IN THE COURT OF APPEAL

AT KISUMU

(Coram: Tunoi, Lakha & O'Kubasu JJ A)

CRIMINAL APPEAL NO 2 OF 1998

DAVID AKOYI ABWAO

CLEMENT MUSA AWUONDO …….....…… APPELLANTS

VERSUS

REPUBLIC…….....RESPONDENTS

(Appeal from a judgment of the High Court at Kisumu

(Tanui & Wambilyangah JJ) dated 27th June, 1997 in

HC CR Appeal No 315 of 1995)

JUDGMENT

The two appellants, David Akoyi Abwao and Clement Musa Awuondo were jointly charged (with two others who were acquitted) with robbery with violence contrary to section 296(2) of the Penal Code (Cap 63 Laws of Kenya) before the Principal Magistrate's Court at Maseno. The trial was conducted by the learned Senior Resident Magistrate Mr A Anambowho after a lengthy trial convicted the two appellants but acquitted their two co-accused persons.

The facts of the case may be briefly stated. The complainant Joshua Mzee was asleep at his home during the night of 22nd and 23rd February 1995 when he was rudely awakened by a gang of people who subjected him and his family to wicked acts of terror. The intruders beat up the complainant and his family and in the process stole an assorted number of items. There was no dispute that what took place was robbery with violence. In the trial court the 1st appellant was the 3rd accused while the 2nd appellant was the 1st accused. After the incident the matter was reported to the police who swung into action immediately and the appellants were arrested together with their co-accused. During the trial it turned out that the evidence implicating the appellants was based on identification during the raid. Each appellant stated that he was not at the scene during the robbery. In a carefully written judgment the learned trial magistrate came to the conclusion that the two appellants had been properly identified and he accordingly convicted them. He proceeded to sentence each of them to death as mandatorily provided by section 296(2) of the Penal Code.

The two appellants preferred an appeal to the High Court where the same was dismissed. They now come before us by way of second appeal. Mr Menezes who appeared for both appellants started on the correct

footing by stating that this being a second appeal it must be confined only to issues of law. In his submission before us Menezes dealt with the issues of identification and the defence of alibi raised by the appellants in their defence during their trial. It was pointed out that there was no clear evidence on how the appellants were arrested. The other important issue raised was the fact that although identification parade was conducted the prosecution failed to offer the evidence in respect of identification parade.

It was Mr Menezes' view that the trial court was rather selective in convicting the two appellants and acquitting their co-accused persons.

The case against the two appellants depended wholly on identification since there was no other evidence implicating them with the offence. The issue before us is whether the identification of the appellants was proper in the circumstances of the case. As already stated the raid took place at night in the rural village of Sagam in Marenyo sub-location of Yala Township. According to the complainant Joshua Mzee he lit his hurricane lamp when he heard some noise outside the house. But it must be remembered that while there might have been some light inside the house there was no light outside where the intruders were. In the present appeal we note that none of the appellants was found in possession of any of the items stolen during the robbery. Hence the evidence of identification called for careful scrutiny. In their judgment upholding the conviction of the appellants, the two learned judges of the superior court (Tanui and Wambilyangah, JJ) stated *inter alia*:-

"The trial magistrate in his reserved judgment analyzed the evidence of each of the prosecution witnesses. He was certainly alive to the fact that the prosecution case depended entirely on the identification of the accused

by the prosecution witnesses. He considered the circumstances obtaining on the night of the robbery. He constantly asked himself whether each of the identifying witnesses had enough light and opportunity for viewing and identifying their attacker. Ultimately he convicted accused 1 and 3. In doing so he said that the evidence of identification was clear beyond reasonable doubt; but he was doubtful of the evidence in respect of the accused 2 and 4 and so he acquitted them."

The foregoing observation clearly shows that the conviction of the two appellants was based entirely on the evidence of identification at night in a rural village where the source of light was that from a hurricane lamp and also from the burning hut.

In *Roria v R* [1967] EA 583 at p 584 Sir Clement de Lestang V-P said:-

"A conviction resting entirely on identity invariably causes a degree of uneasiness and as Lord Gardner, LC said recently in the House of Lords in the course of a debate on section 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 question of identity."

We have stressed the issue of identification due to peculiar circumstances of this case. We say so because there was evidence that identification parade was held but the prosecution declined to tender that evidence.

During the trial, Joseph Mzee (PW4) on being cross-examined by Mr

Aroka, said:-

"since the accused persons were arrested I attended an identification parade at Yala Police Station. I identified some of the robbers from the identification parade. Only one parade was conducted. All the accused persons in the dock were on the parade. I picked accused 1, 2 and 3 from parade. Accused 4 had been arrested that time."

There was then Tom Mboya Oyoya Odiembo (PW6) who on being crossexamined on the issue of identification parade had the following to say:-

"I attended the parade at Yala Police Station. I identified accused 1, 2 and 3 prior to the identification parade. I did not communicate with the police as to whom to pick."

From the foregoing it would appear that the police mounted an identification parade in which a number of suspects including the appellants appeared. From what the two witnesses (PW4 and PW6) said in their answers during cross-examination it would appear that the identification parade was not properly conducted. It would be improper to place a number of suspects in one single parade. Hence, the complaint by Mr Menezes that the police ought to have produced evidence in respect of identification parade(s) is fully justified.

Having considered the issue of identification and in view of what we have said about the evidence of identification in this matter we are of the view that the conviction of the two appellants is unsafe and hence we have no alternative but to allow these appeals.

Perhaps it may be necessary to state that the learned state counsel conceded the appeal.

We accordingly allow the appeals, quash the convictions and set aside the sentences. The appellants are to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kisumu this 28th day of March, 2003

P.K.TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

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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