



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 25 OF 2018

NICHOLAS ONYANGO OCHOLA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. B. Ochieng, Ag PM

dated 1st December 2014 at Principal Magistrate's Court

at Maseno in Criminal Case No. 777 of 2011)

JUDGMENT

1. The appellant and three others, two of whom their appeal has been determined in ***Benson Achach Achach & another v Republic [2015] eKLR*** were charged with robbery with violence contrary to **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of Count 1 was that on 21st June 2011 at about 10.00pm in Kisumu West District within Nyanza Province they with other not before the court joint robbed EAO of a 50kg bag of beans valued at Kshs. 650/-, one bucket valued at Kshs. 250/-, onions valued at Kshs. 100/-, tomatoes valued at Kshs. 500/-, tea leaves valued at Kshs. 250/-, rice valued at Kshs. 600/- and a panga valued at Kshs. 400/- and at or immediately before or immediately after the time of such robbery used actual violence on the said EAO.
2. The appellant herein was the 3rd accused. Count 2 was a charge of defilement contrary to **section 8(1) and (3)** of the ***Sexual Offences Act*** against the 2nd accused. The appellant and his co-accused persons also faced Count 3 of assault causing actual bodily harm contrary to **section 251** of the ***Penal Code***. The particulars were that on 21st June 2011, the appellants, in Kisumu West District unlawfully assaulted EAO thereby occasioning her actual bodily harm.
3. The appellant and his co-accused were convicted on the first and principal count of robbery with violence. The appellant was sentenced to life imprisonment.
4. The appellant now appeals against the conviction and sentence based on his petition of appeal and oral submission made on his behalf by his counsel Mr. Anyul. The principal issue raised by the appellant is that of identification. He contended that he was not identified on the material night and that the learned magistrate failed to find that the conditions and surrounding circumstances could not allow positive identification. He contended that he was not at the scene of crime and that the conviction and sentence was unjustified. He also contended that his conviction on the 2nd count was unwarranted since he was not charged with it.
5. 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***). The prosecution case was as follows.
6. The prosecution case was narrated by the principal witness, EOO (PW 1) who recalled she was sleeping in the sitting room of her mother's house with her younger siblings WA (PW 2) and JA (PW 4) on the night of 21st June 2011. Their mother, RAO (PW 2) was attending a funeral. At about 10.30pm, she heard a bang on the door and four assailants came in and started demanding Kshs. 10,000/- which she did not have and they rejected her suggestion that they take Kshs. 500/-. PW 1 stated that the intruders had 3 big torches which they were flashing in turns. She said that she 4 people in the house all armed with pangas and that she recognised them as Atoti, Fred, Achach and Okoth who are also residents of Magwar. She said she held Fred by the neck and Atoli intervened by hitting her on the back as Achach also hit her on my neck.

7. PW 2 recalled that on the material night she saw five people enter the house. One of them flashed a torch and she only recognised two assailants as the other three had covered their faces. She testified that her sisters were assaulted and that she was dragged into one of the bedrooms and defiled. She passed out and found herself at Kombewa Hospital. PW 4 was also present in the house when the assailant struck. She told the court that the assailants came into the house flashing torches, demanding money and threatening to beat them. She testified that the assailants started beating PW 1. Although she knew the appellants, she could not recall seeing them.

8. After the orgy of violence, the assailants left whereupon the PW 1 raised alarm. A neighbour, Joan Odhiambo Onyango (PW 7) took them to hospital. PW 3 arrived from the funeral that morning and was informed of the incident. She proceeded to Kombewa Hospital where she found PW 1 and PW 2 undergoing treatment. She testified that she knew appellants as they were from the neighbourhood. PW 1 was later examined by Paul Outa Ouko (PW 9), a clinical officer at Kombewa District Hospital, who confirmed that she had sustained injuries on the chest inflicted by a panga.

9. A local youth leader, MOO (PW 5) recalled that on 22nd June 2011, he was informed that some people had invaded his in-laws. He proceeded to Kombewa Hospital where he found PW 1 and PW 2 admitted. PW 1 gave him the names of the assailants and he proceeded to report to Kombewa Police Station. He later met the Assistant Chief who assisted in locating and arresting the appellants and the other accused. The Assistant Chief, Jennifer Okelo (PW 6), testified that the incident was reported to her on 23rd June 2011. She arrested one of the accused and confirmed that members of the public had arrested the others. PC Nzuki (PW 8), the investigating officer, told the court that he visited the scene at Kombewa and re-arrested the accused who had been arrested. He collected the exhibits and recorded statements.

10. When put on his defence, the appellant denied that he had committed robbery.

11. The offence of robbery is defined under **section 295** of the *Penal Code* as follows:

Any person who steals anything, and at, or immediately before, or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

12. For this robbery to qualify as a violent one under **section 296(2)** attracting a death sentence, the offender must be:-

a. armed with a dangerous or offensive weapon or

b. be in company with one or more other persons or

c. immediately before or after the time of robbery, wound, beat, strike or use any other personal violence to the victim.

13. It is apparent from these provisions that the prosecution must prove stealing as an essential element of the offence of robbery with violence. From the particulars of the charge the appellants were accused of stealing 50kgs of beans valued at Kshs. 650/-, at one bucket valued at kshs. 250, Onions valued at Kshs. 1,000/-, Tomatoes valued at Kshs. 500/- tea leaves valued at Kshs. 400/-, Rice valued at Kshs. 1,000/-, Sonitec radio valued at Kshs. 600/- and a panga valued at Kshs. 400/-.

14. However, none of the witnesses called by the prosecution testified that the items outlined in the charge were stolen. PW 1 testified that, *"the attackers took J's money in a basket. I didn't know the amount of money. A bag containing my Kshs. 500/- was also taken by the thugs."* PW 2 simply stated that household goods were removed outside but did not elaborate what these household goods were. PW3 did state what was taken from her house while PW 4 did not give any evidence on the items stolen.

15. In order to succeed, the prosecution had to prove that the items set out in the charge sheet were stolen in the course of the robbery as the stealing is an essential ingredient of the offence of robbery. I find that the prosecution failed to prove that the items set out in the charge sheet were stolen from the complainant consequently the offence was not proved.

16. As regards the 2nd count of defilement, I have come to the conclusion that the conviction was mistaken since the appellant had not been charged with that count.

17. Before I delve into the 3rd count of assaulting PW 1 and causing her actual bodily harm, the court is tasked to decide whether the evidence of identification was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. In the case of *Kiarie v Republic [1984] KLR 739*, the Court of Appeal was more categorical on reliance on such evidence holding that the evidence must be *"absolutely watertight"* to justify conviction.

18. The robbery in the present case was committed at night and the only form of lighting was torches in the hands of the robbers. PW 1, PW 2 and PW 4 confirmed that the assailants were flashing torches. Only PW 1 said she was able to identify the appellant. She recognized the appellant as he came from the same village and she had known him from childhood. PW 2, PW 3 and PW 4 also confirmed that they came from the same neighbourhood. She gave their names to the Police following which they were arrested so soon thereafter. This was thus a case of recognition as opposed to identification of a stranger.

19. From the fact that the assailants had torches in the closed space of the room, the time it took for the assailants to threaten PW 1 and demand money and the fact that the appellant and others were not strangers is sufficient assurance that the identification evidence upon which the appellant was convicted was free from error. I also find that nothing was suggested to the witnesses in cross-examination that implied a grudge of some sort against the appellant.

20. Evidence that PW 1 sustained injuries was established by PW 9 who classified her injuries as harm. The appellant's defence did not shake the prosecution case. I therefore find the appellant guilty of assault causing actual harm contrary to **section 251** of the **Penal Code** and I convict him accordingly.

21. The appeal succeeds and is therefore allowed on the following terms;

a. The appeal is allowed and the convictions and sentence for Count 1 is being robbery with violence contrary to section 296(2) of the Penal Code and defilement contrary to section 8(1) and (3) of the Sexual Offences Act are quashed and the sentence on the 1st count is set aside.

b. The appellant is convicted on Count 3 being assault occasioning actual bodily harm contrary to section 251 of the Penal Code and is sentenced to three (3) years imprisonment and the sentence shall run from date of sentence which is 15th March, 2018.

DELIVERED AND SIGNED AT KISUMU THIS 20th DAY OF December 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - N/A

For the Appellant- Mr Athuro/Anyol

For state - Mr Muia