



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 85 OF 2012

GEORGE ODUOR OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in the Chief Magistrate's Court at Kisumu Criminal Case No. 315 of 2008 Before Hon. T. Obutu]

J U D G M E N T

Introduction

1). The appellant was charged with five counts of Robbery with Violence as follows:

Count 1: Robbery with Violence contrary to section 296 (2) of the Penal Code.

Particulars: **George Oduor Otieno alias Angima**, on the 14th June 2007 at Pala sub location in Bondo district of Nyanza province, jointly with others not before court being armed with dangerous weapons, namely pangas and simis robbed **Hellen Akinyi Odhiambo** of cash Kshs. 550/=, one sonny radio cassette, one pair of sandals and one Mobile phone 3310 all valued at Kshs. 7,450/= and at or immediately after the time of such robbery used actual violence to the said Hellen Akinyi Odhiambo.

Count 2: Robbery with Violence contrary to section 296 (2) of the Penal Code.

Particulars: **George Oduor Otieno alias Angima**, on the 14th June 2007 at Pala sub location in Bondo district of Nyanza province, jointly with others not before court being armed with dangerous weapons, namely pangas and simis robbed **Vitalis Onyango Malowa** of one AUCMA television, one vitron CD deck, one Nokia mobile phone 1110, 45 CD discs, one small pouch, cash Kshs. 6000/=, two motor vehicle batteries, two long trousers all valued at Kshs. 2,400/= and at or immediately after the time of such robbery used actual violence to the said Vitalis Onyango Malowa.

Count 3: Robbery with Violence contrary to section 296 (2) of the Penal Code.

Particulars: **George Oduor Otieno alias Angima**, on the 14th June 2007 at Pala sub location in Bondo district of Nyanza province, jointly with others not before court being armed with dangerous weapons, namely pangas and simis robbed **Monika Aoko Maginga** of assorted clothing, 3 sufurias, 12 steel poles, one jacket, two over coats, one kethol, six glass plates all valued at Kshs. 14,500/= and at or immediately after the time of such robbery used actual violence to the said Monika Aoko Maginga.

Court 4: Robbery with Violence contrary to section 296 (2) of the Penal Code.

Particulars: George Oduor Otieno alias Angima, on the 14th June 2007 at Pala sub location in Bondo district of Nyanza province, jointly with others not before court being armed with dangerous weapons, namely pangas and simis robbed **Jemima Ojwang Gumba** of one Bird mobile phone, one sonitec radio, one wrist watch make OKNY both valued at Kshs. 5,800/= and at or immediately after the time of such robbery used actual violence to the said Jemima Ojwang Gumba.

Count 5: Robbery with Violence contrary to section 296 (2) of the Penal Code.

Particulars: George Oduor Otieno alias Angima, on the 13th June 2007 at Utonga sub location in Bondo district of Nyanza province, jointly with others not before court being armed with dangerous weapons, namely pangas and simis robbed **Gilbert Abonyo Obang** of one Nokia mobile phone 1110, cash Kshs. 3000/=, one torch, one panga, one pair of adidas sports shoes all valued at Kshs. 15,600/= and at or immediately after the same of such robbery used actual violence to the said Gilbert Abonyo Obang.

2). The appellant was equally charged with three counts of handling stolen property as follows:

Alternative Charge for Count 3: Handling Stolen Goods contrary to section 322 (2) of the Penal Code.

Particulars: George Oduor Otieno alias Angima, on the 14th July 2007 at Pala sub location in Bondo district of Nyanza province, otherwise that in the cause of stealing dishonestly handled 2 over coats both valued at Kshs. 500/= the property of **Monika Aoko Maginga** knowing or having reasons to believe them to be stolen goods.

Alternative Charge for Count 4: Handling Stolen Goods contrary to section 322 (2) of the Penal Code.

Particulars: George Oduor Otieno alias Jaugenya, on the 14th July 2007 at Pala sub location in Bondo district of Nyanza province, otherwise that in the cause of stealing dishonestly handled one Bird mobile phone, one plastic mobile cover, one wrist watch make DKNY all valued at Kshs. 5,550/= the property of **Jemima Ojwang Gumba** knowing or having reasons to believe them to be stolen goods.

Alternative charge for Count 5: Handling Stolen Goods contrary to section 322 (2) of the Penal Code.

Particulars: George Oduor Otieno alias Jaugenya, on the 14th July 2007 at Pala sub location in Bondo district of Nyanza province, otherwise that in the cause of stealing dishonestly handled one Nokia mobile phone 1100 valued at Kshs. 5000/= the property of **Gilbert Kabonyo Obango** knowing or having reasons to believe them to be stolen goods.

3). After a full trial the appellant was convicted in all counts and sentenced to suffer death. He has filed this appeal citing several grounds.

Facts

4). Each of the prosecution witnesses gave various accounts of the situation. **PW1, Jemima Ojwang** was preparing to sleep at around 10 p.m. She was with her husband as well as her daughter who was still studying using a lantern lamp. She heard dogs barking and his herdsboy shouting. When she opened the door she saw three people including the houseboy.

5). They then forcefully entered the house and identified themselves as police officers. The accused was armed with a pear, panga and rungu. They proceeded to assault her as well as her husband. Her daughter hid under the bed.

6). She managed subsequently to run and raised alarm. She was assaulted and she sustained injuries on her body. She was taken to Bondo hospital for treatment as well as Usenge police station where she was issued with a P3 form.

7). **PW2, Monicah Magunde** told the court that at around 11 p.m on the material day she was asleep.

She heard people knocking her door but she refused to open. They broke the door as they forcefully entered. They then proceeded to assault her while demanding money. They blindfolded and tied her. After they left she went to her neighbour called Nyaseme who untied her.

She later went to Usenge police after hearing of the arrest. She also managed to identify her stolen items.

8). PW3, Gilbert Abonyo Obango is the husband to PW1. He equally gave chronology of what transpired that night. He was assaulted by the accused and sustained injuries on his forehead. He also lost several items which some were later recovered. He was equally treated at Bondo district hospital where he saw the appellant tied on a bed.

9). PW4, Hellen Akinyi Odhiambo was equally asleep on the very night of the incident when three people attacked them. She was sleeping in the same house with her cousin called Emily and a house help called Lilian. When they woke up they saw several people in the house who included Jaugenya who had worked for them. They robbed her also of her items and assaulted her before she escaped from the attackers.

10). PW5, Vitalis Onyango Malowa was with PW4 though in a different room. He was however lucky as by the time the robbers reached the house he was in he had escaped through the window. However, when he went back to the house he found that several assorted items including cash had been stolen by the attacker.

11). PW6, APC Josiah Odero when he received a report from Helen Akinyi proceeded with his colleagues to the scene. He was told that one of the robbers included one Jaugenya who was known by the witnesses.

His colleague **APC George Odongo** knew his house. They proceeded and indeed they managed to arrest him with another person and recovered some other stolen items. (The said Jaugenya and his accomplice have already been convicted).

12). Thereafter, they managed using Jaugenya's phone to trace the other robber who included the appellant. The witness told the court that when confronted the appellant charged at him with a panga but he managed to shoot him on the leg. The other accomplices ran away.

13). When arrested the appellant was found with the bag of Helen Akinyi beside other assorted items. He was then taken to hospital but charged separately as he spent considerable time recuperating at the hospital.

14). PW2, Japheth Oduor, a clinical officer at Bondo hospital produced P3 forms in respect of Helen Akinyi Odhiambo. Gilbert Abonyo Obang, Monicah Aoko Magunga and Jemima Ojwant Gumbo. All these people according to the said witness had sustained various degrees of injuries.

15). When put on his defence the appellant denied that he was involved in the offences. He said that on the material day he had gone to buy fish from the lake. He only found himself at the hospital after two days and he was accused of being a thief.

16). His witness **Joel Nyangiya Ochieng DW2** a convict, told the court that his phone was not used to trace the appellant or at all. He even denied owning a phone.

Issues for Determination and Analysis

17). The appellant has mounted 10 grounds of appeal. The same can be summarized into two major issues:

- 1. Whether the appellant was identified by the witnesses.**

2. **Whether the doctrine of recent possession apply in this instance.**
3. **Whether other key evidence and witnesses left out by the prosecution were essential.**

18). There is no doubt that a robbery took place at Nyamonye area on the dates enumerated in the charge sheet. It is also not disputed that the complainants suffered several bodily injuries and their properties stolen in the cause of the said robbery.

19). As is the case with such offences, there is need to always ensure that the robbers or the attackers are identified during the cause of the incident.

PW1 told the court that **“the lights were on as my child was still studying. The accused entered the house first. He was holding my houseboy. The accused was armed with a spear, panga and rungu”**.

She further went on to say, **“I identified the accused clearly as there was enough light in the house. He even talked with me for long”**.

On cross examination the said witness said **“you had a black jacket and a cap like that of the police”**.

20). PW2 equally told the court that he recognised the attackers using the torches they were flashing. She particularly singled out Jaugenya (Abdalla) who she used to see at the beach. She went further to say that it was the appellant who hit her on the right hand using a rungu.

21). From the above evidence we have no doubt that the lamp and the torches available at the scene enabled the witnesses to positively identify the robbers and in particular the appellant herein.

22). The next issue which in our opinion tied up the prosecution case is the recovery of the stolen items that particular night. PW6 clearly explained in his evidence how the appellant was shot. He has not challenged this fact. He was arrested with a bag and other assorted items which the witnesses successfully and positively identified.

23). Even if the appellant's defence was to be interrogated he did not explain how he came into possession of the bag containing stolen items. He did not suggest at all that the police “planted” the said items on him upon being shot. He further did not explain how he was shot on that night.

24). We do hold that the items recovered from the appellant were properly identified by the owners, they were found with the appellant shortly after being stolen and that they were indeed stolen from the complainants. **(See Isaac Nyange Kahiga alias Peter Nganga Kahiga Criminal Appeal No. 82 of 2004 [unreported])**.

25). The appellant has argued that some essential witnesses and exhibits were not produced by the prosecution for instance the panga that he allegedly had and the torches. We think that the evidence as adduced by the respondent were overwhelming. Even though whatever the appellant is complaining about were not produced or essential witnesses were not called the case against him was clearly proved beyond reasonable doubt.

26). In conclusion therefore and for the reasons given, we do not find any merit in this appeal. We consequently dismiss it.

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

H.K. CHEMITEI
JUDGE

A.O. MUCHELULE
JUDGE

HKC/va