REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO 24 OF 2020

ROBERT OUKO OUMA.....1ST APPELLANT

LABAN AYAKO OUMA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of Hon H.M. Nyaberi (SPM) delivered at Winam in the Senior Principal Magistrate's Court in Criminal Case No 312 of 2017 on 11th September 2020)

JUDGMENT

INTRODUCTION

1. The Appellants herein were tried and convicted of the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code Cap 63 (Laws of Kenya). The particulars of the offence were that on 25th May 2017 at Ongadi Village in Kisumu East Sub- county, while armed with **(sic)** offensive weapon namely spade jointly robbed Beatrice Adongo Nyaula (hereinafter referred to as "PW 1") of Kshs 20,000/= and at the time of the said robbery wounded the said PW 1. They were sentenced to life imprisonment.

2. Being dissatisfied with the said Judgement, on 18th September 2020, they lodged the Appeal herein. They set out six (6) grounds of appeal.

3. Their Written Submissions were filed on 16th July 2021 while those of the State were dated and filed on 5th October 2021.

4. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the Learned Trial Magistrate in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **[1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

7. Having looked at the Appellant's and State's Submissions, it was this court's considered view that the issues that have been placed before it for determination were:-

> **a. Whether or not the Learned Trial Magistrate complied with the provisions of Section 200 of the Criminal Procedure Code Cap 75 (Laws of Kenya); and**
>
> **b. Whether or not the Prosecution had proved its case beyond reasonable doubt.**

8. The court therefore dealt with the two (2) issues under different and distinct heads.

I. SECTION 200 OF THE CRIMINAL PROCEDURE CODE

9. Ground of Appeal No (5) was dealt with under this head.

10. Although the Appellants did not submit on this issue, in their Petition of Appeal, they stated that the Trial Court failed to observe the provisions of Section 200 of the Criminal Procedure Code.

11. On its part, the State submitted that the provisions of Section 200 of the Criminal Procedure Code Cap 75 (Laws of Kenya) were complied with when the new trial magistrate took over conduct of the matter.

12. Section 200 (3) of the Criminal Procedure Code provides as follows:-

> **"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."**

13. A perusal of the proceedings showed that on 11th October 2017, Hon C.N. Njalale RM took the evidence of PW 1 that was adduced in examination- in chief, cross-examination and re-examination. Subsequently, on 21st June 2018, Hon B. Kasavuli SRM also took her evidence that was adduced in examination-in-chief , cross examination and re-examination. She also took the evidence of Jane Mameme Alouch (hereinafter referred to as "PW 2"), Philip C Kilimo (hereinafter referred to as "PW 3"), No 69895 PC Sebastian Mweresa (hereinafter referred to as "PW 4") and Elisha Odongo Menya (hereinafter referred to as "PW 5") on diverse dates between 6th November 2018 to 25th June 2019 when the Prosecution closed its case.

14. On 24th July 2019, Hon H.M. Nyaberi SPM took over the matter. He indicated that Section 200(3) of the Criminal Procedure Code had been complied with. The Appellants' counsel requested that PW 1, PW2 and PW 6 be recalled due to the gravity of the offence whereupon the Learned Trial Magistrate directed that PW 1 and PW 2 who were present be recalled. The Prosecution had indicated that PW 6 was absent but that it would confirm his availability.

15. On 18th September 2019, the evidence of PW 1 and PW 2 was taken afresh and the Prosecution closed its case. The Appellants counsel indicated that he would not be filing submissions at that stage.

16. On 4th December 2019, the Learned Trial Magistrate delivered his Ruling indicating that the Prosecution had established a *prima facie* case against the Appellants and put them on their defence. The hearing date was fixed for 20th February 2020. On the said date, the Appellants adduced sworn evidence and through their counsel, they closed their case and informed the Trial Court that they would be filing Written Submissions.

17. Notably, there was no indication of Hon B. Kasavuli having informed the Appellants of their right to recall the PW 1. This was a procedural flaw that did not, however, go into the root of the Appellants' rights during trial as PW's 1 evidence was taken afresh. On his part, Hon H.M. Nyaberi, the Learned Trial Magistrate complied with the provisions of Section 200(3) of the Criminal Procedure Code culminating in PW 1 and PW 2 adducing evidence afresh. He did not make any order regarding PW 6.

18. It was not clear if they had abandoned this Ground of Appeal as they did not submit on the same. Be that as it may, PW 6 was never produced to adduce fresh evidence. The Appellants who were represented by counsel did not seek to have PW 6 recalled on 18th September 2019 herein but in fact, they took a Ruling date on the question of whether they had a case to answer or not and subsequently, adduced their defence. They could not now be heard to complain that the provisions of Section 200 (3) of the Criminal Procedure Code was not complied with.

19. In the premises foregoing, this court found and held Ground of Appeal No (5) was not merited and the same be and is hereby dismissed.

II. PROOF OF THE PROSECUTION'S CASE

20. Grounds of Appeal Nos (1), (2), (3) and (4) were dealt with under this head as they were all related.

21. The Appellants submitted that the evidence that was adduced by the Prosecution had grave contradictions and inconsistences rendering it unsafe to base a conviction upon.

22. They averred that in her Witness Statement, PW 1 never mentioned that she had money or where she kept the same despite the said statement having been made when her mind was still fresh. They added that while PW 1 testified that they both beat her up, Jane Kamene Aluoch (hereinafter referred to as "PW 2") stated that it was only the 1st Appellant who beat her up while the 2nd Appellant's role was to tell the 1st Appellant to stop beating her. They placed reliance on the cases of **Philip Nzake Watu vs Republic [1016** (sic)**] eKLR** and **Ramkrishnan Pandya vs Republic (1957) EALR 336** where the courts therein indicated the dangers of basing a conviction on inconsistent evidence.

23. They pointed out that the First Report indicated that it was an assault case as was stated by No 69895 PC Sebastian Mweresa (hereinafter referred to as "PW 4") when he was cross-examined. They were emphatic that there was no mention of loss of money and mobile phone.

They submitted that the evidence of the stolen properties was an afterthought.

24. It was their argument that the manner in which PW 1, PW 2 and PW 4 created a case of robbery against them marked them as incredible witnesses of doubtful integrity whose evidence ought not to be relied upon to base a conviction. In this regard, they placed reliance of the case of **Ndungu Kimanyi vs Republic 1979 KLR 282** where the court therein held that it was unsafe to accept evidence of a witness who created an impression that he was not a straight forward person.

25. They termed the investigations as shoddy and questioned why they were arrested after eleven (11) days despite them and PW 1 being neighbours and the report having been made on the same day it occurred. They referred the court to PW 4's evidence in which he admitted that there had been a dispute between them and PW 1.

26. They submitted that their defence was not displaced by the Prosecution's case and urged this court to acquit the 2nd Appellant and reduce the charge to assault as had originally been preferred by PW 4.

27. On its part, the State opposed the Appeal herein on the ground that PW 1 identified the Appellants as persons who assaulted her through recognition as they lived in the same village and that it was day time. It submitted that PW 3 confirmed the injuries PW 1 sustained and tendered in evidence the P3 Form.

28. During all the three (3) times that she testified, PW 1's evidence was that on the material day, she was at her place of work where they used to collect sand when a person who was known as Ochieng called the 1st Appellant on phone and they were joined by the 2nd Appellant herein. She was emphatic that the three (3) persons beat her with spades as a result of which she sustained injuries.

29. Her testimony was that they then took a sum of Kshs 20,000/= which was three (3) days collection of the same they had sold which money she had been given by the PW 2 on 25th May 2017 for banking at an Mpesa shop that was near her place and her Samsung phone.

30. Her evidence was that she had tied the money in a polythene paper and hid it in her petticoat. She was emphatic that the said Ochieng was present when PW 2 gave her the money. She knew the Appellants as they lived in the same village. She reiterated this evidence during her cross examination.

31. On her part, PW 2's evidence was that another person called the 1st Appellant who came and started hitting PW 1 with a spade. Her evidence was that the 2nd Appellant also came to the scene and urged the 1st Appellant to hold on to the matter **(sic)**. She then ran to her house. When she came back, she found PW 1 still lying on the ground and she took her to hospital with the help of a good Samaritan.

32. In her third testimony, she reiterated the facts but stated that when the 2nd Appellant came, he urged Ochieng and the 1st Appellant to carry on hitting PW 1 with spades. When she was cross-examined, she stated that she was not sure if Ochieng was present when he was giving PW 1 the money.

33. PW 3, a Clinical Officer at Kisumu County Hospital saw PW 1 after eight (8) days of the incident and he completed the P3 Form. He stated that the probable type of weapon was blunt and he classified the injury as "harm".

34. PW 4, the Investigating Officer reiterated PW 1's evidence and added that he charged the Appellants with the offence of robbery because PW 1 said that she had been robbed of a sum of Kshs 20,000/= and a mobile phone. When he was cross-examined, he stated that in the covering report, PW 1 did not mention the loss of the money and the phone. He admitted that he had formed an opinion that the offence was an assault. He also stated that the document he relied upon for proof of business transaction was a translation by the Chief. When he was re-examined, he clarified that PW 1 had mentioned about the loss of the money and the mobile phone in the covering report. PW 5, the Assistant Chief of Kadero Sublocation confirmed that he was the one who translated the document.

35. Both the Appellants adduced sworn evidence. On his part, the 1st Appellant's testimony was that on the material date, his brother Emmanuel Ochieng called him and informed him that there were some people who were interfering with his sand. When he got to the site, PW 2 ran away while PW 1 tried to hit him with a spade. His evidence was that he disarmed her and hit her with the spade on the back. He denied ever having taken any money from her. The 2nd Appellant denied ever having beaten her or stealing her phone.

36. Emmanuel Ochieng (hereinafter referred to as "DW 3") Told the Trial Court that the 1st Appellant was his brother while the 2nd Appellant was his uncle. He stated that PW 1 was his aunt. His evidence was that on the material day, PW 1 started spreading sand belonging to the 1st Appellant. He asked her why she was doing so and when she and PW 2 threatened him, he called the 1st Appellant who was the owner of the sand. He stated that the 1st Appellant came in anger, took the spade from PW 1 and hit her. He denied that both the 1st and 2nd Appellant lifted PW 1's petticoat and robbed her of her money.

37. Notably, the versions of the Prosecution and the Appellants were on diametrically opposite poles leaving the court with the very difficult role of establishing whether this was a case for assault or robbery with violence.

38. It was evident that the Appellants, PW 1 and PW 2 were not strangers to each other as they lived in the same village. The issue of identification whether by recognition or otherwise did not therefore arise in the circumstances of the case herein. In addition, the question of PW 1 having sustained injuries was not in contestation as in their sworn evidence, the 1st Appellant confirmed having hit PW 1 on her back with a spade.

39. Save for a few contradictions, during the different times that PW 1 and PW 2 testified, their evidence on what occurred on the material date was quite consistent. Having said so, what was in contention was whether the circumstances prevailing on that material day amounted to

an assault or a robbery with violence and/or whether or not the Prosecution had proved its case against the Appellants in view of some contradictions.

40. For an accused person to be found culpable of the offence of robbery with violence, the Prosecution must prove the following ingredients:-

> **1. The offender is armed with a dangerous or offensive weapon; or**
>
> **2. The offender is in the company of one or more other person; or**
>
> **3. The offender immediately before or after the robbery wounds, beats, strikes or uses any other personal violence to any person.**

41. In a case of assault, the Prosecution must prove that the accused person used personal violence, which could be hitting or striking, on a complainant which violence must have been perpetuated by the accused person's hand or by any other object and that such personal violence must have resulted in an injury that is capable of being classified as harm.

42. A careful analysis of the evidence led this court to form the opinion that PW 1 and PW 2 were not entirely truthful about what really transpired on the material date. Instead, this court was more persuaded to find and hold that the version that was given by the Appellants was the most probable one of what really transpired on the material date. This is because PW 1, PW 3, the Appellants and DW3 all lived in the same village and the incident is said to have happened at 11.00 am at the river bank where they all did sand business,

43. Notably, PW 4 had initially formed an opinion that this was an assault case and that the only reason that he charged the Appellants with robbery with violence was because PW 1 said that she had been robbed of Kshs 20,000/=. She adduced in evidence a document that was titled "Translation" that was marked as PExh 6(b).

44. The translation by Elesha Menya was as follows:-

> **" I bought three sand lorries at Sh 9,000 (nine thousand only). The delivery was done by a lorry KSCE 229 X branded "Tuko Bussy". The same day a vehicle branded----driven by a Mr Ken picked two trips worth Sh 6,000/= (Six Thousand only) Totalling to Sh 15,000/= (fifteen thousand). Then on 21/5/17 3 lorries worth Sh 9,000/=, 23/5/17 3 lorries worth 9,000/= 24/5/17 2 lorries worth"**

45. Whereas formal documents are not a requirement of proof of business, improper keeping of accounts can pose a challenge to a court in determining the loss incurred, if at all. It was not clear from the said Translation was accounts of the business or a statement that was subsequently translated by PW 5. In view of the serious nature of the offence the Appellants had been charged with, this court restrained itself from accepting the document as proof that PW 1 had a sum of Kshs 20,000/= at the material time.

46. There was also no evidence that DW 3 was present when PW 2 gave PW 1 the money. In fact, PW 2 had testified that she did know if DW 3 was present when she gave PW 1 the money. If he was present, PW 1 did not explain where that was so as to persuade this court to agree with her version that the Appellants knew that she had hidden the money in her petticoat.

47. Taking the facts of the case against the provisions of the law, this court was not entirely persuaded that this was a case of robbery with violence. The Appellants were not on a course to steal. It appeared to have been more of a brawl following a sand dispute. The fact that the Appellants had any spades was not alarming. Indeed, when she was cross-examined, PW 2 admitted that it was normal for people to walk with spades where they were. From her evidence, PW 1 did also testify that she saw the Appellants come with spades to assault her while DW 3 used two (2) sticks to beat her.

48. As the 1st Appellant admitted that he hit PW 1, he could not be exonerated from the injuries that he sustained. However, the evidence of whether the 2nd Appellant hit PW 1 was not clear. In her initial evidence, PW 2 testified that the 2nd Appellant asked the 1st Appellant to hold on while the third time, she stated that the 2nd Appellant urged the 1st Appellant to carry on beating PW 1.

49. Having said so, this court noted that PW 2 ran away immediately the 1st Appellant beat PW 1. PW 1 was emphatic that she was not lying facing downwards and she could see both Appellants beating her with spades. As PW 2 may not have known if the 2nd Appellant beat PW 1was beaten, this court was more persuaded to accept PW 1's evidence that the 2nd Appellant also participated in beating her with the spades.

50. This court thus came to the firm conclusion that the Prosecution did not adduce any evidence to show that the Appellants robbed PW 1. However, this court was satisfied that the Prosecution had proved that both Appellants beat PW 1 with spades.

III. <u>SENTENCE</u>

51. Section 237(a) of the Penal Code Cap 63 (Laws of Kenya) provides that:_

> **"Any person who unlawfully wounds another is guilty of a misdemeanour and is liable to imprisonment for five years."**

52. Bearing in mind that there appeared to have been a disagreement regarding sand of which PW 1 appears to have proved the 1st Appellant

who was assisted by the 2nd Appellant, this court found and held that a sentence of two and a half (2 ½) years would be reasonable punishment in the circumstances of the case herein. The term liable means that the court can impose a sentence from a minimum of a day to a maximum of five (5) years for the offence under Section 237(a) of the Penal Code.

DISPOSITION

53. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 10th February 2019 be and is hereby allowed. The effect of this decision is that the judgment of the Learned Trial Magistrate be and is hereby set aside and the conviction and sentence set aside as it was unsafe.

54. In its place, this court hereby substitutes the conviction on robbery with violence with a conviction against both the 1st and 2nd Appellant for the offence of unlawfully wounding PW 1 contrary to Section 237 (a) of the Penal Code and hereby sentences each of them to serve two and a half years (2 ½) imprisonment.

55. It is hereby directed that any period the Appellants spent in custody during the hearing of their case will be taken into account at the time of computing their sentence as provided for in Section 333(2) of the Penal Code.

56. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY 2022

J. KAMAU

JUDGE