REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CRIMINAL APPEAL 54 & 64 OF 2007

RICHARD OLOO OTIENO ……..1ST APPELLANT

RICHARD ORICHO ONYANGO ……2ND APPELLANT

JARED OCHIENG JURA …… 3RD APPELLANT

RICHARD OMONDI OMBEWA alias SOLDI…… 4TH APPELLANT

AND

REPUBLIC …… RESPONDENT

(*Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Mugo, JJ) dated 13th March, 2007*

In

H. C. Cr. A. No. 232 – 234 & 241 of 2004)

****

JUDGMENT OF THE COURT

This appeal has a long history and it may be necessary to give a brief background before we come to the grounds of appeal argued before us on 24th June, 2008 when Mr. Evans Ondieki appeared for all the 4 appellants while Mr. Musau the learned Senior Principal State Counsel, appeared for the State.

On 19th May, 2000 the four appellants herein RICHARD OLOO OTIENO, RICHARD ORICHO ONYANGO, JARED OCHIENG' JURA and RICHARD OMONDI OMBEWA alias SOLDIER were jointly charged with three others whose appeals are not before us with eight (8) counts of robbery with violence contrary to **section 296 (2)** of the Penal Code and three counts of rape contrary to **section 140** of the Penal Code and as well as one count of assault contrary to **section 251** of the Penal Code. After a lengthy trial the appellants and their co-accused were all convicted on the first count of robbery with violence contrary to **section 296(2)** of the Penal Code and on the last count of assault contrary to **section 251** of the Penal Code. Being dissatisfied by the conviction and sentence the appellants and their co-accused preferred appeals to the High Court. The appeals were consolidated and heard in the

High Court (Kisumu) Criminal Appeal No. 212 of 2001, in which the convictions and sentences were set aside and a retrial ordered.

The re-trial was conducted by Ms. M. Rungare (Principal Magistrate) who however retired before concluding the re-trial. It was then that Mrs. Olga Sewe (Chief Magistrate) took over the trial pursuant to the provisions of **section 200** of the Criminal Procedure Code (Cap. 75 Laws of Kenya). So that the trial of the appellants proceeded in respect of only one charge of robbery with violence contrary to **section 296 (2)** of the Penal Code on a substituted charge sheet dated 24th September, 2003. The particulars of the charge were that:-

"On the night of 30th day of April 2000 at [A..] Nursing Home, [particulars withheld], Bondo District of Nyanza Province, jointly with others not before court while armed with pangas, rungus and simis, robbed [M.A.P] of Kshs.290,000 cash, Five Panasonic Radio cassettes, one (1) Grunding Radio cassette, one (1) briefcase and one (1) wrist watch all valued at Kshs.317,000/- and at or immediately before or immediately after the time of such robbery used personal violence to the said [M.A. P]."

The summary of the prosecution case in the trial Magistrate's court was that on the night of 30th April and 1st May, 2000 while the complainant [*M.A.P*] (PW1) was sleeping in her house within the compound of [A..] Nursing home, she was woken up and told that there was a patient requiring her attention. [*M.A.P*] who was a nurse and the matron of that Nursing Home opened the door not knowing that she had been duped by those who were calling her to come out and assist somebody who had been knocked down by a vehicle. On coming out [*M.A.P*] was confronted by a group of about ten people who immediately attacked her and her husband forcing the husband to flee. She was held hostage, led to the office as these people were asking for money. From there they went to her house and finally to where the trainee nurses were sleeping. These people robbed the trainee nurses – and even raped three of the trainee nurses in the presence of *[M.A.P*] and the other nurses! These people behaved in such disgusting manner as they forced *[M.A.P*] to put condoms on the rapist's penises. After the robbers had subjected the complainant and her husband and the trainee nurses to the aforesaid treatment they left the scene. The incident was reported to the police and investigations commenced which led to the arrest of the appellants. The complainant had known some of those who attacked her and she recognized the appellants herein among the robbers. Each of the appellant gave an alibi as a defence.

The learned Chief Magistrate carefully considered the evidence adduced by the prosecution vis-à-vis the defence put forth by each appellant and in the end came to the conclusion that the appellants had been recognized by the complainant (Pacho). In the course of her judgment the learned Chief Magistrate stated:-

"From the circumstances under which the incident took place it is clear that the robbery indeed took place and it was dark at the time and the conditions were far from favourable. Nonetheless PW1 told the court that she was able to see and identify A1, A2, A3 and A4 among others. She said

They were several of them and one of them knocked the drawer where the money was and it spilled all over the floor. They then scrambled for the money and were by now torching each other and I could identify all of them ... I recall 4th accused Richard was in short, 1st accused was the one in Army jungle uniform. 2nd accused was the one who was very vocal and 3rd accused was the one holding my hands from behind. The 5th accused had a pistol which he kept pressing my stomach with, I was by then 6 ½ months pregnant.

Apart from PW1 the other witnesses who purported to identify accused 1, 2 and 4 were PW6, PW7, PW8 and PW9. Therefore the issue is whether this evidence of visual identification is credible and 2ndly, whether it is free from the possibility of error, granted that this is the only evidence relied on by the prosecution herein."

The learned Chief Magistrate then went on to consider the evidence of the other prosecution witnesses and was of the view that their evidence corroborated the evidence of the complainant and continued to state this in the judgment:-

"If there was any doubt as to PW1's identification of accused 1-4 and in my view I find none then that doubt was cleared by the corroborative evidence of PW2, PW6, PW7, PW8 and PW9. Besides, I have pointed out the discrepancies in the defence statements made by accused 1 – 4 especially A1 and A4 and have reasons to conclude that they did not tell the court the truth about their whereabouts on the night of 30th April/1st May 2000. The prosecution has therefore demonstrated beyond reasonable doubt not only that they had the opportunity to commit this crime, but also that they did in fact commit it. I therefore find no merit in the defences offered."

The learned Chief magistrate proceeded on the basis that the appellants were not only identified but recognized by the complainant who had known them before the incident. The learned Chief Magistrate relied on the authority of **ANJONONI AND OTHERS V. R [1980] KLR 59**.

Having referred to the above authority the learned Chief Magistrate concluded her judgment delivered on 7th October, 2004 thus:-

"Thus, on the basis of my findings herein I find the charge of robbery with violence proved against Accused 1-4 beyond reasonable doubt and I hereby convict each of them thereof accordingly."

Each appellant was sentenced to death as mandarorily provided by the law.

Being aggrieved by the foregoing the appellants filed appeals to the superior court which appeals were consolidated and heard together.

The learned Judges of the superior court (Mwera & Mugo, JJ) carefully analyzed the evidence before the trial court, the findings made therein in the judgment of the learned Chief Magistrate and came to the same conclusion as did the trial Magistrate that the appellants were indeed, properly recognized as the people who had been involved and did commit the crime for which they were charged. In the course of their judgment which was delivered on 13th March 2007 the learned Judges said:-

"What is clear from our analysis of the proceedings at the lower court and the judgment appealed against is that contrary to what has been submitted by the appellants they cannot be said to have been convicted on the strength of uncorroborated dock evidence of one witness. Secondly, the learned Chief Magistrate was very careful of the various witnesses' testimonies particularly as to the issue of identification and the circumstances prevailing. She considered, as we have, that the incident took a long time. It is clear from the various accounts by eye witnesses herein that the lighting from the assailants' torches which was intense enough to blind PW4 who was out doors and bright enough to brighten the rooms where the assailants were identified was adequate in the circumstances as to lead us to find that error in visual identification can safely be ruled out. Consequently, we find that given the visual identification of the appellants whose faces the witnesses swore to have recognized, the issue of clothing and

names does not carry much weight as to create doubt. That being the case, we are of the considered view that indeed the appellants were involved in and did commit the crime for which they were charged, tried, convicted and sentenced."

The learned Judges considered other issues raised before them and concluded their judgment thus:-

"In that light and in view of all the above considerations we are unable to uphold any of the grounds of Appeal and see no reason to interfere with the judgment, conviction and sentence of the lower court.

The appeals are accordingly dismissed."

Still dissatisfied by the foregoing and in pursuit of their right of appeal to the highest Court in the land the appellants now come before us by way of second and last appeal. That being so and by dint of the provisions of **section 361** of the Criminal Procedure Code only matters of law fall for consideration.

That is the appeal that came up for hearing before us on 24th June, 2008 and as already stated Mr. Ondieki appeared for all the appellants while Mr. Musau appeared for the State.

Mr. Ondieki, as expected, took up the issue of Constitutional provisions relating to **sections 70, 72** and **77** of the Constitution in that the appellants having been arrested on 2nd May, 2000 they were taken to court on 17th July, 2000 which was beyond the 14 days allowed by the Constitution. Mr. Musau, on his part submitted that the appellants were taken to court within 14 days. Mr. Ondieki boldly told us to allow this appeal on that ground alone.

At the commencement of this judgment we gave the background of what happened. Our perusal of the record does not lend support to Mr. Ondieki's contention and he (Mr. Ondieki) failed to convince us that indeed the appellants were kept in custody from 2nd May, 2000 to 7th July, 2000. In view of the background to this appeal we are unable to accept Mr. Ondieki's contention on that ground.

The second ground argued by Mr. Ondieki was that the charge was defective in that it was duplex. He also submitted that the counts were too many leading to multiplicity of charges. We do not think so. The appellants were arraigned before the trial court on one count only being that of robbery with violence contrary to **section 296 (2)** of the Penal Code. We therefore find no substance in that ground of appeal. It is accordingly dismissed.

The next ground taken up by Mr. Ondieki related to the language used during the proceedings in the trial court. He contended that there was no evidence of interpretation. Our perusal of the trial Magistrate's court record reveals that there was a clerk throughout the trial and that the appellants participated fully in the trial by cross-examining the witnesses. They could not have done so if there was no interpretation. It is to be noted that they defended themselves in Dholuo language which was interpreted into English. We similarly dismiss that ground of appeal.

The most important ground in this appeal related to the identification of the appellants. Mr. Ondieki submitted at length on this ground pointing out that conditions prevailing were not favourable for a correct identification. Together with this issue of identification Mr. Ondieki contended that the appellants' defences were not considered.

Mr. Musau on his part submitted that the appellants were identified by the complainant by torchlight and that it was at night. For that reason Mr. Musau concluded his submission by saying that he was

constrained to concede the appeal. That of course was sweet music to Mr. Ondieki's ear! We did not agree with Mr. Musau as we shall now proceed to demonstrate.

We have carefully considered what has been urged before us and while we dismissed all the other grounds we thought that the most important issue in this appeal related to the identification of the appellants. The robbery took place at night when conditions for identification were difficult. However, the complainant testified that she was able to recognize the appellants as these were people she had known before the incident. The proper identification of the robbers is always an important issue in a case of this nature. This issue was appreciated by both the trial court and the superior court. In **KIILU & ANOTHER V. R [2005] 1 KLR 174 at pp.179 -80** this Court stated:-

"In the well known case of Abdalla bin Wendo and Another v. R [1953], 20 EACA 166, the predecessor to this Court stated as follows:-

Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

The two counts below were of the view that this was not a case of identification but recognition. In **ANJONONI AND OTHERS V. R** (supra) this Court said:-

"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

We have carefully considered the trial court's findings, the conclusion of the first appellate court, the submissions by counsel appearing herein and the bottom line is that a gang of robbers raided [A…] Nursing Home where they subjected the matron – [M.A.P] (PW1) to what can be described as inhuman treatment together with the trainee nurses; three of whom were raped in the presence of the matron and others. The appellants were identified, nay, recognized, by the complainant as having been among the robbers. The two courts below were satisfied that the appellants were properly identified during the robbery incident.

Having considered all that has been urged before us we are satisfied that there could have been no other conclusion than that the appellants actively participated in the commission of the offence with which they were charged. This Court is slow in interfering with concurrent findings of facts on a second appeal. In **THIONGO V. R [2004] 2 KLR 38** at p. 44 this Court stated:-

"In that regard, we would reiterate what this Court said in Stephen Muriungi & others v. Republic [1982 – 88] 1 KAR 360. Chesoni, Ag JA (as he was then) in delivering the majority judgment said at page 366:-

"We would agree with the views expressed in the English case of Martin v. Glywed Distributors Ltd. (t/a MBS Fastenings) [1983] 1 CR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat finding of fact and law as holdings of law or mixed findings of fact and law , and , it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

And in **Nyambane v. Republic [1986] KLR 248**, this Court held that:

"An appellate court should be reluctant to disturb concurrent findings of fact on a second appeal unless there were compelling reasons."

In the circumstances of the case before us there is nothing which would remotely indicate to us that the appellants' conviction was not based on sound evidence. In our view the appellants' conviction was inevitable. The law under which they were convicted provided for a mandatory death sentence. Accordingly we have no hesitation in dismissing this appeal. We do so and order that the appeal is dismissed in its entirety. Those are the orders of the Court.

Dated and delivered at Kisumu this 5th day of December, 2008.

S.E.O BOSIRE

……

JUDGE OF APPEAL

E.O. O'KUBASU

……

JUDGE OF APPEAL

J. ALUOCH

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR