REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HIGH COURT CRIMINAL APPEAL NO. 69 OF 2015

(CORAM: J. A. MAKAU – J.)

BENARD ADEKE ODINGA ….....APPELLANT

VERSUS

STATE ..... RESPONDENT

(An Appeal from the Original Conviction and Sentence dated 2.4.2015 in Criminal Case No. 393 of 2013 of P.M'S Court At Bondo By C.A. Kutwa (PM)

JUDGMENT

1. The Appellant **BERNARD ADEKE ODINGA** and another were jointly charged with an **offence of Robbery with Violence contrary to Section 296(2) of the Penal Code**. The particulars of the offence are that on the 20th day of May 2013 at Kipasi-Owimbi Road at Anyuongi area in Rarieda District within Siaya County, jointly with others not before court, while armed with a dangerous weapon namely a knife robbed **WILSON OTIENO ACHIENG** of cash Ksh.230,000/= and immediately before or immediately after the time of the said robbery, used actual violence to the said **WILSON OTIENO ACHIEN**G.

2. That after full trial the Appellant and another were not found guilty of an offence of **Robbery with Violence** but as there was evidence to support attempted Robbery, the trial court applied the provisions of **Section 179 of the C.P.C.** convicted the Appellant with a minor offence though not charged with, under the said section, thus **attempted Robbery contrary to Section 297(1) of the Penal Code** and sentenced the Appellant to Seven (7) years imprisonment.

3. Aggrieved by both the conviction and the sentence the Appellant preferred this appeal setting out several grounds of appeal which can be summarized as follows:

i. ***The learned trial Magistrate erred in law and fact in failing to accord the Appellant fair trial.***
ii. ***The learned trial Magistrate erred in law and fact in convicting and sentencing the Appellant when the prosecution did not prove their case beyond any reasonable doubt.***

4. The Appellant was represented by Mr. Ken Omollo, Learned Advocate, whereas the State was represented by M/s. Mourine Odumba Learned State Counsel. That at the hearing of the appeal Mr. Ken Omollo, Learned Advocate combined all the grounds of appeal and argued them altogether as one ground, thus the prosecution did not prove their case beyond any reasonable doubt. M/s. M. Odumba the Learned State Counsel conceded the appeal.

5. 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 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)"

6. The facts of the prosecution case are that, on 20.5.2013 PW1 and his wife PW2 went to Equity Bank, Bondo and withdraw Ksh.230,000/= from PW1's account, that after withdrawal of the money they proceeded to a nearby shop and bought airtime credit cards and left for Ragengini. That on the way they saw a saloon car ahead of them which was moving and stopping which PW1 overtook and saw the owner of the saloon car rolling up the window. The saloon car then followed him increasing its speed, that made PW1 suspicious and he informed PW2, his wife. PW1 was subsequently knocked from behind, falling on one side of the road. PW1 got up and ran away, and went hid in a house under a bed, after asking the owner of the house to rescue him by allowing him to hide under the bed. PW1 was then locked inside the house by the owner of the house telling him to keep quiet as she could see two people searching for him in the maize field. PW1 telephoned his father and informed him of the incident. PW1 testified as he was running away he carried the bag containing the money and scratch cards but he could not recall where it had fallen. That after PW1 was informed by the woman (***owner of the house***), the police had come to the site of incident, he then proceeded to the scene of the incident. PW1 testified he had seen the appellant before, who was from his home area and named him as Bernard. PW1's wife, PW2 meanwhile remained at the scene of the incident unconscious after the accident. Police came and took her to the Hospital.

7. The Appellant's case is that after the accident which he termed a normal accident he proceeded to make a report at Aram Police Station. He returned back to the scene of the accident. He and the 2nd accused the owner of the vehicle who were at the scene taking pictures of the vehicle were arrested and charged with the offence of robbery with violence.

8. At the hearing of the appeal Mr. Ken Omollo Advocate for the Appellant consolidated all the grounds of appeal to one ground of appeal, urging there was no evidence to support either a charge of **robbery with violence** as rightly found by trial court nor of **attempted robbery** and that trial (court) finding that an offence of attempted robbery was proved was an error.

9. The Learned trial Magistrate in his judgment stated as regard the offence of robbery:-

"Lastly, was the complainant violently robbed. I do not think so from the evidence on record. The complainant was knocked from behind. At the time he recognized the 1st accused he was not armed. The 1st accused and his accomplices did not use personal violence against the complainant. The purported weapon, a knife, was recovered in the saloon car after the accident.

Further PW1 and 2 do not know where the bag containing Kshs. 230,000/= fell. It was PW1's evidence that he was holding the bag. It is possible to say that the bag may have been collected by the members of the public or any other person."

10. The appellant in this case was charged with an **offence of robbery with violence contrary to section 296 (2) of the Penal Code**. A charge under the said Section has three (3) ingredients that must be proved by the prosecution. In case of **Johana Ndungu V R. Criminal Appeal No. 166 of 1995** the ingredients for the charge of robbery with violence were stated to be:-

i. ***If the offender is armed with any dangerous or offensive weapon or instrument or***
ii. ***If he is in company with one or more other person or persons or***
iii. ***If, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person.***

11. **Section 295 of Penal Code defines 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."

12. I have carefully perused the evidence of PW1 and PW2 coupled with circumstantial evidence relating to the accident. In the instant case the evidence of the appellant is that after overtaking motor vehicle, the driver of the motor vehicle increased speed and hit him from behind. PW1 was suspicious of the people in the vehicle and after the accident he fell down,got up and ran away. PW2 stated she thought there were three people in the vehicle. PW2 confirmed the car hit them from behind and after the accident her husband PW1 ran away. PW1 and PW2 did not mention witnessing of any of the suspects from the vehicle taking any money or stealing the money from the complainant. That PW1 and PW2 did not mention any of the suspects from the vehicle being armed, though they were more than one in number. The complainant did not in his testimony nor that of PW2 testify that any of the occupants of the vehicle ever attacking the complainant or demanding more or attempting to snatch the bag containing money and credit cards from him, or demanding money from them or attempting to snatch the bag containing money and credit cards from him. PW1 in his evidence stated as follows as regards the bag:-

*"**I had carried the bag, I had which had the money and scratch cards but do not know where it had fallen."***

13. The prosecution proved that the appellant was in company with one or more other person but did not prove they were armed nor did it prove that immediately before or immediately after the accident the complainant was wounded, or beaten , or struck or any violence was used nor was it proved that anything was stolen or there was an attempt to steal anything from the complainant. I therefore find that none of the ingredients of the **offence of robbery with violence** or **attempted robbery** was proved, as it is not an offence for people to travel in a vehicle, being more than one and the fact an accident was caused by the appellant is no basis for presumption of an intention to **commit a felony**. The prosecution did not prove that the occupants of the vehicle at the time of the occurrence of the accident had any intention to rob or steal anything from the victims of the unfortunate accident. I therefore find that the trial court correctly found the offence of **Robbery with Violence** was not proved to the required standard.

14. The Appellant's Counsel contends the trial court failed to consider inconsistencies in the prosecution case and as such came to the wrong conclusion. It's appellant's case that the testimony of the complainant is inconsistent and contradictory to that of PW2 which the trial court failed to take into account. I have carefully considered the evidence of the prosecution, especially evidence of PW1 and PW2 as regards identification of the appellant who PW1 stated he had known as a neighbour. PW1 in his evidence in chief stated he saw the appellant in the bank earlier on in that morning, and later as one of the occupants in the vehicle KAQ 972W. In cross-examination he stated the appellant greeted many people when he saw him in the bank including the complainant. PW2 on her part stated a person wearing a brown jacket entered the bank and left without talking with any person. The evidence of PW2 has material contradictions to that of PW1 as regards the person in brown jacket. That PW1 and PW2 were at the bank together and if the person in brown jacket entered the bank in their presence PW2 should have seen him greeting many people including PW1 and walking out. The trial magistrate in his judgment found evidence of PW2 wanting as in her evidence during cross-examination she stated she became unconscious immediately after the accident. In view of her own admission, that after the accident she lost consciousness and that she did not see the person who was left with her, it is correct therefore to find

and hold that after the accident she did not know what happened and did not see the suspects of the vehicle KAQ 972W.

15. Further more identification of a total stranger by mode of dressing such as being dressed in a brown jacket is insufficient, as brown jackets are many and readily available as a commodity of trade in open markets and many people can be dressed in brown jackets on the same day and at the same place or at different places. PW1 did not identify the people who were chasing him away after the accident because he did have sufficient opportunity to observe them nor did he say how close they were to him and it is possible he never keenly looked at the people chasing him as he was scared. The complainant never stated that any demand was made by the said people nor did he know why they were running after him. Is it possible they were running to take him to the hospital or to punish him for the occurrence of accident, or what? Thus the purpose for the two people to have chased PW1 was not disclosed to the court and in absence of any material evidence from the prosecution, it would be wrong to speculate why the two people were running after the complainant. The evidence of PW1 is on the other hand contradicted by PW4 to whom PW1 reported that he had been involved in a road traffic accident and never mentioned of being robbed. PW8 contradicted PW1 in his evidence in that he stated he saw two people running towards Aram and not after PW1. I have carefully examined the evidence of PW1, PW2, PW4 and PW8 and I am satisfied that there are fundamental inconsistencies that dent the prosecution case. The appellant has succinctly identified the alleged inconstancies and how they dent the prosecution case.

16. The learned Appellant's Counsel contends that the accident was a normal accident which the Appellant reported to PW10 P.C. Linda Wafula No. 92138 on 20.5.2013 at 9.10 a.m. and returned to the scene of the accident.The Appellant in his defence confirmed the occurrence of the accident and reporting the accident to the Police. I have considered the conduct of the appellant after the purported attempted robbery with violence and I am satisfied that after the accident he reported the matter to police and returned to the scene of accident. He did not run away or abscond after the incident. The appellant's conduct is not a conduct of a guilty person and from his conduct, and in absence of of any evidence of attempted robbery and the fact that the appellant never disappeared after the accident but went to the police and gave his particulars and returned to the scene without having been arrested and on seeing police at the scene and not running away, I have no option but to find that the appellant was involved in a normal accident and increasing speed of a vehicle or motorcycle having overtaken another vehicle is a common behaviour of most of Kenyan drivers. in an attempt to demonstrate which of the vehicle is more powerful or in circumstances in which after an accident some victims run away and the causer of the accident chase them for what reason, either to check on their condition or assault them or beat them for causing an accident in absence of other evidence or circumstantial evidence to suggest otherwise should not be construed to mean the causer of the accident intended to rob or steal from the victim as other evidence is necessary before such a conclusion is reached. The learned trial Magistrate in this case came to the wrong conclusion, that there was an attempted Robbery against PW1 in absence of other evidence to support hisfinding. The evidence of PW1, is that he was scared after the accident, after seeing the vehicle he had overtaken speeding up as it followed him and that in itself same cannot be a basis of holding there was an attempted robbery after the accident. PW2 did not witness what happened, after the accident as she fell unconscious. PW7, PW9 and PW10 evidence do not materially support the prosecution case on the offence of robbery with violence but only on occurrence of an accident. The Police should have investigated a traffic offence rather than offence of robbery with violence and charged the party who was to blame for the accident but not to charge the appellant with an offence of robbery with violence in absence of evidence in support of the charge.

17. The Learned state Counsel M/s. M. Odumba concedes the appeal on the grounds that the appellant was not properly identified, as PW1 took off before he could see the occupants of the vehicle after the accident, PW2 fell unconscious promptly after the accident, that the charge was not proved beyond reasonable doubt, that PW1 complained to PW4 of road traffic accident and not of robbery and that what occurred was a normal accident, that the Police should have investigated a traffic offence rather than an offence of robbery with violence and charge the party who was to blame for the accident but not to charge the appellant with an offence of robbery with violence in absence of evidence. I have considered the entire prosecution's evidence and I have found that the prosecution did not prove their case against the

appellant beyond any reasonable doubt, and I do find that the State Counsel quite correctly concedes the appeal.

18. The Appellant's Counsel contends the failure to call as a witness the lady who according to PW1 rescued him from his two pursuer to state whether indeed the complainant was pursued by two people and whether he told her that he was being pursued, was an important and material evidence in support of the prosecution case and failure to call her denied the court material evidence on what she witnessed and what PW1 told her. The learned State Counsel concedes that failure to call the witness comprised the prosecution case to a great extent. The evidence of PW1 indeed revealed that the evidence of the lady who rescued him was vital evidence in this case. The potential witness who was not called to testify had evidence which would have either linked the appellant with the offence of robbery with violence or exonerated him from the offence. The failure to call her as a witness in my view would have reasonably invited an inference that had she been called her evidence, would have weakened further the prosecution evidence, which was not strong enough to support a conviction.

19**. Having considered this appeal I have come to the conclusion that the evidence adduced against the appellant fell far too short of proof to the required standard in criminal cases. The offence of robbery with violence was not proved nor the offence of attempted robbery with violence. I find the conviction of the appellant with a lesser charge of attempted Robbery with Violence contrary to Section 297 (1) of the Penal Code was unsafe and should not be allowed to stand. I accordingly quash the conviction and set aside the sentence. I order the appellant to be set at liberty forthwith unless otherwise lawfully held.**

DATED, SIGNED AND DELIVERED AT SIAYA THIS 16TH DAY OF JUNE 2016.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

Mr. Ken Omollo for the Appellant

M/s. Mourine Odumba for State

Court Clerk: 1. Kevin Odhiambo

2 Mohammed Akideh

J. A. MAKAU

JUDGE