REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 55 OF 2011

SIMEON ONYWONGA MOCHOBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*APPEAL FROM ORIGINAL CONVICTION AND SENTENCE OF THE PRINCIPAL MAGISTRATES COURT AT OGEMBO IN CRIMINAL CASE NO.1796 OF 2009 DATED 28TH FEBRUARY, 2011 BY L.M NAFULA- PM*).

JUDGMENT

1. On 14th December, 2009 the appellant was arraigned before the Ogembo Principal Magistrate's court charged with three counts of Robbery with violence contrary to **section 296(2)** of the Penal Code. In count one , the particulars were that on 2nd December,2009 at Bokimonge Sub-location in Kenyenya District within Nyanza Province, the appellant jointly with others not before court while armed with pangas robbed Consolata Ntenga of two big torches, one battery ,one video deck make Panasonic , one T.V,two blankets, one Motorola mobile phone ,twenty chickens and cash in the sum of Kshs 47,875/= all valued at Kshs 80,000/= and at or immediately before or after the time of robbery used personal violence on the said Consolata Ntenga. The particulars of count two were that, on 2nd December, 2009 at Bokimonge sub-location in Kenyenya District within Nyanza Province, the appellant jointly with others not before court while armed with pangas robbed Jackline Kemunto of shop goods, one Nokia mobile phone, cash in the sum of Ksh.15,000/= all valued at Kshs 70,000/=and at or immediately before or after the time of robbery used personal violence on the said Jackline Kemunto. On Count three, the particulars were that, on the same day and at the same place as in the first two counts, the appellant jointly with others not before court while armed with pangas robbed Simon Ombui Ntenga of a Nokia 110 phone valued at 4,000/= and Kshs 1,540/= all valued at Kshs 5,540/= and at or immediately before or after the time of such robbery used personal violence on the said Simon Ombui Ntenga. The appellant pleaded not guilty on the three counts. After the trial, he was acquitted on the second count as the complainant did not turn up to testify. The trial magistrate however found him guilty on count one and three, convicted him and sentenced him to death on count one. The sentence on count three was left in abeyance as it should.
2. Being aggrieved, the appellant filed this appeal against his conviction and sentence. In his petition of appeal, he complained that the trial magistrate based his conviction on insufficient evidence; that she relied on the uncorroborated evidence of a minor and failed to appreciate that there was no proper identification. Further, that the evidence was full of contradictions. He also contended further that the trial magistrate relied on hearsay evidence and did not comply with the

provisions of **section 168** of the Criminal Procedure Code. He complained also that his own evidence was ignored. When the appeal came up for hearing before us, Mr.P.J Otieno, advocate appeared for the appellant while the State (Respondent) was represented by Mr. Shabola. Arguing the grounds globally, Mr. P.J Otieno submitted that there was contradiction in the evidence of the witness regarding the time the offence was committed which according to him would make one wonder whether the appellant escaped from police custody to go and commit the offence. He submitted further that the decision to convict the appellant was reached by the trial magistrate before she had even considered the defence that had been put forward by the appellant and his witness. He submitted that the trial magistrate did not consider the appellant's defence of alibi. In support of his submission on how to treat the evidence of alibi, he cited the decision of the court of Appeal in, **Kiarie vs Republic (1984) KLR 739**. On identification, he submitted that it was impossible in the circumstances of the case for a proper identification to take place. He argued that the evidence of identification was not water tight. Referring to the evidence of PW1, he submitted that it was that the attackers were masked and did not enter the inner room and yet the trial magistrate did not ask herself how in the circumstances it was possible for PW 1 to identify the assailants. Further that it is instructive that the name of the appellant did not feature in the list of names of those who PW1 alleges to have attacked her and it is only after she was recalled that she changed her story. He contended that this evidence matched that of the minor witness word for word save that the minor exaggerated. On the evidence of the minor, he contended that the trial magistrate failed to assess the minor's appreciation of the need to tell the truth on oath. He submitted that during the *voire dire*, the minor stated that the date was 4th December, 2010 while her evidence was being taken on 3rd December, 2010. He stated that in any case it was the minor's evidence that the person she identified was one Osoti and not the appellant. Mr. P.J.Otieno cited the case of **Muiruri V. R (1983) KLR 445** on the admissibility of the evidence of a child and urged us to set aside the appellant's conviction.

3. Regarding count 3, he submitted that whereas the charge sheet read that a Nokia phone valued at Kshs 1,540/= and cash all valued at Kshs 5,540/= were stolen, the evidence of the complainant was that the value of the phone was 2,500/= and the cash stolen was 15,000/=. He submitted that this was a contradiction to which the trial magistrate ought not to have shut her eyes. He also took issue with the identification parade and relying on **Martin Lawrence Ochieng V. Republic C/A 180 of 2007** he submitted that PWI and her daughter had seen the appellant just before the parade and as such the parade was not conducted properly. He further argued that the defence had demonstrated that there was bad blood between the appellant, the area Assistant Chief and PW1 because the appellant had reported that the complainant was a changa'a brewer. Pointing out the evidence of PW7 he wondered what the motive of this attack was. He urged the court to find that the conviction was not safe, quash it and set aside the sentence.
4. On his part, Mr. Shabola reiterated the evidence of the prosecution witnesses and submitted that the appellant was positively identified by PW2, PW3 and PW4. On the ground that the appellant's evidence was ignored he submitted that the trial magistrate considered it and found it was a mere denial. That in any case the defence witness never indicated the whereabouts of her husband during the night of the attack. On the evidence of the child it was his submission that the confusion regarding the date does not invalidate the child's evidence or bring it to question. He contended that the magistrate based the conviction and sentence on the evidence on record and it did not in any way infringe on the appellant's right. He urged the court to dismiss the appeal as the prosecution's case had been proved beyond reasonable doubt.
5. As the first appellate court, we have reconsidered and evaluated the evidence on record afresh so as to reach our own conclusion, of course bearing in mind that we did not see the witnesses (**see, Okeno V. Republic (1972) EA 32**). We have also considered the submissions rendered

before us. We have come to the conclusion that the conviction of the appellant was not safe. It was the evidence of PW1, the complainant in count one that at the time of the attack which was at night she was in the house with her two daughters and two sons. That earlier at 8p.m, some people had gone to her house and warned her that she would not live there as she had reported them to Nyangusu police station. It was for that reason that she had asked all her children to stay in her house. When later that night she heard a loud bang on her door she got up and started screaming but nobody went to their rescue. She armed herself with an iron bar and her daughter PW2 with a slasher and together they positioned themselves at the door of the bed room. We presumed the gangsters broke the main door to the house because in her testimony she stated that the people entered the house and hit the bedroom door and one timber broke. Together with her daughter they mounted a counter attack and hit one of the assailants on the face. Her younger daughter (PW6) had a twelve battery torch which she shone at the appellants. When she hit the first assailant another who was armed with a panga tried to enter the bedroom but she hit the panga and when it fell the assailant fled. That is when she and her daughter (PW2) escaped through the window. She went to call the police while PW2 went to her uncle's house. By the time she went back with help one of her sons had been killed and the other badly injured. The assailants also made away with her household goods. A closer scrutiny of the evidence as a whole reveals a sharp contradiction between the evidence of PW1and that of her children PW2, PW3 and PW6. Whereas she was emphatic that she was in the house with her two sons and daughters, her daughter PW2 testified that those in the house at the material time were her mother, herself, her sister Wilkister Moraa and Nyanchama. She told the court that she had two brothers one of who was sleeping in an adjacent house and the other in the cattle boma with his wife. Her brother (PW3) was also emphatic that he was in his house but not his mother's house. PW1was emphatic that when she fled through the window she left all her children in the house and that the assailants were beating her son in the sitting room. Her daughter PW6 testified that she was in the house with her mother, sister (PW2) and brother Simeon Ombui (PW3). That the door was hit and it gave way. He mother hit one of the assailants and he started bleeding and when he ran outside to call more people her mother and sister Wilkister jumped through the window.

6. Apart from bringing out the contradiction as to who exactly was in the house at the material time PW6 also brings out another contradiction. Whereas her mother testified that they escaped with Wilkister it was PW6's testimony that the person their mother escaped with was their younger sister Lydia. These contradictions bring the credibility of the witnesses into question. Why would any of them want to lie about who was in the house at the material time and which of them was telling the truth. The question of which of the witnesses gave an accurate account of the events of that fateful night also arises when it comes to what was stolen. Each witness gave a different version of what was stolen. PW2 testified that Kshs.47,000/= 2 cell phones a Motorola and a Nokia, and Video deck were stolen. PW6 stated that it was she who showed the attackers where her mother had kept the kshs.70,000/= that they stole and that they also stole a battery and a television that looks like an album. On her part PW1 testified that what was stolen was Kshs. 47,000/= a battery (radio), three blankets and a video deck. These contradictions go to the credibility of the witnesses and the reliability of their evidence. On identification it was observed as follows in, **Anjononi and others vs. Republic (1976-1980) IKLR 1566** at page 1568**;-**

''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."

7. Here as in that case the conditions for identification of the robbers were not favourable as the

attack took place at night at 10.00pm to be precise. However as in that case this was also a case of recognition which as was observed in that case is more reliable than identification of a stranger. The complainant as well as her children PW2, PW3 and PW6 knew the assailants. They testified that the appellant was not just their neighbour but their kin. They therefore had no doubt about their identity. However it has also been held that such evidence ought to be tested with the greatest care as a witness though honest may be mistaken **(See Kiarie vs Republic 1984 KLR 739).** It is clear that the trial magistrate did not properly direct her mind to the need to inquire fully into the conditions facilitating identification. In our view there was no proper and safe identification in this case. To begin with, it is clear from the evidence that PW1 could not have identified any of the attackers. It was her evidence that she remained in the inner room and when she thwarted the assailants attempt to enter the room, she escaped through the window. Secondly, it was her evidence that the attackers had covered their faces leaving only their eyes. If this was the case, how did she identify them" She alleges that her daughter PW6 had a torch which she shone on the faces of the attackers but we doubt that even if this was the case the fact that the attackers were masked rendered a proper identification impossible and even more so because she was busy fighting them and as soon as they were outside she too ran away. The fact that the attackers were masked also makes it improbable that PW6 saw and recognized any of them. The investigating officer (PW5) was more candid. His evidence was that during the robbery the house was not lit and that there was no proper light. When answering questions from the second accussed he stated that the complainant identified him at an identification parade because the offence had been committed at night when identification was not very proper (sic). The evidence of this witness makes it doubtful that the witnesses identified any of the assailants let alone the appellant. According to him the appellant was arrested after informers revealed he was one of the robbers but not because he was implicated by any of the witnesses. This perhaps explains why none of the witnesses mentioned the appellant in their statements to the police. Indeed the appellant was not in the list of ten names that PW1 gave at the trial. Her explanation that she was stood down before she gave his name is not convincing. This is because whereas she alleges to have given the names of the attackers to the police this was contradicted by the Investigating Officer (PW5) when he stated during cross examination by the appellant that;

“The complainant did not give me the list of names before I arrested you. She said it was family members who had robbed her. She identified you out in an identification parade.”

8. As for PW6, she was very inconsistent. Whereas in court she claimed to have been cut by the appellant, at the police station she recorded that she had been cut by one Oguta Osoti. Asked why she had now changed that to the appellant, she casually stated that it was because she had recorded her statement at night. The logical conclusion to draw from this is that PW1 and PW6 were not certain as to the identity of the appellant. Had they been certain they would have mentioned his name to the police in their initial report since they knew him well. As explained by PW5 there would also have been no need for an identification parade. As for PW2, her evidence was that she identified the appellant by his voice. It was her evidence that it was him who ordered them to lie down. She also claimed to have told the police this but pushed by the appellant she admitted that she did not because after the robbery she got sick. In**, Mbelle versus Republic (1984) KLR 626** the court of Appeal at page 627 held as follows on this issue:

4. “In dealing with evidence of identification by voice, the court should ensure that;

a) The voice was that of the accused.

b) The witness was familiar with the voice and recognized it.

c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it."

9. It is instructive to note that this is the only witness who alleges to have heard the appellant ordering them to lie down. It is also instructive that she did not state the exact words uttered by the appellant and that she admitted to not telling the police that she identified his voice. It is also instructive that in her statement she records to have identified Ogaka Osoti but not the appellant. Her inconsistency comes to the fore when she is cross examined by the appellant. Had she truly identified the appellant during the attack she would certainly have mentioned his name and her allegation that she forgot to do so because she was in hospital when she recorded her statement is not convincing more so given that she had to be referred to that statement to admit that she had not told the police that she had recognized his voice. We interpret her inconsistency to mean that she was not credible and her evidence is therefore not reliable. As for the fact that the appellant was identified at a parade, our view is that that parade was of no value as the appellant was already known to the witnesses. The court of Appeal had occasion to deal with a similar issue in, **Nzingi vs Republic (1991) KLR 128** where it held;-

"There was no need for the police to hold an identification parade because the only witnesses who could have attended such a parade were the same witnesses who chased caught and took the appellant to the police station."

10. Here the witnesses did more than chase and catch the appellant. They knew him very well as he lived only 200 meters from them. PW1 even stated that she knew him since his youth. There is also evidence that PW1 and PW2 saw him alighting from the police vehicle. Certainly they could not have failed to pick him out at a parade. Moreover the probative value of the parade if indeed there was one is reduced even more by the fact that although we are told PW1 identified the 2nd accused in the parade she testified during cross examination that she had not seen him during the robbery. She stated this, despite her insistence during her examination in chief that **"the 2nd accused tried to enter the inner room. I threw a slasher at him and he retreated back outside."** It has also not escaped our attention that although the investigating officer used the parade as the basis for charging the appellant, he did not call the officer who conducted that parade. The Force Standing Orders give clear guidelines on how identification parades should be conducted yet we have no evidence at all that those guidelines were followed. The submission by Mr. P.J. Otieno that the same was not properly conducted may not be far fetched. We are of the view that it was un procedural for the investigating officer to refer to the identification parade when evidence pertaining to the same was not adduced. The appellant was also convicted on count three whose particulars were that on the material night he robbed Simeon Ombui (PW3) of a Nokia phone valued at Kshs. 1540/= and Ksh. 4000/= in cash all totalling to 5,540/=. However the evidence on this charge was that the phone was valued at Ksh. 2,500/= and that 15.000/= was stolen from him. Clearly, this was an exaggeration which should not have been ignored given that PW3 denied being in his mother's house on that night yet his mother (PW1) and sister (PW6) testified that that is where he was during the attack. His mother even went further to state that she saw the appellant beating him with an iron rod in the sitting room. Of course she could not have seen this since she never entered that room if her evidence that she jumped out through a window in the bedroom is to be believed. Nevertheless one is left wondering whether PW3 was himself a credible witness. His evidence that he did not obtain a P3 form also raises eyebrows. Whereas we agree with the trial magistrate that a charge of robbery with violence may be proven even without evidence of injuries, we find that in the circumstances of this case proof of injuries would have gone along way in establishing the credibility of this witness and hence the reliability of his evidence. This is a witness who claims to have sustained very serious injuries during the robbery and even treated for the same yet it is alleged he did not have a PW3 form because he had no treatment notes. Granted he may not have had them when he went to the police station but why did he not carry them when he went to court" Could it be that he was

not assailed at all. He told the trial court that the items listed on the charge sheet were those stolen from his brother. In other words the charge does not relate to him. Where was he during the attack" Was he in his own house or in his mother's house" Why did the witnesses give different accounts of his whereabouts" Which of them was telling the truth" All these are issues that should have been resolved in the appellants favour. His own defence was dismissed as **"a mere denial lacking in any truth whatsoever"** yet PW1 when she was recalled admitted to having differences with him. She testified as follows in examination -in-chief:

"I had differences with 1st accused person, he wanted to fight with the deceased, I reported matter to the police..."

11. It was submitted that the testimony of PW6 ought not to have been received as it turned out that she was not possessed of sufficient intelligence to warrant its reception. We do not however consider her confusing the date as evidence of her being less than intelligent as even the brightest of minds do sometimes get mix-ups. The important thing is that at twelve years she was not a child of tender years within the meaning assigned to that term under the Childrens Act and a *voire dire* was not necessary. The decision in, **Muiruri vs Republic** would therefore not apply.
12. On the whole it is our finding that the prosecution's case was riddled with inconsistencies and contradictions and that the trial magistrate failed to direct her mind properly to the need to inquire fully into the conditions facilitating identification. It is clear from the evidence that the appellant was arrested not because he was identified at the scene but because he was implicated by some informers. It could be that the complainants testified against him because of the differences they had with him. The evidence of the four key witnesses was a complete departure from what they told the police immediately after the robbery and the fact that although PW1 is alleged to have identified the appellant's co-accused to the police in court she testified that she did not see them during the robbery makes it even more probable that she and her children had a motive to implicate the appellant. We find merit in this appeal and accordingly the conviction is quashed and the sentence of death is set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered at KISII this 30th Day of December 2013

E.N.MAINA S.OKONG'O

JUDGE JUDGE

In the presence of:

Appellant present in person

Mr. Imbali for the state

Mr. Kasera Court clerk.

E.N. MAINA S.OKONG'O

JUDGE JUDGE