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

CRIMINAL APPEAL 103 OF 2007

HENRY MUGANGA NYALERO ……...…….. APPELLANT

AND

REPUBLIC …….……...…… RESPONDENT

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

Kisumu (Mwera & Mugo, JJ) dated 27th March, 2004

in

H.C.CR.A. NO. 100 OF 2004)

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JUDGMENT OF THE COURT

The appellant herein, ***Henry Muganga Nyalero,*** was tried alongside eight other suspects in Kisumu Chief Magistrate's Court *Criminal Case No. 734 of 2004*, found guilty and convicted on a charge of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code. He was sentenced to death as prescribed by the law. The particulars of the offence stated as follows:

"***On the night of 10th day of April, 2003 at Kamariga beach in West Uyoma Location of Bondo District within Nyanza Province, jointly with others not before court while armed with offensive weapons namely Somali swords, rungus and torches robbed LYDIA AKECH ARIMBI of cash Kshs.6000/=, two traveling bags, one wall clock, two pairs of women shoes, one cap, one jacket, two pressure lamps and one table cloth (sic) all valued at Kshs.11,400/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said LYDIA AKECH ARIMBI".***

The prosecution relied upon the following facts as accepted by both the trial and the first appellate courts. The complainant ***Lydia Aketch Arimbi*** (PW4) was asleep in her house within Kagwa sub-location in Uyoma location when at about 1.00 a.m. on the night of 9th and 10th April, 2003 a gang of armed men raided her house by first knocking at the door. She put on a lantern as she inquired who was knocking. These people opened the door and entered the house. They demanded that the complainant should give them what she had. She told them that she did not have money. One of these men, who was short, hit the complainant with an iron bar and ordered her to give them money. Another one climbed on top of the bed and started removing things and the complainant recognized this man as the appellant. He removed the wall clock, 2 bags and 1 handbag, 1 hat, sports shoes, a pressure lamp, jacket, table cloth and some open

shoes which were under the mattress. After taking all these items, these men told the complainant not to make any noise and they then left after locking her door from outside. After the incident, the complainant screamed and a young man called Moses Otieno opened the door for her. She went to report the incident to the Assistant Chief. Some of her property was recovered in a bush the same morning. The appellant was arrested the same morning when the villagers who had beaten one of the robbers to death proceeded to his home and when he saw them he ran to the home of one Makodipo.

When put to his defence, the appellant made unsworn statement in which he denied the offence stating that the time the offence is alleged to have been committed, he was in his house sleeping. In the course of her judgment the learned trial magistrate (Ms. W. B. Mokaya – Senior Resident Magistrate) said:

"***As relates to 2nd count Lydia Aketch said she was attacked at night by some robbers who stole certain items from her house. Among those who attacked her she said she could identify A1 and A9 as being among those who came into her house. An identification parade was conducted for both A1 and A9 and she said she identified them. However the identification parade form for accused 9 was rejected by court on account of wrongful procedure. This identification of accused 1 is the only one that can stand. PW1 said she was able to identify A1 with the help of a lantern light. She stated that she had seen accused 1 prior to this incident and at the time the robbery was taking place she was able to recognize him. She also said that when she made a report. She gave name of A1 as one among those people who had attacked and robbed her. A1 was equally mentioned by the prosecution witnesses as having being (sic) mentioned by the deceased a member of the gang who was beaten to death.***

PW4 Lydia confirmed in her testimony that the deceased was among the people who came to her house that night.

From the foregoing, I find that evidence against A1 has been established. There is corroboration of PW4's evidence on identification and even though she was cross-examined her evidence was not shaken. It has been established too that A1 was in a group of others when attacking PW4 which is one of the ingredients of the charge of Robbery with Violence. The evidence against the rest of accused persons accused 2 to 9 has not been established".

After dealing with the evidence relating to the appellant's co-accused the learned trial magistrate discharged them (co-accused) and proceeded to conclude her judgment thus:

"***As for A1, I find that he was properly identified by PW4, both at the scene and during identification parade, accused on the other hand did not state of his whereabouts on the date and time of the said incident. That not withstanding the prosecution have properly proved their case against him on the aforesaid charges of Robbery with Violence he is accordingly convicted under section 296 (2) of the Penal Code".***

It was in view of the foregoing, that the appellant preferred an appeal to the High Court.

The High Court (Mwera and Mugo, JJ.) considered the appeal and came to the same conclusion as did the learned trial magistrate that the appellant was, indeed, properly identified by the complainant. In the course of their judgment, the learned Judges stated:

"***There is no doubt from the record and the appellant does not dispute that he was known to the three witnesses whose accounts, in our view, do corroborate each other and clearly link the appellant to the 1st count for which he was charged, tried and convicted. He was known to the complainant Lydia Akech Arembe who was able to identify him by means of light from a lantern she had lit in her house where he remained under her surveillance for about 10 minutes as he and his accomplices were robbing her of properties which she said were taken personally by the appellant and recovered about 50 meters from his house. She had no problem therefore identifying him at the police station".***

Still aggrieved by the foregoing, the appellant now comes to this Court by way of second and final appeal. That being so, only matters of law fall for consideration – see ***Section 361 (1)*** of the Criminal

Procedure Code (Cap 75 Laws of Kenya).

When the appeal came up for hearing before us on 23rd June, 2008, Mr. W. O. Nyende appeared for the appellant, while Mr. D. I. Musau, the learned Senior Principal State Counsel appeared for the State. In his submissions, Mr. Nyende raised two important issues viz, identification and defence of alibi raised by the appellant. Mr. Nyende contended that the appellant was convicted on the evidence of identification by a single witness (PW4) and yet this identification was, in his view, in difficult circumstances since it was not indicated how bright the lantern light was. He went on to argue that even recognition can be erroneous.

As regards the appellant's defence, Mr. Nyende submitted that the trial court misapprehended the law and for that reason he asked us to allow the appellant's appeal.

Mr. Musau, on his part submitted that the appellant was properly identified by PW4 who had known him before the incident as they lived within the same neighbourhood. Mr. Musau pointed out that the robbery took about 15 minutes and during this time the lantern was on. In conclusion, Mr. Musau was of the view that the appellant was convicted on very sound evidence.

As already stated elsewhere in this judgment, this is a second appeal and hence it must be confined to points of law only and this Court would not normally interfere with concurrent findings of fact of the two courts below unless they are shown to have not been based on evidence – see ***KAINGO V REPUBLIC*** [1982] KLR 213.

In our view, the main issue in this appeal relates to identification. There was also the issue of the defence of alibi raised by the appellant at his trial.

We have the concurrent findings of the two courts below that the appellant was identified, nay, recognized by the complainant (PW4) during the robbery and that the appellant was not a stranger to the complainant. There was further finding that one of the robbers who was beaten to death had stated that it was the appellant who had led them to the scene of the robbery.

As regards identification, the two courts below were satisfied that the appellant was not only identified but recognized by the complainant as the appellant was known to the complainant prior to the incident. But even though this was a case of recognition, we must remember that the robbery took place at night. There was therefore, need for caution as has been stated repeatedly in many decisions – see ***ABDALLA BIN WENDO AND ANOTHER V R*** [1953] 20 EACA 166 but particularly ***RORIA V REPUBLIC*** [1967] EA 583 in which Sir Clement de Lestang V.P. said:

"***A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L.C. said recently in the House of Lords in the course of a debate on s.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:***

'***There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity' ".***

The evidence led by the prosecution and accepted by the two courts below was that the complainant put on the lantern when the gang struck. The lantern remained on until the robbers left. It was the evidence of the complainant that she knew the appellant and that she recognized him among the robbers, and that the incident took about 10 to 15 minutes.

This is therefore, not a case of identification but recognition in which the complainant gave details of the circumstances under which she was able to recognize the appellant. In ***ANJONONI AND OTHERS V REPUBLIC*** [1980] Kenya Law Reports 59 at page 60, the predecessor of this Court said:

"***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 The Republic*"**.** (unreported)

We respectfully agree with the foregoing which in our view, applies to the facts in this appeal.

We have anxiously considered the issue of identification of the appellant and it is our view that the two courts below cannot be faulted in the manner they dealt with this issue. As regards the defence of alibi by the appellant, we are satisfied that this was displaced by the prosecution evidence. The two courts below cannot be faulted on that account.

For the foregoing reasons, we are satisfied that the appellant was convicted on very sound evidence and for that reason, we detect no error on the part of either the trial court or the first appellate court. Accordingly, we find no merit in this appeal which we order that it be and is hereby dismissed in its entirety.

Dated and delivered at Kisumu this 27th day of June, 2008.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR