



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.50 OF 2012

CHRISTOPHER OWITI.....1ST APPELLANT

JOSEPH OGUTU 2ND APPELLANT

GEOFFREY OCHIENG 3RD APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from Original Conviction and Sentence from Kisumu Chief Magistrate;s Court by E. AWINO SPM

in Criminal Case No.498 of 2011

J U D G M E N T

In the trial court the 2nd appellant was the 1st accused , the 3rd appellant was the 2nd accused and the 1st appellant was the 3rd accused. They were jointly convicted of robbery with violence c/s 296 (2) of the Penal Code in Count 1 whose particulars were that on the night of 14th and 15th September, 2011 at Nyalenda Estate in Kisumu District of Nyanza Province they were jointly and while armed with pangas and iron bars robbed Nelson Wanjala (PW1) of Kshs.3000/= and at or immediately after the time of such robbery wounded the said PW1 by cutting him with a panga. In Count 2 the 1st appellant was convicted of malicious damage to property c/s 339 (1) of the Penal Code. It was alleged that during the incident in Count 1 he willfully and unlawfully damaged the window and door of PW1 and the value of the damage was Kshs.8000/=. In Count 1 each appellant was sentenced to 15 years in jail. In count 2 the 1st appellant was discharged under section 35(1) of the Penal Code. The appellants were aggrieved by the conviction and sentence and preferred this appeal.

The main ground in the petitions of appeal filed by the appellants was that the trial court did not properly consider, evaluate and analyse the evidence on record and had therefore arrived at the wrong conclusion; and that the prosecution had not established its case beyond reasonable doubt and therefore they were wrongly convicted. Mr. Mongare for the State defended the conviction and sentence.

The prosecution evidence as recorded was that Simion Agola (PW4) owned 25 rental houses at Nyalenda B estate. PW1 and his wife Millicent Auma Wanjala (PW2) had rented one of the houses in which they lived., The 2nd appellant is PW4's son and lived in one of the houses. Earlier on, the 2nd and 3rd appellants had attacked one Peter in the estate at night and chased him into PW1's house. They had then taken Peter's property. The incident was reported to police and PW1 recorded a statement. Secondly,

PW1 is a luhya and, according to PW4, the 3rd appellant did not want him to live in his father's house. On 14th/15th September 2011 after midnight PW1 was in his house when the door was hit and a person called out "Wanjala Fungua". He recognised the voice to be that of the 2nd appellant. The attackers wanted to tear a P3 that PW1 had. The door was broken as the couple screamed calling Arthur Otieno (PW6) who stayed in the estate and was involved in community policing. The 1st appellant entered PW1's house. PW1 had a panga. He cut the appellant on the right hand. He had a torch which fell. He began to bleed and ran out. The 2nd appellant came in with a torch and panga. He hit PW1 with the torch and also cut him in the face. PW1's panga fell. He went to hide in the kitchen. The 3rd appellant asked PW2 to light the lamp. She lit a tin lamp. The 3rd appellant followed PW1 into the kitchen where he had gone to hide. He had an iron rod. He used it to hit PW1. They ransacked the house and took PW1's Kshs.3000/= and driving licence. PW6 came and found the 1st appellant cutting PW1's window using a panga. The panga was blood stained. The 1st appellant showed PW6 his hand which had been cut. PW1 was bleeding from the hand and head. PW6 found the 2nd and 3rd appellants at the scene. He knew the 2nd appellant but the others were strangers. He (PW6) had a panga and a torch. The attackers left.

PW4's evidence was that he was asleep when he was woken up by noise at PW1's door. He came out shortly and returned to the house. He was now watching through the window. He saw the three appellants who were asking PW1 to open so that they could tear the P3. The 2nd appellant had a panga and the 3rd appellant had an iron rod. The door and window of PW1 was broken and he saw PW1 bleeding. Following the incident PW1 told PW4 that he had lost money.

There was medical evidence (Exhibit1) produced by clinical officer Robert Orina (PW5) of Kisumu District Hospital to show that PW1 had a cut wound on the forehead which received 6 stitches. He had tender chest and left arm. He had suffered harm.

Each appellant gave sworn evidence and did not call witnesses. They each testified as to when he was arrested and brought to court. This was the basis for the complaint that he was held before charge for longer than the law allowed.

This is the evidence that the trial court considered before reaching its verdict. This is the first appellate court whose duty is to reconsider and re-evaluate all the evidence tendered before the trial court to be able to determine whether the conviction was properly founded (OKENO .V. REPUBLIC [1972] EA 32). In doing so it is appreciated that this court did not have the advantage of seeing and hearing the witnesses.

This was an attack on PW1 and PW2 at night. There is no dispute that PW1, PW2, PW4 and PW6 knew the 3rd appellant before. PW1 testified that he first heard the 2nd appellant's voice which he recognised. Then the attackers came to the house and ordered PW1 to light the tin lamp which she did . He used the light to see them. There was moonlight outside. PW6 testified that he came with a torch and used it to see the attackers. The night was not dark. PW4 followed what was happening and testified that the 2nd appellant was in the attack. When PW3 was cross-examined he admitted that he has had a case before with the 2nd appellant. The appellant raised the issue of land which PW4 said it was his. PW1 was questioned and he answered that:

“We have no issue of land with your father.”

We consider that the trial court did not deal with this issue of dispute over land, or at all, to be able to find that it did not exist or did not influence the case. We, however, observe that there was no dispute that PW1 was attacked and injured and his Kshs.3000/= taken. The money was not recovered.

The evidence of PW1 that the 2nd and 3rd appellants had previously attacked one Peter and that he was going to be a witness was not disputed. PW1, PW2 and PW4 testified that on the day when PW1 was attacked those who attacked him were looking for a P3 which they wanted to tear. We do not find that the evidence of PW1 and PW4 was influenced by any grudge.

PW2 did not know the 1st and 3rd appellants before and her evidence would be dock identification as no

identification parade was conducted following their arrest. PW1 testified that he knew the 3rd appellant as a friend of the 2nd appellant and even knew his name. He did not know the 1st appellant before. In respect of the 1st appellant the evidence would be that of dock identification and therefore of no value as no identification parade was conducted. PW4's evidence was that he knew the 3rd appellant before and by name but that did not know the 1st appellant "well." The 3rd appellant sought the recall of PW4 who admitted that he had not given his name to the police.

PW6 did not know the 1st and 3rd appellants before. Again, as there was no parade conducted by the police after their arrest, his testimony in court amounted to dock identification. About the 2nd appellant whom he knew, he stated:

"I saw you. I asked what you were doing."

PW6 testified that the person he found breaking the window was the 1st appellant on whom he showed the torch. He did not say he used the torch to see the 2nd appellant. He stated that:

"It was not a dark night....."

He did not say he recognised the 2nd appellant by his voice. Nonetheless he said:

"I saw you. I asked you what you were doing."

During his evidence in chief PW6 testified that:

"They told me that I should not interfere with their work."

On our evaluation of all the evidence it is our considered impression that the persons who attacked PW1 did not worry about their identification or recognition. They were led by the 2nd appellant, were looking for a P3 to tear and were concerned about the prospect of PW1 testifying in a case concerning Peter. The combined evidence of PW1, PW2, PW4 and PW6 safely placed the 2nd appellant in the attack and we find that he was properly convicted of robbery with violence c/s 296(2) of the Penal Code as charged in count 1. We find that in respect of the other appellants, and the 1st appellant in regard to Count 2, the evidence did not meet the required standard. The conviction of the 1st and 3rd appellants in Count 1 and the 1st appellant in Count 2 is consequently quashed and the sentences set aside. They will be set at liberty forthwith unless they are otherwise being lawfully held.

The sentence of 15 years against the 2nd appellant for the offence in Count 1 was an illegal one. There is a mandatory death penalty that is provided under section 296(2) of the Penal code. We set aside the sentence of 15 years in jail and substitute it with that of death penalty. The result is that the appeal by the 2nd appellant against his conviction and sentence by the trial court is dismissed.

Dated, signed and delivered this 10th day of December, 2013

A. O. MUCHELULE

H. K. CHEMITEI

JUDGE

JUDGE