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

CRIMINAL APPEAL 80 OF 2004

WILLIS OCHIENG ODERO ……...…….……. APPELLANT

AND

REPUBLIC ……..……RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kisumu (Tanui, & Gacheche, JJ.) dated 11th March, 2004

in

H.C.CR.A. NO. 209 OF 2002)

****

JUDGMENT OF THE COURT

In this second appeal by ***Willis Ochieng Odero***, (Odero) two broad issues have been raised namely, that the first appellate court did not subject the evidence adduced before the trial court to a re-evaluation, scrutiny with a view to itself drawing its own conclusions on the involvement or otherwise of the appellant; and secondly, that the trial court failed to comply with the mandatory requirements of ***section 200*** of the ***Criminal Procedure Code***, ***Cap 75*** Laws of Kenya.

The background facts of this case are short and straightforward. ***Killion Otieno Akello***, a resident of Kadero sub-Location where he engages in farming, was inside his house on the night of 7th February, 2001. At about 1.30 a.m. he was surprised by a bang at his main door. Someone barked a command to him to open the door or else it would be forced open. He armed himself with a panga and picked a torch which he said had new batteries. He then went and opened the door and readied himself to confront whoever dared to force his way into his house.

He flashed his torch through the door. He saw some people. The first one was a person he knew. He immediately aimed and cut that person with a panga on his left temple and inflicted a deep cut wound. Another person however, successfully pushed his way into the house, caught hold of ***Akello*** and forced him to the ground. He held his neck firmly and tried to strangle him. The complainant felt pain and as he struggled his bowels eased and he excreted on himself. His attackers demanded for and ***Akello*** told them where he had kept some money which the attackers took.

Apart from the appellant ***Akello*** testified that he recognized two other people – ***Ondele Ochieng*** and ***Saturday Ochieng*** who ***Akello*** said he recognized by voice. ***Akello*** testified that ***Saturday Ochieng*** (Saturday) is his brother's son and that he knew his voice well. The other two, he said, are people from

his village who he knew well, and with the help of torch light he was able to recognize them. These two were prepared to kill ***Akello***, but ***Saturday*** pleaded with them to spare him which they did.

In total the attackers stole Kshs.15,940/= from ***Akello*** which he had intended to use on a journey he had planned to make the next day. The raiders also took his torch and panga. However, before they left they used the panga to assault ***Akello*** using its flat side. They also kicked and stepped on him before they left. In the course of all that ***Akello*** sustained injuries. He screamed until he lost his voice.

The first person who responded to ***Akello's*** screams was one ***Charles Ndala Malo*** (Malo). He heard the screams while at his house which was close by. ***Akello*** told him that he had been robbed by people he knew, among them ***Saturday Ochieng***, ***Ouma Ondele Ochieng*** and ***Ochieng Odero***, that he had cut one of his attackers, and that he had been robbed of Kshs.15,940/=.

On 8th February, 2001, the appellant went to the shop of one ***Alfayo Otina Jaruba*** (Alfayo). He had a fresh cut wound on the left side of his head. He told ***Alfayo*** that he had fallen into Arude river and hit a sharp stone which cut him. This encounter took place only a few hours after the attack on ***Akello***.

The three persons who ***Akello*** said he identified as his attackers were arrested on different days, times and places and were jointly charged that on the night of 7th and 8th February, 2001, at Kadero sub-Location in Kisumu District, jointly while armed with offensive weapons to wit pangas and knives, robbed "***Okello"*** of Ksh.15,940/=, a panga and a torch, contrary to ***section 296(2)*** of the ***Penal Code***. The charge sheet gives the name of the complainant as ***Okello***, but in court he said he was ***Akello***.

The prosecution called six witnesses all who testified before T.O. Auma, Senior Resident Magistrate. For some reason Auma did not complete the trial. After the defence hearing, another magistrate took over the case. The new magistrate, like Auma, was a Senior Resident Magistrate. This is how the proceedings went before he took over the case:

"***7.5.5.2002***

Before A. Onginjo, S.R.M.

CPL. Nyongesa for state.

C.C. Okumu

Accused persons: Present.

Accused 1: We request the court to finalise the matter as we have overstayed in remand.

Accused 2: I leave court to determine issue.

***Order**: Mention on 28.5.2002 for fixing date for judgment. Proceedings to be typed.*

(A. Onginjo)

S.R.M

***7.5.2002**."*

That record shows that a Police Corporal was prosecuting. However in our view his presence did not vitiate the proceedings as he took no part in the prosecution of the case in the strict sense of the word.

Mr. Mwamu for the appellant submitted, among other things, that the magistrate who took over the case did not comply with the mandatory provisions of ***section 200*** of the ***Criminal Procedure Code***, and in his view, therefore, the proceedings of the trial court thereafter were a nullity. We will consider this point

later.

Mr. Onginjo having taken over the case, reserved judgment which he delivered on 21st June, 2002. In that judgment, he held that the evidence which had been presented before Auma was insufficient to warrant a conviction against ***Saturday Ochieng Ouma*** and ***Paul Otina Omondi***. They were the first and second accused respectively. Mr. Onginjo further held that the complainant's evidence of identification by voice required corroboration which was lacking and that there were flaws in the evidence of identification of ***Saturday***. He therefore acquitted them.

But as for the appellant, he found as fact that he was positively identified by ***Akello*** and that evidence was corroborated by his injury, and also the fact that the complainant mentioned his name to ***Malo***, among other people. He was satisfied that the evidence against the appellant was overwhelming and he therefore, proceeded to convict him of the robbery with violence charge contrary to ***section 296(2)*** of the ***Penal Code***, and sentenced him to death.

The appellant was aggrieved. In his first appeal to the superior court the appellant raised the following issues: identification evidence was lacking in its quality, the evidence in general was contradictory, the trial magistrate shifted the burden of proof to him, and certain essential witnesses were not called.

The appellant's appeal to the superior court was heard by two Judges, Tanui and Gacheche JJ. In their judgment the learned Judges were clearly aware of their duty, as they rendered themselves thus on that issue:

"**As this is a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanor of witnesses."**

The learned Judges appear to have relied on ***Pandya v. R*** **[1957] EA. 336** where the Court of Appeal for East Africa, quoted Lindley, M.R. Rigby and Collins LLJ. in the case of ***Coghlan v. Cumberland*** (**3) [1898] 1 Ch. 704**, in which they stated as follows:

"**Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; …"**

In obedience to that guidance the learned Judges then rehashed the evidence relating to identification, considered the fact that the evidence before the trial court was recorded by one Magistrate and judgment was prepared and delivered by another Magistrate. The learned Judges did not however, allude to the provisions of ***section 200*** of the ***Criminal Procedure Code***. They then concluded their judgment as follows:-

"**Having carefully re-examined the evidence as a whole on our own we are also satisfied that PW1 saw the appellant with a flash of a torch as the appellant led the robbers as they entered the appellant's house. That identification was corroborated by the fact that PW1 gave the name of the appellant to PW4 shortly after the robbery and to PW5 later on in the hospital. That evidence was further supported by that of PW2 who said he saw a fresh cut wound on the left head of the appellant on the following morning after the robbery."**

The learned Judges did indeed analyse the evidence but they did not go far enough. An accused is entitled to know how a court has gone about re-examining and re-evaluating the evidence of the trial court. He is entitled to know how the court has dealt with the weaknesses, if any, of the prosecution case. For instance the superior court did not consider whether the handling of the appellant's case by two magistrates in any way prejudiced him.

In the appeal before us, as we stated earlier the appellant laments that the first appellate court did not subject the evidence to scrutiny and thus arrived at a decision unsupported by evidence. Mr. Mwamu for the appellant submitted before us that had the learned Judges considered the quality and amount of light the complainant used to identify the appellant, his proximity to the appellant, and whether the evidence was consistent, they would have come to the conclusion, firstly that conditions favouring a correct identification were poor, that there were contradictions in the prosecution case as to the date of the offence, and that ***section 200*** of the ***Criminal Procedure Code*** was not complied with.

Mr. Musau for the state was of the view that the evidence on record is overwhelming against the appellant and that the learned Judges of the superior court sufficiently analysed the evidence. As for ***section 200*** of the ***Criminal Procedure Code*** he submitted that as the trial court had given the appellant an opportunity to indicate whether or not the case should start *de novo* there was sufficient compliance with that section.

We earlier stated that the learned Judges of the superior court did not go far enough in their analysis of the evidence. We think that that failure is not fatal to the appellant's conviction, more particularly because the complainant's identification of the appellant was clearly supported by the appellant's injury. He had described beforehand who had cut him and where he had cut him. He had used torch light, and had the only evidence of identification been his description of the appellant, one would have doubted the correctness of that identification. But the witness not only described the person who had attacked him but also said he had cut that person on the head. The appellant's cut answered the complainant's description.

As for the contradictions in the prosecution evidence it may be true that such

contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of ***section 382*** of the ***Criminal Procedure Code***.

The final point we wish to deal with is with regard to the alleged non-compliance with the provisions of ***section 200*** of the ***Criminal Procedure Code***. We earlier reproduced the proceedings of the trial court when the second magistrate took over the hearing of the case. It is clear from the responses of the accused persons that some explanation was given to them concerning their rights. They decided that it would be to their benefit if the trial proceeded from where the first magistrate reached. There is no note whether the succeeding magistrate informed the accused persons of their right to resummon witnesses. However, the accused persons' responses were categorical implying that they wanted the succeeding magistrate to pick up from where his predecessor had left. In our view, the appellants were made aware of their rights under ***section 200*** of the ***Criminal Procedure Code***. It would have been different if there was no note indicating compliance with that section.

In the result, we are satisfied that the appellant's conviction is safe and we accordingly dismiss his appeal.

Dated and delivered at Kisumu this 23rd day of June, 2006.

S.E.O. BOSIRE

…….

JUDGE OF APPEAL

E. O. O'KUBASU

……

JUDGE OF APPEAL

W. S. DEVERELL

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR