REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Criminal Appeal 350 of 2008

JOHN OTIENO OLOO …………………..………………..APPELLANT

AND

REPUBLIC ……………...………………………………..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ) dated 30th July, 2008

in

H.C.CR.A. NO. 28 OF 2007)

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JUDGMENT OF THE COURT

The complainant in the case that was before the Principal Magistrate at Siaya- Criminal Case No. 1149 of 2005, J.O.O (PW1) was as on 31st October 2005, a teacher at Ambira High School. He was living at Ugunja Township nearby with his sister-in-law C.A.O (PW2), his son J.O.O 2 (PW3) and his sister A.A.O (PW4). These were young persons aged between 13 and 17 years. On 31st October 2005, he was away from his house till about 8.30 p.m. when he went back to his house, but unfortunately, he could not access the house that night. This was because, earlier at 8.00 p.m. that same evening, as C, J 2 and A were in the house and as J 2 opened the door to pour out some dirty water, a person hitherto unknown to all the three held the door and opened it wide. J 2 described that person in his evidence as *"a tall dark person,"* whom he later identified at an identification parade as the appellant. After that person had opened the door wide, other five people unknown to C, J 2 and A entered the house. C identified the first person who opened the door wide for others to enter as a person wearing dark clothes and black shoes. She identified that person as the appellant. A also identified the appellant as the first person who opened the door wide from outside as J 2 was opening it from inside. She identified him at an identification parade. There was lantern in the house and the three witnesses said that lantern was the source of light enabling them to identify the appellant. The appellant thereafter reduced the intensity of the lantern and all the thugs started harrasing the witnesses together with a younger son of the complainant- Flavious Odhiambo who was also in the house. They gathered all the witnesses into the sitting room and began to remove various items from the house. These included a bicycle, a motor vehicle battery, a radio cassette, suit cases that had clothes and other items. J 2 was asked for money but as there was no money in the house, he gave them his own Ksh.190/=. In the meantime, as the robbers were ransacking the house, the complainant was approaching his house. He noted that there was light in the house. As he had not left the lamp burning when he went out last, he was surprised but

proceeded to the house and knocked the main door. That was coincidentally at the time one of the thugs was carrying the television. One of the thugs told the complainant to get in. But as that voice was not a familiar voice the complainant did not comply and exercised caution as he smelt danger. He went to his immediate neighbour for assistance but, unfortunately, that was not forthcoming as the neighbour declined to assist him. He returned to the door to see what he could do and again knocked the front door.

Five of the robbers went out through the rear door, according to C. A, and the complainant also confirms. These five attacked the complainant as he was still outside the house. They attacked him with clubs and beat him up thoroughly injuring him on the head, right knee and shoulders. One of the attackers demanded money and the complainant gave them his ***NOKIA 1100*** mobile phone, together with his wallet that had Ksh.100/=. Thereafter they ran off. The complainant ran to a neighbour who took him to police station where he reported the incident. He was taken to Ambira Health Centre and thereafter to Busia District Hospital where he was admitted for three days. After discharge from the hospital, he went back to his house and found that his Kodak camera, a radio, cassette, shoes, suit cases, clothes, a brown coat, a jacket all valued at Ksh.26,000/= were taken by robbers. He did not identify the robbers. Thomas Ngege (PW6), a clinical officer at Busia District Hospital received the complainant at the hospital that night at 12.30 a.m. On examination he found the complainant with multiple wounds on the head. His right shoulder was tender, right knee was swollen and tender. The injuries were four hours old and could have been caused by sharp and blunt objects. He assessed the injuries as maim. Acting I.P. Cosmas Ndeda (PW7) was, at the relevant time, the Sergeant in charge of Ugunja Police base. He received a call from the house of the complainant that the complainant had been robbed by a gang of men and he was on his way to Busia District Hospital for treatment. He gathered several police officers and rushed to the scene. One of the girls found at the scene told I.P. Cosmas that she saw the thugs well and she described the thugs to him. After investigations he went to a certain house where there were three men including the appellant. Two of them were arrested but the appellant fled and escaped. Those two arrested on that day were charged with the offence. Later, the appellant was arrested by Ag. I.P. Cosmas at Rangala Centre. On 26th November 2005, I.P. Jack Wafula from CID Siaya District was requested to and did organize and conduct an Identification Parade. The parade witnesses were the complainant, C, J 2 and A. At that parade complainant did not identify the appellant whereas C, J 2 and A, all identified the appellant.

Thereafter, the appellant was charged as we have stated before the Principal Magistrate's Court with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. The particulars of the charge were that:-

"On the 31st day of October 2005, at Ugunja Township location in Siaya District within Nyanza Province, jointly with others before (sic) Court while armed with dangerous weapons namely, pangas, and rungus robbed Joseph Oluch (sic) Odhiambo of mobile phone make Nokia 1160 one radio make National, one suitcase one Kodak camera, one pair of shoes, one coat, one bag, one rain jacket and Ksh.750/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Joseph Oluoch Odhiambo."

He pleaded not guilty to that charge. At his trial, his defence was that on 16th November, 2005 he was from Siaya District hospital in a vehicle to Rang'ala. When he reached his destination, he saw some police officers who arrested him. He was taken to his house but a search there did not result into any recoveries. He was then taken to Ukwala Police Station via Ugunja Police station. He was beaten thoroughly but the OCS rescued him. From Ukwala, he was taken to Siaya Police station and was taken to ID parade where the Inspector conducting the parade said some three people identified him. Those were people who knew him.

After full trial, the learned Principal Magistrate found the appellant guilty as charged, convicted him and sentenced him to death. In convicting him, the Principal Magistrate (G.K. Mwaura) stated inter alia:-

"After carefully considering all the evidence in this case and warning myself of the possibility of mistake of identification, I am left with no doubt at all that the accused was positively identified by the three children during the incident. I find that he is the dark man who led the robbers to the complaint's home. Consequently I dismiss his unsworn statement and denial of the offence as the same are not true at all. I find the accused guilty as charged and proceed to convict him accordingly."

The appellant felt dissatisfied with that conviction and sentence. He lodged appeal in the superior court vide Criminal Appeal No. 28 of 2007. That appeal was conceded by the learned Senior State Counsel (Mr. Musau), but in a judgment dated and delivered on 30th July 2008, the superior court (Mwera and Karanja JJ.) dismissed the appeal, stating as follows in pertinent part:-

"We agree with and uphold the finding of the trial court that the appellant was positively identified by C (PW2), J 2 (PW3) and A (PW4). The identification was confirmed in a subsequent identification parade conducted by I.P Jack Wafula (PW5) which in our opinion was properly conducted.

With respect to the learned Senior Principal State Counsel, we are unable to agree with him that the evidence against the appellant was inadequate and suspect. The evidence was cogent and sound. It led to a proper and lawful conviction of the appellant. This appeal is without merit and is hereby dismissed."

Still not satisfied, the appellant has now moved to this Court on second appeal in which he is, through Mr. Odhiambo, his learned counsel, citing and canvassing six grounds of appeal namely that;

"1. The trial magistrate and the first appellate court erred in fact and law by convicting and sentencing the appellant to death despite the fact that his Constitutional rights as enshrined in section 72 (3) of the Constitution had been violated.

2. The trial magistrate erred in law in fact (sic) in failing to observe the provisions of section 19 of the Oaths and Statutory Declaration Act (Cap 15) and section 124 of the Evidence Act (Cap.80).

3. The first appellate Court erred in law and in fact by affirming the decision of the trial magistrate notwithstanding the fact that the trial magistrate did not follow the procedure in taking the evidence of children of tender years.

4. The first appellate court erred in law and in fact in failing to analyse and evaluate the evidence tendered in the subordinate court.

5. The first appellate court erred in law and in fact in relying on evidence that required corroboration to corroborate another evidence.

6. The trial magistrate and first appellate court erred in fact and in law by convicting and sentencing the appellant relying on the evidence of identification which was marred with inconsistencies and irregularities."

As we have stated above, Mr. Odhiambo canvassed the above grounds at length except the first

ground which he did not pursue fully after certain parts of the record were brought to his attention. After fully canvassing the grounds of appeal, he pleaded that the appeal be allowed as it had merit. Although, Mr. Musau, the learned Senior Principal State Counsel did not support the conviction and sentence in the superior court, Miss Oundo, the learned Senior State Counsel who conducted the appeal before us on behalf of the state, nonetheless opposed the appeal, contending that the provision of ***section 72 (3)*** of the Constitution was not in any way violated in this matter; that C, J 2 and A were not children of tender age according to Children Act; and that if their evidence required corroboration then the conduct of the appellant in running away when confronted by the police and the evidence of the complainant as to the direction from which the appellant and his colleagues came immediately before attacking the complainant were all corroborative evidence of the material aspects of the children's evidence. She urged us to dismiss the appeal.

After perusing the record fully, we have no hesitation whatsoever, that the first ground alleging violation of the appellants constitutional rights under ***section 72 (3)*** was ill-advised. Ag I.P Cosmas who arrested the appellant said in his evidence that he received a report of the incident - on 1st November 2005, and he arrested the appellant after two weeks from the date he received the report. That would put the date of arrest at any time immediately before or after 15th November 2005. We agree Ag. I.P. Cosmas should have been certain of the date of arrest as the police are expected to have their notebooks and the occurrence book (OB) for recording such important events and to aid their memory. Be that as it may, the appellant's own evidence is that he was arrested on 16th November 2005. He was produced in Court, on 29th November 2005. That was 13 days after his arrest. ***Section 72 (3)*** states that in a case such as the one before us which carries death penalty, accused cannot be detained without being produced in Court beyond fourteen (14) days unless an acceptable explanation for such a delay is availed. Here there was no delay and hence no explanation was necessary. Hence, the ground lacks merit and should not have in the first place been preferred.

In our view, the second, third and fifth grounds of appeal revolve around two main complaints which are first whether the evidence of C, J 2 and A should have been subjected to what in law is referred to as ***voire dire*** examination before being received and to determine in what way such evidence would be received whether on oath or not on oath. The second complaint is as to whether the evidence of C, J 2 and A required corroboration, and if such evidence required corroboration, then whether the Court could, after warning find, whether in the matter before us there was corroboration of their evidence on material aspects. It is clear from the record that none of the three was subjected to any examination to ascertain as to whether they could understand the nature of an oath or whether they were sufficiently intelligent to give evidence not on oath. That notwithstanding, all the three gave evidence on oath. The complainant, in his evidence gives the ages of those three witnesses. He stated that J 2 was 13 years, C (whom he called C.A but gave her name in Court as C. A) was 11 years whereas A's age was given as 15 years. In their evidence on oath, C gave her age as 13 years, J 2 gave his age as 15 years and A stated that she was 17 years old. It must be born in mind that C was not complainant's daughter but rather she was his sister-in-law. J 2 was a son of the complainant but noting that in the year 2006 when he gave evidence in court, he was in Std 8, he probably could not have been 13 years as his father alleged for that would have meant that he was in Std 1 at the age of 6 years. In respect of A, she was a sister to complainant and so it was possible the complainant was not fully aware of her exact age. In any event, each of the three gave his/her age and these were not challenged by the defence. We note that the learned trial magistrate did not consider this aspect at all and although he referred to A and C as a *"child"* and to J 2 as *"adult"* in his recording of their names, and refers to them as children in his judgment, he actually treated them as adults and never gave any indication that they were children of tender age in his recording of their evidence.

The superior court however, was alive to the issue. In its judgment it stated, inter alia:-

"The evidence which implicated the appellant was that for a child aged 13 year's old C.A (PW2), a child aged 15 years J.O.O 2 (PW3) and a young person (teenager) aged 17 years A.A.O (PW4). The lower court record does not show that C (PW2) and J 2 (PW3) were examined as to their capability of understanding the meaning of oath.

However, they gave evidence on oath and were cross-examined by the appellant. We do not think that the failure by the trial magistrate to comply with the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap 15) Laws of Kenya occasioned any miscarriage of justice."

The first issue to resolve is, in law, what is the definition of a child of tender age. ***Section 19*** of the Oaths and Statutory Declarations Act (Chapter 15 Laws of Kenya) provides that evidence of a child of tender years called as a witness, who in the opinion of the Court does not understand the nature of an oath, may be received if in the opinion of the Court such a child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of telling the truth. That Act however, does not define child of tender years. The Children Act, 2001 (Act No.8 of 2001) defines a child of tender years as follows at ***section 2:-***

"Child of tender years" means a child under the age of ten years."

That however, is for purposes of Children Act, 2001 (Act No. 8 of 2001) and may not necessarily be applicable in respect of cases such as the one that is now before us on appeal which is a matter instituted under the Penal Code, and so is for purposes of ***section 19*** of the Oaths and Statutory Declaration Act. In the case of ***Johnson Muiruri vs. Republic***, (1983) KLR 445, the same question arose before this Court. The Court held as follows:-

"The matter whether a child is of tender years or not is a matter of the good sense of the Court where there is no statutory definition of the phrase. In Kenya there is no statutory definition of the expression "child of tender years" for purposes of section 19 of the Oaths and Statutory Declarations Act (Cap 15)."

See also the first holding in the case of ***Kinyua v. Republic*** (2002) KLR page 256.

In our view, whereas we agree that as concerns C, who said she was 13 years old the trial court should have, out of caution formed an opinion, on a *voire dire* examination whether she understood the nature of an oath before she could be sworn. We do not agree with the superior court that failure to do so could not have occasioned miscarriage of justice had that been the only witness on the issues that were before the Court. It goes without saying that if a witness who does not understand the nature of oath is made to swear, her evidence will have higher probative value than if the same evidence was given unsworn. However, in this case we note that apart from C, there was the evidence of J 2, who was 15 years old and A who was 17 years old. In our view, those two were young persons but they could not in our view be treated as children of tender years and the learned Principal Magistrate was properly entitled to treat them as such. Before we continue to consider the effect of their evidence on the entire case, we need to say something in passing as regards the need for corroboration in case of the evidence of a child of tender years. In our view, corroboration of evidence of a child of tender years is only necessary where such a child gives unsworn evidence. In the case of ***Johnson Muiruri v. Republic*** (supra) this Court held:-

"Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the

assessors must be directed that it would be unsafe to convict unless there was corroboration."

In the earlier case of ***Kibangeny Arap Kolil v. R***, (1959) EA 92, the predecessor of this Court stated as follows:-

"But even where the evidence of a child of tender years is sworn (or affirmed) then although there is no necessity for its corroboration as a matter of law, a court ought not to convict upon it if uncorroborated, without warning itself and the assessors (if any) of the danger of so doing."

In short, we are of the view that in law evidence of a child of tender years given on oath after *voire dire* examination requires no corroboration in law but the Court must warn itself that it should in practice not base a conviction on it without looking and finding corroboration of it. Evidence of a child of tender years not given on oath must in law be corroborated. In this case however, even if we ignore the evidence of C which was taken without *voire dire* examination by the trial court, there was still evidence of J 2 and A. These two witnesses were firm that they saw the appellant in the house of the complainant where they were. Lantern was the source of light, and they were with the appellant and his colleagues for over 20 minutes. They described the appellant as tall and black and later, at an identification parade properly organized by I.P Jack Wafula, they each identified the appellant. We cannot on that evidence which was concurrently accepted by the trial court and the superior court fault those two courts. In any case, if corroboration of their evidence was required, then we agree with Miss Oundo, the evidence that the appellant went out of the complainant's house through the back door and attacked the complainant, was corroborated by the evidence of complainant that he was attacked by people who approached him from behind the house. Further corroboration was in the appellant's conduct of running away when the police approached them in a house where they were. That was an action of a person who was guilty conscious. We have, in the above analysis covered the first, second, third, and fifth grounds of appeal. As is clear from what we have stated, nothing turns on these grounds.

As to the fourth ground, we were not told what aspects of the evidence before the trial court and the first appellate court were not analysed and evaluated or re-evaluated. On our own we see none except the question of whether there was necessity to give reasons as to why C was not subjected to *voire dire* examination, but we have in this judgment ignored her evidence so that the failure by the trial court, did not in our view occasion any failure of justice as in any event, on the question of identification, there was still ample evidence given by J 2 and A upon which any court could rely for a conviction without corroboration. But if any corroboration was required at all, we have stated what we feel were corroborative evidence of those two witnesses evidence.

Lastly, from what we have stated, we see no merit on ground 6 of the appeal. We are not told what marred evidence of identification, neither are we told of the alleged inconsistencies and we have not deciphered any.

The totality of all the above is that this appeal must fail. It is dismissed.

Dated and delivered at Kisumu this 9th day of October, 2009.

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

I certify that this is a truecopy of the original.

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