



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO: 18 OF 2016

[From Original Conviction and Sentence in Criminal Case

No: 535 of 2015 of The Chief Magistrate's Court at Thika]

CHRISTOPHER OLOO ODHIAMBO.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

1. This is the judgement of the **Criminal Appeal No: 18 of 2016**. The Appellant herein is **CHRISTOPHER OLOO ODHIAMBO**. The Appellant was charged with Robbery with Violence contrary to **Section 296 (2)** of the Penal Code at Thika in **Criminal Case No. 535 of 2015**.

The particulars thereof were that on **10th day of February, 2014** at **Weitethie** area within **Kiambu County** being armed with a knife robbed **KEVIN MWANGI WAITHERA** of his mobile phone make Tecno T20, Kodak Camera, Wallet, Maasai Kikoi and Cash 220/= and immediately before the time of robbery threatened to use actual violence.

2. In **count II**, he was also charged with Robbery with violence contrary to **Section 296 (2)** of the Penal code.

Particulars thereof were that on the **10th day of February 2014** at **Weitethie** area within **Kiambu County** being armed with a knife robbed **EMILY MUKIRI** of her mobile phone make Nokia Lumia, handbag containing a pair of shoes and **Ksh. 620/=** and immediately before the time of robbery threatened to use actual violence.

3. He pleaded not guilty when the charge was read to him on **3/02/2015**. The prosecution marshalled four **(4)** witnesses to testify against the accused. He was put on his defence. The accused gave unsworn evidence in his defence. In his judgement, the trial magistrate found the accused guilty and convicted him in both counts under **Section 215** of the Criminal Procedure Code. And, accordingly, sentenced him to death in count **I** and **II**. However, sentence in count **II** was suspended.

4. **The appeal**

The accused being aggrieved and dissatisfied has now appealed against both the conviction and the

sentence.

5. **HIS GROUNDS OF APPEAL are:**

1. **THAT** the trial magistrate erred in both law and fact by relying on evidence adduced in court by all 4 prosecution witnesses which was contradictory.
2. **THAT** the trial magistrate erred in both law and fact by failing to appreciate that the identification did not pass the test of the judges rules.
3. **THAT** the trial magistrate erred in both law and facts by failing to find that the investigating officer did not conduct any investigations and if he did, the same was shoddy in regard to my identification during the alleged scenario.
4. **THAT** the trial magistrate erred in both law and facts by failing to find that the possession of the alleged stolen items (mobile phone & Ki-koi) was not proved to the required standard of law.
5. **THAT** the trial magistrate erred both in law and facts by shifting the burden of proof to me.
6. **THAT** the trial magistrate erred both in law and facts by failing to give my defence adequate consideration, and further failed to uphold **Section 169 (1)** of the Criminal Penal code while disowning my defence.

Supplementary Grounds:

7. **THAT** the learned magistrate erred in both law and facts in convicting the applicant while relying on identification recognition evidence by prosecution witness No. 1 and No. 2 as the circumstances of identification were not favourable for positive identification.
8. **THAT** the learned trial magistrate erred in law and facts in convicting the appellant while relying on the evidence of **PW1, PW2 & PW3** which evidence was inconsistent and contradictory thus incredible.
9. The learned magistrate misapprehended the facts, applied wrong principle and drew erroneous conclusion to the prejudice of the appellant.
10. The learned magistrate erred both law and facts by failing to appreciate that the prosecution failed to prove its case to the standard required in law, to prove beyond reasonable doubt.
11. The learned magistrate erred, in both law and facts by provision of **Section 198** of the Criminal Penal Code.
12. The learned trial magistrate erred in both law and facts in convicting the appellant's constitutional right under **Art. 50 (2)** of constitution 2010, was violated.

The Appeal is opposed:

1. The conviction was proper after a fair trial was conducted. The witnesses that appeared narrated the incident, there were no contradiction. Thus the evidence was credible.
2. The learned magistrate correctly applied the doctrine of recent possession and connected the accused to the offence. The recovery was made the following day after the incident which sufficiently proximate to the commission of the offence. Therefore, the identification of the accused person together with recent possession confirms that indeed the accused committed the offence.
3. Lastly, there is nothing to fault the leaned magistrate in arriving at the conviction.

6. SUBMISSIONS

a) The appellant submitted that identification by recognition by **PW1** and **PW2** was not adequate as there was darkness. That the burden of prove lies with the prosecution, this cannot be shifted to the accused to prove his innocence. That my rights under **Article 50 (2) (b) (j) (m)** of the constitution were violated.

b) The respondent, **Mr. Kinyanjui** opposed the appeal.

1. The conviction was proper after a fair trial was conducted. The witnesses that appeared narrated the incident, there were no contradictions. Thus the evidence was credible.

2. The learned magistrate correctly applied the doctrine of recent possession and connected the accused to the offence. The recovery was made the following day after the incident which was sufficiently proximate to the commission of the offence. Therefore, the identification of the accused person together with recent possession confirms that indeed the accused committed the offence.

3. Lastly, there is nothing to fault the learned magistrate in arriving at this conviction.

7. First Appeal

This being a first appeal, this court has a duty of reconsidering and evaluating the evidence afresh with a view to reaching its own conclusions in the matter making allowance only for the fact that it neither saw nor heard the parties, Viva Voce, when they appeared before the trial court. **See generally Okeno -Vs- Republic [1972] E.A. page 32.**

8. Questions for Determinations

i) Was the offence of robbery with violence committed on material day on **10/02/2015** by the accused person?

ii) Was identification of the appellant full-proof?

9. Proceedings: Analysis

From the proceedings, it is not in dispute that **PW1** and **PW2**, that is **EMILY MUKIRI** and **KEVIN MWANGI WAITHERA** on **10th February, 2015** at **WAITETHIE** area at around **11 o'clock** at night. **EMILY** lost a mobile phone Nokia Lumia 520, a hand bag containing a pair of shoes and Ksh. 620/=

Whereas **KEVIN MWANGI** was robbed a mobile phone, make Tecno T20, Kodak camera, wallet, Maasai Kikoi and Ksh. 220/= and immediately before threatened to use actual violence with a knife with which he was armed and was in company of others, not before the court.

On identification of the appellant, **PW1 says:** I had not known him before. In cross-examination, he said: The place you robbed us was not very dark. **PW2 Says:** There was light but I recognized his voice and height. He further said in cross-examination: There were no lights but it was not very dark. I had not known you before. I mastered the height and I also mastered your voice. I never gave police your descriptions I could not remember everything after I left AP post.....

The person who robbed me was tall like you. **PW4** – police officer, **JULIUS KABANYA GITURU**. In his unsworn evidence, he was with one **SAMMY NGUNGI** a butcher man. The Nokia phone he was found with was given to him by **SAMMY NGUNGI**. When he led the police to **SAMMY**, they found him covering himself with a Kikoi, both were arrested but **SAMMY** was later released but he was charged.

10. The circumstances in which the robbery took place was at night. No evidence that there was

moonlight or street light. Both witnesses and complainants admit that they did not know the attacker before. They both claim they mastered the attacker's voice and height. But attacks of this nature are fleetingly brief in time to master anything. This therefore, raises doubt.

The attacker could therefore, be somebody else but in the company of the appellant. Therefore, in my view, the circumstances that prevailed then on **10/02/2015** at **11** o'clock at night were not conducive for positive identification of the appellant.

11. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either the prosecution or appellant.....as to whether committed the offence, the prosecution has not made out the case.....the appellant is entitled to acquittal. **See Woolington Vs DPP [1935] A.C. Page 481.** A legal aphorism states: It is better for a guilty person to be free than for an innocent person to be found guilty.

12. **FINDINGS**

For those reasons, there is merit in this appeal. Therefore, this appeal is hereby allowed. The appellant is therefore, hereby set free unless otherwise lawfully held.

JUDGMENT WRITTEN AND SIGNED BY:

C. B. NAGILLAH

JUDGE

JUDGMENT DELIVERED, DATED AND COUNTERSIGNED AT KIAMBU BY:

THIS 18TH DAY OF MAY 2017

JOEL NGUGI

JUDGE

In the Presence of:

.....the Appellant

.....for Respondent

.....for Court Assistant