REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 63 of 2010

(An appeal against both conviction and sentence of the Senior Resident Magistrate's Court at Butere in Criminal Case No.481 of 2008 [B. O. OCHIENG, SRM])

DOMINIC SHIBIA OMULUBI …………………..……. APPELLANT

VERSUS

REPUBLIC …..........................………..…..........….. RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with another with robbery with violence contrary to **Section 296(2)** of the Penal Code. The particulars of the offence were that on 6th April 2007 at Oparanya estate, Shirotsa Sub-location, Township Location in Butere District within Western Province jointly with others not before court while armed with dangerous weapons namely pangas and rungus robbed Malack Matoke of a mobile phone, I wrist watch, 3 ATM cards and cash Kshs.3,800/= all valued at kshs.27050/= and at or immediately before or immediately after such robbery used actual violence to the said Malack Matoke. He was also charged separately in the alternative with handling stolen goods contrary to **Section 322 (2)** of the Penal Code. The particulars of the charge were that on 21st March, 2007 at Ekuria village, Shirotsa Sub-location, Township Location in Butere District within Western Province dishonestly retained 3 ATM cards belonging to Malack Matoke knowing them to be stolen property.

He and his co-accused denied the charges. After a full trial, the co-accused was acquitted. The appellant was however convicted on the main count of robbery with violence and was sentenced to suffer death. Being dissatisfied with the decision of the trial court, he has appealed to this court challenging both the conviction and the sentence.

The appellant also filed written submissions to back up his appeal. He relied on the same. In the submissions, the appellant stated that his identification was not positive. He also submitted that recovered exhibits were not produced in court. He stated that no inventory was produced to prove that he possessed government stores. He further submitted that he was not arrested due to any report made by the complainant. He stated that his Constitutional rights were violated.

The learned State Counsel, Ms Ngovi supported both the conviction and sentence. In counsel's view, the trial was conducted fairly and the appellant understood the language used. The appellant did not raise any

issue of violation of his Constitutional rights in his defence. Counsel submitted that the identification or recognition of the appellant was satisfactory. Though the stolen property was not found on him, that fact did not vitiate the conviction. Counsel lastly stated that PW8 confirmed that the complainant suffered injuries.

In brief, the case of the prosecution is that on the 16th April 2007, PW1 (the complainant) was heading to his house at Oparanya's estate, Shirotsa Location at 10.30 p.m. Near his gate, he saw some light from torches flashed at him from torches by people who claimed to be policemen. He started running away towards the shopping centre and he was hit with a club or a rungu. Another attacker cut him with a panga on the head and he fell down. They beat him up and took his Ksh.3,800/=, 2 ATM cards, an I/D card and a mobile phone make Erickson and a handkerchief. In the process, he saw one of the attackers whom he could identify by his size and voice. The voice was medium base. He was injured, taken to hospital, treated and discharged on 18th April, 2007. He reported the matter to the police.

The Assistant Chief, PW2 Benard Opanga received the report of the incident on the 21st April 2007. He proceeded to the home of the appellant with a village elder. When the appellant saw them, he started running away. They restrained him, took him back to his house and a police jungle jacket and boots were found therein. They called the police.

Later, when the police came, PW4, Cpl. Henry Ile searched the house of the appellant. They recovered 3 ATM cards and a diary in the grass thatched roof of the appellant's house. On information from the appellant, the other co-accised was arrested. An identification parade was conducted. The complainant identified the appellant at the parade. The appellant was then charged, tried, convicted and sentenced. There from arose this appeal.

This being a first appeal, we are duty bound to re-evaluate the evidence on record afresh and come to our own conclusions and inferences. We rely on the case of ***Okenyo -vs- Republic [1972] 32.***

We have re-evaluated the evidence on record. We note that the date of the robbery was clearly stated in the charge sheet as 6th of April, 2007. However, the evidence on record is that the offence occurred on 16th April 2007. The date of the alternative charge of handling stolen goods is 21st March 2007, which was before the robbery. It is not possible to handle items before they are stolen. The learned trial magistrate, in the judgment, stated that the robbery occurred on 6th April 2007. The charge was not amended.

This in itself, in our view is a serious irregularity. It cannot be a coincidence. In our view, the error that the dates on both counts are wrong created a miscarriage of justice, as the appellant could not effectively defend himself. In our view, the charge was defective. The charge should have been amended in order to tally with the evidence that was given in court. The failure to amend the charge in regard to the date of robbery with violence was fatal to the conviction herein. We will allow the appeal on that account.

The above aside, the conviction of the appellant was predicated on visual identification. In the case of ***Nzaro -vs- Republic [1991] KLR 70*** the Court of Appeal held inter alia as follows -

> ***"Whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence alleges to be mistaken, the judge should warn the jury (himself) of the special need for caution before convicting the accused person in reliance on the correctness of the identification or identifications."***

The complainant was a single identifying witness. The incident occurred at night. He was attacked suddenly. He tried to run away but was injured and fell down. In our view, the circumstances of identification were difficult. Though he stated that there was light from a security lamp, no description was given regarding the intensity of that light. No description was given on the distance of that source of that security light from where the complainant was and where the appellant was. No description was given regarding the duration of the incident to explain how the complainant was able to visually see the

face of the appellant to identify him.

Though the complainant is said to have identified the appellant in an identification parade, the evidence of his arrest suggests that he was a known or suspected criminal. He has had a number of criminal cases pending against him in court. In our view, it is quite possible that the appellant was pointed out as a known criminal in the area and consequently implicated in this case. The alleged discovery of the complainant's ATM cards in the grass thatched roof of the appellant's house appears to have been the connecting factor. The recovery was not supported by believable evidence. The possession by the appellant of stolen property belonging to the complainant was not proved.

This case appears to have been poorly investigated. The evidence on record does not meet the threshold for conviction in a criminal case. The evidence on record is evidence of mere suspicion. It is not a basis for sustaining a conviction in a criminal case – see the case of ***Sawe –vs- Republic [2003] KLR 364***. We find merits in the appeal. We allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered at Kakamega this 29th day of January, 2014

SAID J. CHITEMBWE **GEORGE DULU**

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