



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 02 OF 2012

BETWEEN

JARED ONYANGO OBAR APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence of the PM's Court at Migori in

Criminal Case No.146 of 2011 delivered on 16th February 2012 by Hon. Kibet Sambu, PM)

JUDGMENT

Introduction

1. The appellant herein, Jared Onyango Obar was arraigned before the Senior Principal Magistrate's Court at Migori in Criminal case Number 146 of 2011 on two Counts and an alternative charge.
2. In Count I, the appellant was charged with robbery with violence contrary to **Section 296 (2)** of the **Penal Code**, the particulars being that on the 7th day of March 2011 at Nyaobe sub location in Migori County within the Republic of Kenya, he robbed George Abedi Odhiambo Peters of Kshs.19200, a mobile phone make Nokia 1680, 18 empty sacks, a black cap and a tilly cooking fat container, all valued at Kshs.23,600/= and immediately at the time of robber, wounded the said George Atedi Odhiambo Peters.
3. In Count II, the appellant was charged with being in possession of papers for forgery contrary to **Section 367 (a)** of the **Penal Code**, the particulars being that on the 8th day of March 2011 at Uriri District Commissioner's Office in Migori County within the Republic of Kenya, without lawful authority or excuse, had in his possession twenty pieces of Kshs.1000/= denomination papers intended to resemble and pass as special papers used for making Kenyan currency notes.
4. In the alternative charge of Count I, he was charged with handling stolen goods contrary to **Section 322 (2)** of the **Penal Code**. The particulars of the offence were that on the 8th day of March 2011 at Uriri District Commissioner's office in Migori County within the Republic of Kenya, otherwise than in the course of stealing, dishonestly undertook the retention of one mobile phone make Nokia 1680 valued at Kshs.3300/= the property of George Abedi Odhiambo Peters, knowingly and having reason to belief (sic) it to be stolen property.
5. The appellant pleaded not guilty to all the counts, and the case proceeded to hearing before Hon. Kibet Sambu, SRM. The prosecution called 8 witnesses in support of its claims against the appellant. The appellant testified under oath, but called no witnesses.

The Prosecution Case

6. The complainant in this case George Abedi Odhiambo Peters who testified as PW4 (Odhiambo) testified that on 6th March 2011, he asked the appellant to look for people who had maize for sale. Odhiambo was a businessman cum farmer. On 7th March 2011, the appellant led Odhiambo to the house of one Salmon Oyier who was said to have some maize for sale, though on arrival at Oyier's house, Oyier was not at home. After making some enquiries, Odhiambo and the appellant were directed to another homestead which was said to have some maize for sale. Odhiambo also testified that on the day in question, he had on him Kshs.19200/= in cash comprising 14000/= in a thousand note denomination and 5200/= in fifty shilling note denomination. That was the money Odhiambo said he intended to use to purchase the maize. He also had with him 18 white manila bags and a tilly tin, a black cap and a mobile phone Nokia 1680.
7. Odhiambo testified further that as he and the appellant walked together from Oyier's home, along a footpath between 9.00 and 10.00 a.m., the appellant suddenly turned on him and wrestled him to the ground as he (appellant) tried to strangle him while demanding to be given all the money that Odhiambo had. The appellant overpowered Odhiambo and took away from him all the cash, the 18 white manila bags, the tilly tin, the black cap plus the Nokia phone 1680.
8. When Odhiambo came to, he found himself alone and minus all the items listed in the charge sheet in Count I. With the help of the people in the neighbourhood, Odhiambo tried to trace the appellant but to no avail. The incident was reported by Odhiambo to the area Assistant Chief, Joseph Oluoch Obuya, PW6, who in turn contacted his counterparts with a view to tracing the appellant. Odhiambo also reported the incident to Rapogi D.O.'s office before going for treatment. The appellant was eventually arrested and charged.
9. Odhiambo also told the court that the appellant was a person well known to him because he had hired him as one of the casuals in cane harvesting. The report by Odhiambo to the D.O.'s office at Uriri was received by Number 2009015183 APC Benson Njoroge Wambui, PW2. According to PW2, Odhiambo arrived at the D.O.'s Office at around 3.00 p.m. and reported that the appellant had robbed him of Kshs.19,200/=-, 18 white manila bags, a tilly tin, a cap and Nokia phone 1680. Together with Odhiambo and APC Nemuel Bigombe PW6 went to a sub stage where they found the appellant in the process of boarding a matatu headed for Migori town. A quick search was carried out on the appellant. The search yielded Kshs.20,000/= in forged currencies and a Nokia 1680 which was in the accused's shirt pocket. The appellant was escorted to Migori CID office for interrogation. Both PW6 and Odhiambo recorded their statements after Odhiambo positively identified the Nokia 1680 phone recovered from the appellant to be his. PW6 stated that the Kshs.19200/= was not recovered from the appellant.
10. Joanes Ochieng Awiti, PW5, told the court that on 7th March 2011 at about 11.00 a.m., he was at his home at Central Kanyamkago Kali village near Kali primary school entertaining some visitors who had attended a funeral when he saw Odhiambo running towards the homestead and on arrival Odhiambo told them that he had been robbed by the appellant. It was PW5 who escorted Odhiambo to the home of the village elder to whom Odhiambo gave a description of the appellant as the person who had robbed him earlier in the day. The village elder then informed the area chief. According to PW5, Odhiambo was looking weak and tired. PW5 also testified that he knew the appellant as one of the sons of Obar's family.
11. The Yaobe sub location Assistant Chief, Joseph Oluoch Obuya testified as PW6. His testimony was that on 7th March 2011 at about 11.30 a.m., while he was in his office at Piny Owacho Chief's office, he received a call from the clan elder, one Zephania Otieno Obar concerning the allegation of robbery against Odhiambo by the appellant. The appellant is a younger brother to Zephania Otieno Obar. Later on, Odhiambo went to PW6's offices where he recounted his ordeal with the appellant. Thereafter, PW6 contacted his counterparts of West, North and South East Kanyamkago location with a request to be on the lookout for the appellant. PW6 also testified that Odhiambo had some bruises around the neck. On the 8th March 2011, PW6 received a report that the appellant had been spotted around Ukwala area. Later on the same day, PW6 got information that the appellant had been apprehended and taken to Uriri DC's office.
12. PW6, who was by that time in Migori town rushed to the DC's office and confirmed the appellant's arrest and recovery of a Nokia 1680 phone from him (appellant). PW6 also testified that the appellant is also known as Tabu. That on that same day, the appellant, who was nearly lynched by people who were taking changaa at a changaa den in the vicinity, bragged on where he had got the fake Kshs.20,000/= notes. PW6 later recorded his statement. During cross

- examination, PW6 could not say whether it was Odhiambo who had given the fake currency notes to the appellant. PW6 confirmed that the appellant is a younger brother to the village elder and that it was the village elder who informed PW6 that the appellant had robbed Odhiambo.
13. PW3, Martha Atieno Wasonga (Martha) testified that she is a resident of Kanyamkago at Kater school Nyaobe Division Rapogi Location. That on 7th March 2011 at around 2.00 p.m., while she was in her house feeding her child, the appellant arrived and asked her to keep certain items which he was carrying. The appellant was a person well known to Martha because they were neighbours. According to Martha, the appellant was carrying a yellow paper bag in which were stuffed white manila bags, an empty tilly 2kg can and a black leather cap. The appellant told Martha that since he was in a hurry, he would leave his luggage with her and requested her to give the same to someone to take to his home which was not far from Martha's home.
 14. Martha testified further that soon after the appellant left, her husband came home and enquired from her what the appellant had left behind. She confirmed to her husband that the appellant had left behind a yellow paper bag containing some manila bags. It was then that Martha was informed by her husband that the things the appellant had left behind were stolen items. Martha identified a bundle of white striped manila bags – **PMF1-5**, an empty 2 kg tilly can – **PMF106**, a yellow paper bag – **PMF1-7**, a black leather cap, **PMF1-8** respectively.
 15. During the cross examination that followed, Martha said she had not known the appellant as a cereals trader and had in fact asked him when she saw the manila bags whether he had become a cereals trader of late.
 16. Number 76786 PC Douglas Ongicho of Migori CID Office testified as PW7. His evidence was to the effect that on 8th March 2011 at around 5.00 p.m., he was on duty at the CID Office when the DCIO, Migori, Mr. Japheth Mateche instructed him to proceed to Uriri DC's office to collect a suspect who had been arrested and was being held at the Uriri AP Camp. Together with other colleagues, PW7 proceeded to the Uriri DC's office where they found the appellant who was being held on allegations of robbery within Yaobe area. PW7 was also informed that a quick search on the appellant after his arrest in Ukwala area had yielded a mobile phone, nokia make, some 20,000/= in forged currency notes bearing similar serial numbers. The appellant was escorted to Migori police station and was charged with being in possession of forged currency notes as he continued with investigations into the robbery incident.
 17. PW7 thereafter prepared an Exhibit Memo Form and sent the forged currency notes to the Document Examiner for analysis. PW7 also recorded Odhiambo's statement the day after and issued him with a P3 form which was duly filled by David Ondieki PW8 a registered clinical officer at Migori District Hospital.
 18. PW8 confirmed that he examined Odhiambo on 10th March 2011 and found scratches around the neck. Odhiambo had already received initial treatment at Uriri Health centre where he had been put on some pain killers. PW8 filled the P3 form issued to Odhiambo by PW7. Apart from bruises on the right side of the head and tenderness on the neck, Odhiambo's other systems were normal. The P3 form was produced as **P. Exhibit 11** while the initial treatment notes from Uriri Health Centre were produced as **P. Exhibit 10**. In cross examination, PW8 explained that according to the initial treatment notes, Odhiambo was first treated on 10th March 2011 though the robbery incident is alleged to have occurred on 7th March 2011.
 19. After PW7 received Odhiambo's complaint of the alleged robbery, he commenced investigations into the allegations. PW7 visited the scene of the alleged robbery and also talked to elder Zephania Otieno Obar who declined to record a statement for fear of retaliation from the appellant who was his younger brother. PW7 also testified that he investigated the appellant's M-Pesa Account No.[particulars withheld]. The M-Pesa statement was produced as an exhibit together with: 20 forged notes – **P. Exhibit 2**; Exhibit Memo Form **P. Exhibit 3**, Nokia Mobile Phone – **P. Exhibit 4**, receipt on purchase of the Nokia phone – **P. Exhibit 9**, yellow paper bag – **P. Exhibit 7**, white manila bags (18 in number) with red stripes – **P. Exhibit 5**, one 2 kg tilly tin – **P. Exhibit 6**, a black leather cap **P. Exhibit 8**, a sworn affidavit **P. Exhibit 12**, M-Pesa transaction statement as **P. Exhibit 13**.
 20. PW7 denied a suggestion by the appellant that the 20,000/= forged currency notes belonged to Odhiambo.
 21. PW1 was Number 232060 Chief Inspector Michira Ndege, a forensic examiner based at CID Headquarters in Nairobi, Document Examination Section. PW1's duties on a day to day basis

