



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CRIMINAL APPEAL 282 OF 2008

KENNEDY OMONDI OCHIENG .....APPELLANT

AND

REPUBLIC .....RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at*

*Kisumu (Mwera & Karanja, JJ) dated 21<sup>st</sup> October, 2008*

in

H.C.Cr. A. No. 116 of 2007)

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### JUDGMENT OF THE COURT

The appellant, **Kennedy Omondi Ochieng** was convicted by the Senior Resident Magistrate at Nyando of two counts of robbery with violence contrary to **section 296(2)** of the Penal Code and sentenced to death in each of the two counts. His co-accused in each of the two counts **Josephat Otuoma Obunda** (co-accused) was acquitted. His appeal to the superior court at Kisumu against conviction and sentence was dismissed save that the sentence in the second count was set aside and the sentence instead ordered to be held in abeyance.

The complainant in the first count **Peter Otieno Oriwa** (Peter), his wife **Elizabeth Nyagundo** (Elizabeth) and complainant in count two **Nehemiah Ashira Omukamba** (Nehemiah) and his wife **Catherine Phoebe Amondi** (Catherine) were housed in the homestead of **Edward Odhiambo** at Koru, Muhoroni who was apparently living in Nairobi with his family. Peter and Nehemiah were employed by Edward Odhiambo as farm workers. There was a farm manager **Caleb Otieno Oduka** (PW6) who was living elsewhere. The house of Edward Odhiambo had electricity lights from solar panels.

On the night of 26<sup>th</sup> March, 2006 at about 10.00 p.m. a gang of robbers raided the home and started beating the two complainants and their wives. The electricity lights were on in the house but it was dark outside. Peter was attacked by one of the members of the gang while he was at the door of the house. He fought with the gang member who had a sword but he ran away after he was overpowered. The gangster however pursued him and caught up with him and again beat him. Another gangster who had a club appeared and beat Nehemiah with the club

demanding money and mobile phone. Nehemiah who could not identify any of the robbers at that stage was taken to the house of Peter where both complainants were beaten. Nehemiah was later taken to Edward Odhiambo's house where he found his wife and other robbers inside the house. The robbers again demanded money from him and he gave them Kshs.200/=. The robbers stole goods from the house of Edward Odhiambo including a water pump and a gas cooker. The robbers also stole house hold goods from the house of Peter including a radio cassette and a television. The two complainants were forced to carry some of the stolen goods up to Murram shopping centre Koru where two other gangsters who were armed with rifles emerged from the sugar plantation. The two complainants were then released. They reported the robbery to the manager Caleb Otieno Oduka at about 2.00 a.m.

On the morning of 27<sup>th</sup> March 2006, a woman who was not called as a witness at the trial found a water pump and a gas cooker abandoned in a bush near a road and reported to a village elder **Caleb Okumu Agutu** (PW7) who in turn reported to **AP. Sgt. Augustine Khamaria** of District Officer's Office Muhoroni. The two items were recovered after which the police proceeded to the house of Josphat Otuoma Obunda (2<sup>nd</sup> accused at the trial) where the appellant and co-accused were arrested on suspicion that they were the people who had abandoned the water pump and the gas cooker in the bush. The water pump and the gas cooker were later identified as some of the goods stolen from the house of Edward Odhiambo. The appellant was charged with the two offences after Nehemiah claimed to have identified him as one of the people who robbed him.

The appellant stated at the trial that on 27<sup>th</sup> March 2006 he left his house at 5.00 a.m. and went to the house of his employer, **Akinyi**, who brews chang'aa where he was later arrested by police and when he was put in the police vehicle he saw a generator and gas cylinder for the first time.

Nehemiah testified at the trial that the robbers who were inside his employer's house had caps except the appellant whom he identified; that it was the appellant who was taking goods from Edward Odhiambo's house and that it was the appellant who guarded them throughout the operation. He testified further:

***"I managed to identify the man who had not worn a hat and he is the one who had been our guard during the operation. I identified him because of facial appearance and his voice. He conversed a lot with us during the incident telling us to carry this or that and other kind of conversation. I told people in the parade to talk and say "Ahero". So when the man said "Ahero" I was sure he was the one who had been our guard. I also looked for other characteristics other than voice. I remembered the man also had a bruise on the left cheek. So I again checked all the men in the parade and again the man I identified had a bruise on the cheek. He was a short man. The parade had about 12 men. The man I identified is the 1<sup>st</sup> accused in the dock. He is the one I identified at an identification parade."***

The evidence of Catherine relating to the identification of the appellant is relevant. She testified in part:

***"However, the man who slapped me when I was in the big house and was short is the 1<sup>st</sup> accused. He had a coat. I know 1<sup>st</sup> accused because amongst my assailants only one was short and dark. I never saw his face. He also had a heavy coat covering his head."***

The trial Magistrate believed the evidence of Nehemiah that he identified the appellant during the time of robbery and at the identification parade where, in addition, Nehemiah identified the appellant by voice. The trial Magistrate however concluded that Peter, Catherine and Elizabeth did not identify the appellant either during the robbery or at an identification parade.

At the hearing of the appeal in the superior court **Mr. Musau**, learned Senior Principal State Counsel did not support the conviction for the reason that the evidence of identification was not sufficient.

The superior court after evaluating the evidence rejected the evidence of Nehemiah that he identified the appellant at an identification parade both by physical appearance and by voice for the reason that the evidence relating to the identification of the appellant at the identification was not tendered by the police officer who conducted the identification parade, if any.

The superior court further made a finding that the identification of the appellant by Catherine was not credible and that there was no evidence linking the appellant with the possession of the water pump and gas cooker which were found abandoned in the bush. The superior court nevertheless believed the evidence of Nehemiah that he positively identified the appellant inside the house of Edward Odhiambo with the aid of electricity and said:

***“Considering that the 1<sup>st</sup> complainant (PW1) saw and identified the appellant at a place which was lighted and had adequate opportunity to do so we are satisfied that in all the circumstances it is safe to act on such identification even in the absence of corroboration.”***

There are nine grounds of appeal but *Mr. Menezes* learned counsel for the appellant abandoned grounds 2 and 3 at the hearing of the appeal.

The 1<sup>st</sup> ground of appeal states:

***“The appellate court misdirected itself in not finding that the appellant’s constitutional rights had been blatantly infringed throughout the tenure of the original trial.”***

In support of that ground *Mr. Menezes* referred to **section 77(1)** of the Constitution which provides that where an accused is charged with a criminal offence the case should be afforded a fair hearing within reasonable time by an independent and impartial court established by law.

*Mr. Menezes* referred to several instances in the record of the proceedings of the trial court where the appellant was not present on the days fixed either for mention or hearing of the case and the case was adjourned without the trial Magistrate recording any reasons for non-attendance of the appellant or adjournment nor giving the appellant an opportunity to be heard.

*Mr. Menezes* submitted that throughout the record, adjournments were granted without the appellant being asked to say anything thus excluding the appellant from proceedings which is a breach of his constitutional right.

We do not understand *Mr. Menezes* to be saying that the appellant was not accorded a fair hearing at the trial or that the case was not tried within a reasonable time. Indeed, there was no specific ground of appeal in the superior court to that effect.

To our understanding the errors that *Mr. Menezes* pointed out were merely procedural errors in granting adjournments without recording reasons for such adjournments and without giving the appellant an opportunity to reply or failing to record reasons why the appellant was not brought on some mention dates which errors are not, in our view, substantial and do not affect the validity of the trial or amount to a breach of the appellant’s constitutional right to a fair trial within a reasonable time. We would nevertheless agree that a trial court, as matter of procedural fairness should make a complete record of the proceedings and wherever possible give an accused person an opportunity to be heard before any adverse or prejudicial order, including an order of adjournment, is made against him.

The other six grounds combined together in essence complained about the failure by the

superior court to properly re-evaluate the evidence relating to the identification of the appellant and by reaching the wrong finding that the evidence of identification was sufficient.

It is evident in this case that the superior court in dismissing the appeal relied solely on the evidence of visual identification of the appellant by Nehemiah. The appellate court, quite correctly in our view, rejected the evidence of Nehemiah that he subsequently identified the appellant at identification parade at the police station. Indeed, no evidence other than the evidence of Nehemiah was called to show that an identification parade was held at all as prescribed by the Police Standing Orders.

In the absence of the identification of the appellant by Nehemiah in a properly conducted identification parade the evidence of Nehemiah was no more than dock identification of the appellant. Nehemiah claimed that he identified the appellant with the aid of electricity light inside the house of Edward Odhiambo. He claimed further that he was able to identify the appellant because he had no hat unlike the other robbers. Nehemiah did not however describe comprehensively the prevailing circumstances in the house of Edward Odhiambo. He did not say for instance, where exactly the appellant was when he identified him, how far he was, and for how long he observed him. It is clear that the superior court did not evaluate all the prevailing circumstances of identification. More importantly, the superior court failed to appreciate that the evidence of Nehemiah and Catherine was contradictory as to whether the appellant had covered his head or not. Whereas Nehemiah testified that he was able to identify the appellant because he had no hat Catherine testified that the man who directed her to the house (*not the appellant*) had a coat that covered his head and that the appellant who slapped her had also a heavy coat covering his head. It is also a material consideration that Peter, Catherine and Elizabeth who were labouring under the same conditions as Nehemiah did not see the face of the appellant or identify him.

In the upshot although **Miss Oundo** learned Senior State Counsel supports the conviction unlike the position taken by **Mr. Musau** in the superior court, we are not satisfied that, had the superior court evaluated the evidence of identification comprehensively it would have reached the same result. Rather, it is our view that the evidence of the identification of the appellant by Nehemiah was not reliable.

For the foregoing reasons, we allow the appeal, quash the conviction of the appellant on each of the two counts of robbery with violence and set aside the sentences.

The appellant shall be set at liberty forthwith unless otherwise lawfully held.

***Dated and delivered at Kisumu this 26<sup>th</sup> day of June, 2009***

**S. E. O. BOSIRE**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**