supplementary Memoranda of Appeal. At the hearing of the appeal, *Mr Gichaba*, abandoned all their

original Memoranda and Supplementary Memorandum of Appeal and relied in his address to us on, the Supplementary Memorandum of Appeal filed by him on 12th September, 2001. That Supplementary Memorandum of Appeal raises nine grounds which are in a nutshell that the learned Judges failed to appreciate that no recognition beyond error was possible in this matter; that the superior court erred in dealing with the issue of identification and ignoring other issues raised in the appeal; that there was no compliance with the provisions of ***section 211*** of the Criminal Procedure Code and this resulted into a miscarriage of justice; that the failure by the Prosecution to call the Assistant Chief of Matongo Sub-location who arrested the appellant should have been considered by the trial court and the superior court; that the superior court failed to subject the entire evidence to fresh and independent scrutiny and that occasioned a failure of justice; that the learned Judges failed to consider the effect of the contradictory evidence in the entire case; that the decision of the superior court was bad in law and could not be supported by any reasonable tribunal; that the defence of alibi was not analysed properly and that the learned Judges failed to appreciate that the totality of the evidence adduced was not beyond reasonable doubt and could not sustain a conviction.

In his address to us, Mr Gichaba on the main highlighted the above grounds and supported his arguments with a list of authorities. He, however, abandoned and withdrew ground 3 of his grounds of appeal on the issue of compliance or non compliance with the provision of ***section 211*** of the Criminal Procedure Code. He raised complaint on contradictory evidence as to whether Kshs. 1,000 or Kshs. 1100 was the amount stolen or not.

Mr Kivihya, the learned Senior State Counsel on the other hand supported conviction and sentence, arguing that the conviction was based on overwhelming evidence as the appellants were well known to the complainant, Lydia and Wycliffe and the light from wicker lamp on the table in the sitting room was enough for purposes of recognition of appellants, who were properly identified by the witnesses. As to the failure to call the Assistant Chief Mr Kivihya's take was that all the Assistant Chief did was to arrest the appellants and the evidence of arrest was not challenged as the appellants were in court having been arrested. There was thus no need for the Assistant Chief to be called as a witness. He further stated that the appellants were arrested five days after the offence was committed and that period could not represent in-ordinate delay. As to the apparent contradiction on the exact amount stolen, Mr Kivihya felt that was neither here nor there, for after all whether it was Kshs.1,000/- stolen or Kshs.1100/-, the fact remains that money was stolen from Bernard in the cours e of violence and on whether Wycliffe PW3 was properly described by one prosecution witness, again he said Wycliffe was a witness and it did not matter what name he was addressed with.

We have considered the record before us, the charge, the decision of the subordinate court, and that of the superior court. We have also considered the submissions and the law. In our view, the main ground of appeal is the issue of identification of the appellants. The other complaints raised such as contradictions in the evidence of the prosecution witnesses as to the actual name of Wycliffe and whether the amount stolen was Kshs.1,000/- as stated by Bernard or Kshs.1,100/- as stated by the other witnesses namely Lydia, Wycliffe and ***IP Jovanalis*** are in our respectful view matters of no consequence. Whether the third person who was with Bernard and Lydia in the subject house at the time of robbery was Wycliffe Maraki Osugo as stated by Bernard or Wycliffe Ontegi Manani as PW3 called himself is in our view of no material effect in the entire case because that person, by whatever name gave evidence and was identified as an existing person. Again whether the amount stolen was Kshs.1,000/- as appears in the typed record as evidence of Bernard or Kshs.1,100/- as stated by others does not really take the case to any other level as in law something capable of being stolen was actually stolen be it Kshs.1,000/- or Kshs.1100/-. However, while still on this issue, we note two aspects. First is that in the original handwritten trial court record, which we called for and perused, the amount written as having been stolen from Bernard as stated by Bernard appeared to have been interfered with such that it could easily have been Kshs.1100/- as well. Second is that the other three witnesses stated the amount stolen from Bernard as they were told by Bernard. That being so, Bernard was the origin of the story and so the court could as well rely on his evidence which in any event was that some money was stolen from him during the robbery whatever amount it was. We thus see no merit in those complaints and in our view, the superior court cannot be faulted as having failed to analyse those aspects of the evidence afresh for even if it had done that, the result would have remained the same. The claim that ***section 211*** of the Criminal Procedure

Code was not complied with in practice and that only lip service was given to the alleged compliance, was withdrawn and we think rightly too because, once the trial court stated it was complied with and the record showed that the appellants made options and each gave evidence on oath, there was no other way of challenging that aspect. We say no more on that ground.

We now turn to the question of identification of the appellants. Bernard, Lydia and Wycliffe all stated in evidence that they clearly saw the appellants and identified them by recognition. They were neighbours and they knew the appellants by names. However, the appellants deny having been at the scene of the robbery and each of them sates on oath that he was in his house on the material date and at the material time. Thus, though they accept being victims' neighbours and indeed the first appellant even claimed to have had some financial transactions with the complainant, nonetheless they denied having been the robbers. The issue to be resolved then is, who is telling the truth on that crucial issue? In an attempt to resolve that issue, we must remind ourselves as we hereby do, that pursuant to the provision of ***section 361,(1)(a)*** our jurisdiction in this appeal is limited to matters of law and not to matters of fact this being a second appeal. The trial court in its judgment stated as follows on the evidence that was before it:-

"I find the prosecution witnesses honest and credible as opposed to the accused persons whom I find to be liars."

The learned Senior Principal Magistrate thus rejected the defence case and upheld the prosecution case on facts that were before the court which included the identification of the appellants as the perpetrators of the robbery upon Bernard. In the parts of its judgment we have reproduced above, the superior court also found that the appellants were identified by recognition as the people who attacked, injured and robbed the complainant. These are two concurrent findings on the issue of identity. However, *Mr Gichaba* still submits that the identification was not proper as according to him, wicker lamp was not enough for proper identification and in his submissions, before recognition is relied on, the person being recognized even if he is a close relative, must be seen with the aid of proper source of light.

We do agree that the issue of identification is a matter of law. We however observe that facts giving rise on whether a suspect was properly identified are matters of fact. Nonetheless, identification, particularly at night as happened here where the attack took place at night and Bernard was being beaten, the issue as to whether identification or recognition was proper remains an important matter of of fact and law and must be approached with greatest care before a conviction can be based on it. In the case of ***RORIA v R*** (1967) EA 583 at page 584 the predecessor to this Court made the following observation:-

"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L.C. 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 powers of the court to interfere with verdicts.

"There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine out of ten – if there are as many as ten – it is on a question of identity."

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 safe to act on such identification."

And in another case heard and decided thereafter – the case of ***ANJONONI & OTHERS vs THE REPUBLIC*** (1980) KLR 59 this Court expressed the same sentiments as in the ***Roria*** case (supra). It stated:-

"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused."

Lastly, in the case of ***R vs Turnbull and others*** (1976) 3 ALL ER 549, to which we were referred *Lord Widgery C.J*. stated inter-alia:-
"Each of the appeals raises problems relating to evidence of visual identification in criminal cases. Such evidence can bring about miscarriage of justice and has done so in a few cases in recent years."

Thus in a case such as is before us, where the appellants deny being at the scene of the robbery whereas the witnesses say they were there, there is need to carefully consider the available evidence before a conviction is arrived at. In this case as we have stated, the source of light was a wicker lamp and although the robbers had torches it is not stated anywhere that the witnesses saw the robbers by use of such torches. However, the robbers were not strangers. They were neighbours. Besides that, as the robbers were with Bernard for sometime in the sitting room with wicker lamp on the table, Lydia and Wycliffe were at a distance from them, but that distance was a short distance. They were not being beaten, at least Wycliffe was not being beaten and was at the door leading to the sitting room. He was in a much better position to see the appellants and he said he recognized all of them. Recognition is a better form of identification than identification of strangers. See the case of ***Anjononi*** (supra), where this Court stated further as follows:-

"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the condition for identification of robbers in this case were not favourable. This was however, a case of recognition, not identification of the 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 draw the distinction between the recognition and identification in Siro Ole Gatonye vs the Republic (unreported)"

In our considered view, having considered the circumstances prevailing at the time of the robbery and the evidence on record, we are satisfied that the wicker lamp could and did in such circumstances provide proper source of light for proper identification of the appellants by Bernard, Lydia and Wycliffe. We cannot fault the trial court nor the first appellate court for their concurrent findings on the issue of identification. We cannot interfere with their findings on those facts and we thus cannot interfere with their conclusion. The appellants were properly identified as the robbers. Their defence of alibi was clearly ousted by the overwhelming evidence given by Bernard, Lydia and Wycliffe identifying them as the robbers at the scene of robbery.

The last matter which we need to deal with is the ground of appeal that says the trial court erred in convicting the appellant when the Assistant Chief who arrested the appellants was not called to give evidence as to the circumstances under which the appellants were arrested and why they were arrested after five days, and the first appellate court erred in failing to observe that error and to act on it. Bernard reported the incident to the Assistant Chief of Matongo sub Location, one Ombui. He also reported the incident to the police. On or about 28th May 2006, IP Jovenalis received a phone call from Ombui telling him that the appellants had been arrested with the help of youth wingers. He went and re-arrested the appellants and later after investigation, charged them with the offence of robbery with violence. In such a scenario, of what help would the evidence of the Assistant Chief have been? The appellants did not deny being arrested. They were in court as a result of their having been arrested. The Assistant Chief and his youth wingers did not arrest them out of the blues. He had received a report from the complainant and that is on record. IP Jovenalis who re-arrested them and thus carried out final arrest of the appellants gave evidence. **Section 143** of the Evidence Act provides:-

"No particular number of witness shall, in the absence of any provision of law to the contrary be required for the proof of and fact."

In the case of **Bukenya & Others vs Uganda** (1972) EA 549, the predecessor to this court stated that the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may

be inconsistent. In short, only witnesses necessary to establish a fact need be made available and not a superfluity of witnesses. However, the fact that Assistant Chief Ombui could establish was the fact of arrest of the appellants and that was established by *IP Jovenalis* who re-arrested them and by the fact that they were in court as a result of them being arrested. Nothing turns on that ground of appeal.

Thus in our view, the two courts below came to a proper conclusion supported by overwhelming evidence. The superior court, as we have indicated above, carried out its duties as is required by law and analysed the evidence afresh, evaluated it and came to the inevitable conclusion to which we also come to which is that this appeal cannot stand.

We find no merit in this appeal. It is dismissed.

Dated and delivered at Kisumu this 3rd day of NOVEMBER, 2011.

E.O. O'KUBASU
……
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
……
JUDGE OF APPEAL

ALNASHIR VISRAM
…….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR