



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.115 OF 2015

(An Appeal arising out of the conviction and sentence of Hon.E.K. Nyutu - PM delivered on 8th July 2015 in Makadara CMC. CR. Case No. 5121 of 2013)

CHRISTOPHER OTIENO OMONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Christopher Otieno Omondi was charged with the offence of **robbery with violence** contrary to **Section 296(2) of the Penal Code**. The particulars of the offence were that on 23rd October 2013 at Riverside area in Kariobangi North Estate in Nairobi County, the Appellant, jointly with others not before court, while armed with a dangerous weapon namely a knife, robbed David Ojuka Odote (hereinafter referred to as the complainant), a bag containing two bibles and a SDA Church lesson book, all valued at Kshs.2,280/- and at the time of the robbery, used actual violence to the complainant. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to death. He was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant filed several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been denied the opportunity to have the complainant recalled and cross-examined hence his conviction on the basis of the complainant's testimony was manifestly unsafe. He took issue with the fact that the trial court had convicted him on the basis of the evidence of a single identifying witness without the court warning itself of the danger of convicting him on the basis of such evidence especially taking into consideration that there existed a possibility of error or mistaken identity. He was aggrieved that he had been convicted before the trial court had exhaustively analyzed his defence. The Appellant was of the view that the evidence adduced against him by the prosecution witnesses could not support the conviction. The Appellant therefore urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He further made oral submission urging his appeal. In the submission, the Appellant complained that the trial magistrate breached his fundamental rights to fair trial when he denied him the opportunity to recall the complainant so that he could cross-examine him. From the proceedings, it was evident that when the complainant gave his testimony in chief, the Appellant did not cross-examine the complainant. The Appellant submitted that the evidence of identification that was adduced against him did not rule out the possibility that he may not have been identified by the Appellant. The robbery incident took place at night and there was possibility that the complainant could have been mistaken that he had identified him. In essence, the Appellant was of the view that since there was no other evidence connecting him with the offence, the trial court should have treated the evidence of identification with circumspection before reaching the verdict of convicting him. He was of the view that the evidence of identification adduced by the complainant did not meet the threshold established by the law. He therefore urged the court to allow the appeal.

Ms. Akunja for the State opposed the appeal. She submitted that the complainant knew the Appellant prior to the robbery incident. His evidence therefore was that of recognition and not merely identification by a victim or a stranger. She explained that the robbery incident occurred at 7.00 p.m. There was sufficient light to enable the complainant identify the Appellant. The complainant's testimony was sufficiently corroborated by that of the investigating officer. The ingredients to establish the charge of robbery with violence were established. The Appellant was armed with a knife, and in the course of the robbery, stabbed the complainant. The complainant had to seek treatment. A P3 form was produced in evidence which established the complainant's injuries. In the premises therefore, learned state counsel was of the view that the prosecution had established a case for the conviction of the Appellant. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced so as to arrive at its own independent determination whether or not to uphold the conviction of the Appellant. In reaching its verdict, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and therefore give due allowance in that regard. (See **Okeno -vs- Republic**

[1972] EA 32). In the present appeal, the issue for determination by this court is whether the prosecution adduced evidence that established the Appellant's guilt on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has re-evaluated the evidence adduced before the trial court. It has also considered the rival submission made by the parties to this appeal. It was clear from the evidence that the prosecution relied on the evidence of identification to secure the conviction of the Appellant. According to the complainant, he was accosted by a group of people while he was crossing a foot bridge within Kariobangi Estate. The incident occurred on 23rd October 2013 at 7.30 p.m. He was carrying a bag containing two bibles, a hymn book and a bible study book. He told the court that when the group of men approached him, they blocked his path. He said he was able to recognize one of the men. He was popularly known as 'Otis' within the estate. Otis is the Appellant. The complainant testified that he hit one of the men with the bag that he was carrying. The Appellant joined the fray and stabbed him on the neck. He screamed thereby alerting members of the public. The members of the public came to the scene. The group of men then robbed of his bag and ran away. The complainant told the court that he was able to be positive that he had identified the Appellant because the Appellant was previously known to him prior to the robbery incident. He told the court that he was able to identify him by the light from a street lamp near the bridge. He asserted that the light was bright and he was able to clearly see what was happening. After the robbery incident, he was taken to hospital where he was treated and discharged. On 26th November 2013, the complainant saw PW2 Dr. Joseph Maundu at the Police Surgery who assessed the degree of injury that he had sustained as harm. The doctor observed that the complainant had soft tissue injuries on both hands. He had a deep cut wound on the left shoulder. He noted that the injuries occurred two days prior to examination. The duly filled P3 form was produced into evidence by PW2.

According to PW3 PC Bernard Achalo, who was then based at Kariobangi Police Station, the complainant made a report to the police on 30th October 2013. He told PW3 that he was robbed on 23rd October 2013 at about 7.00 p.m. as he was going home from church. PW3 testified that the complainant told him that he had identified the Appellant as the person who had robbed him. After the report was made, PW3 looked for the Appellant and arrested him. He did not conduct an identification parade because the complainant had told him that he had recognized the Appellant during the course of the robbery. Nothing that was robbed from the complainant was recovered from the Appellant. According to PW3, the bible that was robbed from the complainant was recovered by school children and handed over to the complainant.

It was this evidence that the prosecution relied on to secure the conviction of the Appellant. On this court's re-evaluation of this evidence, it was clear to the court that there are gaps in the complainant's evidence that militates against this court finding that the complainant had indeed identified the Appellant during the course of the robbery. The reason for this finding is that it was not clear from the complainant's evidence under what circumstances he knew the Appellant prior to the robbery incident. Other than saying that he knew the Appellant as a resident of Kariobangi Estate, he did not state how he had previously related or interacted with the Appellant to be able to be certain that he knew the Appellant as the 'Otis' that attacked him on the material night of the robbery.

Further, the robbery incident took place at night. Although the complainant told the court that there was a security light near the bridge, it was not clear from his testimony what position he was *vis-a-vis* the security light that enabled him to be certain that he was positive that he had identified the Appellant. The Court of Appeal in **John Muriithi Nyaga –vs-Republic [2014] eKLR** held thus:

“In addition, there is no evidence as to the type of light or how bright or otherwise it was but the High Court was alive to the need of this evidence as it stated,

“in testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspect etc.”

In the present appeal, it was clear from the evidence of the complainant that he was confronted by a group of men who blocked his pathway as he was crossing a bridge which appears from his evidence to be a footbridge. The complainant confronted one of the men by hitting him with his bag. It was then that he was assaulted by the group. In such hectic circumstances, this court is not convinced that the complainant was able to isolate the face of the Appellant from that of the group of men that was attacking him. Further, it was apparent from the testimony of the investigating officer that the complainant did not immediately report the robbery incident to the police. He made the report seven (7) days after the robbery incident. This raises doubt that the complainant was robbed in the circumstances that he described to the court.

This court agrees with the Appellant that the prosecution ought to have called evidence to set out the circumstances of his arrest. From the investigating officer's testimony, it was not clear how the Appellant was arrested. What is interesting is that after the Appellant's arrest, the complainant was called to the police station to identify him. If the complainant knew the Appellant, *why was he called to the police station to identify him?* The nature of the evidence adduced by the prosecution clearly raises reasonable doubt that the Appellant was properly identified to enable the trial court convict him.

The Appellant complained that he was denied the opportunity to cross-examine the complainant when he testified before court. From the proceedings, when the complainant first testified before court, the Appellant indicated that he did not wish to cross-examine the Appellant. However, sometime later, the Appellant requested the trial court to recall the complainant so that he could cross-examine him. The trial court declined the Appellant's application for no apparent reason. For the trial court to later use the same untested evidence of the complainant to convict the Appellant, meant that the Appellant's right to fair trial as enshrined in **Article 50(2)** of the **Constitution** was infringed. The trial court denied itself the opportunity of testing whether the complainant's testimony, which happened to be the evidence of a single identifying witness, was such that it implicated the Appellant to the required standard of proof beyond any reasonable doubt. This court therefore, cannot, in good conscious, reach the same finding as the trial court that the complainant had positively identified the Appellant during the robbery.

The upshot of the above reasons is that the Appellant's appeal has merit and is hereby allowed. The Appellant's conviction is hereby quashed. The Appellant is acquitted of the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF JUNE 2018

L. KIMARU

JUDGE