



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 4 OF 2004

AKELO WAGAKA OGINA

PETER KITINE AMOLO

SALIM KAPELA ABONYO.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Mbogholi & Mutito, JJ) dated 5th August, 2003

in

H. C. CR. A. NO. 763 – 765 OF 1999)

JUDGMENT OF THE COURT

The three appellants, *Akelo Wagaka Ogina (Ogina)*, *Peter Kitine Amolo (Amolo)* and *Salim Kapela Abonyo (Abonyo)* were charged jointly with two other persons in the Senior Principal Magistrate's court at Migori with one count of attempted robbery with violence contrary to **section 297 (2)** of the Penal Code. While the two other persons jointly charged with the appellants were acquitted for lack of evidence, the three appellants were convicted of the offence charged, and sentenced to death.

The appellants duly appealed against conviction and sentence to the superior court but their consolidated appeals were dismissed, precipitating this appeal.

At about 9.00 pm on the night of 14th June, 1997 *Sylvanus Wagaka Ogima* (PW 1) (the complainant) was asleep in his house at Nyabisawa village in Migori District when robbers broke open the door of the house using a big stone and proceeded to his bedroom. One of the robbers was armed with a gun, the others with rungu and pangas. It was dark, and the only light, according to the record, was the torch that the complainant had, and which he flashed and recognized only one robber – his son, Ogina, the 3rd appellant. As the complainant attempted to stand up from his bed, Ogina is alleged to have struck him with a rungu, and he fell down. According to the complainant's testimony, Ogina held a gun pointed at him while the others asked for money. He heard Ogina tell other robbers that the gun had refused to fire,

whereupon the others said they could “finish” him with pangas and rungas. He pleaded with them not to kill him inside his house, but to do so outside. They continued to beat him, pounding blows on him, hitting him with rungas and pangas. He struggled to get out, and eventually managed to do so, and began screaming aloud until the neighbours came. That is when the robbers ran away, taking nothing with them, and leaving him in pain and bleeding. With the help of the neighbours, and eventually with the help of his three wives who were attending a funeral in the neighbourhood, he managed to report the matter to the area Chief and the Police, who apprehended Ogina the same night. Ogina gave police the names of the other appellants and two others, who were all arrested before dawn. The police found nothing in the possession of the appellants or the other accused persons at the time of the arrest, except a home-made gun, which was recovered from Abonyo’s house. The complainant later testified that that indeed was the gun that Ogina had pointed at him. **IP Joshua Leina** (PW 4) of the Migori Police Station took a charge and cautionary statement from Amolo, who admitted in that statement to participating in the robbery. **IP Benjamin Mutua** (PW 7) took a similar charge and cautionary statement from Ogina, who also made similar admissions. At the trial, both Amolo and Ogina retracted their statements. However, after a trial within a trial, the subordinate court admitted into evidence both the statements.

When put on their defence, each of the appellants elected to give unsworn statements, and each denied the charge. Ogina stated that he had had a long-standing dispute regarding land with the complainant who is his father; that his father had refused to give him any land because he was an illegitimate son; that his father had continued to call him a bastard; that on the evening of the alleged robbery he had been caned and chased away by his father; and that his father wanted him put in jail. Amolo said he was in his house asleep on the night of the robbery, while Abonyo said that he was arrested because he had at one time complained against the arresting officer who, he alleged, had attempted to seduce his wife.

After the trial, in which seven witnesses testified, the three appellants were convicted and sentenced to death. In a brief and completely unreasoned judgment, the learned Senior Principal Magistrate rendered himself thus:

“I am satisfied that the prosecution evidence against the 1st, 2nd and 4th accused persons is overwhelming. I find that they participated in the attempted robbery against the complainant. I therefore find each of them guilty of the offence as charged and I convict each forth with.

As for the 3rd and 5th accused persons, I am satisfied there is no evidence connecting them with the commission of these offence

against the complainant. I therefore find the 3rd and 5th accused persons not guilty of the offence as charged and I acquit each one of them forthwith. They are set free forthwith unless otherwise lawfully held.”

The appellants then appealed to the superior court (Mbogholi and Mutitu, JJ). In a brief, two-and-a-half page, 29-line judgment, which is also completely unreasoned, the learned judges dismissed the appeals. Here is how they rendered themselves:

“We have carefully considered the evidence adduced in the lower court as carefully summarized by the learned trial Magistrate Mr. Ateya. We have noted that the trial Magistrate considered the evidence of the prosecution witnesses as against the defence testimony of the three appellants. The trial Magistrate carefully analyzed the evidence on record.

