REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Criminal Appeal 403 of 2007

KENNEDY OWINO OTIENO

GEORGE OCHIENG ABALA ……...……APPELLANTS

AND

REPUBLIC ……..……RESPONDENT

(*Appeal from a conviction, judgment of the High Court of Kenya at Kisumu (Mwera & Mugo, JJ) dated 31st July, 2007*

in

H.C.Cr. A. No. 55 & 57 of 2006)

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JUDGMENT OF THE COURT

Kennedy Owino Otieno and ***George Ochieng Abala***, the appellants herein, were jointly charged in the Principal Magistrate's Court at Siaya with the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code. The particulars of charge were that on 6th day of May, 2005 at Nyandiwa Sub-Location in Siaya District of Nyanza Province while armed with dangerous weapons namely, pangas and metal bars jointly robbed ***Odhiambo Theodore Onimbo***, (PW1) of his cash Kshs.200/= and a torch all valued at Kshs.400/= and at or immediately before or immediately after the time of such robbery wounded the said Odhiambo Theodore Onimbo. The 1st appellant was separately charged with the alternative offence of handling stolen property contrary to ***section 322(2)*** of the Penal Code in that on the same day and at the same place otherwise than in the course of stealing dishonestly retained a torch knowing or having reason to believe the same to be stolen property. The case was heard by the Senior Resident Magistrate (*Mr. Okaro)* who delivered his judgment on 28th April, 2006. He found the appellants guilty, convicted and sentenced them to death on the main charge as mandatorily provided by law. Their appeals to the superior court at Kisumu *(Mwera & Mugo JJ)* were dismissed, hence the appeals before us. Being second appeals, only points of law fall for consideration by this Court by virtue of ***section 361(1)*** of the Criminal Procedure Code.

PW1 was walking home from a funeral vigil on the material day at 2.00 a.m. with his girlfriend ***Nancy Jimmy*** *alias* ***Nancy Atieno Onyango*** (PW6) when they were attacked by two people whom PW1 said were the appellants. The appellants were alleged to have hit PW1 on the right side of the head and right hand respectively. They also hit PW6. But when the PW1 and PW6 screamed, the robbers ran away. PW1 reported the incident to ***Marcellas Okech Murunga*** (PW5) "*Murunga*" the Assistant Chief for Mulaha Sub-Location on 7th May 2005. PW5was with Fredrick Ochieng Opeto (PW3) and Joseph

Owino Odayo (PW4), described as youth-wingers of PW5. The three then went to the house of the 2nd appellant on the night of the report and arrested the appellants. In that house were also recovered a panga and a metal bar which were alleged to have been used to assault PW1 during the robbery. From the 2nd appellant's house, PW3, PW4 and PW5 visited the house of the 1st appellant also and a torch identified by PW1 as the one he was robbed of during the robbery incident was recovered. The appellants were then taken to Siaya Police Station where they were received by ***Pc. Francis Mwita*** (PW7) who charged them with the offence as hereinbefore stated.

The appellants denied the offence in unsworn statements. The 1st appellant told the trial court that he was a mason and that on the day of the incident he had woken up and gone to his place of work where he stayed up to 5.00 p.m. when the 2nd appellant went to him and asked to use his (1st appellant's), bicycle which he took away. He then went to look for the 2nd appellant at 7.00 p.m. and when he found him, they both proceeded to the 2nd appellant's house. While there PW5 with PW3 and PW4 arrived and searched the house. They recovered a panga and a metal bar from there. They arrested both the appellants and the 1st appellant led them to his house where they also made a search and recovered a 3-battery powered torch which the 1st appellant claimed to be his property. The 2nd appellant told the trial court that at the time of his arrest he was working at a certain hotel. He however, adopted what the 1st appellant had told the court. In his judgment the learned trial Magistrate said:-

"***The complainant (PW1) told the court that on the night of 6.5.05 while walking home in company of his girlfriend (PW6) the accused persons attacked them while armed with a panga and a metal bar and not only assaulted him with the metal bar but also robbed him of his cash Kshs.200/= and the torch he had adding that he clearly saw and recognized the accused persons because there was full moon that was very bright adding further that he had known the accused persons before by appearance. His evidence was sufficiently corroborated by Nancy Atieno Onyango (PW6) who was an eye witness and whose evidence was direct and highly reliable.***

With regard to the torch that was recovered from the house of accused, I find that the same is the same one that was produced in court as exhibit 2. The said torch was positively identified by the complainant as his for it bore inscription of the short form of his name Tedd for Theodore on its plastic body. PW6 also identified it as the same torch the complainant had when they were attacked and the complainant robbed of the same. Frederick Ochieng Opeto (PW3) and Joseph Owino Odoyo (PW4) and Marcellas Okech Murunga (PW5) identified, the said torch as the same one they had recovered from the house of 1st accused. I therefore find that exhibit 2 belonged to the complainant.

Having found as a foresaid it is trite law that a person found in possession of a recently stolen good is either the thief or a guilty handler save where he renders a reasonable account as to how he acquired the said good. In his attempted explanation the accused 1 said that the torch that was recovered from his house was a 3-battery powered torch and not exhibit 2 that was powered by 2-batteries. Essentially his account was more of a denial than an explanation. His denial was … in unsworn statement which without more did not amount to a reasonable explanation since he was arrested in possession to exhibit 2 on the same day that the complainant was robbed of the same I invoke the doctrine of recent possession and draw a <u>*reluctable*</u> *(sic)* ***presumption that the accused 1 jointly with accused 2 robbed the complainant of the torch and cash Kshs.200/= and I so find;*** underling provided.

The complainant told the court that the accused persons were armed with a panga and a metal bar. PW6 sufficiently corroborated his evidence and identified exhibits 3 and 4 as the panga and metal bar respectively as the weapons the accused persons were armed with and I therefore find that the accused persons were armed with the said dangerous weapons when they attacked and robbed the complainant.

During, before or after the time of such robbery the accused wounded the complainant who sought treatment at Siaya District Hospital. The p3 form PW3 produced in court as exhibit 1 shows that the complainant suffered soft tissue injuries and tenderness on the head and both upper limbs and I therefore find that the accused persons wounded the complainant as they robbed him.

The upshop** (sic) **of the foregoing is that I find that the accused 1 and 2 jointly robbed the complainant with violence of cash Kshs.200/= and a torch all valued at Kshs.400/= and each accused is found guilty and I so find."

And in dismissing the appeal filed by the appellants in the superior court the learned Judges stated that:

"***on our own review of the whole record of the lower court and with respect to the learned Senior Principal State Counsel we are of the same mind as that court.***

Identification: ***The appellants raised this point and the Senior Principal State Counsel seemed to agree that as the incident took place on a night described by some (PW1, 6) as having bright moonlight and other witnesses as dark and without moon identifying the robbers could not be positive. We agree. Identification at night and particularly in a sudden attack with weapons from behind (PW1, 6) can pose a problem. After all the victims of that attack only knew their attackers physically. It was even more of a problem regarding the issue whether there was moonlight or not. To this we say that it is not impossible on the night and not the next. Why, if on the next night it was overcast with clouds? Thus the evidence of PW1 and 6 and that of PW3, 4 and 5 cannot be assumed to be necessarily contradictory. There could as well be a bright moon on the night of the attack while it was dark on the night of the ambush. See PW5.***

"*There was no moon."*

on the night of the ambush. But anyway on a more fundamental basis we forecast on other evidence that connected the appellants to the robbery. The complainant reported the incident to PW5 the Assistant chief while at a baraza the following day. At the meeting was PW3 and PW4. PW1 only knew the appellants by appearance. So when he reported:

"*The complainant mentioned that he suspected Owino and Ochieng Abala."*

PW5 also did not know the names of the appellants although his youth-wingers PW3 and PW4 said so. These three people laid an ambush at a certain house, whether they knew the appellants or not and whether their names had been given. There is that bit to consider. The appellants walked into the ambush at 11.00 p.m. They were followed into the house of the appellant 2 and the panga and metal bar the weapons which PW1 said were used on him were recovered. They were recovered in the house and not on the way as PW3 said. But even more importantly whether by trick of PW5 or the feeling of guilt of George he disclosed that the appellant 1 took away PW1's torch. PW5's team before it called up PW1 whom it had left somewhere, proceeded with both appellants to Kennedy's house and there the torch stolen from PW1 during the robbery was recovered when Kennedy produced it and handed it over to the team. This torch bore PW1's inscribed in its plastic case in short form** *TEDD, for* ***Theodore. He identified it at the time of recovery and also before court. It is no matter that that torch was not entered in the O.B. at Siaya Police Station or that it was either 2- or 3-battery powered. The overwhelming evidence was that it bore PW1's name – *TEDD.* ***That both appellants knew where that torch was and they led PW5's team to its recovery was only peculiarly known to them. It was stolen from PW1 when he was assaulted and robbed on the night in question. With such evidence we could only conclude that the appellants were the people who violently robbed PW1 as per the charge that faced them.***

In the circumstances of the case and all factors having been taken in regard, it is no matter whether the night was with or without the moon, or that perhaps an identification parade ought to have been mounted. We did not find either, that a confession was made to PW5 the Assistant Chief. The appellants told him what they alone knew and they led him to recover this torch we have already spoken about. Its ownership did not remain unresolved at all. PW1 identified it positively as his property at every stage where it featured. The appellants were found with it. As the learned trial Magistrate found, it was a case of recent possession.

All in all having gone over the proceedings, the judgment and submissions, our finding is that

conviction of the appellants was on sufficient evidence and, it with the sentence pronounced need not be disturbed. The appeals herein are dismissed."

It was necessary for us to reproduce a large portion of the superior court's judgment to show its relevance to what we shall say hereinafter. The appellants were aggrieved with this judgment and they have filed this appeal through their advocates *Messrs Otieno Yogo & Company* in a memorandum of appeal filed in the Kisumu sub-registry of this Court on 1st August, 2009. It had four grounds of appeal as follows:-

1. The learned Judges of the superior court erred in law in failing to re-evaluate the evidence on record regarding the circumstances surrounding the identification of the appellants and therefore came to the wrong conclusion that the appellants were properly identified.

2. The learned Judges of the superior court erred in law in failing to come to the conclusion that the appellants were not afforded fair hearing and that their rights under *section 77(1)(2)* ***of the Constitution of Kenya were violated.***

3. The learned Judges of the superior court erred in law in failing to address adequately the fact that a confession was obtained from the appellants contrary to the law.

4. That the learned Judges of the superior court erred in fact in finding that the appellant was at the scene of crime while there was lacking sufficient evidence to support his finding.

The appeal was heard in this Court on 6th August, 2009 wherein ***Mr. P.J.O. Otieno***, learned counsel for the appellants abandoned ground 2 of the grounds of appeal and submitted on ground 1 that circumstances were difficult and not conducive to a positive identification of the appellants. According to him the Judges of the superior court went outside their mandate by advancing possibilities of the findings of the trial Magistrate. On ground 3 counsel stated that it was through the inadmissible confession by the appellants to the Assistant Chief which led to the recovery and which implicated the appellants with the commission of the robbery. He stated that a panga is a common implement and the 1st appellant claimed the torch recovered from his house to be his property. In his opinion the standard of proof was not met to prove the charge of robbery against the appellants. ***Ms Oundo***, learned Senior State Counsel opposed the appeal on the grounds that the appellants were convicted on evidence of recognition and recent possession. There was moonlight and the appellants were known by the identifying witnesses. According to her the report made to the Assistant Chief gave the description of the appellants. He carried out investigations and the appellants were arrested with weapons. The torch recovered at the house of the 1st appellant was identified by PW1 as his.

The main legal issue in this case that of identification.

The evidence of PW1 as to how the robbers attacked him and PW6 was as follows:-

"***While on the way two men arrived with pangas and metal bars attacked us*** *(sic).* ***They attacked us*** *from behind*. ***I was hit on the right side part of the head with an iron bar and I lost balance and another person hit me with a blunt object on my right hand and I dropped down. I had an eveready torch. I recognized accused 1 for there was full moonlight and he is the one I struggled with. Accused 2 hit my girlfriend on the back with the side of a panga. I also saw accused 2 clearly. Accused 1 searched my pockets as I struggled with him and had*** *(sic)* ***robbed me of Kshs.200/=. We screamed and the accused persons ran away with my torch and Kshs.200/=. I had known both accused persons physically and not by names,"*** emphasis provided***.***

The evidence of PW6 which was said to be corroborative of that of PW1 talked of the tall and short persons – in reference to the appellants. The 1st appellant was referred to as the short person while the tall one was the 2nd appellant. The two witnesses alleged they had known the appellants physically but not by their names because they used to see them either at the market according to PW6 or because the 1st appellant used to be a watchman at Siaya Academy according to PW1. PW1 did not say whether or

where he could have met the 2nd appellant earlier. If PW1 was attacked from behind and when hit on the right side of the head he lost balance and then fell down, he would have had no strength to struggle with the 1st appellant to give him an opportunity to see and identify both the appellants. And although PW1 and PW6 alleged that there was full moonlight which enabled them to identify the appellants, PW5 who testified about the events of 6th May, 2005 when the offence was committed said in cross-examination by the 1st appellant that:-

"***There was no moon."***

These were the circumstances which prompted the learned Judges of the superior court to remark in their judgment:-

"***The appellants raised this point and the Senior Principal State Counsel seemed to agree that as the incident took place on a night described by some (PW1, 6) as having bright moonlight, and other witnesses as dark and without a moon, identifying robbers could not be positive. We agree. Identification at night and particularly in a sudden attack with weapons from behind (PW1, 6) can pose a problem. After all the victims of that attack only knew their attackers physically. It was even more of a problem regarding the issue whether there was moonlight or not."***

We are of the view that the above was the main finding of the learned Judges and that the rest of the judgment as narrated earlier was an attempt on their part to either provide some explanation, possibilities or probabilities as to how the presumption of the appellants' guilt could have been arrived at. As a general rule in criminal cases the burden is always on the prosecution to establish the guilt of an accused person beyond any reasonable doubt; see ***Mkendeshwo v Republic [2002] IKLR 361***, at ***p.366.*** In the case subject to this appeal, when the complainant (PW1) reported the incident to the Assistant Chief (PW5) he stated that he had been attacked by people whom he did not know. He did not give the Assistant Chief the descriptions of his attackers to enable the latter to follow up the matter. According to one of the Assistant Chief's youth-wingers (PW3) who was present when the report was made.

"***The complainant mentioned that he suspected Owino and Ochieng Abala."***

whom the youth winger did not know. Another Assistant Chief's youth winger (PW4) who was present when the report was made testified that

"***The complainant described the appearances of these people to the Assistant Chief and we got to know their names as Kennedy Owino Otieno and George Ochieng Obala."***

The Assistant Chief did not say so in his evidence neither were the descriptions of the appellants alleged to have been given by the complainant to him described to the court. Considering the evidence of the complainant that he was attacked from the back and hit on the right side of the head and fell to the ground and the report the complainant made to the Assistant Chief no reasonable court would have been satisfied that such circumstances were conducive to a positive identification. The evidence adduced was not positive that there was moonlight during the time of the robbery or that the complainant used the torch which he had, if at all, to identify his attackers. And in regard to the torch which was said to have been robbed from the complainant by the appellants during the robbery incident and to which the learned Judges put emphasis, the 1st appellant insisted that police occurrence book at Siaya Police Station at the time be produced in court. It was produced on 19th April, 2006. According to the record therein apart from the panga and metal bar which were booked no torch was so booked, yet it was an important item in the case. At the same time the torch produced in court as the one the complainant was robbed of was also claimed by the 1st appellant as his. With such conflicting claims, the inscription found on the torch "*TEDD"* was not conclusive proof that that torch belonged to the complainant to call into play the doctrine of recent possession. We are not even convinced the metal bar and panga alleged to have been used to attack the complainant on the night of the incident were sufficiently identified to be the weapons used in inflicting injuries which PW1 suffered.

This case wholly depended on the identification of the appellants by the complainant at night. As this Court stated in ***Odhiambo v Republic*** ***[2002] IKLR 241:-***

"***Where evidence rests on a single witness and the circumstances of identification are known to be difficult, then other evidence either direct or circumstantial pointing to the guilt of the accused persons from which the court may reasonably conclude that identification is accurate and free from the possibility of an error is needed."***

In this appeal no such evidence was produced. The evidence of ***Nancy Atieno Onyango*** (PW6) intended to support the evidence of the complainant did not measure up to the required standard. She talked of a full moonlight which was not supported by the evidence of PW3, PW4 and PW5. She also talked of the height of the complainant's attackers which was not supported by the evidence of the complainant. When the complainant reported the robbery to the Assistant Chief (PW5) he merely suspected the appellants as the culprits and not that he was sure they were his attackers. No wonder that the trial Magistrate drew

"***reluctable***" *(sic) presumption that the accused 1 jointly with accused 2 robbed the complainant of the torch and cash Kshs.200/= and I so find."*

The word ***reluctable*** *(sic)* is not described in any dictionary but we think the word intended was "***reluctant***". This being the learned Magistrate's view, then there was a doubt which occurred in his mind and which vitiated his final verdict. In the circumstances, it was incumbent on the learned Judges to follow suit and to give the benefit of doubt to the appellants.

Given the evidence and circumstances of the case we are not persuaded the case of robbery as framed against the appellants was proved against them beyond all reasonable doubt. After the superior court Judges agreed with the trial Magistrate that in the circumstances in which the incident occurred identifying the robbers could not be positive then they too raised a doubt benefit whereof they should have given to the appellants. We allow this appeal, quash the appellants' conviction and set aside the sentence. Unless the appellants are otherwise held for some other lawful cause they should be set at liberty forthwith.

Dated and delivered at Kisumu this 9th day of October, 2009

E. O. O'KUBASU

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JUDGE OF APPEAL

D. K. S. AGANYANYA

....……

JUDGE OF APPEAL

J. G. NYAMU

....……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR