



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.100 OF 2015

ISAACK OMONDI OSEWE.....1ST APPELLANT

ISMAEL OPAR KONDO..... 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

1. Both appellants were charged with 2 counts of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars of the offence were that:

COUNT 1 – ROBBERY WITH VIOLENCE, CONTRARY TO SECTION 295 AS READ WITH SECTION 296 (a) OF THE PENAL CODE.

Particulars of offence: **(1) ISAACK OMONDI OSEWE (2) ISMAEL OPAR KONDO-** On the 27th day of April 2014 at about 2.00 p.m. at United millers along the railway line in Kisumu East district within Kisumu County, jointly with another not before court while armed with dangerous weapons namely a panga and knife robbed EUNICE AWINO ONDONGO cash Kshs.2,500, one mobile phone make Techno and a pair of sleepers all valued at Kshs.5000 and at or immediately before or immediately, after the time of such robbery threatened to use actual violence to the said EUNICE AWINO ONDONGO

COUNT 11 – ROBBERY WITH VIOLENCE, CONTRARY TO SECTION 295 AS READ WITH SECTION 296(2) OF THE PENAL CODE

Particulars of the offence: **(1)ISAACK OMONDI OSEWE (2) ISMAEL OPAR KONDO** – On th 27th day of April, 2014 at about 2.00 p.m. At United millers along the railway lines in Kisumu East District within Kisumu county jointly with another not before court while armed with dangerous weapons namely a panga and knife robbed REPHA KHENDI MARENDE cash. Kshs.3200, one bag containing clothes all valued at Kshs.4100 and at or immediately after the time of such robbery threatened to use actual violence to the said REPHA KHENDI MARENDE.

2. The prosecution called several witnesses to buttress its case. Eventually the appellants were convicted and sentenced to suffer death hence this appeal. The entire proceedings at the lower court can be summarised as hereunder.

3. **PW1 EUNICE AWINO ONDONGO** was walking home at around 2 p.m. behind United Millers within Kisumu Town. She was with PW2 Gladys Refa Kendi. Suddenly they were both attacked by 3

men who were armed with a knife and a panga. They robbed her of the assorted items enumerated in the charge sheet. She then struggled and managed to escape. She thereafter managed to meet people who assisted in arresting the two out of the three assailants.. The 3rd assailant managed to escape. They also recovered a panga but not the stolen items. The two were escorted to Railways Police Station.

4. **PW2 REFA KHENDI MARENDE** gave same testimony as her colleague PW1. She also managed to escape and the following day she reported at Railways Police Station. She managed to identify appellants while she was recording her statement. She said that it was 2nd appellant who had a knife while the 1st appellant had a panga.

5. **PW3 PAUL ATIENO ANTHOGO** was at his place of work on the material day at around 3.30 p.m. when PW1 approached him and told him about the incident. He went with her together with others and managed to apprehend the three persons but the 3rd one managed to escape and in the process of struggling to disarm them the panga cut the 1st appellant. Apparently the said 1st appellant used to work for PW3's mother and consequently he knew him well. They however did not recovery any items from the appellants. They then took them to the police station.

6. **PW4 P.C. NAFTALI NYAMOUMI** received the two appellants at the Railways Police Station when they were brought by the members of public. One of them had been cut and was taken to hospital. He also received a panga handed over to him.

7. **PW5 CPL. STEPHEN MAINA** was the investigating officer. He found the suspects already at the police station as well as the panga recovered from them. He took statements from the witness and proceeded to charge the appellants. He produced the panga as an exhibit.

8. When put on their defence the 1st appellant gave unsworn evidence denying the charge. He said that he was on duty on the material day at a hotel (Lwangni) where he works together with his mother. He said that some people approached him and asked for a person who wore a short. On answering negatively he was cut on the neck and lost consciousness and he found himself at the hospital and later arrested and charged.

