



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 167 of 2010

No. 665

ISAAC OKINYI OGETO 1ST APPELLANT

JOHN MOKAYA OBONYO 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Magistrate's Court

at Kerokas, Hon. B. Were in Criminal Case No. 1197 of 2009 dated 13th August, 2010)

JUDGMENT

1. The appellant herein Isaack Okinyi Ogeto (1st appellant/2nd accused) and John Mokaya Obonyo (2nd appellant/1st accused) were charged with robbery with violence contrary to **section 296 (2) of the Penal Code**. The particulars of the charge were that on the night of 18th and 19th September 2009 at Ichuni sub location in Masaba South District within Nyanza Province while armed with crude weapons namely a machet, robbed Geoffrey Nyakundi Akaki of Kshs.3,360/=, a motor bike worth Kshs.86,000/= and P.S.V. of Kshs.1,000/= all valued at Kshs.99,360/= and immediately before or immediately after the time of such robbery used actual violence to the said Geoffrey Nyakundi Akaki.
2. Both appellants denied the charge against them and the case went to trial. The prosecution's case was that the complainant was attacked and robbed between the night of 18th and the morning of 19th September 2009 between 11.30 p.m. and midnight.
3. The complainant, Geoffrey Nyakundi Akaki, (PW1) testified that on that night he was at the stage of Garissa hotel near the Bus Park when the 2 appellants asked him to take them to Resource. He agreed to take them on his motor cycle NS Star KMCF 935P at a fare of Kshs.150/=. He knew the 1st appellant/2nd accused as he used to ride a motor cycle. The 1st appellant/2nd accused then spoke to him to take them Resource. As they left the main road and got into the rough road, the 1st appellant/2nd accused hit him on the right side of his face with a knife and they both fell. The 2 appellants then began to assault him and they also cut him on the head and shoulder.
4. The 2nd appellant/1st accused took his cash Kshs.3,360/= from his pocket, as the 1st appellant/2nd accused held him from behind. They then tried to take off with the motorcycle but they fell and left it on the ground. It was then that he called his colleague (as the appellants did not take his phone) who came and took him to Ram, where he was admitted for four days. When the police came to see him he told

them that he could identify his assailants.

5. After he was discharged he wrote his statement, he identified in court the photo that showed the rear of the motor cycle as **MF1-1(a)**, the P3 form that was filled and further identified the 2nd appellant/1st accused's clothes as a cap, red sweater, blue jeans marked as **MF1-4**, and 1st appellant/2nd accused's clothes, namely a jumper and white black stripped trouser – **MF1-7**. He also identified the knife the appellants used to assault him. PW1 indicated that it was the 1st appellant/2nd accused who had the knife. He told the court that though the cash was not recovered, he was able to properly recognize the two appellants as he saw their faces before the day of the attack.
6. On cross examination, PW1 maintained that he was attacked and robbed by the 2 appellants and that prior to the incident the 1st appellant/2nd accused was known to him as he used to come to the stage and take a ride on motor cycles.
7. On re-examination, PW1 maintained that he was hit by the 1st appellant/2nd accused who was next to him and the 2nd appellant/1st accused took the money from his pocket.
8. PW2 was Theresa Nyaboke Nyaega, the employer of PW1. She produced a receipt to show ownership of the motorcycle which was marked MF1-8. She confirmed to the court that on 19th September 2009 she received a report that PW1 had been attacked and after the motor cycle was recovered at the scene of the attack, it was later taken to the police station.
9. PW3 was Philip Mairura, a taxi driver. He told the court that on 18th September 2009 at midnight, as he was approaching Nyanturago building centre he met 2 boys coming from the opposite direction on foot. On reaching the stage, he heard reports that a motor cyclist had been attacked. He informed them that he had seen the attackers. The people at the bus stage decided to go after the attackers and managed to arrest the 2nd appellant/1st accused who at that time had a dagger sheath and a bag on the back containing clothes inside. He recognized the sheath the accused had that night and identified the stripped trouser which was marked as MF1-5 and jacket which was marked as MF1-7.
10. PW3 further testified that the 2nd appellant/1st accused told them where the 1st appellant/2nd accused was and they went to his house found him in the sitting room dressed in blue trouser and red sweater. The blue trouser had mud on its knee. He identified the trouser as MF1-6 and sweater MF1-4.
11. On cross examination, PW3 testified that his motor vehicle had its full lights on hence it was easy to identify the 2 appellants as they were the only ones on the road. He then noticed that the 1st appellant/2nd accused's trouser had mud on it as he drove past him and the 2nd appellant/1st accused had a bag and that when the people at the matatu stage described the people taken by PW1 he had compared them to the people he had seen on the way.
12. PW4 was Ombagi, a motorcyclist. He confirmed to the court that on 18th September 2009 at about midnight, 2 men came and hired PW1. He was able to see them as there were bulbs at the stage. After half an hour PW1 called and said he had been assaulted and motor cycle taken. They later found him at a junction to Resource and took him to Kisii. He identified the photos of the motor cycle as **MF1-1 (a) and (b)** and further confirmed that when they told PW3 of the incident, he told them that he had met 2 people on the way. The people pursued them and managed to arrest the 2nd appellant/1st accused who led them to the home of the 1st appellant/2nd accused.
13. PW5 was Douglas Kiriago Marango a motor cycle rider. He testified that on 18th September 2009 the 2 appellants went to hire his motorcycle but he told them he was waiting for another client. It was then that they proceeded to PW1 who was near Garissa Hotel and they left with him. He corroborated PW1's testimony that PW1 had called and informed them that he had been robbed. He further confirmed PW3's testimony on how they used PW3's taxi to apprehend the 2nd appellant/1st accused and confirmed that at

the time of his arrest he had a sheath and a broken knife handle. He also stated that at the time of arrest the 2nd appellant/1st accused had a checked trouser and a jacket while the 2nd accused had a blue trouser and red sweater.

14. PW6 was NO.42265 Sgt. Sila Katiku of Keroka police station. He testified that he was on duty on the night of 18th /19th 2009 when the 2nd appellant/1st accused was brought by PC Ngetich and PC Abdi on allegation that he and others had robbed PW1 of a motor cycle and seriously assaulted him. He confirmed that on searching him a matchet broken at the handle was found and after interrogating him he took them to the home of the 1st appellant/2nd accused where they arrested him. He identified the clothes the 2nd appellant had worn as MF1-5, MF1-7, MF1-6 and MF1-4.

15. On cross examination, PW6 stated that he did not recover any cash or insurance document from the appellants.

16. PW7 was Joel Ongaro a registered clinical officer at Masaba District Hospital. He testified that on 29th September 2009 PW1 was sent for examination alleging he had been assaulted on 18th September 2009 at 11.30 p.m. by two people known to him. He had a healed wound on right periodontal region, a cut wound on the shoulder and hands bilaterally between the index finger and thumb. PW7 opined that the weapon used was sharp. He classified the injury as grievous harm.

17. PW8 was No.88940 PC Abdi Mohammed of Keroka Police Station. He was the investigating officer. He testified that on the night of 18th and 19th September 2009 he was on patrol with PC Ngetich within Keroka Town when they came upon 2nd appellant/1st accused who was about to be lynched by the public on allegations that he had stolen a motor cycle which had been recovered. They took him to the police station, searched him and recovered a handle of a knife, and upon interrogating him he took them to the home of the 1st appellant/2nd accused whom they arrested and took to the station. PW8 testified that the knife used to cut the complainant was removed from the scene the following day but the handle had been recovered the same night from the 2nd Appellant/1st Accused. He further confirmed that PW1 identified the appellants as his assailants.

18. On cross examination, PW8 stated that Kshs.3360/= had also been stolen, though it was not recovered and that he had no proof save for the complainant's assertion that he had cash. He also testified that they did not recover the insurance cover for the motorcycle which had already been recovered when they apprehended the 2nd appellant/1st accused.

19. At the close of the prosecution case, the appellants were put on their defence and they both chose to give unsworn statements with no witnesses. The 2nd appellant/1st accused told the court that on the night of 18th/19th September 2009, he had come from Nairobi and arrived at 8.00 p.m. On reaching Keroka he alighted at the Gusii Deluxe and began to walk home but reaching Ichuni a mob appeared, told him to get into the motor vehicle, and took to his cousin's house. On reaching there, he was handcuffed and they were both taken to the police station and charged with an offence he knew nothing about. He also stated that the clothes produced as exhibits were not his clothes.

20. The 1st appellant/2nd accused told the court that on the 18th/19th September 2009 at about 11 p.m. he was asleep when he heard a knock on the door. On opening the door he saw police officers who searched his house and took him to the station. He also stated that the clothes produced in court as exhibits were not his clothes.

21. After an evaluation of the evidence on record, the trial court found the charges proved and convicted each of the appellants of the charge of robbery with violence. Both appellants were sentenced to death.

22 The appellants were dissatisfied with the conviction and sentence hence the present appeal.

23. The complaints raised in the two appeals are, *inter alia*, that the charge sheet was defective; that they

were not properly identified, that the exhibit evidence did not tie up; that the trial magistrate failed to evaluate or resolve and cure conflicting and contradictory evidence, that the appellant was not informed in a language he understands on the reason for his arrest as enshrined in **Article 49 (1) (a)** of the **Constitution of Kenya** and that the trial magistrate erred in rejecting the 1st appellant's alibi defence. The appellants also contend that a mere arrest does not connote *mens rea*.

24. When the appeal came before us for hearing on 5th November 2012, the appellants handed in written submissions. In summary the 1st appellant/2nd accused's submissions revolve around the issue of a defective charge sheet and identification. He submits that the charge sheet did not reflect the actual position as disclosed by the evidence on record and that since no amendment was made, the charge became incurably and fatally defective. He relied on the Court of Appeal decision in **Jackson Yongo –vs- Republic [1982-1988] 1 KAR 167.**

25. Finally he submits that the evidence of PW1 was not accurate as the alleged light at the stage was not known where exactly it was placed and neither did PW1 adduce any evidence on the intensity of the alleged light.

26. In his submissions the 2nd appellant/1st accused argues that the charge of robbery with violence was defective in that the evidence on record is that the alleged motor cycle was not stolen which should have been attempted robbery, the alleged light at the stage was not disclosed where exactly it was placed and its intensity, the allegation that he led the police to the arrest of the 1st appellant/2nd accused did not mean that he had any knowledge of the crime committed and that the recovery of the alleged knife was doubtful because the alleged blood on it was not taken to the government chemist under **section 71 (1)** of the **Evidence Act Cap 80.**

27. The appeal was opposed by the state. Mr. Mutai learned counsel for the state submitted that the conviction was based on sound evidence of recognition of the 1st appellant/2nd accused as the complainant knew him before. The 2nd appellant/1st accused led to the arrest of the 1st appellant/2nd accused thus the issue of identification does not arise. The arrest happened the same night shortly after the incident therefore there could have been no mistake in linking the appellants to the robbery.

28. In addition, counsel submitted that the clinical officer testified to the injuries suffered by the complainant and that the trial court considered all the evidence laid before it and reached the conclusion that the prosecution had proved its case against both appellants beyond any reasonable doubt. In conclusion, he urged the court to uphold the conviction and sentence and dismiss the appeal.

29. As a first appellate court, we are under duty to subject the evidence tendered before the trial court to a fresh and exhaustive evaluation so as to reach an independent verdict.

30. The following are the issues of determination in this case:

Ø *Was the charge sheet defective and if so was it incurably and fatally defective such that the defendants were prejudiced in their defence?*

Ø *Were the appellants positively identified by the complainant?*

Ø *Was there any need to take the blood allegedly found on the knife recovered from the crime scene for testing?*

31. With regard to the 1st question PW1 during examination in chief told the trial court that **“the motor cycle remained at the scene ---” The two tried to take off with the motor cycle but they fell and left it on the ground.**

32. On reading the charge sheet and evidence on record it appears that the alleged motor cycle did not leave the scene of crime. Therefore the appropriate charge against the appellants should have been one of

attempted robbery with violence of a motorcycle contrary to **section 297 (2) of the Penal Code**. However, this court takes due cognizance of what was held in **Kilome –v. Republic [1990] KLR 194** that the paramount consideration in determining whether or not a defect in the charge is incurable or not is whether there is prejudice occasioned to the accused in putting up his defence because of the words used in the charge sheet.

33. We are therefore of the view that the appellants should have been charged with the offence of attempted robbery with violence of a motor cycle contrary to **section 297 (2) of the Penal Code**. Despite the fact that the trial court did not amend the charge sheet such failure to amend did not prejudice the accused persons in their defence as the charge itself did not differ with the ingredients of the offence of robbery with violence. Therefore this ground of appeal must fail.

34. Secondly, on the issue of whether the 1st appellant/2nd accused was positively identified by the complainant, PW1 stated in evidence in chief that **“I know one of the customers. He used to ride a motor cycle. It is the 2nd accused who came and spoke to me. It is the 2nd accused that I knew before ---- I was able to properly recognize the 2 assailants. It was a bit dark but saw the faces of the 2 accused. The 1st accused had a cap, red sweater and blue jeans. The 2nd accused had a jumper blackish and white and black stripped trouser.”**

35. PW3 who saw the appellants moments after the alleged robbery stated: **“I was able to note how the 2 were dressed that night. The motor vehicle had its full lights on ---- We arrested the 1st accused. He had the dagger sheath. He had a bag on the back with clothes inside. It was a black trouser and shirt --- the 1st accused had a stripped trouser and a jacket.”**

36. PW5, a colleague to PW1 on examination in chief stated: **“On 18/9/2009, I was at the Keroka stage at midnight I had my motor cycle. Some 2 men came to hire me but I refused. I saw the 2 suspects when they came to me. I saw their clothing. The 1st accused had a checked trouser and a jacket. The 2nd accused had a blue trouser and red sweater.**

37. On cross examination he stated that: **“I didn’t see PW1 carry the 2 suspects. I had no business with them. I don’t know the people PW1 carried.”**

38. The upshot of the above is that there was inconsistency between the evidence of PW3 and that of PW5 as regards the type of clothing each of the appellants was seen wearing. In the circumstances, We are persuaded that this could be a case of mistaken identity. The fact that the complainant was attacked is not doubted as PW7 correctly corroborates that fact but as to who attacked PW1 is still in doubt. In our view, it has not been established beyond reasonable doubt that indeed it was the 2 appellants who attacked PW1. PW1 stated that he saw the appellants with the aid of light but he did not describe to the court the intensity of the light.

39. In **Jeska Guesi Kakami –vs- Republic [2010] e KLR** it was held:

“It is also an established point of law that for any night identification to be relied on, it must be shown that the source and intensity of light was sufficient to have enabled the complainant to make a positive identification.”

40. In this case we are unable to accept PW1’s claim that he was able to identify his attackers that night. This is because we are not told the source or intensity of the light that enabled him to make that identification. In the circumstances we reject his testimony that he identified the appellants as the people who robbed him.

41. As to the admissibility of the blood stained machete alleged to be recovered at the scene of the crime, PW8 (the investigating officer) stated on cross examination that: **“I asked about the blade but he didn’t state where it was. It was night and we all went to the scene with PC Ngetich and Kaliku. We didn’t go the next day but one of the boda bodas brought the knife. I received it from Patrick. It was**

brought before we went to the scene The machete had blood. I can't tell whose blood it is. I didn't send the blood for matching and analysis. Possible it could be for someone else."

42. In our view the police should have taken the alleged machete for blood analysis to confirm that the blood found on the machete belonged to the complainant. In his own testimony PW8 confirmed that the blood in the machete could have been for someone other than PW1's.

43. In conclusion, it is trite law that the burden of proof lies with the prosecution who must prove their case beyond any reasonable doubt. Any inconsistencies or doubts in the evidence tendered by the prosecution will clearly be to the advantage of an accused. In this case, the doubts and inconsistencies must be for the benefit of the appellants. The appellants are therefore successful on this ground. We therefore allow the appeal, quash the conviction, set aside the sentence and order the appellants be set free forthwith unless they are otherwise lawfully held.

Dated and delivered at Kisii this 27th day of February, 2013

**RUTH NEKOYE SITATI
JUDGE.**

**R.LAGAT KORIR
JUDGE.**

In the presence of:

Mr. Shabola for the State

Both present for the Accused

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI
JUDGE.**

**R.LAGAT KORIR
JUDGE.**