



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 181 OF 2012

BETWEEN

JOSEPH AMOYE OYAMO.....APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the Judgment of Hon. H. Wandere P.M. delivered on 24.07.2012 in Mumias Court Criminal Case No. 473/2011)

J U D G M E N T

Introduction

1. The appellant herein Joseph Amoye Oyamo was charged with the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code. Particulars of the offence were that on the 20th day of June, 2011 at Khainga Village, Musanda Location in Mumias District within Kakamega County jointly with another not before court being armed with dangerous weapons namely pangas robbed Dickson Werimo of his motor vehicle keys, mobile phone make Nokia E71, shoes, loaf of bread, ATM cards of Equity valued at Kshs.8.140/= and cash Kshs.300/= and at the time of such robbery wounded the said Dickson Werimo.

2. The case was heard before the Senior Resident Magistrate's Court at Mumias which found the accused guilty as charged and sentenced him to death as prescribed by law.

The Appeal

3. The appellant was aggrieved by both the conviction and sentence of the trial court and filed this appeal which is based on the following homemade grounds;-

1) I did not plead guilty to the above appended charge.

2) The trial Magistrate erred both in law and fact in convicting me on the evidence of a single eye witness.

3) The trial court erred both in law and facts in convicting me when she knew that the exhibits brought to court were brought by the PW1 himself on the hearing day, that is clothing of the

complainant and the wallet which was allegedly stolen.

4) The trial Court did not consider there was darkness on the material night which did not render good visibility for positive identification as some of the prosecution witnesses even used lamps to come at the scene of the alleged incident.

5) The trial court did not consider that the evidence of PW1 was not genuine in terms of identification how exactly he identified me, what he used to identify me.

6) The trial court erred in law and fact when she convicted me yet there was no weapon or anything found on me to link me with the offence.

7) The evidence of PW1 was not consistent and was meant to implicate me with the offence.

8) The trial court rejected my sworn alibi defence which created reasonable doubt on the prosecution's case.

9) The sentence was very harsh

10) More grounds will be adduced when I get the lower court proceedings.

4. The appellant wants the appeal allowed, conviction quashed and sentence set aside and he be set at liberty.

Submissions

5. The appellant in canvassing this appeal filed written submissions. To a large measure he addressed the issue of identification.

6. He maintained that the complainant made a mistake in alleging that he recognized him identifying him on the material night as people resemble and that it was impossible for him to have run a head of the complainant to the sugar plantation and robbed him. He also submitted that there was nothing that prevented the complainant from shouting his name at the time of the attack, and therefore that the complainant's testimony was unsafe to warrant a conviction as the same was evidence of a single eye witness under difficult circumstances. The appellant also submitted that the prosecution witnesses had already formed an opinion against him following an earlier case. Finally, the appellant submitted that his alibi defence was rejected by the trial court. He maintained that he is innocent and should be set at liberty.

7. Mr. Oroni Senior Prosecution Counsel opposed the appeal. He submitted that the appellant was positively identified by the complainant as there was sufficient moonlight that evening at 7.30pm. He added that the complainant had known the appellant well for over 30 years, and that when the appellant was put on his defence he never raised the issue of a land dispute which was an afterthought. Counsel also submitted that in such an incident it is very hard to recover exhibits from suspects, and that in such circumstances a conviction can be based on the evidence of a complainant and his witnesses. In counsel's view the trial court properly found the appellant guilty. He urged this court not to interfere with both the conviction and sentence.

8. In a short rejoinder, the appellant maintained that he raised the issue of the land dispute and that the complainant gave a false testimony. He also maintained that at 7.30 P.m. on the material evening he was in his house with his wife and the mother.

Duty of this first Appellate Court.

9. This being a first appeal the court is duty bound to re-evaluate the evidence on record analyze it and come up with its own conclusions, only making an allowance for the fact that it never had the chance of

hearing and observing the witnesses during the trial to assess their demeanour. It has been widely held that such matters are best left to the trial court which had the chance to observe the witnesses. The duty of a first appellate court was well postulated in the well-known case of **Okeno Vs – Republic [1972] E.A 32**. In evaluating the evidenced this court will briefly analyze the proceedings during the trial.

The Prosecution Case

10. During the trial the prosecution summoned seven (7) witnesses who testified. PW1 hereinafter referred to as the complainant testified that on 20.06.2011 at about 7.30pm he was attacked by the appellant and another person whom he did not know. He had just parked his vehicle at a neighbour's home (Morris Nyaronjo's) because the road to his home was muddy and so he decided to walk to his home. As he walked to his home which was about 300 metres away, he saw the appellant with whom he had grown up and one he had known for over 30 years emerge from a sugar cane plantation. There was moonlight that night and he was able to see the appellant who was armed with panga and a "kiboko". The appellant whipped him with the "kiboko" and later used the panga to cut him on the head.

11. He was rescued by neighbours who heard him scream and was taken to Musanda Health Clinic for treatment. The next day he was discharged and he reported the matter to the police. He adds that the appellant went underground after the incident and was arrested after three (3) weeks.

12. He recovered some of the items he lost during the incident which were brought to him by one Evans Amoye. He further told the court that the appellant tried to reach him for reconciliation but he declined. During the trial the complainant produced the following exhibits.

- Auto Card from Equity Bank – PEX1
- Original old ID Card No. 841798 – PEX2
- Copy of new ID Card PEX3
- Copy of card from KATECO – PEX4
- Copy of booklet from Bukaya Health Center – PEX5
- P3 form PEX6
- Blood stained vest – PEX7
- Cream shirt with blood stains PEX8.
- Treatment notes from Musanda Health Center – PEX9

13. During cross examination, PW1 maintained that he knew the appellant well and that he had seen him earlier that day. He added that the appellant who attacked him emerged from their sugar cane plantation, and further stated that because of the bright moonlight that night he was able to recognize the appellant.

14. PW2 was the complainant's daughter. She was seventeen years old when she testified. She was taken through a voire dive examination. She gave a sworn statement. Her testimony was as follows;

15. On the 26.06.2011 she was at home sleeping when she heard a commotion outside the house. People were screaming and calling her mother. She woke up and followed her mother towards the river. At the river she saw her father who was bleeding from the head and his shirt was all bloody. She also saw her neighbours at the scene including one Joseph who sent her for the keys of her father's car. They took her father to Musanda Hospital where he was examined and treated. She made a report at Musanda. PW2 identified the appellant in the dock. Later after about a month she picked three cards PEX4 and PEX5.

16. On cross examination by the appellant PW2 explained that it is her father who told her that it is the appellant who attacked him. PW3 assisted the complainant by taking him to hospital for treatment since he could drive. He stated that he was attracted to the scene by the scream from the complainant. At the scene, he saw the complainant who was bleeding and whose clothes were all bloody. The complainant told him that Amoye the appellant was the one who had attacked him. PW3 testified that he had known the appellant since birth. He added that he sent the complainant's daughter for the father's spare car keys which he used to open the car and transport the complainant to hospital. Thereafter they reported the incident to the police. Thereafter, the appellant went missing until he was apprehended weeks later.

17. On cross examination, PW3 maintained that the appellant was the only son of Omoye in their village. PW4 examined the complainant on the 01.07.2011 while at Bukaya Health Centre. He gave the complainant's history and offered him further treatment and filled the P3 form. He told the court that the complainant's injuries were ten (10) days old and he opined that a blunt object caused the injuries which he classified as "harm".

18. PW4 also produced all treatment sheets from Musanda Clinic and the P3 form. They were marked as PEX6, 7 and 9. PW5 was at home on 20.06.2011 at 7.45 PM when PW2 and PW3 went to him and told him what had happened to the complainant. He went with them to the scene where he saw the complainant who had a cut wound on the head and was bleeding. He assisted in taking the complainant to hospital. He testified that there was moonlight that evening and that the person who attacked the complainant was the appellant who was well known to him.

19. On cross examination PW5 told the court that he only witnessed the injuries on the complainant and nothing else. PW6 No. 92262 told the trial court that after receiving the report of the attack on the complainant on 10.06.2011 from PW2, PW3 and PW5 he started looking for the appellant whom he knew as an ex-convict. They found him and arrested him a month later. He did not resist arrest. He added that some of the complainant's documents which were lost during the robbery were recovered. He later recorded his statement. He identified the complainant blood stained shirt and vest PEX7 and 8 respectively.

20. On cross examination PW6 explained that it was the members of the public who informed him that the appellant was an ex-convict. He added that when the case was reported the complainant mentioned the appellant's name. PW7 No. 43331 carried out investigations into this matter after booking the report of the attack from PW2, PW3 and PW5. He went to the health centre where complainant has been taken for treatment. He saw the injuries the complainant had sustained. The complainant told him that it was Amoye the son of Oyamo who attacked him and cut him up. It happened that he PW7 knew both families in this case. After interrogating the complainant PW7 left the hospital and prepared a robbery with violence report. The officer he first sent to arrest the appellant did not find the appellant that night. He alerted wananchi and they all continued to look after the accused. He further told the court that the appellant had a children's case and that it was because of the said case that he came to know the appellant.

21. He later issued the complainant with a P3 form. Later, he received a tip off on the whereabouts of the appellant. PW7 sent two officers who went and apprehended the appellant. He is the one who produced all the PEX1-8.

22. The prosecution closed its case after all the seven (7) prosecution witnesses had testified. The trial court ruled that a prima facie case had been established against the appellant and placed him on his defence.

Defence Case

23. The provisions of Section 211 of the Criminal Procedure Code were duly explained to the appellant who thereafter opted to give a sworn defence. He called one (1) witness.

24. He told the trial court that on the date in question he was at home with his wife till morning. In the morning he left for work. He claimed that he did not know what happened during that night of 20.06.2011. It was in July, 2011 that he was arrested and placed in the cells at Musanda. The charges before him are all strange.

25. He was cross examined by the court prosecutor IP Mwitii. He stated that PW1's evidence were lies against him because of a grudge over a piece of land.

26. DW2 who is the wife of the appellant confirmed that the appellant was with her the night the alleged incident occurred. The next day they went together to weed and on their way back the appellant was

arrested. She was told that her husband was the one who was involved in attacking the complainant which according to her was not true. The defence closed its case and judgment delivered on 24.07.2014.

Analysis of the Evidence

27. From the evidence on record PW1 was attacked at night by a person known to him and who robbed him of the items as described in the charge sheet. He was the only witness that night. Other prosecution witnesses only came to his aid after he raised an alarm which attracted them to the scene. The prosecution witnesses only saw the injuries on the complainant but they did not see the appellant in the act of robbing and attacking the complainant.

28. On his part the appellant called his wife as a witness to his alibi defence. The wife claimed that they were together with the appellant throughout the night the complainant was attacked and that the next day they went together to weed in their farm. As they went home after weeding the appellant was arrested on allegations that he was the one who had attacked the complainant. From the evidence of the prosecution the appellant was arrested a few weeks after the incident while DW2 testified that the appellant was arrested the next day after the incident occurred. From the charge sheet I note that it is true that the appellant was arrested on 21.07.2011 and arraigned in court on the 25.07.2011.

29. That notwithstanding PW1 the complainant testified that the appellant sought to reconcile with him after the incident but he (PW1) declined. This evidence was not corroborated but what is clear is that some of the complainant's items were recovered after some days and given back to the complainant by one Amoye.

30. The first issue that arises for determination is whether the identification of the appellant was proper. The robbery in this case took place at night, under circumstances that can be described as difficult. The complainant stated that there was moonlight, a fact that was corroborated by the evidence of other prosecution witnesses. This moonlight helped him to identify the appellant whom he recognized as he knew him before. He had seen him behind him as he walked home that night. He even described the clothes the appellant wore that night. I find that the trial court properly addressed itself to the identification evidence and came to the correct conclusion. The identification evidence against the appellant was sound. In the well-known case of **R-Vs. Turnbull and others [1976] 3ALL ER 549** the Court of Appeal held that " recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friend are sometimes made..... All these matters go to the quality of identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger."

31. In the instant case, the evidence relied on was that on PW1 and no other. The fact that PW1 described what the appellant was wearing and gave his name to the other prosecution witnesses and the police is sound evidence and the same remained unshaken by the prosecution.

32. It was PW1 who was attacked and his items were lost. However identified some of his items in court which were lost. These documents were later produced by PW7, the investigating officer. For that reason alone ground 3of the appeal cannot stand. The trial court in making its judgment noted that in circumstances such as this, it was difficult to recover the weapons used during the robbery. I do agree with the trial courts' finding and do hold that during the time the appellant escaped he must have hidden whatever weapons he had used to attack the appellant and the same could not be recovered.

33. The fact that complainant was injured proves that the appellant at the time of the robbery attacked him and cut him. There were also marks on the body of complainant seen by PW4 who examined the appellant. The marks the complaint's evidence that he was beaten by a kiboko.

34. As for the sentence, I find that this is the sentence provided for by law and there is no other.

35. Lastly, I would wish to say that the prosecutions do not have to exaggerate in their evidence in order

to make it strong. I looked at the charge sheet and noted that the appellant was arrested a day after the incident occurred and not three weeks later as alleged by PW1 and PW6.

36. The appellant only disappeared during the night of the incident. For the above reasons, I find no merit in the appeal. The conviction and sentence is upheld and the appeal dismissed. Right of Appeal within 14 days from today.

Orders accordingly

Judgment delivered, dated and signed in open court at Kakamega this 23rd day of March 2017

RUTH N. SITATI

JUDGE

In the presence of;-

present in person for Appellant/Applicant

Mr. Juma (present) for Respondent

Mr. Polycap Court Assistant