



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CRIMINAL APPEAL 100 OF 2007**

KENNEDY OTIENO ODENYAPPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Warsame, JJ.) dated 20th February, 2007

in

H.C.CR.A. NO. 248 OF 2005)

JUDGMENT OF THE COURT

The appellant was convicted by senior resident magistrate Kisumu for the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death as prescribed by the law. His first appeal to the superior court against conviction and sentence was dismissed hence the present appeal.

Peter Odhiambo Ogutu (*PW1*) the complainant testified at the trial, among other things, that, he was going home from a funeral on the night of 11th June 2005 at about 2 a.m; that on the way two people who were armed with a club and a machete stopped him and ordered him to remove everything he had; that the two people thereupon robbed him of his jacket, identity card, ATM Card, wallet containing shs.500/=, a belt and a pair of shoes; that he identified the two robbers through moonlight; that the appellant who was wearing a jacket and a cap was one of the two robbers; that he identified the appellant at the funeral on the following day whereupon he was arrested and that thereafter his jacket, belt, identity card and ATM card were recovered. AP Cpl. Stephen Apuoga (*PW3*) testified that on 12th June 2005 the appellant took the police to a house where he used to sleep; that he searched the house and recovered a belt; and that the appellant led them to the bush where a jacket and an identity card which complainant identified as his were recovered. Mayor Ondiek Anyanga (*PW2*), the Assistant Chief of the area, testified that the appellant upon arrest led them to the house where he used to sleep and a belt belonging to the complainant was recovered inside a bag and that later the ATM Card of the complainant was found and brought to him.

The appellant denied that anything was recovered from his house. He also denied that he led police to the recovery of some stolen items.

The trial magistrate found the evidence of the identification of the appellant by the complainant unreliable but nevertheless convicted the appellant on the basis that he was found in possession of the complainant's

belt and that the appellant led the police to the recovery of the complainant's jacket and identity card. The trial magistrate said in part:

“The complainant testified that he was able to identify the accused because there was moonlight at the time of the robbery... This evidence would not ordinarily have had any evidential value but for the recovery of this belt which was among the stolen items. This recovery after the arrest of the accused removed any issues as to whether there was proper identification or not”.

The trial magistrate further observed:

“In the instant case, the conduct of the accused in leading police officers where the jacket and identity card of the complainant were recovered is admissible evidence against him. The question that begs an answer is how the accused knew that the items were there if he was not involved in the offence. Without an answer forthcoming from the evidence on record, the only logical conclusion to make is that he was one of the robbers.”

Similarly, the superior court considered that the evidence of identification of the appellant by the complainant was of very little value saying in part:

“The case of the prosecution is not based on identification but on the issue of possession ... We think that the issue of identification is of very little value to the success of the prosecution case”

The superior court upheld the conviction on the basis that the appellant was in recent possession of the complainant's belt, jacket and identity card as he led police to the recovery of those items.

There are two grounds of appeal the first being the main ground of appeal. It reads:-

“1. The learned Judges erred in not finding that the evidence of the recovery of the stolen items was inadmissible the appellant having led the police to their recovery.”

In support of that ground, Mr. Obuo, learned counsel for the appellant, submitted that **section 31** of the Evidence Act which made information from an accused person leading to discovery of a fact admissible was repealed by Act No. 5 of 2003.

Section 31 of the Evidence before it was repealed provided:-

“Notwithstanding the provisions of sections 26, 28 and 29, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.”

It is true that **section 31** of the Evidence Act was repealed by **section 102** of the *Criminal Law (Amendment) Act 2003, No. 5 of 2003* which commenced on 25th July, 2003 in the following words:-

“Section 102: The evidence Act is amended by repealing section 31.”

When the amendment was brought to the attention of Mr. Musau, learned Senior Principal State Counsel, he readily conceded the appeal even though he had supported the conviction in the superior court.

It is evident from the respective judgments of the trial magistrate and superior court that the two courts below appreciated that the evidence of the identification of the appellant by the complainant was unreliable. That undoubtedly was the correct assessment of the evidence of identification. Indeed, it was evidence of identification by a single witness at night in difficult circumstances. It was no more than dock identification since no identification parade was conducted.

There is no doubt that the appellant was solely convicted on the basis of recent possession of the

complainant's belt, jacket and identity card. According to the evidence, the belt, was recovered after the appellant led police to the house where he used to sleep. Similarly, the jacket and the identity card were recovered after the appellant led police to the bush. It is clear that the belt, jacket and identity card were recovered in consequence of the information given by the appellant. The repeal of **section 31** of the *Evidence Act* made such evidence inadmissible. The conviction of the appellant being solely basely on inadmissible evidence is unlawful.

In the result we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 28th day of November, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR