



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

Criminal Appeal No. 5 Of 2015

Between

FRANCIS ONYANGO AYUKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1025 of 2014 at Chief Magistrate's Court at Homa Bay, Hon. P. Gichohi, CM dated 17th November 2015)

JUDGMENT

1. In the subordinate court, the appellant **FRANCIS ONYANGO AYUKA** and another person faced two charges of robbery with violence contrary to **Section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the first count was that on 17th September 2014 at Rodi market he, jointly with others not before the court, while armed with dangerous weapons namely pangas and rungus, robbed **LIZZY LORNA LUMUMBA** of Kshs. 4,000/- and a mobile phone make Bird valued at Kshs, 3,800/- and at the time of such robbery wounded the said **LIZZY LORNA LUMUMBA**. The particulars of the second count were that on 17th November 2014 at Rodi Market he, jointly with others not before the court, while armed with dangerous weapons namely pangas and rungus, robbed **LAUREEN NANCY ODERA** of one mobile phone make Nokia valued at Kshs. 2,000/-.

2. The appellant was convicted and sentenced to death on the first count while the sentence on the second count was held in abeyance. He now appeals against both conviction and sentence. The principal issue raised by the appellant is that of identification. In his grounds of appeal and written submissions, the appellant contends that he was not identified on the material night as the assailant and that the learned magistrate failed to find that the conditions and surrounding circumstances could not allow positive identification. In considering the issues raised by the appellant, I am enjoined to consider the entire evidence, evaluate it and reach an independent conclusion as to whether I should uphold the conviction bearing in mind that I neither heard nor saw the witnesses testify (see **Okeno v Republic [1972] EA 32**). The prosecution case was as follows.

3. On the night of 7th September 2014, Lizzy Lorna Lumumba (PW 1) and Lauren Nancy Odera (PW 3) were at their grandmother's home at Rodi. Their grandmother was attending a funeral that night so they decided to go and see her at about 9.00pm. PW 1 testified that while they were on the way, they met 6 men armed with pangas and rungus. One of the assailants held her hand while the rest surrounded her while the other held PW 4. She recalled that when she refused to go with one of them, the beat her up leaving a scar on the middle finger of her left hand. They also took her Bird V260 phone worth about Kshs. 3,800/- and Kshs. 4,000/- cash. When she raised alarm, the assailants ran away.

4. PW 1 further testified that on the material night, she was carrying a one battery torch which was on throughout, and which she used to identify the appellant as one of the assailants. On the following day, she reported the incident at Homa Bay police station where she recorded a statement and was issued with a P3 form. PW 1 stated that she knew the appellant as the assailant as she had known him for about 2 years while he was working in a neighbour's home. PW 1 further recalled that three days after the incident, she spotted the appellant in the evening whereupon she alerted the police who accompanied her to where the appellant was and arrested him.

5. PW 3 confirmed that she was with PW 1 on the material night. She narrated how one of the assailants held her hand and pulled her aside and hit her back with a panga. She screamed for help and he hit her again. She struggled with him as he tried to pry her Nokia mobile phone from her hands. He took it while she screamed for help. One of the people who came to help was her cousin George Kabila Lumumba (PW 2). She continued screaming as she left PW 1 and PW 2 behind and went home. PW 1 and PW 2 later joined her. PW 1 told her that she recognised her assailant and showed her the injury. They reported the matter to Homa Bay Police Station the following day.

6. On 9th September 2014, she was called to Rodi Police Post to identify the people who attacked her and she identified the appellant as the assailant. She stated that she recognised him as he used to work near her home. She recalled that he is the one who gestured to others using his arms before the other assailants surrounded them.

7. George Kabila Lumumba (PW 2) recalled that he was at his grandmother's home on the material night when he heard screams. He rushed there and found six men, with pangas and rungas, attacking PW 1 and PW 3. He stated that he was able to see them because there was moonlight and he had a torch in his hand. He recognised the appellant as the assailant who struck PW 1 with a panga. He testified that the assailants ran away when PW 1 and PW 3 screamed for help. He confirmed that they reported to Homa Bay Police Station and PW 1 was issued with a P3 form as she had been injured. He also recalled that on 9th September 2014, he was at Rodi at about 7.30 when he saw the appellant who he identified before he was arrested by members of the public.

8. Michael Ochola (PW 4), a clinical officer at Homa Bay District Hospital, recalled that he examined and treated PW 1 on 8th September 2014. He noted that she had tenderness and swelling on the left fingers and a deep cut wound on the left middle finger. He opined that the injuries could have been caused by a sharp object. He thereafter signed the P3 form.

9. Sgt Dominic Odera (PW 5) recalled that on 7th September 2014 at 9.00pm, he heard people wailing causing him to leave the camp to find out what was happening. He found members of the public combing the nearby sugar plantation for a gang that was said to be terrorising the public but they did not find anyone. He testified that on 9th September 2014, the appellant was arrested by members of the public and brought to the AP Camp. As a report of a robbery had been made on 8th September 2014, he called PW 1 to come and identify the suspect. PW 1 identified the appellant as one of the people who attacked her on 7th September 2014. PW 5

10. The investigating officer, Corporal Paul Mureithi (PW 6), received the complaint by PW 1 and PW 3 on 8th September 2014 and recorded their statements and issued PW 1 with a P3 form. He testified that PW 1 and PW 3 identified one of the attackers as a person they knew before. He liaised with the Administration Police at Rodi who arrested the appellant.

11. The appellant elected to give sworn testimony when called upon to make his defence. The appellant stated that on Sunday, 7th September 2014, he went to church as usual, came back home and looked after the cows. He got back home at 6.00pm, had supper at 8.00pm and went to bed until the next morning. As regards the events of 9th September 2014, he stated that he was at Rodi at about 5.00pm after closing his business when he heard someone say that he resembled someone who had assaulted his sister. Shortly afterwards, he was arrested and charged with robbery with violence.

12. In a prosecution for robbery with violence **under Section 295 as read with 296 (2) of the Penal Code**, the prosecution must prove theft as a **central element of the offence**. The other elements of the offence of robbery with violence were elaborated by the Court of Appeal in ***Ganzi & 2 Others v Republic* [2005] 1 KLR 52** as follows:-

The offence of robbery with violence under section 296(2) of the Penal Code is committed in any of the following circumstances namely:-

(a) The offender is armed with any dangerous or offensive weapon or instrument; or

(b) The offender is in company with one or more other person or persons or

(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.

13. As regards the issue of theft, both PW 1 and PW 3 testified that they had mobile phones which were stolen by the assailants acting together when they attacked the complainants. Although the appellant contended that PW 1 and PW 3 did not own their respective phones, there is no reason to believe that the complainants lied. I also agree with the learned magistrate that mobile phones are such a common place item that it is unlikely that the complainants did not have phones. I also hold that it is not necessary to prove ownership and possession of the mobile phones by producing documentary evidence in every case. Every case must be determined on its own facts and the learned magistrate believed the complainants in this case. I therefore find that there is no reason why I should depart from this aspect of the finding.

14. It is also not in doubt that the assailants were more than one in number, or that they were armed with weapons namely pangas and rungus as narrated by PW 1, PW 2 and PW 3. That PW 1 was assaulted is confirmed by the testimony of PW 4 who examined and treated her on the day after the event. The description of events of the material night by PW 1, PW 2 and PW 3 is consistent and leaves no doubt that the prosecution proved all the elements of robbery with violence. The fact that there was an incident on the material night is also corroborated by the testimony of PW 5 who heard wailing that night and was informed that an incident of robbery had taken place.

15. The central issue in this appeal is whether the appellant perpetrated the offence. The evidence on the record shows that the robbery was committed at night, although the complainants maintain that they were able to identify the appellant as one of the attackers using light from torches which they carried. The principles guiding the court's approach to matters of identification in difficult circumstances are well settled. Our courts have emphasised that unless handled with care, evidence of visual identification can occasion a miscarriage of justice (see ***Karanja & Another v Republic*, [2004] 2 KLR 140** and ***Wamunga v Republic*, [1989] KLR 424**). In ***Republic v Eira Sebata* [1960] EA 174**, and ***Kiarie v Republic* [1984] KLR 739**, the Court of Appeal was even more categorical on reliance on such evidence holding that the evidence must be "*absolutely watertight*" to justify conviction. In ***Wamunga v Republic* (supra)** the Court of Appeal warned that;

[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.

Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see ***R v Turnbull* [1967] 3 ALL ER 549**).

16. I have scrutinised the testimony of PW 1, PW 2 and PW 3 very carefully. They all confirm that there was moonlight and that they all had torches with which they were able to identify the appellant. PW 1 testified that she had her torch and when the appellant got hold of her hand, she shone the torch to see his

face. I therefore find that the appellant was sufficiently close to PW 1 to be properly identified, and that the time for interaction diminished the chances of mistaken identity. PW 2 testified that he saw the appellant trying to cut PW 1 and since he had a torch, he also managed to recognise him. PW 3 also testified that she had her own torch and was also able to see and recognise the appellant using PW 2's torch.

17. The quality of evidence is augmented by the fact of recognition. In **Anjononi & Others v Republic [1980] KLR 59**, the Court of Appeal observed that, "*recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.*" But even in such cases of recognition, the court must exercise caution as mistakes can be made as the Court also warned in **Wamunga v Republic (supra)** that "*Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.*"

18. PW 1, PW 2 and PW 3 all testified that they knew the appellant as a person who used to work on a farm in their neighbourhood but when their statements were put to them in cross-examination, they all admitted that the description of the appellant was not recorded in their statement recorded on the day after the incident. They were however firm that they clearly identified that appellant. Furthermore, according to PW 2 and PW 5, the members of the public with the assistance of the complainants were looking for him where after he was arrested not so long after the incident. The investigating officer, PW 6, explained in cross-examination that PW 1 explained to him that the assailant worked in the neighbourhood. According to him, "*The neighbours knew you and that is why they took the initiative to assist the police to arrest you.*"

19. I am satisfied that the evidence against the appellant was watertight to justify conviction.

20. The conviction and sentence are affirmed. The appeal is therefore dismissed.

DATED and DELIVERED at HOMA BAY this 23rd day of May 2016.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.