



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NUMBER 93 OF 2011

BETWEEN

JUSTUS ASHISAMBE OKUSIMBA APPELLANT

AND

THE REPUBLIC OF KENYA RESPONDENT

[An Appeal from the Judgment of the Learned Principal Magistrate Mrs. L. Gicheha dated 31st March 2011, in the Chief Magistrate's Court at Nairobi, Criminal Case Number 2059 of 2010]

Appeal before Justices Monica Mbaru and James Rika

The Appellant Justus Ashisambe Okusimba appearing in person

Prosecution Counsel Ms. Nyauncho appearing for the State

JUDGMENT

1. The Appellant was charged, tried, convicted and sentenced for the offence of robbery with violence contrary to Section 296 [2] of the Penal Code. The details of the offence were as follows:-

On the 8th day of October 2010 at Gachie in Gigiri within Nairobi Area, jointly with others not before Court while armed with dangerous weapons namely pistol and knives robbed John Opiyo Ojal of one mobile phone make Nokia 6300 valued at Kshs. 4,500/= and at the time of such robbery used actual violence against the said John Opiyo Ojal

2. A total of 6 witnesses testified for the prosecution. The Appellant gave unsworn evidence in his defence and called no witness.

3. PW1 John Opiyo Ojal told the trial Court he worked as a driver with Mantruck [K] limited. Early in the morning of 8th October 2010, he left his house and took the 15 minute walk to the bus stage, where he expected to get a vehicle to take him to work. He left at around 4.45 a.m. Upon arrival at the bus stage called power stage, he saw three people approach where he stood. There was plenty of illumination from the nearby power station. When they reached where he was, the people split, one going to the left and two to his right. He was placed in the middle. They brandished a gun at him and told him to stay silent. The person who had the gun had a mark on the left side of his face. PW1 physically engaged the gun wielder. The robber fell. The other two robbers approached PW1 from behind and stabbed him. PW1's phone dropped from his pocket. The robber who had the gun grabbed the mobile phone, and all the robbers then fled, leaving the badly injured PW1 behind. He summoned all his remaining strength and headed back

home. He was taken to Coptic Hospital, then Nairobi Hospital by his wife and neighbours. He was admitted up to 11th October 2010. After he was discharged, he reported the incident at the Kihara Police Post. He testified that he saw one of the attackers very well as there was plenty of light, and this person was his neighbour, named 'IDI.' He had known the person for a long time, and even offered him a lift in his car, at one time. He knew the person was a dog trainer. Police investigated the matter and arrested the Appellant. PW1 went to the Police Station and confirmed the Appellant was among the group which attacked him. The Appellant was the person who pointed a gun at him. PW1 wrote his statement after the arrest of the Appellant.

4. PW2 Millicent Achieng' Nyabure, wife to the PW1 testified her husband left for work at around 4.30 a.m. on 8th November 2010. After sometime, she heard her husband crying, as he entered their house. He said he had been attacked by robbers. He was bleeding on his face and back. He fell and fainted. She called the neighbours and took him to Coptic Hospital and Nairobi Hospital. He told her he could identify the persons who attacked him. She went and reported the matter at Gigiri Police Station. Her husband left hospital after three days. He went and recorded a statement with the Police. PW3 Violet Afuna Mana was one of the neighbours called by Mama Lawrence [PW2] to assist in taking PW1 to the hospital. She testified she was called by PW2, went to PW2's bedroom and found PW1 bleeding. They took him to Coptic Hospital, and later transferred him to Nairobi Hospital. He was attacked while on his way to work. He said he had identified one of the attackers who was a Luhya. The matter was reported at Kihara Police Post. PW3 later heard someone was arrested over the offence.

5. Dr. Zephania Kamau [PW4] a Police Doctor examined John Opiyo Ojal on 21st October 2010. The doctor found the complainant to have a scar with stitch marks. The injury had healed and stitches been removed. The injuries were in the opinion of the doctor caused by a sharp object. PW5 PC Stephen Kuto worked at Kihara Police Post which was under the Gigiri Police Station. He was on patrol on 1st December 2010 at Kanugu area within Kihara, accompanied by Inspector Mugacha and AP Corporal Peter Nduru. The Officers learnt while on patrol, that some people were taking chang'aa at a certain house. They entered the house and found two men and a woman. The Officers suspected the group to be in possession of bhang. They found the bhang at the suspects' feet. They arrested the suspects and took them to Kihara Police Post. The two persons were Stephen Thama and Julius Ashisambe. PW6 Cpl. Fenasia Njeru worked at Gigiri Police Station. He received a complaint from PW1 on 6th November 2011. PW1 had earlier on made the complaint to the DCIO Gigiri, stating that he had been robbed on 8th October 2010 at Gachie. He complained that he was not receiving assistance from the Kihara Police Post. He stated he had identified one of the persons who attacked him. The DCIO asked PW6 to investigate. PW6 recorded a statement from PW1 and told PW1 to call PW6, once he saw the person who attacked PW1. PW1 identified the person as 'IDDI,' a person they lived together with in the same plot. On 1st December 2010, PW6 received a report from the complainant that the person who robbed him was at Kihara Police Post. The person was brought to Gigiri Police Station, rearrested and charged with the offence. That person was the Appellant. PW1 was given a P3 Form and treated. He was robbed of a Nokia phone valued at Kshs. 4,500.

6. In his unsworn statement in defence, the Appellant stated he is a dog trainer. On 1st December 2010 he went to work at about 11.00 a.m. When he returned home, he heard a knock on the door. Some people entered his house, beat him and knocked out his teeth. The attackers did not tell him why they were beating him. He was taken to the Police Station, and kept in custody. He was later charged with the offence whose execution he knew nothing about.

7. The Court found there was enough evidence that a robbery took place. PW1's evidence was corroborated by that of his wife PW2 and their neighbour PW3. PW1 lost his mobile phone. He reported the loss to the Investigating Officer. There robbers were armed. PW1 sustained injuries which were caused by a sharp object. The Appellant was not arrested at the scene, and nothing was recovered from him. The only evidence connecting the Appellant to the crime was that of PW1; which was the evidence of a single witness. There was sufficient electricity light coming from a nearby power station. He was able to identify a mark on the left side of the Appellant's face. He recognized the Appellant as they had once been neighbours. He reported to the Police that his attacker was a man known to him as 'IDD.'

When he learnt that certain persons had been arrested by the Police, and were being held at Kihara Police Post, he went there and confirmed the Appellant was among the persons who attacked him on the material night. The Appellant was not a stranger to PW1. The Appellant lived next to PW1 at one time and had been given a lift by PW1 in his car. PW1 also knew him as a dog trainer, an occupation confirmed by the Appellant in his defence. The Court concluded the Appellant was shown, beyond any reasonable doubt, to have committed the offence against PW1.

8. The Appellant filed the following grounds of Appeal:-

- a. **The trial Magistrate erred in convicting the Appellant on the evidence of a single identifying witness;**
- b. **The charge against the Appellant was fabricated to cover up the assault upon the Appellant, made by the arresting Officers;**
- c. **The trial Magistrate erred by failure to have PW6 re-sworn when recalled for cross-examination contrary to Section 151 of the Criminal Procedure Code Cap 75 the Laws of Kenya; and,**

d) The trial Magistrate did not give adequate consideration of the Appellant's defence.

9. The Appeal was heard on 16th October 2013. The Appellant argued that the complainant alleged he was robbed on 8th October 2010. He alleged he was a neighbour to the Appellant, and knew the Appellant. Why was there a delay in arresting the Appellant? The Appellant alleged he was attacked by three persons, and suggested elsewhere in his evidence that he was attacked by five robbers. He did not tell his wife that he had been attacked by a person known to him. He did not lead the police to the Appellant's residence. The Appellant was arrested on 1st December 2010, almost 2 months after the incident, and on a different allegation of taking chang'aa and possessing bhang. PW1 alleged he told the Police the attacker he recognized was nicknamed 'IDD'. This was not included in the charge sheet as Appellant's alias. This can only be so because no such name was given to the police in the first report made by PW1. PW3 testified that PW1 stated one of his attackers was a Luhya. PW1 did not give the name of this Luhya. PW1 stated he gave the description of his attacker to the police at Kihara, and have the name 'IDD.' PW5 an Officer from Kihara, stated he had no description of the Appellant. The evidence of PW6 was valueless because he was not re-sworn when recalled for cross-examination. This violated Section 151 of the Criminal Procedure Code. There were inconsistencies in the evidence of the prosecution. PW6 testified PW1 reported on 6th November 2010, alleging to have been assaulted on 8th October 2010. PW1 testified he reported after he left hospital on 11th October 2010.

10. Ms. Nyauncho submitted the Appeal has no merit and should be rejected. PW1 was accosted by three men who were armed with knives and pistols. It was at around 4.45 a.m. but there was sufficient electricity light. PW1 was stabbed with a knife on the back and robbed of his mobile phone. He recognized the Appellant as part of the group that attacked him. The two were neighbours. The Appellant was also identified because he had a mark on his face. Prosecution witnesses corroborated each other in their evidence. There was medical evidence establishing the complainant suffered stab wounds. The Appellant used actual violence. He was arrested for another offence relating to possession of bhang. The complainant was able to identify him.

11. We have re-evaluated the evidence as the law demands [*see Ngui v. the Republic [1984] KLR 729 and Okeno v. the Republic [1972] E.A. 32*]. The Appeal is based on one major ground, which is that the Appellant was convicted on the evidence of a single identifying witness. A fact may be proved by the testimony of a single identifying witness, subject to the testing with the greatest care by the trial Court, of such evidence as stated in *Abdallah Bin Wendo v. the Republic [1953] 20 E.A.C.A 166*. The trial Court correctly found the prosecution's case to rest on the evidence of a single identification witness PW1. The only issue raised in the Appeal is whether the trial Court tested such evidence with the greatest of care.

12. PW1 testified he was attacked early in the morning on 8th October 2010. He was going to work and was attacked while waiting to board a vehicle at the stage. Although he stated there was sufficient

electricity light emanating from an adjacent power station, there are other co-existing circumstances that raise doubt on the veracity of his identification evidence. He on occasion testified there were three attackers, and on another occasion testified that two of the attackers had a bag, three of them had nothing. The implication is that he saw five attackers. He stated he recognized one of the attackers as a man nicknamed 'IDI.' The Court has noted that this nickname kept alternating in the evidence of the prosecution. Sometimes the nickname given was 'IDI' 'IDD' or 'INDI'.

13. He does not seem to have given the name of his attackers to his wife PW2, who was the first person he encountered after the incident. This is significant particularly because the Appellant was alleged to have been the couple's neighbour and also considering that it was PW2 who reported the attack of her husband to Gigiri Police while her husband was still in hospital. PW3 testified that the complainant merely mentioned to the persons who assisted him to the hospital, that he had identified one of the attackers as a Luhya. No name, physical appearance or the fact that the attacker used to be PW1's neighbour, was mentioned by PW1, according to the evidence of PW3. The description given was a worthless description; that one of the attackers was a Luhya. Whereas PW2 testified she reported her husband's attack at Gigiri Police Station, PW3 stated "we reported at Kihara Police Post."

14. PW 5 PC Stephen Kuto was the arresting officer. He was based at Kihara Post. He did not arrest the Appellant pursuant to the offence of robbery with violence; he arrested the Appellant because he was in possession of bhang and was taking chang'aa in a certain woman's house. He categorically stated there was no description of the Appellant at the time of his arrest. The complainant himself testified that when he left hospital after three days, on 11th October 2010, he reported the matter to Kihara Police Station. The inference would be that he had made an initial description of the Appellant at Kihara Police Station. But the Police at Kihara testified there was no description of the Appellant at the time of the arrest. It does not appear convincing to us that the complainant would not give definite details to the police of the Appellant, if indeed he positively recognized the Appellant was his former neighbour, dog trainer and a man he had at one time carried in his car. Such details would have been captured in the report made at Kihara from the outset, and also be apparent in the evidence of PW2 and PW3.

15. We are persuaded that the evidence of PW1 was not tested to the required standard. The police at Kihara appear to have been pressured by the DCIO at Gigiri after the complainant protested at Gigiri that he was not getting the assistance he required from Kihara. It was only then that Kihara captured the Appellant over unrelated offence, and called the complainant. Instead of the police at Kihara dealing with their counterparts at Gigiri, they preferred to have the complainant himself report to Gigiri, that the Appellant had been captured. Should not the police have organized a parade to have the complainant pick his attacker, instead of calling the complainant to merely confirm that a bhang and chang'aa suspect, was among the men who attacked PW1?

16. The evidence by the prosecution, without the support of PW1's identification evidence, was of extremely poor quality. The defence given by the Appellant was not adequately considered. With the evidence of the single identifying witness out of the equation, it cannot be said that that defence was in any way displaced by the evidence of the prosecution witnesses. PW6 was stood down on 7th March 2011 after he had given his evidence-in-chief. He was not recalled as such on 11th March 2011. He merely attended Court to be cross-examined by the Appellant in continuation of the hearing that was adjourned on 7th March 2011. There was no requirement that he is sworn again before being cross-examined. All he needed was to be reminded by the Court that he was still on oath, something that the Court appears not to have done. The Court also appears to have confused the Appellant by indicating that the witness had been recalled. A recall would only happen after the witness had testified in full. There was no need to re-swear PW6, and all he needed was to be reminded he was still on oath. There was no fundamental departure from the requirement of Section 151 of the Criminal Procedure Code, and this ground of Appeal is rejected. The Appeal must however succeed on the grounds mentioned in the forgoing. ***The Conviction is quashed and sentence set aside. The Appellant shall be set at liberty forthwith, unless otherwise lawfully held.***

Dated and delivered at Nairobi this 20th day of November 2013

Monica Mbaru

Judge

James Rika

Judge