



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 82 OF 2013

STEPHEN ODHIAMBO OWISO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in the Principal Magistrate's Court at Ukwala Criminal Case No. 88 of 2012 Before Hon. R.M. Oanda]

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 25th day of February 2012 at Yenga in Siaya county within Nyanza province jointly with another before court robbed **Peter Odhiambo** of Nokia Mobile phone **C-12 IMEI NO. 351098133055375/351098133055383 No. 77005** valued at Kshs. 2000/= and at or immediately before or immediately after the time of such robbery used actual violence to Peter Odhiambo.

The appellant after full trial was convicted of lesser charge of simple robbery and sentenced to ten years imprisonment hence this appeal.

Facts

2). The complainant PW1 was on 25-2-2012 at around 7.30 p.m walking home with his friends after watching a game of soccer. On the way they were stopped by two people on a bicycle and told to sit down. They then threatened them and took away his phone.

3). In the the process the complainant's colleagues raised alarm. The appellant's co-accomplice took off and the members of the public who came arrested the appellant. His phone was recovered from him by the assistant chief. He was taken to Ukwala police station where **PW6, Paul Sigilai** preferred the charges against him.

4). **PW2, Edmond Otieno Obonyo** and **PW5, Michael Oduor** were together with the complainant. The sum total of the prosecution case was that the appellant was arrested and when searched the complainant's phone was recovered.

5). The appellant did not deny that he was arrested when put on his defence. His argument however is that while he was riding his bicycle on his way home some youths refused to give way and he almost hit one of them. An argument ensued which attracted the members of public including the village elder and

the chief. He was then arrested and taken to Ukwala police station and later charged.

Issues for Determination and Analysis

- 6). From the petition of appeal filed by the appellant herein on 20-6-2013 the main issues are whether:
 - a. **The prosecution failed to call essential witnesses.**
 - b. **Established the ownership of the phone.**
- 7). We have no doubt in our minds that the appellant was arrested at the scene. The same is in fact confirmed by him. We are further in agreement with the trial court reducing the charge as earlier on explained as the ingredients of robbery with violence under the provisions of section 296 (2) of the Penal Code were not established.
- 8). We are however unable to establish how the phone was recovered from the appellant. The prosecution witnesses said that it was the assistant chief who recovered the phone from the appellant. In fact the complainant had no idea how the phone was recovered as it was admittedly dark.
- 9). Further, PW2 on cross examination said that he did not see the assistant chief conduct a search upon the appellant. PW3, Fredrick Ouma Ragumo the complainant's father equally generalised the recovery of the phone from the appellant.
- 10). Further, the ownership of the phone was not proved by the prosecution. Nokia C12 phones are numerous and for one to establish his, proper documentation is essential. The complainant did not produce any receipt of purchase or any iota of evidence to prove this.
- 11). We do find therefore that the above two reasons without going into any other reasons are sufficient to alter this appeal. We find that the assistant chief was an essential witness in this case who would have shed light on actual recovery of the phone. Equally, the village elder who was at the scene would have been another useful witness to the prosecution case.
- 12). We are aware of the provisions of section 143 of the Evidence Act chapter 80 Laws of Kenya which provides that no particular number of witnesses is required to prove a fact, but in this case an essential witness was left out by the prosecution.
- 13). We find also that the appellant offered a plausible defence. The issue surrounding the bicycle and the ensuing arguments between the appellant and the complainant and his witnesses seemed to have been the cause of the dispute.
- 14). Consequently, we do allow this appeal and set the appellant free unless lawfully held.

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

H.K. CHEMITEI
JUDGE

A.O. MUCHELULE
JUDGE

HKC/va