



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.76 OF 2013

STEPHEN ONYANGO SALALA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

[Appeal from Original Conviction and Sentence from KISUMU CM'S Court: L. GITARI – CM

In Criminal Case NO.6 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 295 as read with Section 296(2) of the Penal Code. The particulars were that on the 18th day of December 2010 at Kamakowa Estate in Kisumu East District within Nyanza Province jointly with others not before court while armed with offensive weapons namely swords, panga and metal bar robbed **JEDIDAH ODHIAMBO OMONDI** (1) mobile phone Nokia 1616 (2) Kshs.1800 all valued at Kshs.4,190 and at or immediately before or immediately after the time of such robbery used actual violence to the said **JEDIDAH ODHIAMBO OMONDI**.
2. The prosecution called 7 witnesses to establish their case. The evidence can be summarised as follows:
3. **PW1 JEDIDAH ODHIAMBO OMONDI** who is the complainant had collected Kshs.1800 from her tenant and she was heading home at around 10 p.m. On the way near her house she met two people who demanded money from her. They forcefully took away her bag which contained the money and her mobile phone, make Nokia 1616.. In the process one of them hit her on the leg and she screamed from the pain.
4. The screams from the complainant attracted the neighbours who came to her rescue. By then she was unable to walk and she was assisted into the house by those who came to rescue her. She said that she was able to identify the appellant as there was security light at the compound and there was moonlight too. She was then taken to New Nyanza General Hospital the following morning.
5. **PW2 PETER MUDIGO ABALA** was in his house at around 10 p.m. When he heard the complainant screaming. He rushed outside and found two people pinning her down. When they saw him they ran away but he however recognised the appellant as they live together in one place. They carried the complainant to the house as she was unable to walk.
6. **PW3 FIDEL OTIENO** came the following morning to see the complainant who is her grandmother. She told him that **STEVEN** the appellant had attacked her. They traced the appellant in

vain but on 2/1/11 they arrested him at Nyawita in a Busaa club.

7. **PW4 GORDON OCHIENG** told the court that on 15.12.10 at 10 p.m. he was watching television when he heard noise from outside. He rushed outside and found PW1 struggling with the appellant and another person. The appellant was carrying a metal bar. They took off when they saw the witness. PW3 and PW2 carried her to her house.. He confirmed that he knew the appellant who was his neighbour.

8. **PW5 CORPORAL WAFULA WATA** was the investigating officer. He together with others arrested the appellant.

9. **PW6 DR. KAMAU ROSELINE** filled the P3 form on 18/1/11 which showed that the complainant had a fracture of left tibia. This was one month after the incident.

10. When put on his defence the appellant denied the offence. He said that the complainant was his mother-in-law.

11. The appellant filed 7 grounds of appeal which can be summarised as follows:

1. **Whether or not recognition was positive**
2. **Whether or not the entire evidence by the prosecution was inconsistent and could not amount to a conviction.**

The above line of argument was advanced by Mr. Oguso counsel for the appellant . The state on the other hand supported both the conviction and the sentence.

12. This being the first appeal our onerous duty is to evaluate the facts afresh with the view of arriving at independent finding, with full knowledge that we did not have the advantage of seeing the witnesses at the trial stage See **OKENO VRS REPUBLIC [1973] E.A.32.**

13. As arguably captured well by the appellant, the incident occurred at 10 p.m. and the question is whether or not there was sufficient light for the appellant to recognise her assailants. The complainant told the court that there was security light at the compound apparently when the robbery took place. The same was confirmed by PW2 and PW4. The three witnesses were even able to confirm what type of weapons they were carrying namely that the appellant was carrying metal bar while the other one was carrying a panga.

14. Further, the appellant was well known to the parties. He was a son-in-law to the complainant, a fact which he confirmed and further that he lived in the same place with PW2. Infact PW2 went ahead to confirm that the appellant wore a black T-shirt and a black trouser that night.

15. The argument that he was a neighbour to all the three witnesses was not disputed at all by the appellant.

16. In **ANJONONI & OTHERS VRS REPUBLIC [1980] KLR** page 59 the court had this to say:

“This was however a case of recognition, not identification of assistants. Recognition of the 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.”

17. Based on the evidence presented by the prosecution we find that there was sufficient lighting for the complainant as well as the witnesses to recognise the appellant. The appellant was previously known to them and he was not therefore a stranger.

18. Without going into the other arguments raised by the appellants we do not think that the appeal is meritorious. The appellant participated in the robbery which caused injury to PW1 as well as loss of her

phone and cash. The appellant and his colleague in crime seemed to have appreciated the fact that complainant had collected rent that day that is why they timed her within her compound

19. The appeal is therefore dismissed.

Dated, signed and delivered this 16th December, 2015.

H. K. CHEMITEI

J U D G E

E. N. MAINA

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