REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 64 of 2008

MICHAEL OTIENO alias JAYALO…….....……APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

(From the original Conviction and Sentence in the Criminal Case No. 1692/2004 of the Chief Magistrate's Court at Mombasa: T. Mwangi – SRM)

JUDGMENT

The Appellant **MICHAEL OTIENO** alias **JAYALO** has filed this appeal against his conviction and sentence on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The given particulars of the charge were as follows:

"On the 17th day of May, 2004 at about 5.45 a.m. at Majengo Mapya Village Likoni Location within Mombasa District of the Coast Province, jointly with others not before court while armed with dangerous weapons namely pangas, rungus and iron bars robbed Charles Otieno Okuna his bicycle make avon F/No. E551811 valued at Kshs. 3,000/= and at or immediately before or immediately after the time of such a robbery used actual violence to the said Charles Otieno Okuna."

The Appellant entered a plea of '**Not Guilty'** to the charge before the lower court and his trial commenced on 11th August, 2004. The prosecution called a total of five (5) witnesses in support of their case. The complainant **CHARLES OTIENO OKUNA** told the court that on 17th May, 2004 at about 6.00 a.m. he was riding his bicycle proceeding to industrial area. Near Ushindi Baptist a group of four (4) men dressed in black rain coats accosted him. One man hit him on the head with an iron bar and he fell off his bicycle. Another took his bicycle away. The complainant remained on the ground struggling with one of the robbers. The complainant who had a knife pulled it out and stabbed one of the robbers on the arm. All this time the complainant was calling out for help. A colleague of his **WILSON ODHIAMBO AGINA PW2** happened by and came to the rescue of the complainant. When the attackers saw **PW2** approaching they all ran off. The complainant went to the police station where he reported the incident. He was issued with a P3 form.

Later on 13th June, 2004 police called the complainant and told him that a suspect had been arrested. Both **PW1** and **PW2** went to Likoni police station where they were both able to positively identify the appellant as one of the man who had robbed him. The bicycle which was recovered was also positively identified by the complainant as his. Upon completion of police investigations the appellant was charged in court.

At the close of the prosecution case the appellant was found to have a case to answer and was placed on

his defence. The appellant however opted to keep silent in his defence. On 20th September, 2007 the learned trial magistrate delivered her judgment in which she convicted the appellant of the charge of robbery with violence and there after sentenced him to death. Being aggrieved by both his conviction and sentence the appellant filed this present appeal.

This being a first appeal this court is obliged to re-examine and re-evaluate all the evidence adduced before the trial court and to draw our own conclusions on the same. [See **AJODE – VS – REPUBLIC 2004 KLR 82].** We have carefully perused the appellant's written submissions in which he raised the following grounds for his appeal:

- Identification

- Insufficiency of evidence

- Failure by the learned trial magistrate to transfer the case to a different court

Mr. Jami who appeared for the respondent made oral submissions in which he opposed the appeal and urged this court to uphold both the conviction and sentence.

At the outset this court must determine whether the incident in question amounted to a Robbery with Violence as envisaged by section 296(2) of the Penal Code. The definition of Robbery with Violence includes an incident in which:

(1) There is more than one perpetrator or

(2) The offenders are armed with dangerous and/or offensive weapons or

(3) In pursuance of the theft, threat of actual harm or actual harm is visited upon the victim.

In this instance the complainant told the court that he was accosted by a group of four men. The men were armed with rungus and iron bars. One of the men hit the complainant with an iron rod causing him to fall off his bicycle – thus there was clear use of physical violence as against the victim. The complainant did sustain physical injuries which are proved by the evidence of **PW4 DR. LAWRENCE NGONE** the doctor who examined the complainant. He filled and signed a P3 form which was produced in court as an exhibit **Pexb2**. From this evidence it is manifestly clear that this incident met all the ingredients of the definition of Robbery with Violence under section 296(2) of the Penal Code.

The next ground of appeal is that of identification. From the evidence of the complainant this incident occurred at about 5.45 a.m. It was dusk and probably daylight had not arrived. Visibility may have been poor. However, the complainant states that he was able to see his attackers well because there were security lights in the area. He states under cross-examination at page 28 line 17:

"From where you were attacking me to where the house and the light was it was about 3 meters away……."

The evidence of the lighting available at the scene is corroborated by **PW2** who states at page 33 line 31:

"It was at dawn and there were drizzles. The security lights were on. Light was thus sufficient."

Both the complainant and **PW2** attended an identification parade mounted at Likoni police station and both made a positive identification of the appellant. **PW4 INSPECTOR EDWARD MARABU** was the officer who conducted the identification parade and he produced the parade forms as exhibit **Pexb5. PW4** confirms that the appellant voluntarily participated in the parade and further that he raised no complaint about the manner in which the parade was conducted.

Apart from this visual identification the complainant told the court that he put up a stiff resistance and he

managed to stab one of the robbers in the arm. The complainant told the court that he was able to confirm his identification of the appellant due to the wound which he had inflicted on the appellant. He states at page 28 line 30:

"I identified you by the stab on your hand alongside your appearance."

PW2 confirms that when he arrived at the scene he found the appellant bleeding from the arm. The complainant even took to the police station the knife which he used to stab the appellant. The said knife was produced in court as an exhibit **Pexb1.** In order for the complainant to have stabbed the appellant we find that he must have been in close proximity with him and thus was able to see him well. The complainant confirmed that the appellant was the man whom he had stabbed when he states at page 29 line 4:

"I had also told the police that I had stabbed you on the left hand. After identifying you by appearance and size, I requested that you remove the long-sleeved shirt that you were wearing and I pointed out the stab marks."

It cannot be a mere coincidence that the complainant stabs his attacker on the arm and the appellant is arrested a few days later sporting a stab wound on his arm. In the circumstances we are satisfied that there has been a clear, positive and reliable identification of the appellant as one of the robbers.

In addition to the evidence on identification, there is evidence of recovery of the stolen bicycle. The complainant told the court that he was robbed of a black bicycle make Avon serial No. E551811 on 17th May, 2004. About two weeks later **PW2 PC REUBEN MUTUA** told court that he received information of a suspect who was hiding at Mtima village. **PW3** raided the house in question from where he arrested the appellant. He also recovered from the same house a black bicycle make Avon bearing serial number E551811 as well as a black raincoat with a torn sleeve. The complainant identified the bicycle as the one which had been stolen from him and he also identified the black raincoat as similar to the one which was being worn by his attacker. The tears on the sleeve of the coat (which were noted by the trial court) obviously resulted from the stab wounds inflicted by complainant on his attacker. The doctrine of *'recent possession'* squarely applies here. The fact that the appellant was found in possession of the complainant's stolen bicycle as well as the torn raincoat provides conclusive proof that it was the **complainant** who attacked and robbed the complainant.

We are satisfied that the prosecution witnesses adduced overwhelming and cogent evidence against the appellant. Indeed this was a case we would describe as *'watertight'*.

The last ground of appeal raised by the appellant was the failure of the trial magistrate to disqualify herself and to transfer his case to a different court upon the appellant's request. We have carefully and anxiously perused the record of the trial to establish if this allegation is true. Firstly, a court is under **no** obligation to disqualify itself from hearing a matter simply because a party has asked that it do so. To allow this would be tantamount to sanctioning forum – shopping by litigants. A judicial officer only need disqualify himself/herself where he feels that there exists a conflict of interest.

Our perusal of the typed proceedings from the trial court reveal that on 13th October, 2004 after the complainant had testified the appellant made the following application (page 7 line 1):

"Accused

I want to recall the complainant for further cross-examination. I don't want to do the case here. I want another court."

The appellant went on to allege that due to an injury to his ear he had been unable to hear the evidence of the complainant. The trial magistrate considered this application but rejected the same on 20th December, 2004. However, as fate would have it the trial magistrate **Ms. Ngugi** later retired from the

Judiciary and the trial had to commence *de novo*. The trial commenced afresh on 29th September, 2005 before a different magistrate and all the witnesses who had previously testified (including the complainant) were re-called and gave evidence afresh. This effectively disposed of the appellant's request to recall the complainant and to be heard in a different court. As such the refusal by the initial trial magistrate to accede to this request is no longer available as a ground of appeal.

We cannot end without taking note of the behaviour of the appellant in carrying human faeces into the trial court and threatening to smear the same on the trial magistrate. This incident occurred on 23rd May, 2007. As an appeal court we must condemn such reprehensible behavior in the strongest possible terms. Indeed the trial magistrate in her judgment at page J5 did comment on this incident and noted that it was an attempt to threaten and/or intimidate the trial court. We commend the magistrate for standing firm and demanding an apology from the appellant before proceeding with the trial. Accused persons cannot be allowed to manipulate trials in this manner.

Following that incident the appellant effectively opted to withdraw from the trial by remaining silent and *'refusing'* to cross-examine the doctor who was the last witness. This was a choice available to the appellant as an accused is not obliged to cross-examine each and every witness who testifies. We find no denial of trial rights by the court. The appellant was allowed an opportunity to examine this final witness but chose not to do so. In any event we note that the appellant fully participated in the trial upto that stage and he did actively cross-examine all the other witnesses. All in all we are satisfied that the appellant was accorded a fair trial as required by the Constitution of Kenya.

The upshot is that this appeal fails in its entirety. The conviction of the appellant is hereby upheld and the death sentence being the lawful penalty for the offence of Robbery with Violence is hereby also confirmed.

Dated and delivered in Mombasa this 8th day of February, 2013.

…….. **……**

M. ODERO **M. MUYA**

JUDGE **JUDGE**

In the presence of:
Appellant
Mr. Jami for State