included the examination of disputed documents, including signatures, stamp impressions, travelling documents among others. He testified that on 14th March 2011, he received some exhibits from Cpl Batinya of CID Migori, marked **A1-A6** being serial numbers AG 86, 35077 A7-A12 Serial No.EF8635076, A13-A20 bearing serial numbers PIC 8635098, being 20 papers in all. On examination of the 20 papers, PW1 established the following:-

- *The paper quality and the texture of the questioned notes when felt with an ordinary hand was poor and did not conform to the quality of a genuine denomination of the Kenya currency;*
- *The characteristic surface on the printing on a genuine note had not been incorporated in the questioned notes;*
- *The ink used on the questioned notes was not genuine as it could not withstand resistances;*
- *the security marks on the questioned notes had not been incorporated;*
- *the colour on the questioned notes was uneven;*
- *There was a noted fictitious register on the questioned notes as opposed to a true register in a genuine note;*
- *The printings on the questioned notes were visibly faded which is not a characteristic of a genuine bank note;*
- *The questioned notes marked A1-6, A7-A12 and A13-A20 were bearing repetitive serial numbers which is against the Central Bank Regulations which require each note to have its own serial number.*
- *The questioned notes, when subjected to ultra violet light failed to show the reflective sections present in genuine currency notes.*

22. After examination and analysis of the questioned notes, PW1 formed the opinion that the said notes were counterfeits. A report to that effect was prepared and produced as **P. Exhibit 1**.

The Defence case

23. The appellant gave sworn evidence and told the court in examination in chief that on 8th March 2011, while he was standing at a bus stage in Ukwala sub location looking for maize to purchase, he received a call from Odhiambo requesting him to wait for him at the bus stage. While he waited for Odhiambo, some strange people whom he later learnt were police officers, went to where he was and arrested him on allegations that he had robbed the said Odhiambo. The appellant denied the allegations that he had robbed Odhiambo whom he said was his business partner. The appellant also testified that it was Odhiambo who gave him the 20,000/= in notes to go out and purchase maize. That it is also Odhiambo who gave him his (Odhiambo's) phone, Nokia 1680 to enable them communicate better since he had lost his own phone.

24. During cross examination, the appellant stated that Odhiambo gave him the phone on 28th February 2011 and that Odhiambo fixed him because he (Odhiambo) had given him forged notes to be used for the purchase of the maize. He also said that he started purchasing maize from 17th February 2011, to 3rd March 2011 with money given to him by Odhiambo. He also testified that the leather bag which was inside the manila bags was given to him by Odhiambo. He denied that the M-pesa balance of Kshs.4000/= found in his phone at the time of arrest was part of the Kshs.19200/= stolen from Odhiambo.

25. Regarding the evidence of the area chief, the appellant testified that he had a land dispute with the said area chief, hence the adverse testimony given by the said area chief.

Judgment of the Trial Court

26. After a careful analysis of all the evidence adduced by the prosecution the learned trial magistrate found that there was overwhelming incriminating evidence to show that the appellant committed the offence of robbery under **Section 296 (2)** of the **Penal Code** against Odhiambo and thereafter went and left the stolen items (apart from the cash) at Martha's house. The trial court found the appellant guilty as charged on Count I and Count II and convicted him accordingly. The appellant

was sentenced to suffer death as by law provided for the offence in Count I. The conviction and sentence on Count II was left in abeyance.

The Appeal

27. Being dissatisfied with both conviction and sentence, the appellant filed his petition of appeal on 23rd February 2012 setting out the following homemade grounds of appeal:-

1. *THAT the Honourable magistrate erred in both law and fact in as much as the subject abandoned the trial proceedings to be spearheaded and manipulated by the prosecution and incredible witnesses.*
2. *THAT the Honourable magistrate erred in both law and fact since the arresting officers found the appellant in possession of domestic fake currency worth 20,000/= which the trial magistrate failed to reconcile with the case of robbery as alleged by the complainant.*
3. *THAT the Honourable magistrate erred in both law and facts for sentencing the appellant to suffer death irrespective of the overwhelming discrepancy of statements and testimonies from the prosecution witnesses.*
4. *THAT the Honourable magistrate erred in both law and fact for not bothering to establish the circumstances under which the appellant was charged with the various offences without a basis, including substitution of the charge to one under **Section 296 (2) of the Penal Code.***
5. *THAT the Honourable magistrate erred in both law and fact for accepting evidence given by the complainant and his neighbours without other corroborative evidence.*
6. *THAT the Honourable magistrate erred in both law and fact by basing the appellant's conviction on hearsay evidence, and without acknowledging that the case against the appellant was based on personal vendetta between the appellant and the clan elder over ownership of ancestral land.*
7. *THAT the Honourable magistrate erred in both law and fact for failing to consider the appellants exonerative evidence with regard to the Nokia mobile phone and the fake currency notes.*

28. The appellant prays that the appeal be allowed, conviction quashed and sentence set aside.

First Appeal

29. This appeal is before us as a first appeal. On such an appeal as this, we are aware of our onerous duty of rehearing the case by reconsidering and evaluating the evidence afresh with a view to reaching our own conclusions in the matter only remembering that we have no opportunity of seeing and hearing the witnesses. Only the trial court had such an opportunity. The appellant expects us to subject the entire evidence to a fresh scrutiny to see whether the same supports the findings reached by the learned trial magistrate. In this regard we are guided by the principles to be applied by the appellate court of first instance when considering whether or not to upset a judgment of the trial court as laid down in such cases as **Mwangi –vs- Republic [2004] 2 KLR 28; Ruwalla –vs- R[1957] EA 336; Ngui –vs- Republic [1984] KLR 729** and the now locus classicus **Okeno –vs- Republic [1972] EA 32.**

Issues for Determination

30. We have set out the whole evidence that was placed before the trial court by both the prosecution and the defence. We have also carefully considered and weighed the judgment of the trial court. From an analysis of the evidence on record, the issue that stands out for determination is whether the said evidence established beyond any reasonable doubt that the appellant was properly convicted by the trial court.

31. Before we make any findings on the issue, it is important for us to examine the submissions made by both the appellant and the State.

The Submissions

32. When this appeal came up for hearing the appellant put in his written submissions in which he

- contended that the ingredients of the offence of robbery under **Section 296 (2)** of the **Penal Code** were not proved, especially because, in the appellant's view, there was no mention of any weapon that was used to commit the offence.
33. The appellant also submitted that the case against him was a frame up by Odhiambo because of the fake currency notes which Odhiambo intended to use for the purchase of maize. He said he was a victim of circumstances because Odhiambo was his business partner.
34. The appeal was also substantively argued on the appellant's behalf by Mr. G.N. Nyambati who contended that this was not a case of robbery under **Section 296 (2)** of the **Criminal Procedure Code**. Mr. Nyambati also submitted that the whole of the prosecution evidence fell far short of proving the case against the appellant. Counsel also faulted the trial court for failing to comply with the provisions of **Section 169** of the **Criminal Procedure Code** in that the trial court did not set out any points for determination. Counsel also submitted that the trial court contravened the appellant's rights under **Article 50** of the **Constitution** for proceeding with the case before the appellant was supplied with witness statements.
35. The State conceded that the appellant was not given a fair trial since the appellant did not have the witness statements before his trial commenced. It was submitted that the trial court failed to comply with the provisions of **Article 50** of the **Constitution** as to a fair hearing which includes the right to be informed of the charge, with sufficient detail to answer it. Counsel urged us to remit the case for retrial since the mistake was not with the prosecution but with the court.

Findings and Conclusions

36. Both counsel in this appeal are agreed that the appellant's right to a fair trial as enshrined in **Article 50 (2) (j)** of the **Constitution** to the effect that **"every accused person has the right to a fair trial, which includes the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to the evidence."** Mr. Nyambati for the appellant referred to the record of the proceedings of 4th August 2011 where after the prosecutor informed the court that he was ready to proceed with witnesses, the appellant stated:-

"I have not been supplied with the prosecution's statements. I am therefore not ready to proceed."

The prosecutor then replied:-

"We pray that we proceed with the evidence of the Document Examiner and thereafter adjourn the matter to enable the accused person be supplied with the witness statements."

37. Counsel for the appellant faulted the trial court for proceeding with the case without first of all making a determination of the appellant's application for adjournment for lack of witness statements, and for proceeding to take the evidence of the Document Examiner under those circumstances. In the appellant's view, the court ought to have made a determination of that issue because the appellant was faced with a grievous offence. The state agrees with the appellant's counsel's submissions on this point.
38. It is our considered view that the charge against the appellant was so grievous that he needed to prepare adequately to counter the allegations against him. Being in possession of witness statements is the most reliable way of ensuring that an accused person has advance information of the evidence to be adduced against him and to appropriately prepare to counter that evidence with his own case. By failing to allow the appellant to have access to witness statements before commencement of the trial was in our humble view, an affront to the appellant's rights to a fair trial as enshrined under **Article 50** of the **Constitution**. On this ground alone, the appeal succeeds, the conviction is quashed and the sentence of death is set aside.
39. The supplementary issue for determination is whether this is a proper case to be remitted to the trial court for fresh hearing. The argument by the State is that the mistake was made by the trial court and not by the state/prosecution. Counsel for the appellant submitted that a retrial may not be the best option in the circumstances since the exhibits were released to the complainant even before the prosecution case was closed. He submitted that a retrial would be in order if all the

evidence, including the exhibits, was intact. For this proposition reliance was placed on the Court of Appeal decision in **Cisse Djibrilla –vs- Republic [2008] e KLR.**

40. In the above cited authority, the issue was whether failure to provide an interpreter for the appellant during the trial was fatal to the prosecution case. According to the record, the proceedings were conducted in English and translated into Kiswahili but it was not shown whether the appellant, who was a citizen of Guinea understood either language, nor was it shown which language he spoke or understood or in what language he had cross-examined the prosecution witnesses and defended himself. It was apparent that the appellant's failure to understand the language used during the trial court had resulted in him remaining silent during the proceedings and standing mute even when he was called upon to defend himself.
41. In the instant case, two things stand out. First, after the court proceeded with the case without first of all ensuring that the appellant was supplied with witness statements in advance, the appellant did not put any questions to the Document Examiner. The second point is that the exhibits were all released to Odhiambo after the appellant said he had no claim to the same, and this was done before the hearing of the case was concluded.
42. It is our humble view therefore that a retrial would be anchored on mere statements without the supporting exhibits. Such a trial would be a waste of judicial time and would prejudice the appellant who would have to await the outcome of a trial which is unlikely to succeed. It is now well established that a retrial should be ordered when the appellant is not to be prejudiced by it or when the prosecution will not be engaged in a fishing expedition to put non-existent evidence together. In this case, the prosecution will be hard put finding the exhibits that will support the complainant's case.
43. For the foregoing reasons, we find and hold that it would be futile to order a retrial of this case. Accordingly the appellant shall be released from prison custody forthwith unless he is otherwise lawfully held.
44. It is so ordered.

Dated, signed and delivered at Kisii this 31st day of July, 2014

RUTH NEKOYE SITATI

E.M. MURIITHI

JUDGE.

JUDGE.

In the presence of:

Miss Nekesa for G.M. Nyambati for Appellant

Mr. Majale for Respondent

Mr. Bibu - Court Assistant