



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 36 OF 2011

PAUL EKWAM ORENG.....APPELLANT

VERSUS

**REPUBLIC.....
....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No.5238of 2010
Republic vs Paul Ekwam Oreng in the Resident***

Magistrate's Court at Eldoret by G. A. Mmasi, Senior Resident Magistrate)

JUDGMENT

1. The appellant was convicted on a count of robbery with violence contrary to section 295 as read together with section 296(2) of the Penal Code. He was sentenced to death. The appellant has appealed against his conviction and sentence.
2. The particulars of the charge were as follows: That on 12th October 2010 at Moi's Bridge trading centre, the appellant, jointly with others not before the court, and while armed with a dangerous weapon, namely a metal bar, robbed Moses Mburu Musundi of Kshs7,000 and immediately before the time of the robbery used actual violence against him.
3. The petition of appeal was filed on 22nd February 2011. It raises six grounds of appeal. The principal grounds urged can be condensed into five. First, that the evidence tendered at the trial was inconsistent, contradictory and unreliable; secondly, that conditions for identification were not favorable; thirdly, that critical witnesses such as the petrol station attendants were not called. The appellant submitted that police investigations were incomplete or shoddy; fourthly, that the court disregarded the appellant's defence; and lastly, that the trial court did not give reasons for convicting the appellant. In particular, the appellant attacked the judgment for not meeting the requirements of section 169(1) of the Criminal Procedure Code. In a synopsis, the appellant's case is that the capital offence was not proved beyond reasonable doubt.
4. The State has contested the appeal. The case for the state is that the evidence tendered at the trial was inconsistent with the innocence of the appellant. The state submitted that the appellant went into hiding after committing the offence. Regarding identification of the appellant, the state submitted that there was sufficient electric light on the material night. Furthermore, the appellant was known to PW1 and PW2 who identified him. In the circumstances, this was a case of recognition. It was submitted that the defence put forth by the appellant related to events of a different date, 21st October 2010, and was accordingly untenable. In a nutshell, the state submitted that all the key ingredients of the charge were proved beyond reasonable doubt.
5. This is a first appeal to the High Court. We are required to re-evaluate all the evidence on record and to draw our own conclusions. In doing so, we have been careful because we have neither seen

nor heard the witnesses. See *Njoroge v Republic* [1987] KLR 99, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190, *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 (unreported).

6. The complainant (PW1) is a carpenter. On 12th October 2010 at about 8.00pm, he was leaving his workshop. He was in the company of two people; Isaac Musundi (PW2), his nephew whom he was teaching carpentry; and David Musundi (PW3). At a petrol station called Rock Filling Station, they saw a group of “ten youths” heading towards them. The complainant identified the appellant and another person from the lights at the station. The appellant and his accomplices attacked the complainant with a metal bar. The metal bar was not recovered. They robbed him of money from his “right trouser pocket”. He said the money was taken by the appellant. The complainant was left bleeding. He went to hospital and later reported the matter to the police. The appellant’s injuries were confirmed by PW4, a clinical officer who produced the P3 form in court. On 23rd October 2010, he saw the appellant passing outside his workshop. He alerted the police. The complainant, with assistance from the public, arrested the appellant. PW5, a police officer from Moi’s Bridge Police Station and a colleague were both called to the scene and arrested the appellant who was by then receiving a beating from the public.
7. In the judgment, the learned trial magistrate stated that the complainant “*said he was robbed of Kshs 7,000 from his right trouser pocket*”. The complainant did not state the figure. He said at page 12 of the record of appeal that he “*was robbed of money in [his] right trouser pocket*”. The actual amount was confirmed by PW2 who said as follows: “*I met PW1 coming from the clinic he had a wound above the left eye he said he had been robbed of Kshs 7,000*”. In cross-examination, at page 19 of the record, PW2 said he “*saw PW1 being given Kshs 7,000*”. PW3 also testified that PW1 *told* him he was robbed of Kshs 7,000. It is instructive that PW2 and PW3 were in the company of PW1 at the time of the attack.
8. The appellant was arrested about 11 days later. PW1 said he knew the complainant. The appellant submitted before us that PW1 and all the other witnesses did not identify him by name. PW1 may not have known him by name but he testified that he used to see the appellant passing outside his workshop. PW2 and PW3 identified the appellant by his nickname of Lokodong. PW2 said the other suspect was known as Ojiji but was not arrested. He saw the appellant raise a metal bar and hit the complainant. From that evidence, we have reached the same conclusion as the learned trial Magistrate that the appellant was known to PW1, PW2 and PW3 and by his local nickname. This was clearly a case of recognition.
9. Evidence of recognition is generally more reliable than identification of a stranger, but mistakes may sometimes be made by witnesses. In *Wamunga v Republic* [1989] KLR 424, the Court of Appeal held as follows-

“It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction.”

10. We now turn to the identification of the appellant on the material night. It was 8.00pm. PW1 said all the shops were closed. PW1 said he identified the appellant, whom he had seen before, from the electric lights at the filling station. PW2 said he identified him because “the moonlight was on and shining”. The appellant submitted before us that that was a contradiction. We do not think so. It is possible that there was moonlight. And it is possible as the complainant testified that the lights at the station were on. Both lighting conditions were sufficient in a case of recognition. Considering that PW1, PW2 and PW3 knew the appellant before by his nickname Lokodong, we are satisfied that the conditions of identification were favourable. See *Abdalla Bin Wendo v Republic* [1953] EACA 166, *Joseph Ngumbao Nzalo v Republic* [1991] 2 KAR 212, *Obwana and others v. Uganda* [2009] 2 EA 333 at 337, *Richard Kinyuru and another v Republic* Nairobi, High Court Criminal Appeal 290 of 2009 [2012] eKLR, *Salim Swaleh Mapinga v Republic* [2013] eKLR.
11. That leads us to another issue: did the complainant or other witnesses positively identify the appellant as the person who robbed and wounded the complainant? The complainant stated that he was attacked by 10 youths. In his evidence, he did not single out the appellant as the one who hit

him with the metal bar. PW2 is the one who said that he saw appellant hit PW1. When the attackers pounced, PW2 and PW3 took off or retreated to the workshop and only returned after 30 minutes to find the complainant bleeding. The metal bar was never recovered. Considering that it was at night and with 10 attackers, it is doubtful that the complainant could pick the person who hit him or by what weapon was used. PW 2 said there were 7 men. That is some inconsistency. But having been a part of the attackers, the appellant would still be liable. The charge sheet clearly stated he was acting in concert with other persons not before the court.

12. We have also considered the defence proffered by the appellant at his trial. It was very brief. He stated as follows:

“On 23/11/2010 I was arrested by 2 police officers who escorted me to Moi’s bridge Police station without telling me what I had done. I was arraigned in court. I denied the charge. I still deny to date”

13. The learned trial Magistrate found that *“the accused’s defence that he never committed the offence cannot withstand this overwhelming evidence”*. It is thus not entirely true as urged by the appellant that the learned trial Magistrate did not give sufficient reasons in her judgment or failed to take into account the defence of the appellant. We are unable to say that the judgment did not meet the threshold of section 167(1) of the Criminal Procedure Code. That said, the burden of proof, subject to section 111 of the Evidence Act, rested with the prosecution throughout. It never shifted to the appellant.

14. The key ingredients for a robbery with violence charge are found in section 296(2) of the Penal Code. It provides as follows-

“if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”.

15. From our reconsideration of the evidence, we have found that the appellant stole Kshs 7,000 from the complainant. The appellant was positively identified. The appellant was in the company of more than one person. In the course of the robbery, the appellant and his accomplices used an offensive or dangerous weapon, namely a metal bar to attack the complainant. The complainant suffered injuries that were confirmed in the P3 form produced by PW4. The complainant’s evidence was corroborated by PW2, PW3 and PW4. There is thus a clear evidential nexus between the robbery and the appellant. It then follows as a corollary that the key ingredients of the offence of robbery with violence were proved beyond reasonable doubt.

16. Section 296 (2) of the Penal code provides for a mandatory death sentence. We are thus unable to disturb the findings of the learned trial Magistrate. We uphold the conviction and sentence. The entire appeal is hereby dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 28th day

of November 2013

FRED A. OCHIENG

G.K. KIMONDO

JUDGE

JUDGE

Judgment read in open court in the presence of

Mr.....for the appellant.

Mr.....for the State.

Mr..... Court Clerk.