REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Criminal Appeal 23 of 2009

BETWEEN

MOI OCHOGO ONCHIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisii (Musinga & Karanja, JJ) dated 4th November, 2008

In

H.C.C. Cr. A. No. 196 of 2006)
****

JUDGMENT OF THE COURT

Moi Ochogo Onchiri, the appellant herein was tried and convicted on a charge of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The particulars of the charge were that on 2nd November, 2005 at Kenyenya sub location in Gucha District within Nyanza Province, jointly with others not before court while armed with dangerous or offensive weapons namely an imitation of a pistol and rungus robbed Esther Bosire of her porch and Kshs. 4,200/- and at or immediately before or immediately after the time of such robbery, used actual violence against the said Esther Bosire. After a full trial the appellant was convicted and sentenced to death. Dissatisfied with the verdict the appellant appealed to the superior court but the superior court upheld the verdict of the trial court on 4th November, 2008 provoking this second and final appeal.

In the trial court the prosecution led evidence that Esther Bosire, PW1, was going home at about 9.00 p.m. accompanied by her husband Fred Mbeche, PW2. Upon realizing that they were being followed PW2 shone his torchlight on the persons following the couple. He was immediately hit on the neck and he fell down. When PW1 saw what was happening she took off screaming for help. PW1 had not gone far when one of the attackers grabbed her and at the same time pointed at her a gun-like object but PW1 was quick to observe that the object was a piece of wood. PW1 was hit again by the attacker who also snatched her handbag which had Kshs.4000/-. At that point PW2 had shone his torchlight on the assailant whom PW1 was able to recognize. PW2 held one of the robbers but after a struggle the robber ran away leaving his cap behind. PW1 and PW2 said they recognised the appellant immediately as one of the

robbers. The following day the couple reported the incident to the police and at the same time gave to the police the description of the person they recognised. The description they gave to the police was that of a waiter who worked at a nearby hotel called Zonic and further stated that they have continually seen him there for a period of two years.

During the hearing of the appeal the appellant was represented by learned counsel Mr. Amondi and the State was represented by Miss Oundo, Principal State Counsel. The appellant relied on the following grounds of appeal:-

> ***"1. The learned Honourable Judge in the Superior Court erred in law by failing to appreciate the error of the trial Magistrate in convicting the Appellant on the evidence of recognition, which (sic) the Appellant was not properly identified.***
>
> ***2. The learned Honourable Judge erred in law by upholding the conviction of the Appellant by the trial Magistrate's Court when the same Court failed to establish that the prosecution had proved its case beyond doubt.***
>
> ***3. The learned Judge in the Superior Court erred in law by failing to appreciate the consistencies (sic), flaws, contradictions and gaps in the testimonies and evidence of the prosecution witnesses.***
>
> ***4. The learned Judge erred in law by failing to find that the conviction of the Appellant was without basis as the evidence against the Appellant was hearsay.***
>
> ***5. The Court erred in law by failing to appreciate the fact that the Appellant was convicted on the basis of circumstantial evidence which was insufficient to warrant the said conviction.***
>
> ***6. That the Superior Court erred in law when it failed to note the failure of the trial Magistrate to admit (sic) the defence of the Appellant without giving any reason at all."***

In his submissions, Mr. Amondi contended that the identification of the appellant by recognition was not free from error because the trial court and the superior court did not address the issue of the intensity of the light allegedly used to identify the appellant; that the two courts below did not conduct an inquiry or demonstrate that they did put themselves on guard that such evidence ought to have been treated with caution so as to satisfy the standard required; that the evidence was not scrutinized as per the often quoted case of **R V. TURNBULL [1976] 3 ALL ER 549**; that PW1 and PW2 had not given the appellant's description to the police before the commencement of their investigations; that the correct amount of money stolen was not given since the witnesses gave two conflicting figures namely Kshs.4000/- and 2500 and the inconsistency must have occasioned a miscarriage of justice; that the appellant could not have gone to his place of work if he had taken part in a robbery the previous night; that in the circumstances further evidence should have been adduced to support identification by recognition; that the appellant's defence was not considered by the courts below because the appellant had stated that he was working at the Hardrock Hotel and not at the Zonic Hotel as alleged by the prosecution and finally that the prosecution had not proved the ingredients of the offence of robbery with violence under ***section 296 (2)*** of the Penal Code.

Miss Oundo stated in her submission that PW1 and PW2 had testified that they had lived in Kenyenya for two years and during this time they had seen and had known the appellant as an employee of Zonic Hotel. She added that, after the robbery the couple was on the following morning able to give the appellant's description to the Administration Police and thereafter in their company accosted the appellant at the Zonic Hotel where they effected his arrest and handed him over to the police. In the course of the robbery PW2 was able to hold the appellant for at least 3 minutes and both PW1 and PW2 were able to recognize the appellant. The appellant's Marvin cap was also recovered from the scene by PW2 and produced as an exhibit in court. On the issue of recognition, alleged discrepancies and inconsistencies of evidence in the courts below, Miss Oundo submitted that the courts below had made concurrent findings on this and had also found the two witnesses as truthful. Concerning the appellant's correct place of work, the learned counsel submitted that this was a matter within the appellant's knowledge and therefore he should have offered explanations as stipulated in ***section 111*** of the Evidence Act. Regarding the alleged lack of proof of the ingredients of the offence of robbery with violence under ***section 296 (2)*** of the Penal Code, Miss Oundo stated that there was evidence that the appellant had robbed a porch and cash from PW1 and was also accompanied by others not before court and in addition the appellant had an imitation pistol and a rungu. Proof of any one of the three ingredients set out in ***section 296 (2)*** was sufficient to constitute the offence.

We have considered the submissions of counsel as outlined above including the authorities cited by the appellant's counsel, Mr. Amondi. On the issue of recognition, we have not detected any misapprehension of law on the part of the two courts below. The courts below, in our view, made concurrent findings of fact that in the circumstances described, PW1 and PW2 were as a noted above, able to recognize the appellant as a person they had continually seen for two years. We cannot on our part undo those findings as they were based on evidence on record. We think that the requirements set out in the important case of **R. V. TURNBULL [1976] 3 ALL ER 549** relating to evidence of visual identification in criminal cases were met in the special circumstances of the matter before us, in that the courts below considered the length of time the witnesses had been with the appellant in the course of the robbery, the distance of one metre within which PW1 was able to observe the appellant, the period of two years the couple had continually seen the appellant as a waiter at Zonic Hotel, as sufficient for the purpose of conviction. On our part we note that the superior court did caution itself on the need for the identification to be safe and accurate as held in the case of **ODHIAMBO VS. R [2002] 1 KLR 241** including the weight to be placed on the evidence of recognition as held in the case of **ANJONONI V. R [1980] KLR 59**. The fact that the superior court has admirably referred to the two cases in the challenged judgment is to us an indication that they addressed the principle enunciated therein..

Similarly, the alleged contradiction relating to the money stolen is a factual matter and therefore not within our mandate as the second and final appeal Court. In any event, it is curable under ***section 382*** of the Criminal Procedure Code. Again the appellants counsel submission that PW1 and PW2 had not given the description of the appellant to the police before investigations goes against the evidence

recorded, in that the appellant's arrest by the Administration Police and the subsequent handover to the police was based on the description which the two witnesses had given to them.

As regards proof of the necessary ingredients under ***section 296 (2)*** and whether the prosecution was able to demonstrate that an offence under the section had been committed in the circumstances of this case, the case of **JOHANA NDUNGU V. REPUBLIC** , Criminal Appeal No. 116 of 1995 sets out he requirements in these words:-

> ***"(i) Therefore, the existence of the afore described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.***
>
> ***(1)If the offender is armed with any dangerous or offensive weapon or instrument, or***
>
> ***(2)If he is in company with one or more other person or persons or***
>
> ***(3)If, at or immediately before or immediately after the time of the robbery, he wounds, beats , strikes or uses any other violence to any person."***

It is not in doubt that the prosecution was able to prove that the appellant was armed with a rungu and an imitation pistol and was also accompanied by at least one other person. It follows that ingredients 1 and 2 above were satisfied. In addition, the prosecution was also able to prove that he did attack PW1 and PW2 in the course of the robbery and we think this satisfies ingredient (3) above. The law is that the presence of any one of the three ingredients constitutes the offence. Consequently, nothing turns on this ground. The appellant's counsel's contention that the evidence on recognition should have been reinforced with additional evidence even in the face of clear and direct evidence of recognition by the two witnesses who had seen the appellant for a period stretching to two years lacks merit.

Regarding Miss Oundo's submission that where the appellant worked was a matter within the appellant's own knowledge, with respect we do not share her view that the appellant had any burden of proof to discharge . However, we note that the courts below did not shift any burden on him but instead they believed the evidence of PW1 and PW2 that he worked at the Zonic Hotel from where he was arrested. For the same reason we are satisfied that the appellant's defence was properly considered and rejected. The upshot in that the appeal lacks merit and the same is dismissed in its entirety.

It is so ordered.

Dated and delivered at Kisumu this 18th day of June, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.