



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

CRIMINAL APPEAL 292 OF 2008

DANIEL ONYANGO OCHIENG..... 1ST APPELLANT

GAFAR IDI ODONGO..... 2ND APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu

(Mwera & Mugo, JJ.) dated 6th May, 2008

in

H.C.C.R.A. NO. 34, 35 & 36 OF 2006)

JUDGMENT OF THE COURT

At the commencement of the hearing of this appeal, the court noted, that by a letter dated 23rd December, 2008, the officer-in-charge, Kisumu Main Prison, informed the Deputy Registrar of this Court that the first appellant had passed away on 17th July, 2008. Ms. Oundo, learned Principal State Counsel, for the respondent, confirmed that she too had been notified of the demise of the first appellant. Accordingly, the first appellant's appeal has abated under **Rule 68(2)** of the Rules of this Court, and it is so ordered.

This is the second appellant's (hereinafter "*the appellant*") appeal, against both conviction and sentence. It is a second, and, of course, the final appeal.

The appellant, **Gafar Idi Odongo**, was charged with four counts of robbery with violence contrary to **section 296(2)** of the Penal Code; and one count of personating a police officer contrary to **section 105(b)** of the Penal Code. In a judgment handed down on 9th March, 2006 by the Chief Magistrate's Court at Kisumu (H.I. Ong'undi), he was convicted and sentenced to death for the offence of robbery with violence, and convicted and sentenced to 12 months imprisonment for the offence of personation.

The appellant appealed to the superior court against both conviction and sentence, and the same was disallowed. He has now preferred this final appeal before this Court, citing seven grounds of appeal, in his home-made memorandum of appeal, dated 23rd March, 2006. However, at the hearing of the appeal,

he was represented by Mr. J.O. Aringo, who chose to argue only the first ground of appeal, abandoning all others. That ground of appeal is as follows:-

“1. That the high court judges erred in law and facts for upholding the conviction of the lower court yet the identification parade was not conducted to the required standard.”

As we have stated, this is a second appeal. By dint of the provisions of **section 361** of the Criminal Procedure Code, we are enjoined to consider only matters of law and not matters of fact.

The appellant’s main and only ground of appeal is centred on his “*identification*”. That, of course, is an issue of law and therefore within the jurisdiction of this court to consider. It also arose before the two courts below. They were both clearly aware that the prosecution case rested on the credibility and proper identification of the appellant. Mr. Aringo, learned counsel for the appellant, submitted that the identification parade had been irregularly conducted; that the investigating officer had suggested to the witnesses who the suspects were; that the officer had exposed the appellant as a “*terrorist*” to the witnesses; and that the identifying witnesses had not given the description of the suspects before the parade was conducted. Mr. Aringo relied on the case of AJODE V. R. (2004) 2 KLR 81.

Ms. Oundo, learned Senior State Counsel, opposed the appeal. She submitted that the appellant was properly identified because of his special “*box-cut*” hair, in a parade that was conducted one week after the incident.

As we have indicated, both the courts below were acutely aware that the prosecution case rested on the credibility and proper identification of the appellant. On such credibility, the best judge was the trial magistrate who had the advantage of seeing and hearing the witnesses. The learned Magistrate had this to say:-

“The next issue is that of identification. This offence took place at around 3:00 a.m. The witnesses were staying in one plot. They have all said they put on lights in their houses when they were asked to open their doors. And they were hence able to identify their attackers with the help of the electricity lights, which were on. One thing that was commonly talked of by the witnesses was that one of the robbers wore a jungle jacket. PW3 is the Landlord of these people who were robbed. He says he saw the robbers through his glass window. The light in Jaseme’s house was off but the security light was on. He saw Accused 1 pass by the light. He had a jungle jacket. Accused 2 again passed and saw him. He identified them. He knows Accused 1 as Onyiso but said he could not give that name to the police because accused could have run away. PW1, PW2, PW3, PW4 & PW7, are all categorical that they saw the accused persons that night. These five (5) witnesses also identified all the three (3) accused on identification parades (EXB 1, 2, 3) same (sic) for PW1 who did not identify Accused 3. PW2 has explained how the robbers used him to access the neighbour’s houses so he went with them to every house and he’d be pushed inside. There was electricity light “on” whenever they entered any house.

This operation took quite sometime and there was sufficient time for this particular witness to see and identify the attackers.

Coming to PW7 this witness said he was able to identify the three people who robbed him. His statements to the police were read in court and he was categorical that he could identify his attackers if he saw them. When called to the identification parades at Central police station this witness (PW7) was able to identify all the 3 accused persons on (sic) different parades.”

The superior court revisited the issue of identification in reassessing the evidence on record and said as follows:-

“Of the five key witnesses PW1, PW2, PW3, PW4 and PW7 were able to identify the 1st and 3rd appellants at the scene, and at the respective identification parades. They also gave similar description of these appellants in court, of scars on the 1st appellant’s face and a “box punk” haircut on the part

of the 2nd appellant. The alleged irregularities in the identification parade are not clear to us and we find no evidence that the witnesses were shown the appellants before they were put on parade.”

“We have no doubt in our minds that the 1st and 3rd appellants were properly identified by their victims both at the scene of the robbery and at the respective identification parades. The witnesses were consistent in their testimony that the two, in the company of a third person, came to their shared compound and robbed the complainants in their respective homes, while posing as police officers conducting a raid. They made one of their victims PW2, wake up the neighbours and to lie that the appellants were police officers who had arrested him and that he needed help. They were at the scene for over 3 hours and did steal from their victims the various items stated in the charge sheet. They were armed and did threaten their victims with violence. We find that the 1st and 3rd appellants were properly convicted and sentenced by the lower court on all counts of the robbery with violence.”

We are of the view, based on our own assessment, that the issue of identification was resolved by the two courts below on sound basis and we have no reason to depart from those findings. Although the incidents occurred at night, there was sufficient light from electricity enabling at least five eye-witnesses to clearly see the appellant and his accomplices, who were with these witnesses for some three hours. In addition, the appellant had a “**box punk**” haircut, a feature that distinguished him clearly, in the eyes of each of the witnesses, who gave a very clear and consistent account of the appellant.

As regards the ground of appeal argued on behalf of the appellant, that the identification parade had been conducted irregularly, we find no merit in the argument. We discern no evidence of the claim that the identification parade was conducted without first obtaining the description of the suspects from the witnesses, or that the appellant was exposed as a “*terrorist*”, or that he was pointed out as “*a suspect*” by the investigating officer. The superior court was right in making the same finding. Accordingly, we reject the argument regarding the impropriety or irregularity of the identification parade.

The appeal has no merit and the same is dismissed. We so order.

Dated and delivered at Kisumu this 19th day of June, 2009.

P.K. TUNOI

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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