



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CRIMINAL APPEAL NO. E025 OF 2021

GEORGE ONYANGO MBIWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No.841 of 2019 of the

Senior Resident Magistrate's Court at Mbita by Hon. Japheth C. Bii–Senior Resident Magistrate)

JUDGMENT

1. George Onyango Mbiwa, the appellant herein, was convicted of the offence of robbery with violence contrary to section 296 (2) of the Penal Code.
2. The particulars were that on the 27th September, 2019 at Mbita-Sindo Junction, Mbita Township sub location, Mbita sub county within Homa Bay County, jointly with others not before court while armed with machetes and knives, robbed Linet Nyaboke Omwenga of one television set, one home theatre, one Nokia mobile phone, One Neon mobile phone, one gas cylinder, two pairs of shoes, assorted clothes, one laptop bag, and one suit case all valued at Kshs. 68,000.00 and immediately before the time of such robbery threatened to use actual violence to the said Linet Nyaboke Omwenga.
3. The appellant was convicted and sentenced to fifty years imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He raised thirteen grounds of appeal that can be summarized as follows:
 - a) That the sentence of 50 years imprisonment by the trial magistrate is harsh, excessive, inhuman and as it violate the right to benefit from the least severe punishment under article 50(2)(p) of the Constitution.
 - b) That the trial magistrate erred in law and facts by not considering that there was no sufficient evidence adduced before the court to prove the ingredients of robbery with violence.
 - c) That the trial magistrate erred in law and facts by convicting and sentencing without evidence of an identification parade.
 - d) That the trial magistrate erred in law and facts by not considering that there was no cogent evidence adduced in court to prove the offence of robbery.
 - e) That the appellant was not accorded a copy of the first report to the police.
 - f) That the trial magistrate erred in law and fact by not considering that the person to whom the kshs.460/- that was in the phone was transferred to was not produced in court.
 - g) That the learned trial magistrate erred in law and facts by not considering that the entire evidence that was adduced in court were mere fabrications and speculations hence there was no truth in them.
 - h) That the trial magistrate erred in law and fact by relying on prosecution's evidence that was marred with contradictions and inconsistencies which rendered them to be unreliable and untrustworthy witnesses.
 - i) That the trial magistrate erred in law and facts by not considering that the present case was not investigated ad if any

investigations were conducted then they were very shoddy.

- j) That there was no any medical report adduced in court to prove that in the complainant was injured in the course of the robbery.
- k) That the trial magistrate erred in law and facts by not considering that there was no other independent witness such as their neighbours who heard their distress call and came to their rescue to corroborate their evidence.
- l) That the trial magistrate erred in law and facts by not considering my defense evidence as it was cogent enough to award me an acquittal.

- 4. The appeal was opposed by the state through Mr. Oluoch, learned counsel who contended that the evidence was overwhelming.
- 5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.
- 6. Linet Nyaboke Omwenga testified that the incident took place at about 1 a.m. The person she alleged was the appellant was a stranger to her. She did not describe her to the police or to any person in authority. In the celebrated case of **R v Turnbull and others [1976] 3 All ER 549** Lord Widgery CJ, stated as follows:

Whenever the case of an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification.

He went on to say:

Furthermore, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made.

- 7. In the instant case I find that the obtaining circumstances were not favourable for a positive identification. Had the complainant given the description of the person she purported to have identified to a person in authority, then if such description led to the arrest of the appellant, this would have been persuasive evidence. More still, had the appellant been arrested with any of the items, then again this would have been persuasive evidence. I however find that there was insufficient identification evidence against the appellant.
- 8. Section 296 (2) of the Penal code states:

If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

The sentence in this case was therefore illegal. This appeal will not turn on the issue of sentence.

- 9. The upshot of the analysis of the evidence on record is that the conviction of the appellant was not supported by the evidence on record. I accordingly quash it and set aside the sentence thereof. The appellant is set at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF MARCH, 2022.

KIARIE WAWERU KIARIE

JUDGE