



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIMINAL APPEAL NO. 102 OF 2010

DAVID OCHIENG NOEL.....
APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

[From original conviction and sentence in Principal Magistrate’s Court at Winam criminal case no. 2081 of 2009]

Coram

Aroni, Chemitei -JJ
 Meroka for the state
 Court clerks Ocholla/Lawrence
 Appellant present in person

J U D G M E N T

The appellant herein was charged with the offence of Robbery with violence contrary to section 296 (2) of the penal code. The particulars of the offence are that on the 3rd April 2009 at Manyatta area in Kisumu district within Nyanza province jointly with others not before court robbed **Justine Omondi Owino** of a motor bike make Bajaj Boxer 100 cc red in colour and at or immediately after the time of such robbery wounded the said Justine Omondi Owino.

After undergoing full trial the appellant was convicted and sentenced to death, hence this appeal. The appellant has filed eight grounds of appeal namely:-

- 1.“That the learned trial magistrate erred in both law and facts by failing to observe that this was a case of recognition not identification and failure to give names in first instant or prompt report causing uneasiness in believing the witness evidence.
- 2.That the learned trial magistrate erred in both law and facts to convict with recognition evidence notwithstanding that conditions and circumstances prevailing were not favourable to permit identification.
- 3.The learned trial magistrate erred in both law and facts by allowing and passing conviction and sentence on evidence based on the complainant alone. Single evidence as referred to should not convict as it lacks corroborative evidence.
- 4.That the learned trial magistrate failed to observe that there was no exhibit recovered in my

possession which could have connected me (the appellant) with the case.

5. That the learned trial magistrate erred in law in convicting without appreciating that the credibility of prosecution witnesses were flawed thoroughly by the duration taken before my arrest since there was no evidence that I had gone underground.

6. That I pray for orders that the occurrence book (O.B) No. 5 of Central Police Station of 3-4-2009 be availed in the high court during the hearing of this appeal to confirm the allegation of recognition that were reported to the police in the first report.

7. That the learned trial magistrate erred in both law and facts by rejecting my alibi defence which sufficiently created a reasonable doubt as to the strength of the prosecution case.

8. That since I cannot recall all that were attested during the hearing, I pray to be furnished with a certified copy of the court proceedings. This will enable me adduce more reasonable grounds for my petition”.

The substance of the appeal is basically on two areas namely, identification and recovery of the item stolen.

The brief facts are that on the night of 3-4-2009 at around 9 p.m. the complainant who was a motor cycle rider (boda boda) was requested by two people to ferry them to a place called Manyatta. The motor cycle was Reg. No. KBF 284B Bajaj Boxer type. It was complainant's evidence that one of the customers was the appellant whom he knew as Davis. The other customer was a stranger to him. At Manyatta primary school they stopped. The appellant hit him with a metal bar on the head and the other customer cut him using a panga on the forehead. The complainant lost consciousness and found himself at Nyanza Provincial General Hospital. Later on 24-5-2009 he managed to see the appellant and with the help of his friends arrested him and took him to Kondele police station. His evidence was that he had known the appellant for over 1¹/₂ years. On further cross examination he was categorical that he knew the appellant and he had carried him that night as there were also sufficient lights at the stage.

PW2 was the owner of the motor bike. He had given it to **PW3 Anthony Maina Wangoda**. PW2 produced the receipts showing that he had purchased the same for the sum of Kshs. 95,000/=. He went to the hospital and saw the complainant.

PW3 had been given the motor bike by PW2. When he went to see the complainant after receiving the robbery report he found him in his house. He was unable to talk. He had a cut injury on the head. PW3 was equally present on 24-5-2009 when the appellant was arrested. PW4 was also the complainant's friend. He went to see him at home and later was present when the appellant was arrested.

PW5 Julius Omondi Okech found the complainant on the material night near Manyatta primary school. He knew the complainant. He said that he found the complainant bleeding. He further said on cross examination that the complainant told him that he knew the person who attacked him.

PW6 is the investigating officer who received the complaint and carried out the investigation. He also re-arrested the appellant when he was brought in by the members of the public. **Rhoda Okal PW7** the clinical officer produced the P3. She testified that the complainant sustained injuries on his neck, back of the head, cut wound on right parental forehead approximate 5 cm. She classified the nature of injuries as harm.