9. The 2nd appellant told the court that on the material day he had gone to look for fish to feed his wife who had delivered. He saw some people rushing to where someone was washing utensils and he saw the man fall down. He rushed to the scene and on inquiring why they attacked him he was also attacked and taken to Railway Police Station. He was later charged. In his sworn testimony he denied the charge.

10. Mr. Nyanga, counsel for the 1st appellant vigorously argued the appeal on behalf of his client. The 2nd appellant was not represented but presented written submissions.

11. Both petitions of appeal centres on the question of identification in which the appellants argued that there was no proper identification; contradicting evidence by the prosecution witnesses and shallow investigations.

12. Miss Osoro counsel for the state supported the trial court's finding arguing that the same was based on sound evidence.

ANALYSIS AND DETERMINATION

13. This court's responsibility is to re-evaluate afresh the lower court's findings and arrive at a new decision as was stated in the case of **OKENO VRS REPUBLIC (1972) E.A.32**

14. The first issue deals with the question of identification. Mr Nyanga contended that the area where the appellants were arrested is a place frequented by thieves and thus there was reasonable apprehension that the complainants could be confused.

15. There's no doubt that the incident took place at around 2.30 p.m. or thereabouts. Both the appellants as well as the complainants have no dispute on this. In the premises it cannot be said that the complainants were prevented in any way from identifying their assailants. PW1 stated that the assailants approached them from the front and she clearly saw them. She said that the 1st appellant had panga and threatened her with it. The panga was equally identified by PW2 and the same was later recovered.

16. Although counsel for the 1st appellant argued that there was discrepancy on time, the same in my respectful finding does not materially change the circumstances. The incident took place at around 2 p.m and thereafter in a span of less than one hour or thereabouts the appellants were arrested. At that particular time it would be difficult to argue that the victims were in a position to appreciate the time. All that was necessary was a reasonable estimation. Infact the courts proceedings shows that she was unable to read well the court's clock.

17. The question of identification was well buttressed by the way the witnesses were able to describe the clothes worn by each appellant. It is worthy to note that the incident generally did not take such a long time that one can argue that the witnesses would be unable to describe their assailants.

18. Further PW3 apparently knew appellant No,1. He said that he used to work at his mother's hotel at the beach a fact not disputed by the 1st appellant.

19. I find that this ground of identification clearly fails. The other issue raised by the appellant was the question of contradictory evidence. Mr. Nyanga argued that the witness did not specify the proper time and that this was a material contradiction. On the contrary, and as earlier alluded I do not find this plausible. The incident including the arrest of the appellants took about 2½ hours or thereabouts. As earlier alluded the victims in such circumstances cannot be expected to be mathematically precise on time.

20. I have perused the appellants sworn defence. The 1st appellant told the court that he lost consciousness following the panga attack. He went on to state that:

“They asked me if I had seen someone wearing a short who had parked going to the beach. I told them I did not know the person cut me with the panga. I fell down and became unconscious. I found myself in the hospital and I was arrested when I found myself in police station”

The second appellant on his part stated as follows:

“...I asked them why they attacked the other man. Otieno upon hearing this he slapped me with the panga he had. They bundled me together with the other man an escorted to Railways Police Station.”

21. The 2nd appellant although legally speaking he had no obligation to give incriminating evidence against the co-appellant, he however did not state that the co-appellant was unconscious. If indeed he became unconscious as a result of the injuries caused by the panga cut, I do not think that it would have been difficult to state.

22. The defence by both the appellants was not really believable and capable of upsetting the evidence as presented by the prosecution.

23. In light of the above findings, I do not find the appeals meritorious. Although the items were not recovered, PW1 managed to produce the receipts showing the purchase of her mobile phone. Moreover the appellants were arrested immediately after the incident and therefore the probability of mistaken identity was minimal. In any event there was no reason why the two complainants would simply target the appellants and not other persons who were supposedly at the scene.

24. The appeal herein is dismissed.

Dated, signed and delivered this 23rd March, 2016.

H. K. CHEMITEI

J U D G E

In the presence of:

.....for state

.....for 1st appellant

.....for 2nd appellant