REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 26 OF 2016

CONSOLIDATED WITH CRIMINAL APPEAL NO. 25 OF 2016

(CORAM: J. A. MAKAU – J.)

MARK TIMOTHY OTIENO .... 1ST APPELLANT

GILBERT ODONGO …...................................... 2ND APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

***(Being an appeal against both the conviction and the sentence DATED 29.3.2016 in Criminal Case No. 349 of 2014 in BONDO Law Court before Hon M. OBIERO – P.M.*)**

JUDGMENT

1. The two Appellants **TIMOTHY MARK OTIENO**, hereinafter the 1st Appellant and **GILBERT ODONGO**, the 2nd Appellant were the 1st and the 2nd accused respectively in the trial before the lower court. They were charged with two counts. Count 1 was **robbery with violence contrary to section 292 (2) of the Penal Code**. The particulars of the offence are that on the 26th day of April 2014 at around 1.00 pm at East Katwenga sub-location in Rarieda sub-County jointly while armed with dangerous weapons i.e. rungus, robbed **DUNCAN OPONDO OGOK** of Kshs.10,000/= and immediately before the time of such robbery used actual violence to the said **DANCAN OPONDO OGOK**. The two were also charged under Count II, with offence of Malicious damage to property **Contrary to Section 339 (1) of the Penal Code**. The particulars of the offence are that on the 26th day of April 2014 at about 1.00 at East Katwenga sub-location Rarieda sub-county jointly; willfully and unlawfully damaged windows panes, photocopy machine and 1 shirt all valued 65,000/= the property of Dancan Opondo Ogok.

2. After full trial the Appellants were found guilty of both counts, convicted and sentenced to death on count I and on count 2 each to serve two years.

3. Both Appellants were aggrieved by the conviction and sentence which provoked these appeals which I have consolidated as they arise from the same trial in the lower court.

4. The two appellants filed these appeals separately but the several grounds of appeal are the same and can be summarized as follows:

> ***1. The conviction and sentence meted against the appellants were erroneous, bad in law and not supported by evidence.***

2. The prosecution did not prove the charge of robbery with violence and that of malicious damage beyond any reasonable doubt as required by law.

3. The trial court erred in sentencing the 1st appellant, a minor to suffer death contrary to the provisions of the law regarding sentencing of minors.

5. Mr. M.C. Ouma learned Advocate represented the two appellants whereas the state was represented by M/s. Mourine Odumba Learned Prosecution Counsel. M/s Mourine Odumba conceded these appeals on the grounds that there was no evidence to show that Ksh.10,000/= had been stolen from the complainant at the time of the incident and on count II of **malicious damage to property** as there is no evidence of whose shop or whose windows were damaged and from which shop the windows were nor was there evidence as to the owner of the damaged photocopier and that the evidence of photographs was not sufficient to support the charge. On the sentence she submitted that it was noted that the 1st Appellant was a student and the court should have called for age assessment to ascertain whether 1st Appellant was a minor as submitted by the 1st Appellant's Counsel and further as evidence of PW2 revealed the Appellants and the complainant were fighting, they should all have been charged with an offence of affray rather than with an offence of Robbery with violence.

6. Mr. M.C. Ouma learned Advocate for the Appellants urged that the Appellants were convicted and sentenced without evidence in support of both counts, notwithstanding in a criminal case the prosecution ought to prove their case beyond any reasonable doubt, that the three ingredients of an offence of robbery with violence were not satisfied, that there was an error in trial court's finding that an offence of robbery with violence had been committed, that there was no evidence of any money having been stolen from the complainant, that the investigating officer did not testify, that the photographs did not show the actual damage, that there was no evidence to the ownership of the shop from which the windows and photocopier was, that the complainant and the appellants were fighting and this was a case of affray rather than a case of robbery with violence, that one of the appellants was a school going student and court should have meted a non-custodial sentence, that the threshold of proving case beyond reasonable doubt was not met, that there was inconsistencies of the evidence of the complainant and witnesses and that if any offence was disclosed in this case it was affray and not robbery with violence nor malicious damage to property.

7. I have carefully considered the Appellants appeals, the counsel oral submissions, the proceedings and trial court's Judgment.

8. I am the first appellate court and as such I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the Court of Appeal case of **Okeno V. R. (1972) E.A. 32** where the Court set out *the duties of a first appellate court thus:-*

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters V. Sunday Post, (1958) E.A. 434)"***

9. I have perused the proceedings in this case and I am not going to reproduce the same as they form part of the record of appeal and are easily accessible, however I shall briefly summarize the facts of the prosecution case and the defence.

10. The facts of the prosecution case are that PW1 Dancan Opondo Ogoko was on 26th April 2014 at 1.00

p.m. in front of his posho mill, when the two appellants came to his compound, the 2nd Appellant confronted the complainant and hit him with a fist on the face while the 1st appellant hit him on the right ear with a club as the two continued beating him. The 2nd Appellant tore the complainant's shirt and took Ksh.10,000/= which was in complaint's shirt pocket, that after beating the complainant for a while he managed to escape. He went to to one of the room made into a shop, as the two continued throwing stones breaking the window panes. The stones hit and damaged the photocopier machine. The complainant eventually managed to escape and proceeded to report the matter at Aram Police Station and recorded statement. The police accompanied the complainant to the scene and assessed the damage. The complainant went to Madiany District Hospital whereby he was treated. The first Appellant, then was arrested that night by Administration Police from Ndingira AP camp while the 2nd Appellant Gilbert disappeared and went to Nairobi. That after one year the 2nd Appellant returned home and complainant informed police and he was arrested. The complainant stated that the incident was witnessed by Onyango Omollo (PW2) and Augustin Otieno, that according to the complainant he had a case of attempted theft with the 2nd Appellant. That he had no grudge with the 1st Appellant and that he knew the appellants before the incident.

11. Both Appellants denied the charge . The 1st Appellant gave unsworn statement stating that on 26.4.2014 they met the complainant who picked a quarrel with the 2nd Appellant. That the two started quarreling while holding each other. The 1st Appellant joined them to separated the two and in the process the complainant fell down, got up and proceeded to a shop and returned armed with a bottle, the 1st appellant took a stick and threatened to beat complainant who ran and locked himself in a shop. The 2nd Appellant picked a stone and threw it and crushed a window. That then the Appellants left . That in the evening at around 8.00 p.m. the complainant took the Police Officers to the 1st Appellant's home, he was arrested and later charged with this offence.

12. The 2nd Appellant in his unsworn statement stated that on 26.4.2014 he was at Awendo. That on 7.6.2015 he went to a drinking house where he was arrested and charged with this offence after police had asked him to pay Kshs.10,000 which he did not have.

13. The Appellant' Counsel contends thieconviction and sentence of the two Appellants is erroneous, bad in law and not supported by evidence. In a criminal case the burden of proof always lies with the prosecution to prove their case beyond any reasonable doubt and the burden of proof never shifts at all. The prosecution in the instant case to succeed in proving **robbery with violence contrary to Section 296(2) of the Penal Code** were required to prove three essential ingredients of the offence of robbery with violence. The Court of Appeal in **CRA 56 of 2013 Martin Mungathia V Republic (2015) eKLR** quoted with approval from the case of **David Njoroge Macharia V R (2011) eKLR** what are the essential ingredients of a charge under **Section 296(2) of the Penal Code** that must be proved by the prosecution in a charge of Robbery with violence. It was stated the ingredients to be as follows:-

> ***1. if the offender is armed with any dangerous or offensive weapon or instrument or***
>
> ***2. If he is in company with one or more other person or***
>
> ***3. If, at or immediately before or immediately after the time of robbery, beats, strikes or using any other violence to any person.***

14. Section 295 of Penal Code as robbery as follows:-

> ***"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."***

15. In the instant case the trial magistrate correctly stated that the three ingredients of the offence of robbery with violence, are satisfied when the following three ingredients are proved thus:-

1. That something of value must have been stolen from the victim.

2. That the perpetrator must have been armed with a dangerous weapon and/or more than one person.

3. That the perpetrator or perpetrators threatened to use or used actual violence on the victim.

16. The prosecution proved the last two ingredients but not the first one. PW1 testified that at the time of robbery PW2 was at the scene and witnessed all what was happening. PW1 stated that the 2nd appellant tore his shirt pocket and took Ksh.10,000/= from him. PW2 testified he witnessed the complainant fighting with the two appellants but the complainant escaped and entered into one of the shops. That he even took the complainant to the Aram Police Station PW2 never mentioned ever witnessing the complainants shirt pocket being ripped off by the 2nd Appellant nor did he mention any money being taken from the complainant by the appellant. PW3, PW4 and PW4 all Police Officers never mentioned the complainant having reported to them that the appellants robbed him Ksh.10,000/=. There is no evidence that anything was stolen from the complainant. There is no evidence other than that of the complainant that he had any money before the incident. That it is of great significance to note the complaint in his first Report to the Police he did not mention that the two appellants robbed him Ksh.10,000/= or anything. PW5 who took over this matter from investigating officer, who retired and received some exhibits from him and who received the complainant's shirt which he was wearing at the time of the incident ,with torn pocket, exhibit P6 testified he was not versed with the case. He did not mention report of complainant having been robbed of Ksh.10,000/= by the appellants. PW3 admitted he did not know anything about the case. The trial court should inview of there being no evidence of anything having been stolen from the complainant have found, the first ingredient of an offence of robbery with violence, thus stealing of something was not proved, shujld have found the offence of robbery with violence, was not proved. I find, had the trial court exercised extreme constraint and considered the three essential ingredients of the offence of robbery with violence it would have found that the offence of robbery with violence was not proved to the required standard as in the instant case, crucial evidence for proving the offence was not proved. The evidence of the complainant was not corroborated by any single prosecution witness. There is no prove that he had money at all and any was stolen at the time of the incident. I therefore find and hold the offence of robbery with violence was not proved as there was no evidence of anything having been stolen.

17. I am alive of the fact that the evidence against the appellants is the testimony of a single witness as regards the stealing of the money. In the case of **Charles O. Maitonyi V R Republic (1986) KLR 198**, the court of Appeal addressed itself thus:-

> ***"Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with greatest care the evidence of a single witness respecting identification."***

18. The above mentioned case clearly makes it clear that testimony of a single witness should be tested with the greatest care inrespect of identification by a single witness. The complainant was under obligation to give a truthful report, thus to PW2 as he was taking him to Aram Police Station, that during the struggle with the appellants they had robbed him Shs.10,000/=. He was also supposed in the first Report to the Police to give statements disclosing the appellants robbed him Kshs.10,000/=. He did not do so but only mentioned about the money when giving his evidence before court. I want to emphasize that in robbery cases there is no better way of giving particulars of the assailants than by giving full details to people who come to aid the victim by giving the names of the assailants (if known) and what they robbed him. The same information should be given to Police Officers in the first report. I think failure to give the names or description of the assailants and amount stolen at the earliest opportunity, then giving the names and the amount stolen subsequently and further when none of the people who came to victim's aid had no such information or the Police officer investigating the matter or any other person who came to the scene immediately, the allegation of any money having been stolen at the time of robbery being given before court or much later after recording of witness statement is either an afterthought or a lie, and that evidence is not reliable at all. The court should not in my view base any

conviction on such uncorroborated evidence.

19. Whether the prosecution proved an offence of malicious damage to property? PW2 in his evidence testified the complainant and the 2nd appellant and the complainant were struggling as if they wanted to fight and the 1st appellant went to scene. That the group continued fighting before the complainant escaped. The 1st Appellant stated that the 2nd Appellant and the complainant were struggling and quarreling when he went to separate them. PW2's evidence contradicts the evidence of PW1 as to what happened. The eye witness PW2 do not support the evidence of the complainant. From the evidence of PW2, I am satisfied at the material time the appellants and the complainant were fighting in a public place and that there was no robbery that took place and if any offence was committed it was an offence for which all the three persons ought to have been charged with. Further the complainant having not been charged in this case and given an opportunity to defend himself I cannot make any finding of any offence of affray. I shall therefore leave that matter to rest.

20. In the charge of malicious damage to property the particulars of the charge are as follows:-

> ***"The particulars of the charge are that on the 26th day of April 2014 at about 1.00 at East Katwenga sub-location Rarieda sub-county jointly; willfully and unlawfully damaged windows panes, photocopy machine and 1 shirt all valued 65,000/= the property of Dancan Opondo Ogok."***

Prosecution were under obligation to prove beyond reasonable doubt that the appellants willfully and unlawfully damaged windows panes, photocopier machine and I shirt all valued at Kshs.65,000/= the property of Dancan Opondo Oguko. Dancan Opondo Oguko gave evidence as PW1. In his evidence he stated that he went to one of the rooms turned into the shop from where the appellants broke the window panes and photocopier machine when they were throwing stones at him. PW1 did not claim ownership of the said shop or the photocopier machine. He did not produce title deed or leasehold or certificate of ownership of the said shop or receipt inrespect of the ownership of the said photocopier machine. He did not in his evidence claim he was the owner of any of the two items. Further more when giving evidence none of the items listed in the charge sheet were identified by the complainant. He did not even identify the shirt which he had claimed had been torn by the 2nd appellant. He identified the photographs which he did not state when they were taken, at what place and by whom and whether he was at the scene when the photos were taken. PW2 did not state the 2nd Appellant used stones to brake the window panes, whereas PW1 stated the window panes where broken by stones thrown by the two appellants PW2 did not state the shops to which windows panes were broken belonged to the complainant. He did not mention any photocopier machine being damaged. He did not mention complainant's shirt being damaged. PW3 did not mention going to the scene and taking photographs but that he received one sealed envelop containing photographic film and an exhibit memo from Aram Police Station and only processed the photographs. PW3 did not state the photographs were taken by who and from where. He could not state the extent of damage as his duty was limiteto processing the photographs. PW3 admitted he did not investigate the case. PW4 evidence dealt with arrest and not damage of the window panes or photocopier machine or the shirt. PW5 received shirt in October 2015 and during cross-examination he stated he knows nothing about this case.

21. It is evident from evidence of PW1 and PW2 that the alleged damaged properties were not identified by PW1 and PW2. That the photographs identified by PW1 and PW3 were not associated with the alleged shop and photocopying machine allegedly damaged. That PW1 did not prove ownership of any of the allegedly damaged properties through production of either certificate of lease or title deed or receipt and as such it cannot be said the prosecution has proved its case beyond any reasonable doubt, that the properties belonged to the complainant, that the value indicated of the items of Ksh.65,000/= was not proved nor was there any attempt to prove the value of any of the alleged damaged properties. PW3 in his evidence stated he could not even state what damage was caused.. His report lacked the extent of damage (if any). I have had careful perusal and examination of the photograps exhibits P. 2(a) P2 (b) and P 3 and certificate as to photographic prints dated 1st July 2014 and it is evidently clear that no damage is reflected on any of the said photographs. Had the trial court examined the exhibits P2(a) 2(b) and P3 very carefully and considered the evidence of PW3 it could not have fallen to the error that it did.

22. I find what was required in this case was other evidence implicating the Appellants with the offence to corroborate the evidence of the complainant but such evidence was not available and even from the record it is very clear that the prosecution was not able to bring such additional independent evidence to implicate the appellants with the offence with which they were charged with. For this reason I am satisfied that the evidence of the complainant and his witnesses was insufficient to sustain the conviction against the appellants on both counts.

23. I have come to the conclusion that the evidence by the prosecution was insufficient and unsafe to find a conviction against the appellants on both counts. The State conceded the appeal. I find that such move was correct one in view of the insufficiency of evidence in support of any of two counts. Accordingly I quash the convictions entered against both Appellants and set side the sentence of death. I will with the same breath state that the trial court stated the Appellants shall be hanged by the neck till death and point out that it is not the duty of the trial court to prescribe the mode of execution of death sentence once it imposes the same and in doing so the trial court exceeded its jurisdiction after meting the sentence to direct on its execution as that is not its role. It is enough to state appellants shall suffer death and leave it at that. Further more once an accused person is sentenced to suffer death and is found guilty of similar offence or other lesser offence it is always prudent to keep the other sentence in abeyance.

I finally order that the Appellants be set at liberty forthwith unless are otherwise lawfully held.

DATED AND SIGNED AND DELIVERED AT SIAYA THIS 23RD DAY OF JUNE, 2016

J. A. MAKAU

JUDGE

Delivered in Open Court in the Presence of:

Mr. M. C. OUMA for the Appellants.

M/s. M. Odumba for the State.

C.C. 1. Kevin Odhiambo.

Mohammed Akideh.

J. A. MAKAU

JUDGE