REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

17th December, 2005. They first broke into the house of their son ***Samwel Ooko Obeto*** (PW5) (*Samwel*) and beat him up demanding money. Samwel tried to fight back and in the process saw and recognized the appellant whom he referred to as "*Stephen Onyango*" also nicknamed "*Owiss*". They overpowered Samwel, tied him up and forced him to wake up his parents. The appellant stood with Samwel as they waited for the parents to open up. They were of the same age group and Samwel said he used to socialize with the appellant as they were neighbours. The appellant told the gang leader that Samwel was nicknamed "*Daddy*". When the parents did not open and Samwel's mother, ***Josephine Kwena*** (PW4) (*Josephine*) started screaming, they broke down the door and entered the house. Paul was holding a torch which he shone on the faces of the robbers and recognized one before his hand was slashed and the torch fell. He recognized the appellant whom he referred to as "*Owiss"*. He was the son of their immediate neighbour and Paul had seen him grow up as a child. The robbers started beating up the whole family demanding money as they collected various items from the house.

In the meantime, Victor from the first family had gone out to report the incident to neighbours and the Assistant Chief of the area. Fortunately the Assistant Chief, ***Grace Onyango Oloo*** (PW9) (*Chief Oloo*), was out on patrol of the village with her vigilantes otherwise known as community policing agents. Two of them were ***Joseph Obier*** (PW8) (*Joseph*) and ***Joakim Okelo*** (PW3) (*Joakim*). Victor gave them the names of some of the robbers who had robbed them and the security team went out after them. On their way, they heard a commotion in Paul Obeto's home and they headed there. Joseph shone his torch inside the house as he stood at the door and saw three people whom he recognized. One was the appellant whom he called "*Onyango*". Suddenly Joseph was hit from the back by someone and he fell, badly injured. A fight broke out between the robbers and the vigilantes, and the vigilantes did not manage to arrest any of them at the scene. Some of the stolen property was recovered. With the assistance of neighbours, Chief Oloo and the vigilantes were able to arrest some of the robbers including the appellant later that morning. But the appellant escaped from that arrest. He was later traced and arrested but again escaped from custody.

Eventually the appellant was apprehended and charged before Siaya Principal Magistrate's Court on four counts, jointly with others not before the court. Two of those counts were on robbery with violence contrary to ***section 296(2)*** of the Penal Code. The others related to grievous harm on Joseph (PW8) and assault causing actual bodily harm on one Sammy Owoko (*not a witness*). After a trial before G***. K. Mwaura***, Principal Magistrate, in which 11 prosecution witnesses testified, the appellant was acquitted on the two counts relating to grievous harm and assault on the ground that there was no medical evidence produced in relation to the complainants. He was however convicted on the two counts of robbery with violence and was sentenced to death. His appeal to the superior court (*Mwera & Karanja, JJ*) was dismissed, hence this second and last appeal before us.

The appeal, as the law requires may only raise issues of law – see ***section 361,*** Criminal Procedure Code. The appellant in person drew up what he called "*Petition of Appeal*" and raised four issues, one of which was abandoned by learned counsel appointed to act for him, Mr. Vincent Adet from the firm of M/s Onsongo & Company Advocates. Mr. Adet also filed a supplementary memorandum of appeal raising five other issues but he abandoned two of them. In the end counsel argued the issues in tranches of three grounds which may be summarized in our own words:

1. The appellant's rights under *section 72(3)(b)* ***of the Constitution were violated as he was confined in police custody beyond the period allowed in law.***

2. The identification of the appellant by way of recognition was not free from the possibility of error.

3. The superior court failed to analyze and re-evaluate the evidence and to make its own independent conclusions*.*

In urging the first ground of appeal, Mr. Adet submitted that the appellant was arrested on 17th April, 2006 but was not taken to court for plea until 26th June, 2006. When the court sought to clarify where Mr. Adet derived the date of arrest from, he was unable to identity it from the record. He referred to the evidence of Chief Oloo (PW9) which was recorded on 15th August, 2007 and quoted the witness as stating that the appellant "*escaped from the police and was re-arrested later early last year"*. In Mr. Adet's submission "*early last year*" meant "*17th April, 2006*". Of course, such summation is as ridiculous as it is baseless!

This Court has repeatedly emphasized the right of an accused person to a fair trial and has acted robustly in protection of those rights. The complaint must however be well grounded on the facts before the burden imposed under ***section 72(3)(b***) is shifted. The subsection as far as is relevant states:

"***... the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of this subsection have been complied with."***

There is nothing in the record before us to show when the appellant was arrested. What the record shows is that his arrest was not easy as he escaped twice from lawful custody before he was finally brought to court. The appellant admits such escapes. Until the issue was raised before this Court, there was no complaint about unreasonable delay or unlawful detention at any stage of the trial. As the issue was raised without sufficient or any basis in fact or in law, we have no hesitation in dismissing that ground of appeal, and we do so.

