



REPUBLIC OF KENYA  
**IN THE COURT OF APPEAL OF KENYA**  
**AT KISUMU**

**Criminal Appeal 322 of 2008**

**CALVINS PETER OMONDI OWAYO .....APPELLANT**  
**AND**  
**REPUBLIC .....RESPONDENT**

***(An appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ.)  
dated 4th November, 2008***

in

**H.C.CR.A. NO. 64 OF 2007)**

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**JUDGMENT OF THE COURT**

At about 8 p.m. on the 15<sup>th</sup> March, 2006, ***Stella Achieng Ambala*** (Stella) (PW1) was preparing supper in the kitchen of her uncle's house in Bondo township. The only other people in the house were two children since the uncle, George Osura (George) (PW2), had walked to a neighbour's house after arriving home from work. Electricity lights were on. Stella then heard the main door of the house being opened. She went to check and suddenly saw two strangers. One was a tall man standing at the door with a slender gun, and was wearing a cap; the other a short man ahead of him. Immediately the tall man started shooting as the short man was slapping Stella telling her "*Toa pesa*" and "*Wapi mzee*" as she screamed. She said she had no money and mzee was not in. The short man opened some drawers in the sitting room and picked up a mobile phone belonging to George. The two strangers then ran out firing more shots outside after hearing some people. According to Stella seven shots were fired inside the house.

The shots attracted the attention of George who came out of the neighbour's house only to see from a distance, a tall man and a short man behind him, walking away from his house. He was unable to recognise or identify any of them. He went to Bondo Police Station to report the incident but the police who arrived immediately were unable to trace the robbers. I.P Leonard Barasa (PW7) however confirmed that seven shots were fired and they collected 7 cartridges which the firearms examiner, I.P Alex Ndindi Mwandawiru (PW5) confirmed were fired from an AK 47 rifle or other firearm designed to chamber 7.62 by 39 rounds of ammunition.

About nine days after the robbery, on 24<sup>th</sup> March, 2006, I.P Barasa received information that there were some people gathered at a home in Barkowino and they were possibly robbers. He and other officers went there at 8.30 p.m. and raided the home, arresting eight people who were all drinking chang'aa. The people were handed over to I.P Isaac Njuguna (PW6), who had been asked by his senior to investigate the robbery case. Among those who were arrested were ***Samuel Ochieng Opondo*** (Opondo), ***Calvins Peter Omondi Owayo*** (Owayo), and ***Lamek Alsadi Onyango*** (Onyango). They were all charged with the offence of being in possession of changaa. Then five days later, I.P Njuguna decided to organize an

identification parade to see if Stella could pick out the people who had assaulted her two weeks earlier. Opondo and Owayo were the suspects who were paraded in two parades conducted by C.I. Boniface Kutswa (PW4) between 11.45 a.m. and 12.15 p.m. on the same day using the same members of the parade, except three. Stella picked out Opondo and Owayo and subsequently the two, as well as Onyango, were charged with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code, in that they jointly with others not before court while armed with dangerous weapons namely AK 47 rifles robbed Stella Achieng Ambala one Nokia 3310 phone valued at Shs.5,500 and at or immediately before or immediately after the robbery, threatened to use actual violence against Stella. They pleaded not guilty. They were tried before Kisumu Chief Magistrate (H.I. Ongudi) who acquitted Onyango after the close of the prosecution case for lack of evidence, and also acquitted Opondo after full trial because she doubted Stella's claim that she positively identified Opondo at the scene and was able to pick him out at the identification parade. Indeed the learned Chief Magistrate castigated the parade officer and found that he had conspired to have Opondo easily picked out by Stella. In her own words:

**“PW1 told this court in her evidence in chief that the person at the door was tall. He wore a cap and she could not see him well (page 9 of the court proceedings). She never had time to see this tall man neither was there any eye contact between them. She later comes and picks him at an identification parade. In cross-examination by accused 1 she said accused 1 was the TALL MAN IN THAT PARADE. This must have been deliberately fixed by someone for easy picking by (PW1) was (sic) not able to see the tall man at the door how was she then able to identify him at the identification parade?”**

That left Owayo who was convicted on the sole identification evidence of Stella and was sentenced to suffer death as by law provided. Owayo's defence that he was arrested and charged for a changaa related offence was accepted since the police confirmed it, but his denial that he participated in the robbery was rejected.

Owayo's first appeal against conviction was dismissed by the superior court (Mwera and Karanja, JJ.) who accepted the finding by the trial court that the appellant was positively identified by the sole witness, Stella. That finding was fortified by the finding that the appellant was picked out in an identification parade which was properly conducted. The learned Judges stated:

**“The identification was subsequently confirmed after the appellant was arrested and placed in an identification parade. There is nothing in the evidence of C.I.P Kutswa (PW4) to suggest that the identification parade was improperly conducted. Our careful consideration of the complainant's evidence of identification leaves us with the inevitable conclusion that the appellant was indeed positively identified as having been one of the offenders.”**

Owayo is now the appellant before us on this second and last appeal. His main challenge is on the issue of visual identification at the scene and the purported confirmation of that identification in an identification parade. Two other issues raised on his behalf in relation to the language used at the trial and non-consideration of *alibi* defence have no substance and may quickly be disposed of.

It was the submission of learned counsel for the appellant Mr. P. Kirenga, that the learned Chief Magistrate did not record the language in which various witnesses testified thus violating the appellant's constitutional rights. Even a casual look at the proceedings however, discounts this assertion. The learned Chief Magistrate was careful to record at the plea and shortly before the trial that the language at the trial would be “Kiswahili/English” and there was an interpreter throughout. Similarly, the learned chief Magistrate recorded the language used by each of the seven witnesses who testified including the language used by the appellant, which was Kiswahili. There was no complaint raised at any stage on this issue, and we think on our part, that it is an afterthought which we dismiss. So is the issue of *alibi* which on the record was not raised. The appellant said nothing about his whereabouts on the day of the alleged robbery and only explained his arrest two weeks later. Learned counsel must have misunderstood the meaning of “*alibi*” and we reject the issue as irrelevant.

That leaves the substantial ground on identification which is an issue of law. We are in no doubt that this court on a second appeal is at liberty to consider and determine any issue of law. The Court will also, ordinarily pay homage to concurrent findings of fact by the two courts below and will resist the temptation to treat findings of fact as findings of law or mixed findings of fact and law (**M’Riungu v Republic [1983] KLR 455**). The Court will nevertheless interfere with findings of fact where they are not based on any evidence at all, or on a misapprehension or perverted construction of the evidence where it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law – see **Mugandi Mwangombe v Republic Cr. Appeal No. 332 of 2008 (ur)** citing with approval **Martin v Glyneed Distributors Ltd (T/A MBS Fastenings)** [The Times, 30<sup>th</sup> March 1983]. Put another way, the court of Appeal may upset a finding of fact by the trial or the first appellate court where there is a misdirection but such misdirection must be of such a nature and the circumstances of the case must be such that if it were a trial by jury, the jury would not have returned their verdict had there been no misdirection (**Kiarie v Republic [1984] KLR 739**).

As stated earlier there was a concurrent finding by the two courts below that the appellant was positively identified at the scene, by Stella and the identification was confirmed at the subsequent parade. Mr. Kirenga strongly argued before us that there was no basis for such finding since the circumstances relating to the identification at the scene were so difficult and stressful that they compromised any positive identification of the assailants. Stella, in his submission, never made any first report to the police confirming the nature of light, the description of her attackers and how long she had to observe their features. As for the identification parade meant to buttress such identification, Mr. Kirenga submitted that there was a finding by the trial court that it was flawed in respect of the appellant’s co-accused who had purportedly been visually identified by the same witness. By parity of reasoning therefore the parade evidence ought to have been discounted in respect of the appellant also.

We have examined the record carefully and considered the submissions of Mr. Kirenga and we think, with respect, that the criticisms raised on this issue are weighty enough to raise reasonable doubts about the veracity of the evidence of the sole identifying witness and hence the propriety of the appellant’s conviction.

In her evidence in chief Stella swore that she made her first report to the police and gave the description of her assailants only to retract that evidence in cross-examination when the Police Occurance Book (OB) was produced and put to her. She was not the one who made the first report but George who was unable to identify any of the assailants. Stella’s only recollection of the assailant she identified as the appellant was that he was short and wore a checked shirt with blue jeans trouser. There was no evidence about how long she observed the appellant or the nature of light and its position at the spot where the identification took place. She testified that as soon as the robbers entered the house there was shooting simultaneously with her slapping and questioning about money and her employer. She was “anxious” in her own words and we think, in the circumstances, terrified. So terrified that she only saw a tall man and a short man without any further physical description of these strangers. That is why it was necessary to organize a proper identification parade to test the evidence of Stella, especially when she was the sole witness on such identification. As is evident from the record however, the police bungled such evidence which was vital in the circumstances of this case. This Court has had occasion to emphasise the utility of a properly organized identification parade, stating as follows:

**“The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422**

where the court stated at page 424: -

*“It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”*

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, *Standing Order 6(iv) (d) and (n)* state as follows:

“6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -

.....  
(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;  
.....

