



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 49 OF 2018

BENSON ONIANG'O SAKWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from conviction and sentence of Hon. P.K.Rugut (SRM) dated 7th May, 2018 at the Senior Resident Magistrate's Court at Tamu in Criminal Case No. 10 of 2018)

JUDGMENT

1. The appellant was charged with robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*.

The particulars are that on 30th December, 2017 at Kibos area in Muhoroni district within Kisumu County robbed KENNEDY OUMA OBUYA of a motor cycle make Boxer valued at Kshs. 120,000/- and at or immediately before or immediately after the time of such robbery used actual violence against KENNEDY OUMA OBUYA

PROSECUTION CASE

2. The prosecution called a total of eight (8) witnesses in support of their case. Complainant recalled on 30th December, 2018 he was engaged in his bodaboda business when a man he did not know before requested him to take him to Kibos. That upon reaching at Kibos, the man stabbed him on the neck and robbed of motor cycle KMCE 240U belonging to one Joseph Juma. He stated that he raised an alarm, the man escaped and members of public who went to his rescue recovered the motor cycle without its ignition key, in a nearby sugar plantation. PW2 Joseph Juma Onyango, the owner of the motor cycle stated that it was valued at Kshs. 120,000/-. PW3 Sgt David Kiptoo rescued the appellant from members of public who wanted to lynch him on allegations that he had stolen a motor cycle on 30th December, 2017 and recovered a motor cycle ignition key from him and later handed him over to his colleagues at Koguyo Police Station. PW4 Austin Tom Onyango stated he saw appellant try to stab the complainant after which he rode away in the stolen motor cycle. He stated he was joined by other members of public and together they recovered the stolen motor cycle also arrested the appellant from whom police recovered a motor cycle ignition. PW5 Brian Onyango Okoth upon receiving a distress call from the complainant went to the scene and escorted him to hospital in the recovered motor cycle which he later took to the police station. He stated that he manipulated the ignition system and managed to ride the motor cycle without the ignition key. PW6 Dr. Eddy Odhiambo Owuor examined complainant on 18th January, 2018 and found him with a healing stab wound on the right side of back of neck. He produced a P3 form in which he assessed the degree of injury as harm as PEXH. 1. PW7 IP Stanley Manore conducted an identification parade on 1st January 2018 in which the appellant was identified by the complainant as the person that robbed him. PW8 PC Japhet Kimutai investigated the case and formed an opinion that an offence had been committed and caused the appellant to be charged.

DEFENCE CASE

3. At the close of the prosecution case, appellant was ruled to have a case to answer and was placed on his defence. In his sworn defence appellant stated that on the material date, he went to visit his sister at Kapkures and it was there that he was attacked, robbed and injured on suspicion that he was a cattle rustler. He denied robbing the complainant or being found with any motor cycle ignition key.

4. On 7th May, 2018, the learned trial magistrate delivered a judgment in which she convicted appellant and sentenced him to serve 20 years imprisonment.

The Appeal

5. The appellant now appeals against the conviction and sentence based on his amended grounds of appeal and written submissions filed on 7th February, 2019. In the amended grounds of, appellant set out seven (7) grounds as follows:-

- (i) **That he was convicted on a fabricated first report**
- (ii) **That his right to a fair trial was violated**
- (iii) **That he was not properly identified**
- (iv) **That the identification parade was not properly conducted**
- (v) **That the court erred in relying on fabricated and manufactured evidence by PW4**
- (vi) **That the evidence of recovery was inconclusive**
- (vii) **That crucial witnesses did not testify**

6. When the appeal came up for hearing on 8th February, 2019 appellant relied wholly on amended grounds of appeal and submissions filed on same date.

7. Mr. Muia, learned State Counsel, opposed the appeal on the grounds that the offence was committed in broad day light; that appellant was identified by complainant and an ignition key to the robbed motor cycle was recovered from the appellant.

Analysis and determination

8. The principal issues raised by the appellant relate to identification and recovery of the robbed motor cycle's ignition key.

9. In considering the issues raised by the appellants, I am enjoined to consider the entire evidence, evaluate it and reach an independent conclusion as to whether I should uphold the conviction bearing in mind that I neither heard nor saw the witnesses testify (see **Okeno v Republic [1972] EA 32**).

10. The prosecution case was narrated by the principal witness, who is the complainant. The offence was committed at about 10.00 am. He did not know the person that robbed him before the date of the robbery. In his statement which was produced as DEXH. 3, complainant did not give the description of the person that robbed him. This was indeed confirmed by PW7 IP Stanley Manore who conducted an identification parade. I have considered the case of **Paul Thuo Mburu & another v Republic [2008] eKLR** where the Court of Appeal dealt with the issue identification and held '*inter-alia*' that:-

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is expected to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conclusion”.

11. On the other hand, the burden weighs heavily on any court considering the solitary evidence of a witness in respect of identification. The caution in the case of **Abdallah Bin Wendo & Another vs. Republic (1953) 20 EACA 166** is that such evidence must be tested with the greatest care. Even where a witness is found to be honest, the possibility of a mistake must be carefully scrutinized and excluded. As the Court of Appeal stated in **Roria v R [1967] EA 583** at pg. 584: -

“A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDNER, L.C. said recently in the House of Lords in the course of a debate on s.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

“There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity.”

12. Having said that, I find that the purported identification of appellant by PW1 in an identification parade, in the absence of prior description, is suspect and I hold that such evidence is neither credible nor worthy of belief and ought to have been rejected. (See **Michael Ochieng' Odongo v Republic [2008] eKLR**).

13. Furthermore, the complainant categorically stated in his statement to the police and in his evidence before the court that the person that robbed him had escaped by the time rescuers arrived. Evidence by PW4 Austin Tom Onyango that he saw the appellant try to stab the complainant and thereafter escape with his motor cycle cannot therefore be truthfully in the circumstances. The fact that PW4's statement was recorded on 6th February, 2018 long after three witnesses had testified leaves no doubt in the mind of the court that it was meant to strengthen an otherwise weak prosecution case by making it appear like the appellant had indeed been identified at the scene of crime by complainant and PW4.

14. The other evidence against the appellant relates to recovery of ignition key of the complainant's motor cycle. PW8, the investigating officer told court that the appellant was arrested about 10 to 20 kms from scene of crime. As earlier stated, PW4's evidence that he was present at the scene of appellant's arrest is riddled with contradictions and inconsistencies of the magnitude that make him a doubtful witness. He did not explain how he gave chase of the appellant for about 10 km to 20 km where he was arrested. PW3 who arrested the appellant told court that he recovered an ignition key from him and handed it over to police officers from Koguyo police station. His colleagues APC Chepkwony and APC Ekal who were with him at the time of the alleged recovery did not testify to corroborate the evidence.

of recovery. Police officers from Koguyo police station who received the appellant after his arrest did also not testify to confirm if any ignition key was handed over to them. PW8 the investigating officer in his testimony did not explain from where and from whom he received the ignition key. He was not at the scene of appellant's arrest. His evidence that "**The key of the motor cycle was also recovered in the accused's pocket**" amounts to hearsay and required corroboration. Appellant has denied that any motor cycle ignition key was recovered from him thereby casting doubt on the uncorroborated evidence by PW3.

Disposition

15. From the foregoing analysis. I have come to the conclusion that the prosecution case was not proved beyond reasonable doubt and he ought to have been given the benefit of doubt. I thus find and hold that the conviction and sentence were unsafe. Accordingly, I quash the conviction and set aside the sentence and unless otherwise lawfully held order that appellant shall be set at liberty forthwith.

DELIVERED AND SIGNED AT KISUMU THIS 28th DAY OF March 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Present

For state - Mr Muia