REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 40 OF 2011

DOMNIC ONDITI ONDITI ….....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

From original conviction and sentence in Criminal Case number 1097 of 2010 of the Principal Magistrate's Court at Ogembo – Hon. L. M. Nafula)

JUDGMENT

Introduction

1. The appellant herein was charged with Robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars were that on 17th July, 2010 at Getenga Sub location in Gucha District within Nyanza province, jointly with others not before court, he robbed John Omare Nyamao of his cash Kshs. 11,800/=. Equity Bank ATM Card, a mobile-phone make Safaricom Kabambe and a National Identity card Number 13289279 all valued at Kshs. 14,799/= and at or immediately before or immediately after the time of such robbery used actual violence against the said John Omare Nyamao.

2. The appellant was after the trial convicted and sentenced to death.

The Facts of the case and Evidence

3. Briefly the facts of this case were that on the material day at about 6:30 p.m. John Omare Nyamao (PW1) was on his way home when he was accosted by three people who he encountered on the road. They beat him and ransacked his pockets. He started shouting for help. **Finley Shem Onchieku (PW2**) happened to be passing by. He saw the three men beating PW1. He too started shouting and asked those men if they wanted to kill the other person. On hearing PW2's screams the assailants fled taking with them the complainant's mobile phone, Equity ATM card, wallet and Kshs. 11,800/= PW2 helped the complainant up and escorted him home. As he had sustained injuries his wife gave him first aid and he slept. The next day he reported the matter to his area Assistant Chief and then to Ogembo police station before going to Ogembo District Hospital where he was treated. At about 7:00 p.m. on the day the attack took place **Evans Ondari (PW3)**, a cobbler at Montoto, was passing near the scene when he saw a wallet which had an identity card and an ATM card. He collected it and took it to **Zachary Miruka (PW4)** a shopkeeper who confirmed that the same belonged to PW1. He called PW1 who went for it.

4. PW1 and PW2 testified that they identified the appellant as one of the assailants; that they knew him prior to that incident and that as it was not yet dark they saw him properly. They confirmed that the

assailants were not armed. The clinical officer who filled PW1's P3 form testified as PW6. He stated that he saw PW1 on 19/8/2010 but that he (PW1) had been treated at the hospital on 17/7/2010. He assessed the degree of injuries inflicted upon PW1 as harm. The appellant was arrested on 21/8/2010 but no recovery was made.

The Defence Case

5. In his unsworn statement the appellant stated how, on a date he could not remember, his brother told him that somebody that he (the appellant) had assaulted had reported to the police. He contended that on the day it is alleged he assaulted him he was at work. He denied that he knew the complainant.

The Appeal

6. The appellant has raised sixteen grounds in his Amended Petition of Appeal filed on 11th March 2013. He has argued that the trial magistrate did not consider that the prosecution witnesses were family members; that their evidence was contradictory doubtful, flimsy and fabricated so as to fix him. He also contends that the court did not take his defence into consideration, neither did it fully appreciate the issues of identification and corroboration and that the court accepted the evidence of PW2 despite his admission that there were mistakes in his statement. That PW3 admitted that he never recorded a statement. He further contends that the charge was defective and also takes issues with the medical evidence saying that the P3 form was filled thirty three (33) days after the incident; that it did not state the kind of weapon used and that there were no cogent treatment notes. Further that the Trial Magistrate abrogated his constitutional right to liberty during the trial .

Submissions by Appellant

7. In his submissions Mr. Mogire, Advocate for the appellant, reiterated those grounds. He submitted that PW1 contradicted himself when he stated that he knew the assailants yet he could not say what happened to the other two. He submitted that as the assailants were not armed the charge against the appellant cannot hold. He also stated that the complainant could not be believed as he chose to report the matter first rather than seek treatment; that treatment was an afterthought. He pointed out that nothing was recovered from the appellant. Regarding the evidence of PW3. Counsel submitted that the court erred in relying on it yet PW3 is on record as saying that he did not record a statement. He further submitted that whereas PW4 saw the complainant the day after the robbery he confirmed that he (PW1) did not have injuries. He stated that as for the investigating officer there were contradictions in his evidence regarding the date when he arrested the appellant creating doubt as to whether the arrest was in respect of this offence or any other. He also wondered why PW6 opined that sharp objects were used to inflict injuries upon the complainant whereas the complainant's evidence was that the assailants were not armed. He further submitted that there was inconsistency regarding the time of the alleged offence with PW1 saying it occurred at 6:00 p.m. and PW2 saying it was at 6:30 p.m. Further that although initially the offence was not bailable the court did not inform the appellant of his right to bail when the offence became bailable. Finally, he contended that it was never proved that what was on the clothes the complainant wore on that day was blood.

Submissions by the State

8. The State opposed the appeal. Mr. Shabola, for the State, submitted that the evidence against the appellant was water-tight and that the appeal ought to be dismissed.

Duty of this Court and Findings

9. As the first appellate court we have reconsidered and evaluated the evidence afresh and from that evidence we find that this offence occurred during the day. According to the complainant it was at about 6:30 p.m and he could clearly see his assailants. He stated that he identified him very well as it was not dark. The assault on him took almost fifteen minutes which in our view gave him sufficient opportunity to identify the assailants.His evidence was corroborated by PW2 who chanced on the incident. This

witness stated that it was 6:00 p.m and that he was only ten metres away when he saw the complainant being beaten. He testified that he saw the appellant very well before he fled. That it was still day time. Although the evidence of these two witnesses regarding the time at which the offence took place differed slightly, they mentioned the appellant in their first statements at the police station something they would not have done had they not positively identified him. It is also noteworthy that it is the complainant who led the police to the appellant's home. The appellant's evidence that he did not know the complainant is therefore not convincing. In our view the discrepancy regarding the time of day was minor. The inconsistency regarding the time even if we were to consider it material would not change the fact that the robbery occurred in day time. We are satisfied that the identification was safe and accurate.

10. We further find that an identification parade would not have been necessary given the fact that the identifying witnesses knew the appellant. (See **Ajode =vs= R [2004] 2KLR** page 81 where at page 88 the Court of Appeal held that no identification parade is required in cases of recognition).

11. We are also satisfied that the ingredients of robbery with violence were proved by the fact that the appellant was in the company of two other persons. He also used actual violence against the complainant during the robbery which in itself would also have proved the offence. That the assailants were not armed is immaterial.

12. We also find that the medical evidence tendered confirmed that the complainant sustained injuries. He testified that he could not go to hospital the same night because it was now right.The next morning he first made a report before going to hospital. This was as is expected and we do not agree that it is proof that the treatment sought by the complainant was an afterthought. Moreover as we have stated above the mere fact that the appellant was, during the robbery in the company of one or more other persons sufficiently proved the robbery, even were we to disregard the medical evidence.

13. Mr. Mogire submitted that the substance on the complainant's clothes was not proved to be blood. With due – respect we do not think that was a crucial issue in the case as there is proof from PW2 that the complainant was injured and that he saw the appellant beating the complainant before he (appellant) fled. PW4 saw the complainant after he had already been to the hospital and that probably explains why he did not notice the injuries.

14. We are also not satisfied that the appellant's right to liberty was abrogated. He was represented by an Advocate at the trial and so had legal counsel. It was the duty of the Advocate representing him to counsel him regarding his constitutional rights. From the record, we do not find instances when the appellant's rights were abrogated.

15. The evidence of PW3 goes further to confirm that the incident complained of occurred on 17/7/2010. He testified that a bout 6:30 p.m he was on his way home when on reaching near Motonto Coffee Society he saw a wallet which contained an identity card and ATM card. He collected it and took it to PW3. The place he picked the wallet is the same place PW1 was attacked. Although PW4 did not record a statement PW3 who did corroborated his evidence. He confirmed that PW4 took the wallet to him and that it belonged to PW1. He also testified that he sent for PW1 and gave it to him. All this evidence goes to confirm that PW1 was telling the truth and that the robbery in fact took place.

Conclusion

16. It was also submitted that the charge is defective. We do not agree.

17. In the result we find no merit in the appeal and dismiss it.

Dated, signed and delivered at Kisii this 24th day of July, 2014

R. N. SITATI **E. N. MAINA**

JUDGE **JUDGE**

In the presence of:

Mr. Majalre (present) for State

Mr. Mogire (present) for Appellant

Mr. Bibu - Court Assistant