(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;”

See David Mwita Wanja & 2 others v Republic, Criminal Appeal No. 117/2005 (ur). That passage would also aptly apply to this case.

There was a finding by the trial court which was not disturbed by the superior court, that the identification parade in respect of the appellant’s co-accused was manipulated by the parade officer in order to make it easy for Stella to pick him out. That parade officer was C.I. Kutswa (PW4). He held the parade in respect of the co-accused on 29<sup>th</sup> March, 2005 at 11.45 a.m. The co-accused was the “tall man” described by Stella and therefore under the standing orders the parade members would have been reasonably tall. But the same officer held a similar parade less than 30 minutes later in respect of the appellant who was described as a “short man”. There was no new set of parade members answering the general description of the appellant. More importantly, it is difficult to discredit the parade officer in the first parade and completely absolve him in the second. We find no reason ourselves for such acrobatics and have come to the conclusion that the identification parade in respect of the appellant was not held with scrupulous or substantial observance of the standing orders. We disregard it.

That leaves the visual identification of the appellant by Stella which as stated above has caused us some degree of uneasiness. She was the only witness and the circumstances surrounding the identification were fairly difficult. As was stated in Kamau v Republic [1975] EA 139:

“The most honest of witnesses can be mistaken when it comes to identification.”

In resolving the issue as to whether in the absence of an identification parade the evidence of visual identification was worthless, this court in Bernard Mutuku Munyao & Another v Republic stated as follows:

We think the issue of law that arises for our decision is whether, in the absence of an identification parade, evidence of visual identification, whatever its strength, becomes dock identification and therefore of no probative value. The statement of law relied on by the two courts which appears in Durand's book is derived from R v Karioki s/o Rushashio and Anor. [1948] 23 KLR (1) 21. It was not merely the opinion of the author as boldly submitted by Mrs. Rashid. The author states:

*“Failure to make identification at a parade is not necessarily fatal, as in Karioki's case, where identification was not made at the parade, but only in court but the Court held that the evidence was in the circumstances, sufficient to establish beyond all reasonable doubt that the accused was one of the group present at the relevant time and a participant in the crime.”*

In the *Karioki* case the Court stated:

*“Now if failure to identify a suspected person upon an identification parade is of itself sufficient to ensure to that person ultimate acquittal of an offence with which he is charged then No. 1 accused would be entitled to be acquitted on all the charges preferred against him in this Court, for none of the Crown witnesses identified him in the parade at the exercise yard of Nairobi Prison on 22<sup>nd</sup> January, 1948. That is a fact to which I have given the gravest consideration in this case and I have borne in mind the consideration given by this Court in its appellate jurisdiction in the case of Rex v. Kipwenei arap Masonik and 20 others (Law Reports, Vol. XII, pg. 153) on the question of identification.”*

.....

Evidence of identification parade is part of the whole process of subjecting the evidence on record to careful scrutiny and considering the surrounding circumstances as stated in R v Turnbull [1976] 63 Cr. App. R. 132. The absence or presence of it goes to the weight to be placed on the available evidence and does not make such evidence inadmissible or of no probative value. One may think of circumstances where lack of an identification parade would seriously weaken the evidence of visual identification where there is a solitary witness or it is the only evidence available and the identification was made in difficult circumstances.”

We think in this case the evidence of Stella was so weakened by the exclusion of identification parade evidence that it is no longer safe to rely on it to sustain the conviction. In the event, we reject the submissions of learned Senior Principal State Counsel that the visual identification was beyond reproach and that the identification parade was conducted impeccably since no complaint was raised by the appellant at the time.

In the result the appeal is allowed, the conviction of the appellant is quashed and the sentence of death is set aside. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

*Dated and delivered at Kisumu this 5<sup>th</sup> day of February, 2010.*

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

**DEPUTY REGISTRAR**