



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

Criminal Appeal 323 of 2008

BETWEEN

EVANS OTIENO OGUTU "ALIAS" MWALIMUAPPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ) dated 16th December, 2008

In

H.C.C.R.A. No. 398 of 2003)

JUDGMENT OF THE COURT

This is yet another case in which a convict challenges the correctness of his identification at night time in a case of robbery with violence contrary to **section 296 (2)** of the Penal Code. Evans Otieno Ogutu alias Mwalimu, the appellant, was charged, tried, convicted and sentenced to suffer death on two counts of the offence of robbery, contrary to the aforesaid section. His first appeal to the superior court was dismissed and hence the appeal before us.

On the evening of 7th February, 2003, Michael Ochieng Opondo (PW3) arrived in a taxi at his residence at Nyalenda Estate, Kisumu, while in the company of his employee, Kennedy Omondi (PW1). Immediately they were confronted by a group of people, some who, described themselves as policemen, and others as members of a vigilante group. In actual fact they were robbers. They were armed with pangas. PW3 had a torch which he shone on their faces. In his evidence at the trial, PW3 stated that he had new batteries in the torch and so its light was bright. With the aid of that light he and PW1 were able to see and recognize some of their attackers, among them the appellant and one Steve. The robbers attacked PW3 and PW1, and robbed them of various items among them a radio, a bag, a jacket, several compact discs and cash. In the course of the robbery the robbers assaulted both PW1 and PW3.

A report of the robbery was initially made by telephone to Kondele police station but later PW1 and PW3 went to that station and recorded statements on the incident. While PW3 was at the police station he saw the appellant in police cells and identified him to the police as one of the people who participated in the aforesaid robbery, and although the police were initially skeptical they later believed PW3 on the matter, more so, when it was later reported that he had sold a radio with one speaker to an employee of one Dominic Sawa (PW2).

PW2 testified that on 8th February, 2003, he went to Kibuye where he operates a small hotel. One Tito Otieno was one of his employees at the hotel. The latter reported to him that he had bought a radio cassette at Kshs.1500/-. It had only one speaker instead of two. The seller had promised to bring the second speaker and a permit for the radio. The seller did not return soonest and PW2 became anxious about it and on 9th February, 2003, he informed Paska Okello (PW6), an Inspector of police then attached to Kondele Police Station, who had called at the hotel presumably to have a meal. PW6 requested for, and was given the radio which he went with to Kondele Police Station and handed it over to Johnson Mwangulwa (PW4), one of the investigating officers of the case. PW3 later identified it as one of the items which were stolen from him in the course of the aforesaid robbery? The appellant was identified by PW2 as the person who sold the radio to him.

The appellant had left a handbag at PW2's hotel and so on 26th February, 2003, PW4 went and collected it. Inside the bag PW4 found, among other things, a red jacket which PW3 identified as one of the items which were stolen from him in the cause of the aforesaid robbery.

PW2 was initially treated as a suspect, but later he was released and was made a witness for the prosecution.

On the basis of the evidence above, the appellant was charged, and at the close of the prosecution case, the trial Magistrate found he had a case to answer and accordingly put him on his defence. In an unsworn statement the appellant stated that he was a hawker at Manyatta, and that he had been arrested for the offence of assault, but the police charged him with two counts of robbery with violence which he knew

nothing about.

The trial Magistrate B.A.O. Asuna, Senior Resident Magistrate (as she then was) discounted the evidence of PW4 on the aspect that it was the appellant who had sold the radio to PW2's employee on account of the evidence being hearsay. In her view, as Tito did not testify to confirm that story that evidence was of little, if any probative value. The learned Magistrate then considered the evidence of both PW1 and PW3 concerning the robbery incident and was satisfied that both witnesses positively identified the appellant as one of the robbers. In her view PW3's torch produced strong light which aided both PW1 and PW3 in identifying their attackers. She said that the appellant was known to them previously and therefore it was not difficult for them to recognize him. She therefore found him guilty and convicted him.

The superior court on first appeal affirmed the decision, and after citing the English case of **R. vs. Turnbull (1976) 2 WLR 455** as providing guiding principles, it remarked as follows:-

“Having the above principles in mind we are of the considered view that the evidence of identification against the appellant was corroborative, cogent and reliable. We therefore hold, as did the trial court, that the appellant was positively identified as having been one of those who committed the offences. His defence is unsustainable in the circumstances. We uphold the conviction by the trial court but order that the sentence in count two be held in abeyance.”

The trial court had sentenced the appellant to death in each of the two counts and the superior court quite properly ordered the sentence in count two to be held in abeyance as a person cannot possibly be hanged more than once.

In submissions before us, Mr. Amondi for the appellant stated that the appeal in effect raises two broad issues. First, that the superior court merely rehashed the judgment of the trial court instead of subjecting the evidence to a fresh analysis and evaluation to come to its own conclusion. Second, that evidence of identification was inadequate and did not support the convictions.

The case of **Simiyu & Another v. Republic [2005] 1 KLR 192**, cited to us by Mr. Amondi, is one of the authorities which, inter alia, sets out the duty of a first appellate court. It re-echoes the principles in the often cited cases of **Okeno v. R [1972] E.A. 32**, **Peters v. Sunday Post Ltd. [1958] E.A. 424** and **Selle & Another v. Associated Motor Boat Company Ltd. & Others [1968] E.A. 123**

It is the duty of the first appellate court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice. Merely scrutinizing the evidence is not enough. In doing so the court should not overlook the trial court's conclusions on the matter.

Although it may appear that the superior court merely rehashed the judgment of the trial court, the nature of the case is such that even an independent evaluation of the evidence will appear as if it is a rehash of the trial court's decision. The evidence against the appellant is basic. He was recognized at the scene of the robbery by people who knew him before. Torch light was used. The torch had new batteries and was therefore capable of emitting bright light. PW3 had it in his possession and was able to direct the rays of its light in the direction of those who held themselves out as being policemen and members of a vigilante group.

Clearly, contrary to submissions by Mr. Amondi that no evidence as to the intensity of light was given, both PW1 and PW3 testified that the light from PW3's torch was powerful. It is also clear that the appellant was pointed out at the police cells where he was held for a different offence. The complaint that his name was not mentioned to the police when reporting the robberies has no basis.

All in all, there is no basis for interfering with the appellant's conviction in both counts. The sentence of death imposed on him is a lawful sentence. In the result the appellant's appeal fails and it is accordingly dismissed.

Dated and delivered at Kisumu this 30th day of April 2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR