



**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**(CORAM: CHERERE -J)**

**CRIMINAL APPEAL NO. 49 OF 2019**

**(CONSOLIDATED)**

**BETWEEN**

**TITUS OWINO OKELLO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(An appeal from the conviction and sentence in Criminal Case Number 534 of 2018 in the Principal Magistrate's Court at Maseno by Hon. C.L.Yalawla (PM) on 13<sup>th</sup> August, 2019)**

**JUDGMENT**

**Background**

1. **TITUS OWINO OKELLO** (*Appellant*) has appealed against conviction and sentence on the charge of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code. Appellant jointly with others not before the court was charged with violently robbing one **STEPHEN ODHIAMBO OCHIENG** of Kshs, 2,300/- on 13<sup>th</sup> July, 2018 and wounding him in the course of the said robbery.

**The prosecution's case**

2. The prosecution called 4 witnesses in support of the charges.

**PW1, STEPHEN ODHIAMBO OCHIENG** the complainant recalled that on 13.07.18, at about 10.30 pm, he was going home from his place of work when he was accosted by two people who robbed him of Kshs. 2,300/-and wounded him. He stated that there was security lighting at the scene and that he had been able to recognize the Appellant after his cap fell thereby exposing his face. He stated that Appellant whom he referred to as Tito who was his regular customer at the pool table playing area where he used to work.

3. **PW2 PETER JUMA OBIERO** stated that on 13.07.18 at about 10.00 pm, he was headed home with one Kennedy when he heard screams and as they went to check what was happening, they met the Appellant running and he who struck him and went away. He stated that there was a big light mast at the scene in Holo market and that he was able to recognize Appellant who was from his village.

4. **PW3 APC LAWRENCE OTIENO**, arrested the Appellant at the Holo AP Post where complainant had been having been robbed by Appellant and others.

5. **PW4 PC ANDREW CHANGWONG**, the investigating officer stated that on 14.07.18 at about 3.45 am, he received Appellant from PW3 who reported that he had arrested him as a robbery suspect. He stated that complainant later went to the police station and reported that Appellant ad robbed him and Appellant was subsequently charged.

**Defence case**

6. In his sworn defence, the Appellant denied the offence. He stated that on 13.06.18, he went to Holo AP Post to check on his colleague who had been arrested but was locked up and charged with an offence that he did not commit.

## **Conviction and sentence**

7. The trial court found the charge proved and on 27<sup>th</sup> August, 2019 sentenced the Appellants to 15 years' imprisonment.

## **The Appeal**

8. The conviction and sentence provoked this appeal. In his petition of appeal and written submissions, Appellant raised the following main grounds of appeal:

**1. The court erred in relying on the evidence of recognition was not sufficient**

**2. His defence was not given due consideration**

9. When the appeal came up for hearing on 11.12.19, the Appellant sought to wholly rely on his amended grounds of appeal and written submissions filed on 11.12.19.

10. Ms. Gathu, learned State Counsel opposed the appeal and submitted that there was sufficient lighting at the scene and that Appellant was identified by PW2 and PW2.

## **Analysis and Determination**

11. As the first appellate court in the instant appeal, I am required and indeed duty bound to subject the evidence tendered in the lower court to thorough re-evaluation and analysis so as to reach my own conclusion as to the guilt or otherwise of the appellant. In doing so I must give allowance to the fact that I neither saw nor heard the witnesses as they testified and therefore cannot comment on their demeanour. (See **OKENO – VS – REPUBLIC (1972) E.A. 32**).

12. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the appellants and for the state.

13. The gravamen of this appeal really turns on the issue of identification, nay, recognition of the Appellant by the complainant. The offence was committed at night and hence, the means by which the appellant was identified by recognition becomes critical. According to the complainant, the Appellant was known to him physically and by name since according to him, he was a regular customer at the pool table yard where he worked. PW2 similarly stated that he knew the Appellant who was from his village. Both complainant and PW2 stated that there was a big street security lighting at the scene that enabled him to see the Appellant clearly when he robbed complainant and struck both complainant and PW2.

14. The difference in approach between identification and recognition was expressed thus by Madan J.A for the Court in **Anjononi and Others vs The Republic [1980] KLR**:

**“.....This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported.)”**

15. That is not to suggest of course, that cases of misrecognition cannot occur (See **Karanja & Anor vs. Republic [2004] KLR 140**) and courts are still duty-bound to examine such evidence with great care.

16. That being the case it was necessary for the trial court to test the reliability of such identification. In the case of **Maitanyi vs Republic (1986) KLR 198**, the Court of Appeal held: -

**“.....That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.**

The court record shows that the learned trial Magistrate carefully evaluated the evidence on record and made a finding that there was adequate lighting at the scene and that the Appellant had come in close contact with the complainant and PW2 and that he had been positively identified. The fact that Appellant was late identified at the Holo Police Post on the same night of the incident makes the evidence by complainant and PW2 definite.

18. In the end, I find that both the conviction and sentence were merited and dismiss the Appeal.

**DELIVERED AND SIGNED IN KISUMU THIS 18<sup>th</sup> DAY OF December 2019**

**T. W. CHERERE**

**JUDGE**

**In the presence of-**

**Court Assistant - Amondi/Okodoi**

**Appellant - Present in person**

**For the State - Ms. Gathu**