



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 164 OF 2016

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 166 OF 2016

CORAM: D. S. MAJANJA J.

BETWEEN

JOHN OTIENO OGINGA.....1ST APPELLANT

IBRAHIM OCHIENG ORWA2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. M. Obiero, PM dated 15th July 2016 at the Principal Magistrates Court at Bondo in Criminal Case No. 1082 of 2015)

JUDGMENT

1. The appellants, **JOHN OTIENO OGINGA** and **IBRAHIM OCHIENG ORWA** were found guilty of the offence of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* and sentenced to suffer the death penalty. The particulars of the offence are that on 3rd December 2015 at Ndori Village in Rarieda District within Siaya County while armed with dangerous weapons namely panga and sticks jointly with others not before the court robbed **BEATRICE OMONDI** a mobile phone make Nokia valued at Kshs. 3,000/- and immediately before or immediately after the time of the said robbery used actual violence on the said **BEATRICE OMONDI**.

2. The facts of this matter are that on 3rd December 2015 at around 8:00pm the complainant, Beatrice Adongo Okech (PW 2) was walking home from a harambee at Ndori market in the company of Ann Akinyi Otieno (PW 3) and Caren. As they were about to reach their home, they were accosted by three people armed with a panga and sticks. Three men attacked them and began beating them demanding for money. PW 2 testified that one of the assailants hit her on her left eye and as she tried to spot them with a phone light her hand was hit and the phone dropped to the ground. PW 2 told the court that they raised alarm and the assailants ran away on noticing there were people approaching from behind but after they had gone PW 2 could not find her phone.

3. PW 2 testified that she was able to identify the 1st appellant and PW 3 identified the 2nd appellant herein. The following day, PW 2 sent PW 3 to the 2nd appellant asking him to return her phone but the 2nd appellant denied having the phone. PW 2 further testified that as she was returning home from the hospital she spotted the 1st appellant and she informed the chief who arrested him. While he was in police custody PW 2 and PW 3 went to him and asked for PW2's phone. The 1st appellant informed them that it was the 2nd appellant who had the phone. As they were leaving the police station they saw the 2nd appellant who ran off upon seeing them. PW 2 raised alarm and the 2nd appellant was arrested by members of the public. He was taken to the police station where her phone was recovered from him. PW 2 stated that she was able to identify her phone because it had her name inscribed on it. On cross examination, PW 2 stated that she was able to recognise the 1st appellant because of his unique hair style and she had known him before from Ndori market where he used to assist women sell clothes.

4. Police Constable David Warutumu (PW 4) testified that on 7th December 2015 PW2 went to Ndori police station and reported about the robbery. PW 4 recorded her statement and she left. After sometime she returned and informed him that she had seen one of the attackers. PW 4 arrested the 1st appellant and after interrogating him, the 1st appellant stated that it was the 2nd appellant who had picked the mobile phone. On the same day, the 2nd appellant was brought to the station by members of the public and he had a phone with him. PW 2 identified the phone as hers. It had the name "Beatrice" inscribed on it.

5. Jared Obiero Opondo (PW 1) a clinical officer who as at the time based at Siaya County Hospital, produced in court a P3 form of a medical examination carried out on PW2 which indicated that the PW2 had been assaulted on the left eye and back using a blunt object.

6. At the close of the prosecution case, the appellants were put on their defence. They both opted to give sworn statements and denied any involvement in the robbery.

7. The robbery in this case took place at night and out courts have warned that visual identification can bring about miscarriage of justice and it is thus vital that such identification evidence be examined carefully to minimize the danger (see *Wamunga v Republic [1989] KLR 424*). PW 2 stated that she was able to identify the 1st appellant from his unique hairstyle and she easily recognised him because she had seen him in the market on several occasions selling clothes. On the material day she had also seen him at the harambee. PW 3 also testified that using the help of a flash light held by the 2nd appellant she was able to see his face. I find that these circumstances were not favourable for positive identification because PW 2 was hit on the left eye and this could have led to poor vision. Further, PW 2 testified that when she raised her phone to shine light on her assailant's face, he hit her hand and the phone dropped to the ground. All these facts cast doubt on whether she was able to see her attacker. I also find that the prosecution case was undermined by the fact that PW 2 who claimed to have identified the 1st appellant because of his unique hairstyle did not report to the police immediately as one would have expected. The issue only arose four days later which neither she nor PW 4 could explain.

8. From the evidence I have outlined, the prosecution case against the 2nd appellant was based on what the 1st appellant told PW 2 and PW 4 while he was in police custody which led to the arrest of the 2nd appellant who was found with PW 2's phone. Mr Wakla, counsel for the appellants, correctly pointed out that what the 1st appellant told PW 2 and PW 4 leading to the recovery of PW 2's phone was a confession. **Section 25 of the Evidence Act (Chapter 80 of the Laws of Kenya)** ("the Act") states as follows;

A confession comprises words, or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

9. The conditions under which a confession is admissible is provided under **section 25A(1)** of the **Act** which states as follows:

25A(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police and a third party of the persons choice. (Emphasis mine)

10. Section 25A (1) of the **Act** recognizes that a confession or admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person, **unless** it is made before a judge, a magistrate or before a police officer (other than the investigating officer) being an officer not below the rank of Chief Inspector and a third party of the accused person's choice. The circumstances in this case do fall within what is contemplated by **section 25A (1)** of the **Act** as PW 4 was the investigating officer in this matter and his rank is below that of Chief Inspector as he was a police constable. Furthermore, as a confession, it was not taken when a third party of 1st appellant's choice was present. In addition, **section 29** of the **Act** provides for situation where a confession may be made to police officers and that officer would have to be above the rank or equivalent to inspector.

11. The net effect of the provisions I have cited is that the evidence leading to the recovery of PW 2's phone was inadmissible. This position is supported by the fact that the provision that previously rendered admissible facts discovered as a result of the confession was repealed by **Act No. 5 of 2003. Section 31** of the **Act** which was repealed provided as follows;

Notwithstanding the provisions of section 26, 28 and 29, when any fact is proved to be discovered in consequences of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

12. Once the confession and its fruits removed from consideration, the only evidence that implicates the appellants is the direct eyewitness testimony of PW 2 and PW 3 which I have already discounted.

13. For the reasons I have set out, I allow the appeal, quash the conviction and sentence. The appellants are set free unless otherwise lawfully held.

SIGNED AT KISUMU

D.S. MAJANJA

JUDGE

DATED and DELIVERED at SIAYA this 20th day of April 2018.

J. A. MAKAU

JUDGE

Appellant in person.

Mr Okach, Senior Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.