IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GICHERU CJ, O'KUBASU JA & ONYANGO OTIENO AG JA)

CRIMINAL APPEAL 87 OF 2004

FREDRICK AJODE AJODE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mr Justice Tanui) dated 16th March, 2001

in

HCCR Appeal No 57 of 2000)

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JUDGMENT

The appellant in this appeal Fredrick Ajode Ajode was charged in the subordinate court with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on 21st day of May 1999 at Kobongo sub-location in Nyando district within Nyanza province, jointly with other people who were not before court, while being armed with dangerous weapons namely pistol, robbed Edward Ochieng' Olunya of a motor vehicle registration No KAL 154, make Toyota Pick Up beige in color, valued at Kshs 1.2 million, the property of Nahashon Okoth and at or immediately before, or immediately after the time of such robbery threatened to shoot the said Edward Ochieng' Olunya. He pleaded not guilty but after full hearing, the learned Chief Magistrate convicted him of the lesser offence of robbery contrary to section 296(1) of the Penal Code and sentenced him to imprisonment for eight years and to receive four strokes of the cane and further to be under police supervision for five years, after completion of the jail term. In convicting him for a lesser charge of robbery under section 296(1), of the Penal Code, the learned Chief Magistrate stated as follows: -

"I therefore do hold that the accused was positively identified by PW 1 and PW2 as one of the robbers and I reject the defence as false. I do find that none of the prosecution witnesses suffered injuries and do reduce the charge of robbery contrary to section 296(2) to one of the simple robbery contrary to section 296(1) of the Penal Code. I therefore do hold that the prosecution has proved its case beyond reasonable doubt against accused on a charge of robbery contrary to section 296(1) of the Penal Code and do accordingly convict the accused accordingly."

The appellant was not satisfied and he filed an appeal in the superior court against the same conviction and sentence. That appeal went before, Tanui J who dismissed the appeal stating *inter alia* as follows: -

“I agree with the trial magistrate that the prosecution had proved its case beyond reasonable doubt. Both (PW1) and (PW2) stated how they saw the appellant with a mark on the right ear during the robbery. They had sufficient opportunity to see him well both at the compound of (PW1) and at the petrol station where there was sufficient light for them to see well. Each of them talked about a mark on right ear of the appellant, which they had seen during the robbery.

In these circumstances, I find that the appellant was convicted on sound evidence. If the State had lodged a cross appeal I would have upheld it as there is in my view evidence to convict this appeal (sic) under section 296 (2) of the Penal Code.”

The appellant was still not satisfied and hence second appeal, which he has brought to this Court citing five grounds of appeal. These grounds are as follows:-

“1. That the trial magistrate and High Court judge erred in law by convicting the appellant on robbery whereas they failed to appreciate the point that the prosecution witness PW1’s participation in the arrest of the appellant destroyed the value of his evidence and identification at the subsequent identification parade held long after the arrest.

2. That the two Courts arrived to their (sic) respective verdicts without considering the fact that among the parade members, the applicant was the only one with swollen mark.

3. That the two Courts erred by convicting by (sic) the purported identification at the Kenol Petrol Station without analyzing why the prosecution did not summon the pumps attendant whose independent witness as was essential in this case thus conviction would not have been free from possibility to(sic) error of mistake.

4. That the trial magistrate and the High Court erred by convicting the appellant on robbery whereas the prosecution did not prove its case against the appellant. First report to the authority was without any name, description of features a fact which if weighed would render the conviction manifestly unsafe.

5. The imposed sentence is harsh and excessive putting in record the circumstances leading to conviction of this offence.”

We think brief facts of the entire case may help to understand the appeal before us. The complainant Edward Ochieng’ Olunya (PW1) (to whom we shall refer to as the complainant) was staying in the home of one Nahashon Okoth (who was at the relevant time in Mombasa) as an employee of the same Nahashon Okoth. He was in charge of the same home in the absence of the owner and he had other employees in the home. William Ochieng’ (PW2) was one such employee. Ochieng’ (PW2) was a watchman at the same time. Wycliffe Otieno Ogola (PW3) is nephew to Nahashon Okoth and was staying at that home also. On 21st May, 1999 at about 10 pm as the complainant was sleeping in his house, Ochieng called his name and told him that some people were calling him outside. Complainant went outside and three people confronted him. The same three people told him they were policemen, but they were not in uniform. They told the complainant to go back to the house and put on good clothes so that he could take them to where tractor driver was. Complainant dressed up and told those strangers that it was too late to go to Ahero where the tractor driver was. Complainant said there was not enough fuel in the vehicle KAC 154P Toyota Pick-Up Hillux but the people insisted and they ordered the complainant to give them the keys and to reverse the motor vehicle after he had given them the keys. Complainant, at the command of the thugs drove the motor vehicle as Ochieng’ sat at the back seat together with two of the thugs. One was seated in front. That vehicle had twin cabin. Wycliffe Otieno was sitted with Ochieng at the back. At the home of Nahashon Okoth there was security light in the front door where the complainant was standing with the three thugs and it was electric light. Complainant drove the vehicle up to Ngere Kagoro when he was ordered to stop. He stopped and Ochieng’ was ordered to alight. He alighted. Complainant was ordered to continue driving to a rough road. He was ordered to reverse the vehicle. At that point the thugs removed pistols which the complainant could see through the moonlight. They then ordered complainant to produce money or they kill him. He told them he hadKshs 10,000/- at home. The car keys were then taken by the thugs and he was ordered to sit at the back seat between one

thug and Wycliffe Otieno. The thugs drove the vehicle back to the home of Nahashon Okoth where the complainant took the money Kshs 10,000/- and gave it to the thugs. After receiving the money, the thugs ordered complainant back to the motor vehicle and the thugs drove the motor vehicle towards Kisumu. On reaching Kisumu, they branched off to Moi Stadium but the vehicle ran out of fuel. Complainant Wycliffe Otieno and one thug were left in the vehicle as the other two thugs went to look for fuel. They returned with fuel; put it in to the vehicle and started the vehicle. They went to Kenol Petrol Station where they added more fuel and then drove up to Namba Okana where the complainant and Wycliffe Otieno were ordered to alight at the vehicle. Throughout all this period the light in the vehicle's cabin was on. The thugs then drove off on a rough road while complainant and Wycliffe Otieno walked up to Ahero police station and reported the matter. They reached Ahero police station at 2 pm. On 22nd and 23rd May 1999, PW5, PC David Langat went to the appellant's house but did not find him on both days . Nothing happened thereafter till 30th, May 1999 when Andrew Obong Okal who was then the acting Assistant Chief of Okana sub location said the complainant took to him a letter addressed to the Chief Kochieng' location. The letter said that the appellant was wanted at Ahero police station in connection with the loss of a motor vehicle Reg No KAL 154F. Okal took the letter to the Chief. The Chief read the letter and Okal, who knew the appellant's home at Okana sub-location went to appellant's home at 1 pm. He found appellant sleeping inside his shamba –about 100 meters from his house. The appellant was arrested and on 1st June 1999, an identification parade was organized at which complainant and Ochieng' identified the appellant. The appellant was then charged before the Chief Magistrate. The appellant as we have said, denied the charge. His defence was that he knew nothing about the alleged offence and he thus raised alibi as his defence.

This is a second appeal, and the law enjoins us to consider only matters of the law. It was not in dispute that complainant was robbed of a vehicle and Kshs 10,000/-. From the facts above the main point of law that pervades the entire case is that of identification. The appellant who argued his appeal in person maintained that he was not properly identified as one of the robbers, and four grounds of his appeal are mainly complaints that he was convicted without considering that the evidence in support of his identification was not sufficient to warrant a conviction. The learned Chief Magistrate considered the evidence of identification and stated as follows:-

"The main issue here is one of identification. The robbery occurred at night. I do not (sic) find that there was light at Nahashon Okoth's house and inside the motor vehicle, which was a twin cabin, and at the Kenol (sic) petrol station and PW1and PW2 positively identified accused as one of the people who robbed PW1 of motor vehicle. I have also found the PW1 and PW2 properly identified the accused at the identification parade and that parade was properly held."

The learned judge of the superior court, after considering the appeal agreed with the learned magistrate on the question of identification except on his analysis he added the evidence of the swollen mark on the right ear. Thus the two Courts reached a concurrent finding that the appellant was properly identified by complainant and Ochieng' because first there was sufficient light to afford proper identification being the security light at the door to the house of the complainant, inside the vehicle cabin and (for complainant) at the petrol station and secondly the two, ie complainant and Ochieng identified the appellant at an identification parade.

We have anxiously considered this appeal. It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade. It is also trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade (see case of *Gabriel Kamau Njoroge v Republic* (1982-88) 1 KAR 1134). In this case two witnesses being complainant and Ochieng' are alleged to have identified the appellant at an identification parade on 1st June, 1999. It must be noted that Ochieng' had a much shorter time to see the thugs that attacked them that night of 21st May, 1999, than the complainant because Ochieng' was dropped at Ngere Kagoro where as the complainant was forced to continue with the robbers back to his house, to Kisumu and back to Namba Okana before he was dropped. Complainant was then in a better position to identify the robbers for he was with them for a much longer time. The other person who was with them for the same period is Wycliffe Otieno but he was unable to identify the appellant at

the identification parade and his evidence on identification was not given any value.

According to the evidence on record, which apparently was not analysed by the Chief Magistrate and the superior court, Andrew Abong Okal, the then acting Assistant Chief of Okana sub-location states:-

“ I recall on 30th May, 1999, at around 11.00 am, I was at my home. One Edward Ochieng’ brought a letter to me. The letter was addressed to Chief Kochieng’ location, I took the letter to the Chief. The Chief read the letter. The letter said Fredrick Ajode Ajode was wanted at Ahero police station connected with loss of motor vehicle Reg No KAL 154F. I know Fredrick Ajode. He is my cousin. I know the home of Fredrick Ajode Ajode. I know his home at Okana sub-location within my jurisdiction.”

In cross-examination this witness said at pertinent parts as follows:-

“I followed your foot steps from your house. You were about 100 meters from your house. I did not receive anything from you. I was with Tom Ochola and Nyachayo Onginyo. I was also with Edward Ochieng, it is not true that you found Edward Ocholla and William Ogola at your house.”

PC David Langat in his evidence said after the police had visited the appellant’s home twice (on 22nd and 23rd May, 1999) without finding the appellant, he wrote an order of arrest; called Andrew Okal the acting Chief of Okana sub-location and the appellant was arrested by the same Okal and taken to police station where he, PC Langat rearrested the appellant. It would appear from the evidence of Andrew Okal, the Assistant Chief and the evidence of PC Langat that the complainant is the person who took what Andrew calls a letter but PC Langat calls the order of arrest to the Assistant Chief. The Assistant Chief, Andrew Okal stated that he was with complainant at the appellant’s home when the appellant was arrested. Complainant in his cross-examination denied having been present when the appellant was arrested. It is clear that appellant’s defence that complainant was present when he was arrested was supported by the Assistant Chief. That in effect means that there was conflicting evidence between the complainant on one hand and Andrew Okal and the appellant on the other hand as to whether the complainant was present when the appellant was being arrested and indeed as to whether he is the person who delivered the letter that prompted the arrest of the appellant. In law it was the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it had neither seen nor heard the witness and make due allowance for that. The learned judge of the superior court did not analyse and weigh this evidence. The learned magistrate did not even refer to it. It is not our duty to carry out that exercise in second appeal. However, if it had been analysed and weighed properly and if the evidence of the Assistant Chief to the effect that complainant took to him a letter seeking arrest of the appellant in connection with the offence and that complainant was there at the time of the arrest of the appellant and thus saw the appellant before the identification parade as the appellant also alleges, then it would not have been proper for the complainant to be a witness at the identification parade two days after the arrest for he had already seen the appellant and indeed it would not have been of any use arranging an identification parade for him to identify a person he had clearly seen since the incident. In the case of *Githinji v Republic* [1970] EA 231, High Court comprising Mwenda CJ (as he then was) and Simpson J (as he then was) stated *inter alia*:-

“Once a witness knows who the suspect is an identification parade is valueless.”

Although, this is also a persuasive a authority and we are not bound by it, we feel it was based on sound principle of law for once a witness has been able to see the suspect before the parade is held, then he will be doing no more than demonstrating his recognition of the suspect and not identifying the suspect. That indeed is the reason why no identification parade is required in cases of recognition. In our mind if the magistrate’s courts and the superior courts had analysed and weighed these conflicting evidence as stated herein they may very well have found that the complainant’s evidence of identification at the identification parade was valueless. The second identifying witness Ochieng’ was with complainant the same day they went to police station for identification parade. If, as we have stated complainant might have seen the appellant before the parade, possibility that complainant could have described the appellant to Ochieng’ could not be excluded completely and thus the entire evidence on the identification parade may not be of any value. That would have left only dock identification, which in law is worthless. We

also note that the superior court did not weigh evidence, that the complainant did not give the description of the robbers before identification parade was conducted. PC David Langat said:-

“ The reportee told us the clothing of the robbers. He did not give us any other clue.”

This is important when it is considered that in this case, there is no evidence on record to show what prompted the arrest of the appellant, and that both complainant and Ochieng relied on a mark on the appellant’s ear which, they never referred to before the parade and which could have been seen by complainant at the time of arrest. Such a description would have helped the police to settle on the culprit, but as matters stand, it is mystery as to what prompted the arrest of the appellant.

In our view we cannot tell what conclusion, the magistrate and the judge of the superior court may have arrived at had they weighed the evidence as we have pointed out herein above. They may very well have found the evidence of identification parade valueless. The benefit of doubt must go to the appellant. Before we proceed to allow the appeal as we must do, we want to state that in our view, the learned Chief Magistrate, was clearly wrong in reducing the charge that was before him to that of robbery under section 296 (1). We do repeat here what this Court stated in the case of *Johana Ndungu v Republic* (Criminal Appeal No 116 of 1995 (unreported). It was stated *inter alia* as follows:-

“In order to appreciate properly as to what acts constitute an offence under section 296(2), one must consider the sub-section in conjunction with section 295 of the Penal Code. The essential ingredients of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or after and further in any manner the act of stealing. Thereafter the existence of the afore –described ingredients constituting robbery are presupposed in three sets of circumstances prescribed in section 296(2) which we give below and any one of which if proved will constitute that offence under subsection.

1. If the offenders is armed with any dangerous or offensive weapon or instrument or

2. If he is in company with one or more other person or persons or

3. If at or immediately before or immediately after the time of the robbery or wounds, beats, strikes or uses any other violence to any person.

Analysing the fist set of circumstances, the essential ingredients apart from the ingredients including the use or threat to use actual violence constituting the offence eg robbery is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in section 295 of the Penal Code, the offender was armed in the manner aforesaid then he is guilty of the offence under subsection (2) and it is mandatory for the Court to so convict him.”

It is clear from the above that injury of the victim in itself is not the only ingredient of the offence of robbery under section 296(2) and to reduce the charge to that of simple robbery under section 296 (1) because none of the witness was injured is not correct in law. In our mind if what happened in this case were accepted after weighing all the evidence we have pointed out above it would have been a perfect case of robbery with violence under section 296 (2) and there would have been no reason whatsoever for reducing the charge as was done in this case.

This appeal succeeds, it is allowed. The appellant is released forthwith unless otherwise lawfully held.

This judgement has been delivered pursuant to rule 32 (2) of the Court of Appeal Rules. The Hon The Chief Justice has not signed it.

Dated and Delivered at Kisumu this 25th day of June 2004.

J.E.GICHERU

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CHIEF JUSTICE

E.O.O'KUBASU

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JUDGE OF APPEAL

ONYANGO OTIENO

...

Ag. JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR