



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.167 OF 2012

(An Appeal arising out of the conviction and sentence of M.M. MUYA - CM delivered on 26th April 2012 in Nairobi CMC. CR. Case No.4778 of 2010)

FELIX ODHIAMBO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Felix Odhiambo, was charged with three others (who were however acquitted by the trial court) with the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 9th December 2010 at KPA slums in Embakasi, Nairobi, the Appellant jointly with others not before court, while armed with dangerous and offensive weapons, robbed Chief Inspector Michael Muriithi of his Ceska Pistol No.G4674, Kshs.12,000/- cash, Nokia phone, wrist watch, identity card all valued at Kshs.44,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Chief Inspector Michael Muriithi. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial in which the prosecution called seven (7) witnesses and the accused gave unsworn evidence in his defence, the trial court found that the prosecution had established its case. It convicted the Appellant on the charge of Robbery with Violence. It sentenced the Appellant to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence and has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of the evidence of identification in circumstances where the identification was not supported by an identification parade. He faulted the trial magistrate for convicting him on the basis of insufficient evidence that did not support the charge. He faulted the trial magistrate for failing to take into consideration the fact that the exhibits, being the recovered jacket and panga were not linked to him to connect him with the commission of the offence. He was aggrieved that the trial court had not taken into consideration the totality of the evidence including his defence before arriving at the decision to convict him. In the premises therefore, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He further made oral submission urging the court to allow his appeal. Miss Matiru for the State,

although opposing the appeal, was of the view that the evidence adduced by the prosecution established the lesser but cognate offence of causing grievous harm contrary to **Section 234** of the **Penal Code** and not the offence of Robbery with Violence contrary to **Section 296(2)** of the **Penal Code** that the Appellant was convicted. She urged the court to convict the Appellant of the lesser but cognate offence. On his part, the Appellant was of the view that the prosecution had not adduced evidence to connect him with either the more serious charge of Robbery with Violence contrary to **Section 296(2)** of the **Penal Code** or the lesser charge of causing grievous harm contrary to **Section 234** of the **Penal Code**. He urged the court to acquit him.

Before giving reasons for our decision, it is imperative that we set out the brief facts of this case. On 9th December 2010, the complainant Michael Muriithi, the then OCS of Embakasi Police Station was instructed to give security to an auctioneer who had been authorized by the court to execute an eviction order. The eviction was to be executed at KPA Maasai Village (also known as Kiangombe Village). The execution involved evicting persons who had erected structures on the particular parcel of land. According to the complainant, he mobilized about sixty (60) police officers to accompany him to the scene where the execution was to be effected. They arrived at the scene at 6.00 a.m. The auctioneer was already at the scene. The demolition of the structures commenced. After a while, the villagers grouped and resisted the eviction. Stones were thrown. The police reacted by using tear gas and riot batons. The police were overwhelmed by the sheer numbers of the villagers. They retreated. In the course of the retreat, the complainant was separated from his police officers. He was hit with stones as a result of which he was injured. He fell to the ground. He told the court that it was while he was lying prostrate on the ground that he was robbed of his Ceska pistol together with 15 rounds of ammunition. He was also robbed of his Nokia phone and a golden watch.

The complainant was rescued from the scene and first taken to Mater Hospital before he was transferred to Kenyatta National Hospital. According to PW6 Dr. Zephania Kamau, the complainant was injured on the scalp and on his face. He also lost his upper incisor tooth. He sustained a partial amputation of the left sixth finger. He also had injuries on his left thigh and upper lower part of the chin. He assessed that the injuries were caused by both sharp and blunt objects. The degree of injury was grievous harm. The duly P3 form was produced as an exhibit in this case.

According to the complainant, he was able to identify some members of the group of youth that attacked him. He testified that one of them was black and slim. He was later informed that the person fitting that description had been arrested with a panga. That person is the Appellant. According to PW2 PC Elias Musinga, he was with two of his colleagues when they saw a group of youth attack the complainant. After rescuing the complainant, they went in hot pursuit of the group of youth. They were able to identify the Appellant because he was wearing a dark blue jacket while encouraging the youth to stone the police. They arrested the Appellant in a nearby house. They found him with a panga which was hidden inside his jacket. The panga and the jacket were bloodstained. They arrested the Appellant and took him to the police station.

PW3 PC James Wanyonyi Makokha was among the police officers who were supervising the execution of the court order to evict the villagers from KPA Kiangombe Village. He narrated how when the eviction started, a group of youth armed with pangas, clubs and stone attacked them and managed to overpower them. In the course of the fracas, the complainant was hit with stones and was injured. PW3 was hit with a stone on his jaw. He sustained a fracture of the jaw. He told the court that in the course of the assault, he managed to identify the Appellant because he was the leader of the group. The Ceska pistol which the complainant lost in the fracas was recovered a few weeks later at Ruiru. The prosecution was not able to tell the court the circumstances under which the pistol was recovered other than state that the person from whom the pistol was recovered was shot.

In his defence, the Appellant stated that he was stopped by the police on the material day of 9th December 2010 as he was leaving his house to go to the market to buy maize cobs. He denied involvement in the fracas that led to the injuries that the complainant sustained. It was his case that he was a victim of mistaken identity. He denied that he was caught with a panga. He however admitted that he was a resident of KPA Kiangombe Village where the police were supervising the eviction of the residents.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the conviction of the Appellant on the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

We have reconsidered and re-evaluated the evidence adduced before the trial court. We have also considered the written and oral submission presented to the court by the Appellant. We have also considered the Appellant’s grounds of appeal. We have taken into consideration the submission made by Miss Matiru on behalf of the State. It was the prosecution’s case that the Appellant, together with others, attacked the complainant when he was performing his lawful duty of providing security to an auctioneer who was giving effect to a court order. The prosecution called two (2) witnesses PW2 and PW3 who testified that they saw the Appellant among the group of youth who were throwing stones at the police in a desperate bid to thwart the eviction. PW2 and PW3 sufficiently described the appearance of the Appellant. They testified that he was tall and slim. He wore a dark blue jacket. It appeared that the Appellant was the leader of the group of youth that were resisting the eviction. After the complainant had been rescued, PW2 accompanied by two other police officers, went in hot pursuit of the Appellant. They managed to arrest the Appellant in a house within the village. The Appellant had a panga hidden in his jacket. The panga was bloodstained. So too was the jacket. The panga and the jacket were produced in evidence by the prosecution. Although the Appellant denied that he was at the scene at the time and that he had not been properly identified, the fact that he was arrested soon after the fracas had died down and the fact he fitted the description of the person that was seen leading the group of youths that were stoning the police, established to the required standard of proof beyond any reasonable doubt that he had participated in a joint enterprise that resulted in the injuries that the complainant sustained.

In our considered view, the prosecution was not able to establish that the Appellant robbed the complainant of the Ceska pistol, 15 rounds of ammunitions, Nokia phone and golden watch. This was because none of these items were found in possession of the Appellant. Infact the pistol was recovered elsewhere when the Appellant was already in custody. The prosecution was not able to establish that the Appellant had the intention of robbing the complainant. The likely scenario was that the Appellant with the group of youths resisted their eviction from a place they considered home. The prosecution was able to establish that the Appellant formed a common intention to prosecute an unlawful purpose, in this case the unlawful purpose was the resistance of the giving effect to a lawful order of the court. This common intention is what is provided for under **Section 21** of the **Penal Code**.

The facts of this case disclose that the Appellant, together with others not before court, formed the common intention of executing an unlawful purpose of resisting their eviction from KPA Maasai Village (also known as Kiangombe Village) pursuant to a court order. In the course of this resistance, the complainant sustained injuries which were established by the doctor to constitute grievous harm of the complainant. Having carefully considered the facts of this appeal, we are of the view that the offence disclosed is that of grievous harm contrary to **Section 234** of the **Penal Code** and not **Robbery with Violence** under **Section 296(2)** of the **Penal Code**. The offence of grievous harm is cognate and a lesser offence to that of Robbery with Violence. The Appellant is thus acquitted of the charge of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code** but is convicted of the disclosed offence of causing grievous harm to the complainant contrary to **Section 234** of the **Penal Code**. The sentence

imposed on him of life imprisonment is hereby set aside and shall be substituted by an appropriate sentence of this court.

As regards sentence, the Appellant has been in lawful custody since his arrest on 9th December 2010. We sentence him to serve five (5) years imprisonment with effect from 26th April 2012 when he was convicted and sentenced by the trial court. It is so ordered.

DATED AT NAIROBI THIS 18TH DAY OF NOVEMBER 2013.

L. KIMARU

JUDGE

P. NYAMWEYA

JUDGE