



**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 15 OF 2013**

*(From the original Conviction and Sentence in the Criminal Case No. 3258/2011 of the Chief Magistrate's Court at Mombasa: J. Gandani – SPM)*

THOMAS ODHIAMBO OGAO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**JUDGMENT**

The appellant **THOMAS ODHIAMBO OGAO** has filed this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at the Mombasa Law Courts. The appellant was first arraigned before the subordinate court on 21<sup>st</sup> October, 2011 on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(1) OF THE PENAL CODE**. The particulars of the charge were given as follows

**“On the 19<sup>th</sup> day of October, 2011 along Moi Avenue in Mombasa District within Coast Province, jointly with another not before court robbed ELIZABETH WANGARE NJUGUNA of her cash Kshs. 7,350/=, a mobile phone make Ideos and a hand-bag all valued at Kshs. 16,549/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said ELIZABETH WANGARE NJUGUNA.”**

The appellant pleaded ‘*Not Guilty*’ to the charge and his trial commenced on 15<sup>th</sup> March, 2012. The prosecution led by **INSPECTOR SUNTU** called a total of four (4) witnesses in support of their case.

The complainant told the court that she is a business woman at Kongowea. On 19<sup>th</sup> October, 2011 she left her house at Moi Avenue at 5.00 a.m. At about 5.30 a.m. she came across two young men walking towards her. The men made as if to pass her. Suddenly one of them held her neck from behind and pulled the handle of her handbag causing it to cut. The two men ran off with her handbag containing cash Kshs. 7,350/= and a mobile phone make Ideos.

The complainant shouted for help and some guards nearby gave chase. **PW2 MOHAMED ALI MOHAMED** told the court that the complainant was his neighbour. On the material day at 5.35 a.m. he was coming from the mosque. He heard the complainant shout ‘*Thief*’ ‘*Thief*’. He saw a man running carrying a woman’s handbag. **PW2** confronted the man who threw down the handbag and ran off. Another passerby eventually caught the appellant. They picked the bag and went to where the

complainant was. She checked the handbag and found her cash and mobile phone missing. The appellant was then handed over to police. Upon completion of investigations he was arraigned in court and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed onto his defence. He opted to make a sworn statement in which he denied having robbed the complainant at all. On 31<sup>st</sup> January, 2013 the learned trial magistrate delivered her judgment in which she convicted the appellant of the offence of Robbery with Violence and sentenced him to death. Being aggrieved the appellant filed this appeal. The appellant chose to rely on his written submissions which had been duly filed. **MR. DZUMO** learned state counsel opposed the appeal.

As a court of first appeal we are obliged to re-examine and re-evaluate the prosecution evidence and to draw our own conclusions on the same [**AJOE VS. REPUBLIC 2002 KLR**]. We have perused the written submissions filed by the appellant. He raises one main ground being identification.

The incident occurred at about 5.30 a.m. It was dawn and daylight was breaking. The complainant in her evidence at page 6 line 13 states

**“It was morning so not very dark and there was also bright moonlight and street lights. I could see well and I could also differentiate colours.....”**

In his evidence **PW2** who helped chase appellant states on page 8 line 2 described the light available thus

**“It was 5.35 a.m. it was dawn. Street lights were on so I saw your face well.....”**

Under re-examination at page 9 line 7 **PW2** emphasizes that

**“There was enough light from security lights.”**

On his part **PW3 PC EMMANUEL NGEIYWA** the husband to the complainant told the court that he heard the commotion and ran out of his house to check what was amiss. He states at page 12 line 8

**“At that time, it was dawn and daylight was breaking out so one could see clearly. Further the street lights were on.....”**

**PW4 CORPORAL ABDALLA MOHAMED** who was the investigating officer gives a description of the scene as follows on page 15 line 6

**“The scene of crime is a well lit area as there are street lights and security lights from nearby buildings.”**

We note that the incident occurred along Moi Avenue which is a main street in the central business district of Mombasa. This is a street which has several hotels and shops. We take judicial notice of the existence of street lights along Moi Avenue in Mombasa. We also have no doubt that many or not most of these businesses have security lights which remain on during the night. We therefore find that the combination of factors – it was dawn, the existence of street lights as well as the existence of security lights at the scene meant that visibility was good lending towards a clear identification.

In her evidence the complainant stated that the two men who approached her were dressed in a red T-shirt and a blue T-shirt respectively. The fact that she could identify and differentiate the colours is further proof of the fact that visibility was good. The complainant specifies that it was the man in the **red** T-shirt who grabbed her neck and she identifies that person as the appellant. It must be noted that the two men were initially walking **towards** the complainant. She therefore had the opportunity to see them well as they approached her. Her identification of the appellant as one of her assailants is corroborated by the evidence of **PW2**. He states that when he confronted a man running carrying a lady’s handbag the man threw down the bag. Others gave chase and caught the man. **PW2** states at page 8 line 17

**“I identified him [the appellant] as the man who threw away the bag. He is the accused.”**

The complainant’s handbag was recovered and she identified the same **Pexb1**. **PW2** had ‘confronted’ the appellant as he ran carrying the bag. He therefore had an opportunity to see him well. The complainant produced in court a receipt dated 12<sup>th</sup> September, 2011 for her phone serial number 35509343951595. This confirms that she did infact have a mobile phone as she alleged.

Further corroboration on the question of identification is provided by **PW3** who was the complainant’s husband. He stated that he came out of his house when he heard the commotion. He found that his wife had been robbed of her handbag. **PW3** also identifies the black handbag **Pexb1** as the one which belonged to his wife. **PW3** was present when the suspect was apprehended and was brought to the scene. He states at page 12 line 4

**“The suspect is the accused here. He was in a red T-shirt.....”**

It is highly unlikely that there were several men in red T-shirts running holding women’s handbags in the same area on that day. It is clear that the man whom the complainant said was dressed in a red T-shirt who robbed her is the very same man apprehended by the public and who **PW2** saw throw down the bag. The chain of evidence is intact and point squarely at the appellant. He was caught at the scene as he did not have time to run far. The fact that the complainant’s mobile phone and cash were not recovered does not in any way negate the prosecution evidence. Clearly the appellant’s accomplice who escaped made off with these items.

In his defence the appellant concedes that indeed he was wearing a red T-shirt on the material day but he denies having been caught along Moi Avenue. He states that he was caught by a mob near Pandya stage. The prosecution witnesses did not know the appellant before. They had no reason to come to court to tender false evidence against the appellant. There is no evidence of any pre-existing grudge between the appellant and any one of the witnesses. We reject this defence as a mere denial. We do agree with the finding of the learned trial magistrate that there was a clear positive and reliable identification of the appellant as one of the men who robbed the complainant.

We now wish to address our minds to the question of whether this incident amounted to a Robbery with Violence as envisaged by section 296(2) of the Penal Code. In her judgment at page 24 line 19 the learned trial magistrate stated that

**“In the case of Oluoch vs. Republic [1985] KLR 549 it was stated that the use of the word ‘or’ in the definition of Robbery with Violence means that proof of ‘any one’ of the 3 ingredients are [sic] sufficient to prove an offence under section 296(2) of the Penal Code.”**

**“In this case the attackers were two and violence was used. I am satisfied that at least two of the ingredients set out in section 296(2) of the Penal Code have been shown to have been present hence the threshold for an offence under section 296(2) of the Penal Code have been met.”**

We are in agreement with this finding. This incident did fall within the ambit of section 296(2) of the Penal Code. The conviction of the appellant was sound and we do uphold the same. The trial court did listen to the appellant’s mitigation after which he was sentenced to death. The sentence was lawful and we do uphold it. The upshot is that this appeal fails in its entirety.

**Dated and delivered in Mombasa this 1<sup>st</sup> day of August, 2014.**

**M. ODERO**

**M. MUYA**

**JUDGE**

**JUDGE**

In the presence of:

Mr. Kiprop for State

Appellant in person

Court Clerk Mutisya