We are satisfied just as the state counsel was in this appeal that the conviction was safely arrived at. We have no good reason to interfere with the findings of the learned trial Magistrate. It is our considered view that this conviction as well as the sentence was safely arrived at.”

If the learned judges had indeed carefully considered the evidence adduced, and the judgment of the subordinate court, they would have noticed that the trial Magistrate had indeed **not** analyzed the evidence on record, and had given **no** reasons for his judgment. It is, therefore, no wonder that the

appellants are now before us in this second and final appeal.

The appeal, as the law requires, may only raise issues of law – see **section 361**, Criminal Procedure Code. Ogina, in person, drew up his home-made grounds of appeal, and filed the same on 18th August, 2003. The grounds that raise points of law relate to identification and the superior court’s failure to consider the defence put forward by him

before the subordinate court. His counsel, Mr. Ojwang Agina, argued essentially that the alleged robbery took place at night; in the dark; that the only light available was the torch light which the complainant had which was inadequate for proper identification. Mr. Agina complained that the superior court failed in its duty to reconsider and re-evaluate the evidence and to draw its own conclusions based on the evidence presented in the subordinate court. Amolo and Abonyo were represented by learned counsel C. B. Masaka and Onyancha respectively. They filed identical supplementary grounds of appeal; abandoned the previous home-made memoranda of appeal filed by their clients previously, and relied on three grounds which relate to identification, failure by the superior court to reconsider and re-evaluate the evidence to draw its own conclusions; and failure by the courts below to take into account the defences presented by their clients before the subordinate court.

Ms. T. Ouya, learned Assistant Director of Public Prosecutions, for the respondent, conceded the appeals with respect to Amolo and Abonyo, both of whom, she agreed, were not identified as robbers by the complainant. She submitted that there was nothing to connect them to the robbery. With regard to Ogina, she argued, however, that the evidence was water-tight as he had been recognized, by means of the torch light, as the complainant’s son, and she, accordingly, supported his conviction and sentence.

We have carefully considered the evidence on record as it relates to the grounds of appeal, as well as the submissions of counsel. In the end we think, with respect, that the superior court failed in its duty as the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld. This is a well-established principle outlined in ***Okeno vs Republic (1972) E A 32*** where this court stated:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs R.*, [1957] E. A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala vs R.*, [1957] E. A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

The superior court clearly did not do its duty. As we indicated before, the learned judges wrote a brief 29-line judgment, essentially agreeing with the subordinate court, and completely failing in its duty as the first appellate court to re-evaluate the evidence and form its own opinion. Had it done so, it would have taken into account the defences put forward by the appellants in the subordinate court. It would have noted that with respect to Amolo and Abonyo, there was absolutely no evidence of their involvement in the robbery. With regard to Ogina, he had outlined to the subordinate court his case of serious disagreement with his father, resulting in his belief that his father wanted to see him jailed. Instead of re-evaluating the evidence on record, the superior court relied entirely on the findings of the subordinate court, which itself made no analysis of the evidence, and gave no reasons for its conclusion. As we noted before, the subordinate court’s “findings” are captured in three lines which have been reproduced earlier in this judgment. There are no reasons given. The rest of the 10-page judgment is simply a narration of the evidence before the court.

Accordingly, we are satisfied that the principles in ***Okeno vs Republic (supra)*** were not complied with by the superior court. We are unable ourselves to say what conclusions the superior court would have arrived at had they discharged their duty to re-evaluate the evidence on record. Indeed we are in agreement with Ms. Ouya, learned Assistant Director of Public Prosecutions, that there was no

identification evidence against Amolo and Abonyo and their conviction was unsafe. We are also of the view that had the superior court re-evaluated the evidence and considered Ogina's defence, it could have found that the robbery took place in complete darkness with only one torch light available; that the defence of Ogina of bad-blood between him and the complainant was credible and that Ogina's conviction was also unsafe.

Accordingly, and for reasons outlined, we allow the appeals of all the three appellants, quash the respective convictions, set aside the respective sentences of death imposed upon each, and order that each be released from prison forthwith unless held for some other lawful cause.

Dated and delivered at Nairobi this 12th day of February, 2010.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR