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

Criminal Appeal 184 of 2002

1. **JAMES OTENGO NYAROMBE**
2. **ALLOYS NYANEKO**
3. **EVANS SIGIRI………..….....….……………… APPELLANTS**

AND

REPUBLIC……….……………………………RESPONDENTS

***(Appeal from a judgment of the High Court of Kenya Nairobi (Mbogholi & Mbito JJ.) dated 25th September, 2002* in H.C.Cr.Appeal Nos. 109, 110 & 111 of 1999 (Consolidated)**

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JUDGMENT OF THE COURT

This appeal has a long history which can be traced back to the *year 1997* when the following five people:-

1) ***Alloys Biri Nyasata***

2) ***Jackion Morara Mayaka***

3) ***James Otengo Nyarombe***

4) ***Alloys Nyaneko Nyaneko***

5) ***Evans Sigiri Ndege***

were arraigned before the Senior Resident Magistrate's Court at Nyamira in ***Criminal Case No. 762 of 1997***. The five were jointly charged with robbery with violence contrary to ***section 296(2)*** of the Penal Code. The particulars of the offence stated as follows:-

"***On the night of 4th May, 1997 at Matongo Sub Location in Nyamira District of Nyanza Province, the appellants jointly being armed with offensive weapons namely pangas robbed David Olweny Angoi of K.Shs.15,000/= and at or immediately before or immediately after the time of such robbery wounded the said David Olweny Angoi.”***

Each of the five people pleaded "***Not Guilty”*** to the charge. The pleas were taken on *20th August, 1997*

before the Chief Magistrate, E.B. Achieng *(now deceased)*, and the main trial commenced on *16th October, 1997* before the learned Senior Resident Magistrate, Mr. J. Kiarie. Prosecution called a total of ten witnesses to testify.

The learned trial magistrate considered the evidence adduced by the prosecution and in the course of his judgment stated:-

"***Looking at the entire evidence, I have no doubt that complainant was robbed of Shs.15,000/= and during the robbery or in the same transaction, the robbery, he was injured and his wife PW9, badly injured. PW3 their brother who came to their rescue was also badly injured. There was torch lights and tin lamp lights and from these sources of light, adequate light came and this helped PW1, PW2 and PW9 to see who the robbers were. They knew them. They knew some by names and others by physical appearance. The physical appearance was also coupled by where one lives and what he does normally. Even the names given may not be the names found in the people's identity cards, but these are names the people are known by and use in their daily or day by day lived (sic) in the village.***

The people seen and also recognized are the five accused persons herein, one Joseph Omollo, and one Kombo Kombo who are not here."

Having so stated, the learned trial magistrate made observations to the effect that one of the accused persons *(2nd accused)* was reported to have died and then concluded his judgment thus:-

"***I do not make a finding in respect to Accused 2 who did not tender a defence alleged because he died. In my opinion, this is the proper cause of action as the case against him was not formally withdrawn.***

As against Accused 1, Accused 3, Accused 4 and Accused 5 herein, I find the charge proved beyond all doubt and at (sic) section 215 Criminal Procedure Code, I convict each one of these four of the offence charged of robbery with violence contrary to section 296 (2) of the Penal Code."

The learned trial magistrate then proceeded to sentence each of the accused persons to death as mandatorily prescribed by the law. The four who were convicted and sentenced to death were ***Alloys Biri Nyasata, James Otengo Nyarombe, Alloys Nyaneko Nyaneko*** and ***Evans Sigiri Ndege***. Being dissatisfied by both convictions and sentence they filed appeals to the High Court which appeals were consolidated and heard together as ***Criminal Appeal No. 109 of 1999*** in the superior court.

The learned judges of the superior court (Mbogholi Msagha and Mbito, JJ.) considered the appeals and in a short judgment stated inter alia:-

"***On our part we appreciate the fact that the offence took place at night and the only sources of light were the tin lamp and the torches held by the assailants. However, these people were known to PW1 PW3 and PW9 not only by name but by appearance. They talked to their victims while demanding money. The wife of the complainant even called one of them by name and asked him why they (robbers) were killing them."***

Having so stated, the learned Judges concluded their judgment thus:

"***We are satisfied that the case against the appellants was proved beyond reasonable doubt and the learned trial magistrate was entitled to arrive at the convictions. We therefore find no merit in the appeals which are accordingly dismissed."***

It is from the foregoing that the appellants come to this Court by way of second and final appeal. It is to be observed that while the High Court dismissed the appeals by four people, we have only three viz ***James Otengo Nyarombe, Alloys Nyaneko*** and ***Evans Sigiri*** before us. We do not know what happened to ***Alloys Biri Nyasata***.

Mr. Evans Ondieki, the learned counsel for the appellants, filed a supplementary Memorandum of

Appeal citing the following eight grounds of appeal:-

"***1. The trial court and the superior court erred in law by confirming the conviction on the basis evidence of identification, which did not meet the required legal standards.***

2. The superior court erred in law by confirming the convictions on the basis of evidence of recognition that was mistaken.

3. The superior court erred in law by confirming the convictions when the evidence on record was full of gaps, material contradictions and inconsistencies which should have been resolved in favour of the appellants.

4. The superior court erred in law by confirming the conviction on the basis of mere suspicion than cogent evidence as required by the law.

5. The superior court Judges erred in law by failing to analyse the entire evidence and the defence as enjoined by law to draw their own conclusions and inferences.

6. The superior court erred in law by confirming the conviction on the basis of circumstantial evidence that did not meet the required legal standards.

7. The prosecution never discharged its burden to proof (sic) their case beyond reasonable doubt.

8. The trial magistrate and the superior court erred in law by misapprehending the facts and applying the wrong principles of law."

This appeal came up for hearing before us on *26th March, 2007* when Mr. Ondieki appeared for the appellants and Mrs. G.W. Murungi, Principal State Counsel, appeared for the State.

On the issue of identification of the assailants, it was Mr. Ondieki's submission that as the incident took place at night, the identification of the appellants was not free from error. He contended that the High Court did not analyse the evidence. He went on to point out various contradictions in the evidence of prosecution witnesses. Mr. Ondieki particularly took issue with the manner the superior court handled the matter. Finally, Mr. Ondieki pointed out that the appellants were charged with the offence which occurred on *4th May, 1997* and appellants were arrested on *6th August, 1997*. Mr. Ondieki complained that the appellants were prejudiced as the date of the offence was never rectified.

On her part, Mrs. Murungi did not seek to support the conviction and sentence on the ground that the superior court never analysed the evidence. She gave the example of the date when the offence is said to have been committed as having been *4th May, 1997* and yet the trial court referred to *4th* and *5th August, 1997*.

While we appreciate Mr. Ondieki's industry in his extensive research of relevant authorities, we think that it will be quite appropriate to dispose of this appeal on only one aspect, viz, the duty of the superior court as the first appellate court to analyse and re-evaluate the evidence. At the commencement of this judgment we deliberately set out the particulars of the offence which stated inter alia, that the offence took place "***on the night of 4th May, 1997."*** When it came to the trial before the learned Senior Resident Magistrate the witnesses were referring to *4th August, 1997*. The complainant ***David Olweny Angoi (PW1)*** in his evidence in chief is recorded as having stated:-

"***I recall 4/8/97 at about 2:00 a.m. at night."***

George Omondi Oluoch (PW2) in his evidence in chief said:-

"***I recall the night between 4th and 5th August, 1997 at 2:00 a.m. I was asleep in my house."***

Nancy Akinyi Olwenyi (PW9) the wife of the complainant in her evidence in chief is recorded to have said:-

"***I am from Matongo sublocation in Nyamira. I farm. I am wife to complainant in this case, David Olwenyi.***

I recall 5th August, 1997 at 2:00 a.m. at night, I was 8 months pregnant and unwell and was in my house with my husband and small child."

From the foregoing, it is clear that the offence took place during the night of *4th and 5th August, 1997*. All the witnesses refer to that date. But in the charge sheet the appellants and their co-accused were charged with an offence that was committed "***on the night of 4/5/97"***. The charge sheet was never rectified up to the time the trial court delivered its judgment on *10th March, 1999*.

It is trite that a trial court has the duty to carefully examine and analyse the evidence adduced in a case before it and to draw conclusion only based on the evidence before it. In the same way a court hearing a first appeal *(i.e. a first appellate court)* also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance for the same. There are now a myriad of case law on this but the well-known case of ***OKENO V. REPUBLIC [1972] E.A. 32*** will suffice in which it was stated:-

"***The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M. RUWALA VS. R. (1975) EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

From the passages we have quoted from the judgment of the first appellate court and what various prosecution witnesses stated in their evidence, it is obvious that the first appellate court failed in its duty as stated in **Okeno's** case (supra). Its failure to consider and re-evaluate the evidence on record was, in our view, a fatal misdirection. It is for that reason that we agree with both Mr. Ondieki and Mrs. Murungi that this appeal ought to be allowed. Accordingly, the appeal is allowed, the conviction quashed and the death sentence imposed on each appellant set aside. The three appellants are to be set free unless otherwise lawfully held. It is so ordered.

Dated and delivered at Nairobi this 11th day of May, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

<u>DEPUTY REGISTRAR</u>