REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO. 15 OF 2020

(From the original conviction and sentence in Criminal case No.148 of 2019 of the

Principal Magistrate's Court at Mbita by Hon. Japhet Bii–Senior Resident Magistrate)

MICHAEL ODHIAMBO KIBIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. Michael Odhiambo Kibira, the appellant herein, was convicted of the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code.

2. The particulars in count one were that on the 21st February, 2019 at Riamakanga village, Suba South Sub county within Homa Bay County, while armed with a knife robbed Margaret Oyugi Owenje of one mobile phone, one purse and cash Kshs.2, 000.00 all valued at Kshs 4,250.00 and immediately before or immediately after the time of such robbery used actual violence to the said Margaret Oyugi Owenje.

3. The appellant was convicted and sentenced to 20 years imprisonment. He was dissatisfied and appealed against both conviction and sentence. He raised grounds of appeal that I have summarised as follows:

a) The learned trial magistrate erred in law and fact by failing to appreciate the alleged offence.

b) The learned trial magistrate erred in law and in fact by erroneously admitting the alleged recovered exhibits;

c) That the medical evidence and the complainant's evidence were at variance;

d) The learned trial magistrate erred in law and in fact by failing to appreciate an existing grudge between him and the complainant; and

e) The learned trial magistrate erred in failing to appreciate his defence.

4. The appeal was opposed by the state through Mr. Ochengo, learned counsel.

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. Michael Odhiambo Kibira, the appellant denied any involvement in the offence and contended that he was arrested by boda-boda riders and taken to the police.

7. Though the complainant did not testify as at what time the offence took place, the evidence of Julius Otieno Ongata (PW2) was that that he heard screams from a woman at 6 a.m. We can safely conclude that the offence complained of was committed at 6 a.m. The evidence of PC David Lelei (PW5) was that the appellant was taken to the station by a rowdy mob at about 8 a.m. We can equally conclude that he was arrested at about 8 a.m. I will revert later to the issue of exhibits.

8. Though the appellant did not raise the issue of identification, the complainant's evidence was to the effect that she had not seen the

motorist who robbed her before. During cross examination she said that she did not ask him his name. In her evidence she gave an impression that he was arrested almost immediately before leaving the scene. However, the evidence of PC David Lelei (PW5) shows that the appellant was arrested about two hours after the alleged offence was committed. The prosecution had the duty to call some of the people who arrested him to testify as to what prompted them to arrest him. The complainant was not with them at the time of the arrest. The appellant found him at Magunga Police Station.

9. The fact that the complainant had not seen the person who allegedly robbed her before, the investigating officer and the prosecutor in court were duty bound to elicit evidence of identification from the complainant. They failed to do so.

10. Julius Otieno Ongata (PW2) testified that when he heard a woman scream at about 8 a.m., he went to the road and found the accused who had been tied up with ropes and had a black purse in his hands. This evidence suggests that he was arrested at the scene. The complainant gave evidence to suggest that the appellant was arrested at the scene but introduced some variation when she said:

The accused was caught by other riders. He was brought to Magunga Police Station.

11. Since no evidence was adduced to indicate the distance from the scene of robbery to Magunga Police Station, the time between 6 a.m. and 8 a.m. was not explained by the prosecution. The failure to reconcile the apparent contradictions ought to have been resolved in favour of the appellant who testified that he was arrested after 7 a.m. as he was ferrying a customer to Olando stage.

12. The trial was perfunctorily conducted. There was no attempt to elicit evidence from the complainant to identify the alleged recovered items. They were just listed after her evidence. This is incorrect procedure. She ought to have been invited to identify what was alleged to have been her recovered items.

13. None of the people who allegedly recovered the items said to belong to the complainant was called as a witness. The Court of Appeal in the case of **Bukenya vs. Uganda [1972] EA 549,** (Lutta Ag. Vice President) held:

> **The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
>
> **Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.**

Failure to call witnesses to adduce evidence on the recovery of exhibits was fatal to the prosecution case.

14. Both the prosecution and the appellant did not adduce any evidence of an existing grudge between the appellant and the complainant. The learned trial magistrate could not therefore make any finding without such evidence.

15. Indeed I agree with the appellant that the medical evidence did not support the complainant's claim. The only issue she talked of is that when she was knocked down her assailant attempted to strangle her. When she went to hospital she complained of back pain and a headache which is likely due to her being knocked down. However, there was no finding on her neck which was pressed in order to make her reveal where the money was. It may not have been a contradiction but again the investigating officer and the prosecutor in court failed to elicit evidence on the same.

16. Section 296 (2) of the Penal Code provides:

> **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.**

This therefore means that the sentence of 20 years meted out an illegal; there was only one legal sentence for the offence without an alternative.

17. After the analysis of the evidence on record, I arrive at the conclusion that it was not safe to convict the appellant. I quash the conviction and set aside the sentence. The appellant is at liberty unless if lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 29TH DAY OF MARCH, 2022

KIARIE WAWERU KIARIE

JUDGE