



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIIAYA

HCCRA NO. 3 OF 2016

(CONSOLIDATED WITH CRIMINAL APPEAL NO. 2 OF 2016)

(CORAM: J.A. MAKAU – J.)

ISAAH OTIENO JUMA.....1ST APPELLANT

CALEB ODHIAMBO OKOTH.....2ND APPELLANT

VS

REPUBLIC..... RESPONDENT

(Being an Appeal against both the conviction and the sentence dated 13.1.2016 in Criminal Case No. 921 of 2016 in Bondo Law Court before Hon. M.Obiero-PM)

J U D G M E N T

1. The Appellants **ISAAH OTIENO JUMA** and **CALEB ODHIAMBO OKOTH** (formerly accused no. 1 and accused no. 2) were jointly charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the charge are that on the 14th Day of September 2014 at about 2000hrs at North Gem sub-location in Gem Sub-County within Siaya County jointly robbed **WILLIS OUMA KANOTI** of Kshs. 3,000, one mobile phone make *Alcatel*, assorted clothing all valued at Kshs. 7,000 and immediately before and immediately after the time of such robbery beat the said **WILLIS OUMA KANOTI**.

2. After full trial, the Appellants were found guilty, convicted and sentenced to suffer death.

3. Aggrieved by the conviction and sentence, they each filed an appeal setting out several grounds of appeal. Mr. Wakla, Learned Advocate, subsequently appeared for both Appellants and filed supplementary grounds of appeal setting out the following grounds:-

a. The Learned Trial Magistrate erred in law and fact in convicting the Appellant when the evidence on record was manifestly insufficient, inconsistent and had glaring gaps hence incapable of sustaining a conviction.

b. The Learned Trial Magistrate erred in law in failing to give adequate consideration to issue of identification of the Appellant by the Prosecution witness.

c. The Learned Magistrate erred in law and fact in convicting the Appellant against the weight of evidence on record.

4. I am the first appellate court and as expected of me have to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are set out in the case of **Issac Ng'anga Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 OF 2005** as follows:-

“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)'

5. Mr. Wakla, Learned Advocate, appeared for the Appellants whereas M/S Odumba, Learned State Counsel, appeared for the State.

6. The facts of the Prosecution's case are contained in the record of appeal and I need not reproduce the whole of it, however, I shall summarize the Prosecution's case and the defence.

7. The Prosecution's case is as follows: - that on 4/9/2014 at around 8.00pm, Willis Ouma Kanoti left for his home on foot. There was moonlight and ahead of him, he saw two people and on reaching where they were, one of them said “*tumfanyie*” and within a short time he was attacked and beaten. He asked them why they were killing him while calling them by their nicknames of “Lebo” and “Mangoti” being the 2nd and the 1st Appellants respectively. They did not talk to him but hit him on the head, stabbed him at the chest and he fell down, they then pulled him to a cattle shed, removed all his clothes, tied his legs with a rope which they tied to a cow shed. PW2 screamed for help. He heard Lebo, the 2nd Appellant say, “*wait here I go and bring something*”. PW2 then managed to escape, running towards the road, reaching near the house of PW3; who responded to his screams. He told her it was “Lebo” and “Mangoti” who were killing him. PW3 talked to the assailants as they were running away. They told her PW2 was lucky as they wanted to kill him. PW2 later reported the matter to the police. The following day he led police to the home of Lebo, the 2nd Appellant but did not find him but the 1st Appellant who was arrested. The 2nd Appellant disappeared and was arrested after 1 month when they were discussing the matter with the complainant. PW2 recorded statement at Akala Police Station and was issued with a P3 form which was completed at Siaya District Hospital. PW2 testified he knew the two appellants, who beat him and they did not tell him why they were beating him. PW2 stated that during the incident, he lost his phone and clothes. That the following day, they went to the scene with police officers and found his clothes at the scene and the phone was recovered from Lebo's father. PW2 identified the clothes, a black pair of trousers - MFI 2; black T-shirt - MFI 3; black pullover - MFI 4; phone make *Alcatel* - MFI 5. He stated he had money and the money was not recovered. PW2 stated he did not have a receipt in respect of the phone.

8. PW1, Jared Obiero, a Clinical Officer based at Siaya District Hospital identified a P3 form in respect of Willis Ouma who was assaulted on 4/9/2014. From the examination of the report, he noted the nasal bridge was swollen and tender, with tenderness on the chest. He classified the injury as harm and produced P3 form as exhibit 1.

9. PW3, Richard Okoth Onyango stated that he realized at 7.00am, one of his children Caleb Onyango, the 2nd appellant had on 5/9/2014 been involved in a fight the previous night. That he found a phone outside the door to his house. PW3 subsequently informed police and gave them the phone. He identified the two Appellants and stated they live in the same village with him. He stated the 2nd Appellant, Lebo is his son whereas the 1st Appellant, is son to a friend of his. That when he recovered the phone, the 1st Appellant had come at his home and gone to the 2nd Appellant's place. That the person who fought with the Appellants claimed the phone was his. On cross-examination, PW3 stated he found the phone at the door and did not know who placed it there.

10. PW4, Beatrice Nelly Ojwang testified that on 4/9/2014 at 9.00pm while at her house, she heard Ouma, the complainant, screaming. She rushed out and asked him what was happening and he told her that Lebo (the 1st Appellant) and Caleb (the 2nd Appellant) were killing him. She rushed to the scene and found Isaiah and Caleb and on seeing her, they started running away. Isaiah was carrying a *rungu*. She said the two were assaulting Ouma, the complainant. She noted he was bleeding from the nose, forehead and the right side of the ribs. PW4 escorted the complainant to Wagai AP Camp, naked and later took him to Nyagondo Dispensary from where he was referred to Siaya. She then recorded her statement, the following day at Akala Police Station. PW4 told court she saw the Appellants with aid of moonlight as they were not far from her, that she knew them prior to the date of the incident. Complainant told PW4 the two had taken his clothes. On cross-examination, PW4 stated the complainant Ouma, is her son. PW4 denied the first Appellant owes her money. PW4 stated she does not know the origin of the exhibit before court as they did not recover any exhibits.

11. PW5, No. 67148 Cpl John Turunya, the Investigating Officer in this case, stated that on 29/8/2014, he was handed over the case by PC Chege who had gone on transfer, that on 5/9/2014 Isaiah Otieno was brought to Akala Police Station by Administration Police officers together with the complainant and on 4/10/2014, the 2nd Appellant was also taken to the same police station by police administration officers, that both appellants were charged with the offence before court. There were four exhibits which included a mobile phone make *Alcatel*, one pair of trousers, a belt, a grey T-shirt and a black jumper which were handed over to PW5 by PC Chege. He discovered the exhibits were handed over by PC Richard Okoth who handed over to PC Shaka who handed over to PC Chege. He produced the phone as exhibit 5, a pair of trousers exhibit 2, grey T-shirt exhibit 3, black jumper exhibit 4. On cross-examination, PW5 stated that he did not investigate the matter, but only stated what he read from the file and added he did not know anything about the file save for what he had read. He stated nothing was recovered from the accused.

12. The first Appellant, Isaiah Otieno Juma (DW1) gave testimony on oath and stated that on 4/9/2014 at 8.00pm, he was at his home and he did not remember anything that happened. That he was arrested on 5/9/2014 from the farm and told there was a case of stealing against him. He was escorted to AP Camp, then to Akala Police Station and later charged with this offence. He denied knowing anything about the charges. On cross-examination, he denied knowing Caleb (the 2nd Appellant). He denied attacking the complainant and stated he did not know the complainant. He denied that he was having any nickname. He denied having taken the complainant's phone.

13. The second Appellant Caleb Odhiambo Okoth (DW2) in his sworn statement told court that on 4/9/2014 at 8.00pm, he was at his house and that on 4/10/2014 at 9.00pm a police officer came and asked him about Nelly, and on telling him he knew Nelly, he arrested him and escorted him to Akala Police Station. On 6/9/2015 he was charged with the offence before court. On cross-examination, he denied knowing Isaiah. He admitted that Richard Okoth was his father and that he cheated the court. He stated on 4/9/2014, he was at home and he did not hear anything nor did he see anybody and that on 5/9/2014, he did not see any phone. He denied having assaulted the complainant and taking his phone. He stated he had a grudge with the complainant because the appellant's family cow damaged complainant's family maize.

14. Mr. Wakla, Learned Advocate, for the appellants argued all the grounds of appeal in the supplementary petition of appeal in support of the appeal. Mr. Wakla urged that robbery was not proved

as nothing was stolen. That the appellants were not identified, that if any offence was proved it was other than robbery with violence; and that evidence adduced was inconsistent, and contradictory hence the offence was not proved. M/S Odumba, Learned State Counsel opposed the appeal urging both the conviction and sentence were proved and urged the court to dismiss the appeal, uphold the conviction and confirm the sentence urging the appellants were recognized, the offence of robbery was proved though stealing was not proved and as such stated if court finds robbery was not proved to find, there was attempted robbery with violence.

15. Mr. Wakla combined ground numbers 1 and 2 of the appeal and argued them together as one ground. He urged that the evidence on record did not support a conviction of robbery with violence contrary to **Section 296(2) of the Penal Code**. He urged that the ingredients of an offence of robbery with violence were not satisfied as defined in **Section 295 of the Penal Code and Section 296(2) of the Penal Code**. **Section 295 of the Penal Code** gives definition of robbery as follows: -

“295. 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.”

16. Under the definition section of “robbery”, it is clear that in an offence of robbery something must be stolen and at or immediately before or immediately after in time of stealing there is use or threat to actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to it being stolen or retained.

17. **Section 268(1)(2)(a) of the Penal Code** defines “stealing” as follows: -

“268 (1)A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say -

(a) an intent permanently to deprive the general or special owner of the thing of it”.

18. The question that must be answered by considering the evidence adduced before the trial court is whether from the evidence tendered and upon its evaluation and analysis by this court there was sufficient evidence for trial court to find as it did, this being a question of law. It was complainant’s evidence (PW2) that when he reached where the appellants were standing, one of them said, “*tumfanyie.*” That they attacked him and beat him. They hit him on the head, stabbed him on the chest, pulled him by his legs to cattle shed, removed his clothes and tied him with a rope. He heard Lebo, the 2nd appellant say, “*wait here I go and bring something.*” That when PW2 escaped, he heard PW4 talk to appellants who said they wanted to kill the complainant. PW2 stated further that the appellants did not tell him why they were beating him.

19. PW2 stated during the incident, he lost money, phone and clothes, he was wearing. The clothes were recovered at the scene of incident and the phone from near the house of the father of Lebo, the 2nd appellant. From the definition of stealing under **Section 268(1)(2)(a) of the Penal Code**, it is clear the appellants had no intention to permanently deprive the complainant of his property as it was found at the scene where probably the complainant left them when he escaped and as the appellants also left without carrying out their wish of beating the complainant further after PW4 intervened. On the issue of money lost, the charge sheet specifically states the appellants lost Kshs. 3,000/=, however, in his evidence he only stated he lost some money. PW4, mother to PW2 who came to his rescue never mentioned the complainant complaining of having lost money or a phone. PW5, the Investigating Officer similarly never mentioned the complainant having complained of having lost any money. That if the complainant had lost Kshs. 3,000/=, he would not have stated he lost money without stating how much. He would

have told his mother, the APs and the police that he lost KShs. 3,000/=. I find from the evidence of PW2 and other witnesses, that the Prosecution failed to prove that the complainant had KSh. 3,000/= and that he lost KShs. 3,000/= at the time of the attack. I consequently find and hold the Prosecution did not prove an offence of robbery as nothing was proved to have been stolen at the time of attack.

20. I find from the evidence of PW2, PW3 and PW4 that the appellants had no intention to steal but to assault the complainant and cause injuries to the complainant for unexplained reason.

21. Whether the appellants were recognized? The offence was committed at around 8.00pm in a dark night, there was moonlight which enabled PW2 to see the appellants, he heard one of them talk to him. He gave their names as Lebo, the 2nd appellant and Mangoti as the 1st appellant. He saw them during the time they were assaulting him and dragging him to the cattle shade. PW4 heard PW2 screaming for help, she went there and saw Isaiah (the 1st appellant) and Caleb (the 2nd appellant) and on seeing PW4 they started running away. PW2 told PW4 he was attacked by Isaiah and Caleb. PW2 and PW4 gave the Wagai Administration police officers and the Akala police officers, the names of the appellants as the attackers of PW2. PW2 took police officers to the appellants' homes. The complainant knew them prior to the incident. I find that the conditions and the time taken at the time of the attack were sufficient enough to enable the complainant and PW4 recognize and identify the attackers. I find the appellants were positively recognized. I find there was no case of mistaken identity.

22. Whether the Prosecution proved the charge of robbery to the required standard? Mr. Wakla submitted the Prosecution's evidence was inconsistent and contradictory. He submitted the complainant stated he was stabbed at the chest and stated that was an outright lie as the P3 form completed by PW7 did not mention any stab wound. That PW4 stated she saw the 1st appellant with a *rungu* which contradicted the evidence of PW2 as he did not mention the attacker being armed with any weapon. PW4 further stated no exhibit was recovered. Upon perusal of the prosecution witnesses evidence I find that there are some inconsistencies in evidence of PW2 and PW4; however, I am alive to the fact that where evidence is given by many witnesses it cannot be consistent in every material fact. I find the inconsistencies and contradictions in this case are not fundamental contradictions and inconsistencies, that can be said to dent the Prosecution's case.

23. In the instant case, upon evaluation and analysis of the evidence, it would appear the appellants herein were intent to beat PW2 as opposed to robbing him. In their defence, they made a general denial and denied being at the scene of the incident or meeting the appellant, they denied knowing him, however, from the evidence of PW2, PW3 and PW4, I find the witnesses knew the appellants very well as their neighbour. I find the three knew the appellants by visual appearance and their names. PW2 and PW4 put them at the scene of the incident. The appellants' defence that the matter was born out of grudge is without basis. PW3, the father of the 2nd appellant never mentioned of any grudge between his family and that of the complainant. None of the appellant put to PW2, PW3 and PW4 of existence of any grudge. I find their defences as a mere denial and reject the same.

24. The appellants in this case, as per PW2 when he reached where they were, one said, "*tumfanyie*", they then attacked him, beating him and pulled him by his legs to cattle shed. They were not interested in robbing him but causing injuries to him. They tied his legs and one of them told the other to, "*wait there, as I go to bring something*". PW2 even told PW4 the two wanted to kill him. PW4 when she talked to the appellants as they were running away, they told her that he was lucky as they wanted to kill him. The complainant never in his evidence stated the aim of the appellants was to rob him but not to kill him. The time when PW4 intervened, the appellants ran away and did not carry anything from the complainant. They left all the complainant's valuables behind. The clothes were found at the scene and so was the phone near the door to the house of PW3.

25. In the case of **Moses Odhiambo Odhiambo and two Others V Republic, Kisumu Criminal Appeal No. 38 of 2016**, the Court of Appeal stated: -

"On our part having carefully considered the testimony tendered before the trial court we would agree with the two counsel that had the two courts below correctly directed themselves, they

would have found the appellants guilty of the lesser but cognate offences of either assault or grievous harm rather than that preferred. The evidence on record shows that the attack upon the complainant was preceded by a disagreement or an altercation of some sort, possibly arising from a business rivalry. Again, the fight was protracted and involved other youths.

The attack upon the complainant could only be explained on the basis of some unexplained reason and not robbery. The two courts below having failed to direct themselves on this issue, the robbery charge cannot stand. We must, accordingly, give the benefit of doubt to the appellant and quash the conviction for robbery with violence and set aside the sentences of death. In their stead, we substitute therefore convictions for grievous harm contrary to Section 234 of the Penal Code since the injury sustained by the complainant was classified as main according to the P3 form – exhibit No. 1”.

26. Recently, the Court of Appeal in **Harun Mwambia Ndereba and Kimathi Mugo Basilio V Republic Criminal No. 57 of 2013 (2015)eKLR**, sitting at Nyeri faced with similar matter stated as follows: -

“In the instant case, the attack upon the complainant was because he refused to part with Kshs.20, the illegal “toll” demanded by the appellants. We are therefore of the considered view that had the two lower courts properly directed themselves, they would have found the two appellants guilty of grievous harm and not robbery with violence contrary to Section 296(2) of the Penal Code as the facts pointed to assault and not of robbery with violence”.

27. In the instant case, the appellants attacked the complainant with the aim of inflicting injuries on him as they stated, “*tumfanyie*”, as he approached them and from the evidence, their intention was not to steal anything from him. I am therefore of the considered view, that the appellants as per P3 form exhibit 1, produced by PW1, they committed the offence of assault and are guilty of assault contrary to **Section 251 of the Penal Code** and not robbery with violence contrary to **Section 296(2) of the Penal Code** as the facts as stated herein above pointed to assault and not the offence of robbery with violence. Accordingly, I find the appeal to be with merits, I quash the convictions of robbery with violence and set aside the sentences of death, instead **I find each of the appellants guilty of an offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code as the injury sustained by the complainant were classified as “harm”.**

Each of the appellant is sentenced to 2years imprisonment, the sentences to run from the date of conviction, namely 13/1/2016.

DATED AT SIAYA THIS 23RD DAY OF FEBRUARY 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 23RD DAY OF FEBRUARY 2017.

In the presence of:

Mr. Wakla for Appellants: Present

M/S Odumba: for State

Court Assistants:

1. George Ngayo

2. Patience B. Ochieng

3. Sarah Ooro

J.A. MAKAU

JUDGE