



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.113 OF 2014

HASSAN OUMA ONYANGOAPPELLANT

VERSUS

REPUBLICRESPONDENT

**[APPEAL FROM ORIGINAL CONVICTION AND SENTENCE FROM BONDO PMS COURT:
C.A. KUTWA – Ag - PM**

IN CRIMINAL CASE NO.830 OF 2013.]

J U D G M E N T

1. The appellant was charged with the offence of Robbery with Violence Contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on the 17th day of August 2013 at around 7.30 p.m. at Siger Sub-Location in Rarieda District within Siaya County, being armed with a dangerous weapon namely a panga robbed JANE AKOTH ACHOLA of her two television sets, DVD player and one mobile all valued at Kshs.22,300 and at or immediately before or after the time of such robbery wounded the said JANE AKOTH ACHOLA.
2. The alternative charge was handling stolen goods contrary to Section 322(1)(2) of the Penal Code. The particulars were that on 15th day of September 2013 at Bondo Town in Bondo District within Siaya County otherwise than in the cause of stealing dishonestly received or retained two television sets, one DVD player knowing or having reasons to believe them to be stolen goods.
3. The appellant after a full trial was convicted and sentenced to suffer death hence this appeal. The prosecution case can be summarised as follows:=
4. PW1 the complainant was in her house at around 7.30 p.m. on the material day, with her brother's wife and the children when she heard the dogs barking. She went out to check but she was slapped with a panga and she fell down. The assailant then forced HAZEL KADENYI her brother's wife to open the cupboard where he took the assorted items. He warned them not to raise any alarm.
5. Later and after about one month the items were recovered by the complainant's husband while on his way to Nairobi. The appellant was equally arrested. She testified that she had known the appellant for about 13 years. She nevertheless did not recognise the assailants.
6. **PW2 MARATE LAWRENCE** was the Clinical Officer who testified and produced the P3 form which shows the injuries suffered by the complainant. The same was filled 4 weeks after the incident
7. **PW3 APC FRANCIS KOECH** testified that on 16/9/2013 one Silvanus Ochola brought the

appellant after being arrested at Bondo on an allegation of stealing from him. They recovered some items the following day from one Austin Odhiambo. He handed him over to the OCS Lwanda Kotieno. On cross examination he said that they had already received a report on the robbery incident.

8. **PW4 CPL. JOSEPH NYARO** was on duty on 18/9/2013 when he received a call from the AP's camp at Lwala. He went there and was handed over the appellant who had been arrested.

9. When put on his defence the appellant said that on 17/9/2013 while at the barber shop somebody came and talked with him. After a while he told him to accompany him to Lwala Police station where he was detained on allegation of stealing. He denied the charge claiming that the charges were framed.

ANALYSIS AND DETERMINATION

10. I have heard the parties oral and read the written submissions by the appellant. The issues as raised in the petition of appeal can be summarised as hereunder:

1. **Whether there was proper identification of the appellant**
2. **Whether the doctrine of recent possession was well applied.**

11. On the first issue the complainant did clearly state that she was unable to identify the assailant. This being the case, there were no other witnesses who were able to identify the assailants Her sister in-law Hazel Kadenyi was not called to testify. This witness perhaps should have shed light on the whole scenario. Secondly and of more concern to this court is an admission by PW1 that the appellant was her in-law and that she had known him for the last 13 years.

12. If this was true how come for all the period the robbery was taking place she was unable to recognise his voice even if she was not in a position to identify him. Further why did Hazel fail to turn-up in court or the children who were in the house although their ages were not disclosed? This in my finding were key material witnesses

13. On the second issue of being found in possession of recently stolen items, the court still find some issues not well clarified by the respondent. The first issue is who had the items. The owner of the shop or the place where the appellant allegedly went to sell the items was never called. More importantly the complainant's husband who allegedly arrested the appellant did not testify. How then can the police especially PW3 prove that indeed the goods were recovered by the complainant's husband?

14. For those two reasons only I do not find that a proper investigation was done in this matter. Three essential witnesses mentioned were not called, namely the complainant's husband, Hazel the complainant's in law and finally the owner of the shop or the place the goods were traced. In any case who tipped the complainant's husband concerning the whereabouts of the items?

15. I find this appeal meritorious. Although the P3 form was produced the same does not indicate that injuries were caused by the assailants Incidences like a headache, chest pain or backache in my respectful finding cannot be said to have been caused by the injuries sustained four weeks ago without proper evidence.

16. For the foregoing reasons the appeal is allowed. The appellant is set free unless lawfully held.

Dated, signed and delivered this 22nd March, 2016.

H. K. CHEMITEI

J U D G E

In the presence of:

.....for state

.....for appellant