



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL NO. 98 OF 2014
(FORMERLY KISII HCCRA NO. 9 OF 2012)

BETWEEN

DAVID OBANDE OMONDI APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1096 of 2011 at Chief Magistrate's Court at Homa Bay, Hon. S. Ongeru, PM dated on 24th August 2012)

JUDGMENT

1. The appellant **DAVID OBANDE OMONDI** appeals against the conviction and sentence of death imposed after he was found guilty of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence as stated in the charge were as follows;

On the 9th day of November 2011 at Waragi Village, Waware North Sub-location, Rusinga East Location in Mbita District within Homa Bay County ... being armed with a dangerous weapon namely a knife robbed STEPHEN OCHIENG OMWONYA of a Nokia valued at Kshs. 3000 and immediately before or immediately after the time of such robbery wounded the said STEPHEN OCHIENG.

2. The appellant challenges the conviction and sentence on the grounds set out in the grounds of appeal filed on 3rd September 2012 and which may be summarised as follows; that the conviction was based on insufficient evidence identifying him as the person involved in the robbery, that there was a grudge between him and the complainant and that the evidence against him was insufficient to secure a conviction. In his written submissions he reiterated the evidence in support of the grounds.

3. Mr Oluoch, learned counsel for the respondent, submitted that the complainant knew the appellant and that this was a case of recognition rather than identification and that therefore the issue of mistaken identity could not arise. He pointed out that the magistrate warned himself of the dangers of convicting the appellant on the testimony of a single identifying witness. He further submitted that the elements of the offence of robbery with violence were proved as the complainant was stabbed and his phone stolen.

4. As to whether there was sufficient evidence to support the conviction, this Court, as the first appellate court, is enjoined to consider the entire evidence, evaluate it and reach an independent conclusion as to whether to uphold the conviction bearing in mind that it neither heard nor saw the witnesses testify (see

Okeno v Republic [1972] EA 32). In proceeding with this task, it is necessary to outline the material facts as they emerged from the trial.

5. The prosecution marshalled four witnesses to prove its case. The complainant, Stephen Ochieng Omwonya, PW 1, testified that he was a motorbike rider and that on 9th November 2011 at about 7.40pm he was at Mbita Town when the appellant requested him to take him to a funeral at Kamgere. As they approached Kamgere Primary School, the appellant told him to stop as the road ahead was muddy. The appellant paid the fare with some coins and as the complainant counted them with the aid of the motorcycle headlights he felt the appellant stab him on the back with a knife. The appellant held PW 1 but he ran away leaving his jacket which also had his mobile phone. He immediately ran to a nearby home and when he came back he did not find his Nokia mobile phone valued at Kshs. 3,000/-. He reported the matter at Mbita Police Station and went for treatment.

6. PW 2, Elias Ochieng Ogutu, the chairman of the motorbike riders in Mbita recalled that on the morning of 10th November 2011, PW 1 reported to him that the appellant had robbed him the previous night. Since he knew the appellant, he caused him to be caught and arrested. PW 3, Duncan Odhiambo Aloo, the clinical officer from Mbita District Hospital, testified that PW 1 reported being assaulted on 9th November 2011 at about 8.00pm. He testified that PW 1 had been stabbed in the back and was wearing a blood stained vest. He examined PW 1 after 12 hours and classified the injury as harm. He produced the P3 form.

7. PW 4, Corporal John Kehara, testified that while he was on duty at the Mbita Police Station on 9th November 2011, the complainant came to the station at about 2 pm and reported that he had been robbed by the appellant. He noted that the appellant came dressed in a blood stained vest and had a stab wound. He booked the report and issued a P3 form. On the next day he re-arrested the appellant after he had been arrested by members of the public.

8. When the appellant was put on his defence, he elected to give a sworn statement where he denied the charge against him. He also denied that he knew the complainant and that on 9th November 2011 he was at home and when he went to work on the following day, he was arrested by some people. He denied ever having boarded the appellant's motor cycle.

9. Before we consider the essence of the appeal before us we wish to point out the prosecution must prove theft as **a central element in the commission of the offence under section 295 as read with 296 (2) of the Penal Code** (see *John Mwikya Musyoka v Republic Mombasa CRA No.38/99 (UR)*). 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.

10. PW 1 testified that he was stabbed by the appellant and as he was trying to run away, he left his jacket which had his mobile phone. The jacket and phone had been taken by the appellant. When he returned to the scene later on he did not find his jacket and phone. The fact that violence was inflicted on him was clearly established by PW 3 to whom he reported soon after the incident and confirmed by the medical evidence presented by PW 3. We therefore find the elements of the offence of robbery with violence were established.

11. The main issue raised by the appellant is that of identification. The appellant denied that he was the person who robbed the complainant. It is well established that the court needs to exercise caution before relying on and convicting an accused person on the evidence of visual identification or even of recognition by a single witness. This is not to say that conviction cannot issue in such circumstances but there is need for extra care and assurance that the witness is reliable. In **Wamunga v Republic [1989] KLR 424**, Court of Appeal had this to say on the subject:

Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.

12. Identification by recognition is more assuring than identification of a stranger particularly under difficult circumstances. In **Anjononi & Others v Republic [1980] KLR 59, 60** the Court of Appeal noted that;

The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; 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.

13. We have carefully considered the evidence and we find that this was case of recognition. PW 1 testified that he knew the appellant for a long time and had given him the motorbike to use when he bought it. On the material day they had met earlier that night in an area where there was a security light, discussed the trip, agreed on the fare and proceeded for some distance. The testimony of PW 1 is further given weight by the fact that he reported the incident to the police that very night where he identified the appellant and also reported the matter to the chairman of the motorbike riders causing him to be arrested in the morning. All the evidence is overwhelming and leaves no doubt as to the appellant's identity as the person who stabbed the complainant.

14. In the petition of appeal, the appellant submitted that there was a grudge between him and the complainant. This submission is inconsistent with his defence that he did not know the complainant. No grudge was suggested by him in the in cross-examination of the complainant or the chairman of the motorbike riders.

15. For the reasons we have set out above, we find that the case against the appellant was proved beyond reasonable doubt. The conviction and sentence are affirmed and the appeal dismissed.

DATED and DELIVERED at HOMA BAY this 22nd day of May 2015.

D.S. MAJANJA

C. B. NAGILLAH

JUDGE

JUDGE

Appellant in person.

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

Public Prosecutions for the respondent.