The second ground of appeal is most important because the sole basis upon which the appellant was convicted was his recognition by various witnesses as a member of the gang that terrorized the two families. Mr. Adet argued forcefully that the witnesses who purported to have identified the appellant by recognition were possibly mistaken because they gave different names. If it was not "***Owino Ochola***", it was "***Owiss"*** or simply "***Onyango***", none of which are the names of the appellant. The witnesses also, in his submission, made their identification under difficult and stressful circumstances at night and there was no evidence on the intensity of light in which the identification was made.

Both courts below were acutely aware that the prosecution case stood or fell on the evidence relating to identification of the appellant. In this case it was not that of a stranger, but of a person previously known and therefore it was identification by recognition. As this Court has stated before in ***Anjononi v Republic [1980] KLR*** 59 at page 60:-

"***The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v. Republic (***unreported***)."***

In considering that issue, the learned Magistrate stated as follows:-

"***The main issue I have to decide is whether the accused was identified as one of the robbers. In considering this issue, I note that these incidents were at night and due to the darkness, there is a possibility that the witnesses may have been mistaken. Accordingly I warn myself I have to be very careful and analyze the testimonies or the identify witnesses and only act on them when absolutely certain that the accused was correctly identified.***

Walter testified that his wife volunteered to give the robbers money. She showed them where the money was and they brought and poured on the table to count. To do this they shone their torches at the money and in the process illuminated themselves. PW1 then saw the accused. His wife Morine supports him on this when she sates as follows

"***Each of the thugs had a torch. When counting the money they had placed their torches on the table and the beams pointed at them. I saw them and recognized the accused person"***

He then analyzed the evidence of Victor (PW7) who said the appellant was his former school mate and neighbour and who made the first report to the Assistant Chief Grace Oloo (PW9); the evidence of Paul (PW6) who shone his torch on the appellant; Josephine (PW4) who could only identify one robber who was not the appellant; and Samwel (PW5) who was the appellant's agemate and neighbour. In the end the Magistrate came to the conclusion that:

"***After carefully considering all the evidence, I have no doubt at all that the accused was seen and correctly recognized by Walter Omondi and his wife Morine Akoth and Victor Onyango (PW1, 2 & 7). The same apply*** *(sic)* ***to Samuel Ooko with regard to the robbery at Paul's home. I proceed to dismiss the accused's denial*** *(sic)* ***as they are not true at all.***"

The superior court went through similar analysis of witness evidence before stating in the end as follows:

"***Grace Oloo (PW9) the Assistant chief proceeded to the home of Paul Obeto with youth wingers on the material night. The next day those arrested among the robbers included the appellant whom she called Stephen Owino Ochola. Paul Obeto and Victor (PW6, 7) told her that the appellant was among the robbers. So in their first report to the authorities, the Assistant Chief, not the police, his names were given. From all the evidence put together Stephen Owino Ochola, Owino Ochola or "Owiss" meant the appellant. By whatever name, he was a well known neighbour and he did not deny any of those names when witnesses referred to him by them and he put questions to them. They had seen him in bright torch lights e.g when the robbers were counting money they had robbed."***

There are therefore concurrent findings made by the two courts below that the appellant was properly identified as one of the robbers. We have re-examined the evidence upon which that conclusion was made and we find that it was well founded. We do not doubt that the identifying witnesses were familiar with the appellant who was their neighbour and we do not doubt the finding that the torches used to identify him were bright enough to provide positive identification as stated by those witnesses. We have no reason to disturb the finding and we dismiss that ground of appeal also.

The last ground challenges the manner in which the evidence of the trial court was evaluated by the first appellate court. Mr. Adet submitted that there was no re-evaluation otherwise it would have been obvious to the superior court that the appellant was sleeping in his house when he was arrested as confirmed by the witness called by him. That court would also have noticed material contradictions and inconsistencies in the evidence of the prosecution witnesses who, at times in evidence-in-chief, would assert that they had recognized the appellant only to recant it in cross-examination. The duty imposed on the superior court was not therefore discharged and the appeal must therefore succeed.

We have examined the record once again and we have noted that the superior court was aware and reminded itself of the duty to review the evidence recorded before the trial Magistrate and proceeded to do so at some length. The few contradictions and inconsistencies identified by Mr. Adet do not materially affect the evidence on record which undoubtedly point to the

appellant as one of the perpetrators of the offences charged. We do not find any merit in the complaint and we reject that ground of appeal.

In sum, we agree with learned Senior State Counsel ***Ms. Oundo*** that the offences charged were proved beyond reasonable doubt, and the conviction of the appellant was safe in all the circumstances. The appeal has no merits and we order that it be and is hereby dismissed.

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

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR