



ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 106 OF 2013

ALFRED ODIPO NDERAM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENTS

[From original conviction and sentence in the Senior Principal Magistrate's Court at Siaya Criminal Case No. 189 of 2013 Before Hon. B.M. Ochoi]

J U D G M E N T

Introduction

1). The appellant was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

The particulars were that on the 23rd day of March 2013 at Kalkada Uradi sub location in Siaya county within Nyanza province jointly with other not before court being armed with crude weapons robbed Lukas Oginga Omondi three cows and one mattress all valued at Kshs. 64,000/= and immediately after or immediately before the time of such robbery used actual violence to the said **Lukas Oginga Omondi**.

He was also charged with stealing stock contrary to section 278 of the penal code.

The particulars are that on the 23rd at Kalkando Uradi sub location in Siaya county with in Nyanza province jointly with others not before court stole three cows valued at Kshs. 60,000/= the property of Lukas Oginga Omondi.

The appellant was convicted and sentenced to suffer death hence this appeal.

Facts

2). On the material day the complainant **PW1, Lukas Oginga Omondi** was busy working in the shamba. The appellant with others came to his compound and demanded for his motorcycle which had allegedly been stolen by the complainant's son one **George Otieno**. They then assaulted him and took him away vide a motorcycle to Ugunja trading centre.

3). At 3 p.m they brought him back to his homestead where the appellant and others took away his cows ostensibly to pay for the stolen motorcycle. He was taken to Uranya trading centre where the appellant locked him in his house till 11 p.m when he released him.

The complainant as a result of the assault lost one molar tooth. He went to Rabul health centre for treatment and later to Siaya district hospital. He reported the matter at Siaya police station where he was given a P3 form to be filled.

4). **PW3, Wilfrida Awino Oduor** gave testimony on behalf of PW1. She narrated to the court how the appellant and others attacked the complainant on the material day. She saw the appellant hitting PW1 with a panga and frog marching him to board a motorcycle.

5). **PW4, Teresa Akinyi** narrated the same story like PW3. She further told the court that at 3 p.m she saw the appellant with others and took away the complainant's cow as well as the mattress.

when put on his defence the appellant denied the charge. He said that on the material day he was sick and was at home. He said that he saw the complainant's son being carried aboard his motorcycle which he later learnt that it had been stolen by him.

6). He further told the court that later he met the complainant who agreed to pay for the stolen motorcycle on behalf of his son. They entered into a written agreement which was witnessed by the police.

7). **PW2, a police officer** told the court that PW1 and the appellant went to the station and reported that they had entered into an agreement. They showed him the same and even the buyer of the cows came to confirm.

8). **DW3, Beatrice Auma Odinga** the appellant's wife told the court of how the complainant agreed to pay for the motor cycle that had been stolen by his son.

DW4, Elvis Ouma Otieno narrated how the motorcycle was stolen from him at gunpoint. In the process the complainant appeared at the scene and agreed to pay for the motorcycle.

Analysis and Determination

9). The appellant has filed seven grounds of appeal which Mr. Onsongo argued in support of the petition.

The issues to be determined is whether the charge sheet was duplex; whether the appellant participated in the robbery; whether the prosecution proved its case beyond reasonable doubt.

10). We find for a fact that the appellant's motorcycle which was stolen was the genesis of the problem herein. The appellant contended that the complainant indeed accepted to pay for the said motorcycle on behalf of his son.

What were the circumstances that prevailed when the said motorcycle was stolen? DW4 told the court that he was carrying two people to Nyawita and Nyadorera chemist. They then accosted him and placed a firearm on his neck and threw him down when he resisted. He went on to say:

“Odipo came to the scene and fortunately Oginga the father of the thief was around. We went with him to stage and went to Uranga and recorded a statement. We were with Oginga who agreed to pay for the motorcycle. Oginga called his son and left” (underlining mine).

11). Previously, the appellant had told the court: **“I asked Aweyo to come for me from where I was. He came and took me to the place where the motorcycle had been stolen and found Oginga who told me that his son is the one who stole the motorcycle and he told me that he had agree to pay me**

for the stolen motorcycle”.

12). The circumstances under which the complainant agreed to pay for the motorcycle remain unclear. First of all DW4 did not state whether he knew the thieves or not. According to him they threatened him using a firearm and threw him out of the motorcycle and left. He did not tell the court whether he knew the assailants or not.

13). Equally, how did the complainant concede to pay for the motorcycle allegedly stolen by his son even without having met his son? Is it possible that by talking to the appellant and DW4 he blindly believed that his son was the thief and agreed to sell his cows so as to compensate the appellant?

14). We do not think that this line of argument by the appellant is sustainable. We do not believe that the complainant would pay for the “sins” of his son just because he “fortunately” appeared on the scene.

15). In respect to the agreement signed, we do agree with the trial court that the same were obtained through coercion. Infact the only departure is when the court deviated to the issues of whether there was a variation in the signature which essentially is the preserve of the experts and not the court although it is entitled to its opinion. The variation on the dates that is 24-3-2012 and March 2013 is at variance which DW2 the police officer failed to explain.

16). We do find the testimonies of PW3 and PW4 credible and consistent. The incident took place at 9 a.m and 3 p.m and being neighbours they positively identified the appellant and his group. There is no doubt that the complainant was assaulted and his cows taken away by force. The complainant lost a tooth which was produced and sustained other bodily injuries as per the P3 form produced.

17). Were the ingredients of the charge established? We shall not hesitate that the prosecution indeed proved their case. The appellant although he did not drive the cows at 9 a.m however came back at 3 p.m to accomplice his mission.

The prosecution witnesses saw him untie the animals and drove them away. Although present, the complainant had been subdued and was unable to offer any resistance.

18). The appellant argued that the charge was duplex. We do not think so. The main charge was well proved as well as the second count. We do therefore for the above reasons dismiss this appeal.

Dated, signed and delivered at Kisumu this 21st day of January, 2014.

**H.K. CHEMITEI
JUDGE JUDGE**

A.O MUCHELULE