

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 8 OF 2018

DOUGLAS SAMUEL OBONYO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from the original conviction and sentence of Hon. R.M Oanda – RM dated 6th December 2017 at the Principal Magistrate’s Court at Kilgoris in Criminal Case No. 775 of 2016)

JUDGMENT

1. The appellant, DOUGLAS SAMUEL OBONYO, was charged, convicted and sentenced to death for the offence of robbery with violence contrary to section 296(2) of the Penal Code (Chapter 63 of the Laws of Kenya). It was alleged that on 30th May 2016 at Enoson Location in Transmara West District of Narok County with another not before the court he robbed SHEM MOGOI ONYANCHA of his motorcycle registration No. KMCR 676H make Bajaj valued at Kshs. 81,000/= and immediately before or after the time of such robbery wounded the said SHEM MOGOI ONYANCHA.
2. At the hearing of this appeal, counsel for the respondent conceded the appeal on the ground that the evidence of identification based on one witness was not safe, as it was contradictory. Notwithstanding this concession, I am obliged to consider it against the evidence and reach an independent determination whether or not to uphold the conviction.
3. Shem Mogoi Onyancha (PW 1) testified that he was going to work on 30th May 2016 at about 5.30 a.m on his motorcycle when he was stopped by the appellant whom he knew as a boda boda operator. The appellant tried to stab him but he lost control, fell down and ran to a home for safety. He was later treated at Ram Hospital where he was admitted on 31st May 2016 and discharged on 4th June 2016. He had sustained a cut wound on the right side of the face according to Festus Kurgat (PW 4), the clinical officer who examined him on 13th June 2016.
4. According to Corporal Francis Juma (PW 2), the appellant was arrested on 9th June 2016 while they were on patrol and after they received a report from PW 1 that a person who had robbed him had been seen in Rosiaka Sub-location. They arrested him and took him to Nyamaiya Police Station and later Enosoen Police Post.
5. The investigating officer, Sgt Patrick Rajwai (PW 3) Kilgoris Police Station at the material time testified that on 30th June 2016, PW 1’s case was reported at Enosoen Police Post. In cross examination, PW 3 told the court that it is members of the public who arrested the appellant and brought him to the police station.
6. In his sworn defence, he stated that he was arrested on 7th June 2016 by PW 4 at Rasiaga and taken to Nyamaiya Police Station on suspicion of having stolen a motorcycle. He was then taken to Enosoen Police Post before being taken to Kilgoris Police Station.
7. I have no doubt that the offence of robbery with violence was established as PW 1 was ambushed by an assailant accompanied by another person, assaulted with a panga as a result of which he sustained injury and his motorcycle stolen. What is in issue is the identity of the assailant as the incident took place in circumstances that were not favourable for positive identification as it was about 5.30 a.m. This though was not a case of identification of a stranger but recognition of a person known to PW 1 as a boda boda operator.
8. It has been established that in cases of recognition in such circumstances, the court has a duty to carefully review the evidence in order to satisfy itself that the recognition is positive and free from error as mistakes may be made even where parties know each other (**Anyononi and Others v. Republic [1980] KLR 59**).
9. I agree with learned counsel for the respondent that since the appellant was well known to PW 1, he ought to have been reported forthwith but the evidence shows that PW 3 received the report on 30th June 2016, a month after the incident. He stated that the accused was arrested and brought by members of the public yet the arresting officer (PW 2) stated that PW 1 was arrested on 9th June 2016 by him and not members of the public. The trial magistrate did not deal with these apparent inconsistencies which would go to assisting the court coming to the conclusion that recognition of the appellant was free from error. The conviction is therefore unsafe.
10. I allow the appeal, quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

Dated and delivered at Kisii this 27th day of September, 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.