REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 301 of 2012

(An appeal against both conviction and sentence of the Principal Magistrate's Court at Vihiga in Criminal Case No. 909 of 20011

[G. MMASI, PM] dated 7th November, 2012)

STEPHEN ODHIAMBO ODUOR …….…… APPELLANT

VERSUS

REPUBLIC ….....……..……..…….. RESPONDENT

JUDGMENT

The appellant was charged with robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the charge were that on 13th September 2011 at Jupiter Electronics, Chavakali, in Vihiga County within Western Province jointly with others not before the court robbed Simon Mugala of his 8 mobile phones make Nokia, 7 kenxinda mobile phones, one banlon H-200 mobile phone, assorted airtime cards and cash Kshs.10,000/= all valued at Kshs.200,000/= the property of Peter Esabwa, and at the time of such robbery threatened to use actual violence to the said Simon Mugala. He denied the charge. After a full trial, he was convicted and sentenced to suffer death as provided by law. Being dissatisfied with the decision of the trial court, he has appealed to this court.

His grounds of appeal are that the magistrate erred in convicting him in reliance on the sole evidence of identification, notwithstanding that the conditions were difficult. That witnesses failed to give a description of the assailants to the authorities or to the members of the public. That the court failed to evaluate contradictions in witness evidence at the scene of crime. That PW7 was not competent to produce the forensic examination report. That the court failed to note that the charge sheet was defective. That Article 49 (1) of the Constitution was violated. That the occurrence book brought to court confirmed that stephen Odhiambo (appellant) was not booked with any stolen or government property. That his alibi defence was not considered during the trial.

At the hearing of the appeal, and with the permission of the court, the appellant tendered in written submissions. He also added that in his view, the prosecution witnesses were couched. They gave exact numbers of the mobile phones stolen which was evidence of coaching. He also submitted that important witnesses who were present during the arrest were not called to testify.

Mr. Orinda, the learned Prosecuting Counsel opposed the appeal. Counsel submitted that the appellant was caught in the act. The robbery had just occurred. There were a number of robberies in the area, and the appellant was arrested while trying to escape. Counsel emphasized that the place of arrest was not the appellant's normal area of abode as he came from Kisumu. In Counsel's view, the appellant was arrested within 50 metres from the scene of crime, and hence there was no possibility of mistaken

identity.

In response to the prosecuting counsel's submissions, the appellant emphasized that none of the people who were alleged to have been at the scene of arrest were called to testify. In addition, he submitted that the pistol which was allegedly found in his possession was not dusted for finger prints.

The prosecution evidence is that on 13th of September, 2011 at around 7.00 p.m., a robbery occurred at the electronic items shop belonging to Peter Isabwa, PW1, situated at Chavakali which deals with the sale of mobile phones, credit cards and other electronic goods. Present in that shop were four workers that is PW2 to PW5. The electricity lights were on in the shop. Suddenly, just before the shop was closed, and as the workers were counting the collections for the day, about five people emerged. They ordered the workers to lie down on the floor. They ransacked the shop, took mobile phones, credit cards and cash and ran away. As they ran away, one of the workers Simon Mugala (PW2) rose up. He chased the robbers and arrested one of them about 50 metres away from the shop. It was the appellant. According to the workers in the shop, there was light from a security lamp near the scene of arrest. A toy pistol and a used cartridge was recovered from the appellant. According to the same witnesses, the appellant was wearing a jumper coat.

Shortly thereafter, members of the public came to the scene. They beat up the appellant before the police arrived and rescued him and took him to the police station. The appellant was admitted in hospital for treatment and was later charged with the offence.

When put on his defence, the appellant gave sworn testimony. He stated that he was a businessman. He was a hawker who sold DVDs at Chavakali. On that evening, he was going to his home after it had rained. He was attacked and mistakenly said to be a robber. No stolen item was found on him. Though he was said to possess a firearm, he was not charged with that offence. He was beaten and his mobile phone, CDs and DVDs taken from him. He stated that he had come from Kisimu to Chavakali four months earlier.

Faced with this evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. The appellant was thus convicted and sentenced to suffer death. Therefrom arose this appeal.

This is a first appeal. As a first appellate court, we are duty bound to re-evaluate all the evidence on record afresh and come to our own conclusions and inferences - *See* the case of ***Okeno -vs- Republic [1972] EA 32.***

The appellant has raised technical issues in his appeal which. The first is to do with the charge sheet. He says that the charge sheet was defective. He did not however give the particulars of those defects. Having perused the charge sheet, we do not find any defect on the same. The charge gave the allegations against the appellant and the particulars thereof. That was adequate for him to defend himself.

The appellant also complained that he was kept in custody for long before he was taken to court in violation of Constitutional provisions. He also complained that he was not given witness statements during the trial.

With regard to being in custody for long before being charged, we note that the appellant had to be hospitalized because of the injuries he sustained from beatings by members of the public, before being taken to court. In our view, that was an adequate explanation for the delay. The Constitution was not violated.

With regard to failure to provide him with prosecution witness statements, the record does not show that he asked for the same. He should have done so. The prosecution cannot therefore be blamed for failure to provide the appellant with prosecution witness statements during the trial. The Constitution was also not violated in this regard.

The conviction of the appellant was predicated on his arrest close to the scene or robbery and recovery of a toy pistol and credit cards and coins. The eye witnesses at the scene of crime did not inform either the police or any of the members of the public who came that they were able to identify any of the robbers visually. None of them claimed to have identified any of the other robbers. The burden of proof is always on the prosecution to prove beyond any reasonable doubt that the accused has committed an offence. It is trite that where a person is connected with an offence because he or she was arrested in hot pursuit, that suspect should not be lost sight of, from the point of the crime to the point of arrest. The appellant claimed in his defence that he was an innocent passerby on a rainy night when he was arrested. We observe that the learned trial magistrate evaluated the evidence in only two short paragraphs of the judgment before convicting the appellant. On the arrest, the learned trial magistrate merely stated –

> ***"The thugs were in that shop for five minutes which was a long time. The robbers were armed whey they escaped and PW2 and his colleagues gave a chase. They arrested the accused about 50 metres from the shop he had. He had credit cards and coins which he had from the shop. The same were taken away by members of the public who assisted in the arrest of the accused."***

In our view, the learned magistrate should have interrogated he evidence on the circumstances of arrest further. There was no proof that the credit cards belonged to the complainant or were from the shop. There was no evidence that the coins were from the shop. In addition, if the same were taken by members of the public who did not testify, how could they be for consideration in evaluating the evidence in the case? The investigating officer PW7 CIP. R A. Rajab Mwanga also did not describe the scene in evidence, nor did he say that there was light, and what type of light there was.

The above summing up by the learned magistrate was therefore based on suspicion. In criminal cases, suspicion however strong cannot be a basis for sustaining a conviction. *See* S***awe –vs- Republic [2003] KLR 364 at page 375*** where the Court of Appeal stated –

> ***"We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear settled rules of engagement. The prosecution must prove the case against the accused beyond reasonable doubt."***

In the present case, we are of the view that the circumstances of arrest per se cannot be a basis for sustaining the conviction. We are convinced that there was a possibility that the appellant was wrongly mistaken to be one of the robbers.

Secondly, in our view, the members of the public who came to the scene of arrest before the police arrived there were very crucial witnesses. They could have given an independent version of the scene and the circumstances of the arrest of the appellant. They were not called to testify. Only the workers from the complainant's shop were called to testify. No reason was given for the failure to call any of these independent witnesses. In the case of ***Bukenya & Others -vs- Uganda [1972] EA 549*** at page 550 the Court of Appeal for East Africa stated as follows -

> ***"It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence that is adequate and it appears that there were others witnesses who were not called, the court is entitled, under the general role of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."***

In our view, in the particular circumstances of our present case, the members of public, who were the first independent witnesses to come to the scene of arrest, or at least one among them, should have been called to testify. Since none of them was called to testify for the prosecution, and no explanation was given for that failure, we come to the adverse inference that those witnesses would have contradicted the prosecution case. The benefit of this adverse inference has to be given to the appellant and we do so. On that account also the prosecution failed to discharge its burden to prove that the appellant was one of the robbers.

In conclusion, we find merits in this appeal. We allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 6th day of December, 2013

SAID J. CHITEMBWE **GEORGE DULU**

JUDGE **JUDGE**