At the close of the prosecution case, the appellant was put on his defence. He confirmed that the complainant was a person well known to him. He however denied that they robbed him. He further said that the complainant owed him Kshs. 800/= which he had declined to pay. When they met at Kondele on 24-5-2009 he was pursuing his debt. He further claimed that he was framed in respect to the robbery.

The duty of this court is to analyze afresh the evidence on record and to come to an independent conclusion on whether or not indeed the lower court's finding was consistent with the evidence adduced before it.

The gist of the appellant's appeal is that the complainant's evidence was inclined on identification and not recognition. He argued that the complainant failed to give his name to the police or other witnesses. On

careful scrutiny of the complainant's evidence it is apparently clear that on the material night the complainant was operating a boda boda business. It is not in dispute that the complainant is a boda boda rider. This is well confirmed by the complainant and the witnesses. Infact, the appellant confirmed this fact on cross examination.

The evidence presented before the trial court clearly showed that both the appellant and the complainant knew each other. The appellant confirmed that the complainant owed him Kshs. 800/=. In his defence evidence he confirmed this position. He said:-

“The complainant is known to me. It is not true that I and other robbed him on 3-4-2009. I know him at work. He owed me Kshs. 800/=. I met him in Kondele on 24-5-2009..... I met him at the clock junction. I called for my debt”.

In his evidence in chief the complainant said **“Two customers came to be taken to Manyatta. One was Davis whom I knew”**. It is therefore apparently clear that both the complainant and the appellant knew each other very well we and cannot accept the appellant's version that the complainant didn't recognize or identify him.

Further, and on the strength of the light which was available at the stage we believe that the appellant was seen and recognized by the complainant. In any case this was not the first time the appellant was getting acquainted with the complainant.

The next question is whether indeed the appellant assaulted and robbed the complainant. It was the complainant's evidence that he was assaulted by the appellant together with his accomplice and he sustained head injuries. The incident took place at night and near Manyatta primary school. PW5's evidence confirms this attack. He found the complainant near Manyatta primary school bleeding and they took him to the hospital. He confirmed to PW5 that he had been attacked by two people and he knew one of them.

From the above evidence, it is clear that the complainant was indeed attacked on the material night and the injuries he sustained were consistent with the findings of the clinical officer PW7.

From the above analysis and evidence on record, we do not find any basis for the complainant to maliciously implicate the appellant as being his assailant. It is apparently clear that they knew each other and on the material night he took him using a motor bike (boda boda) just as he had been doing and unfortunately he was attacked.

The appellant alleged that it took a longer time for the complainant to apprehend him, but we think and indeed agree with the respondent that the treatment and healing process of the complainant took such some time (about one month) which we do not find inordinate. Even if the complainant owed the appellant Kshs. 800/=:, there was no sufficient proof of such to dispel the event of 3-4-2009. The appellant did not present any reasonable explanation as to why he assaulted and robbed him. We find that there was therefore that the circumstances were favourable to allow the complainant identify and or recognize the appellant.

We do agree with the learned state counsel that the trial court did not warn itself while relying solely on the evidence of a single witness. It was held in the case of **Roma –VS- Republic [1967] EA 584** that:-

“Subject to well known exception it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness”.

We also take cognisance of section 143 of the Evidence Act Chapter 80 Laws of Kenya. Thus **“no particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact”**.

In this case the complainant and the appellant were well known to each other. They had known each other for over one year. This was therefore a reasonable time. Further the light present in the stage was sufficient for the complainant to recognize the appellant. Even though no recovery of the motor cycle was done, this nonetheless, doesn't help the appellant's case. Although the details of the motor cycle were not indicated in the charge sheet, we are of the view that there was no miscarriage of justice and no prejudice suffered by the appellant. On our part we warn ourselves of the danger of relying on one witness and find the evidence credible.

The upshot of this is that we dismiss the appeal. We shall nonetheless fault the sentencing and pursuant to section 329 of the Criminal Procedure Code chapter of the 75 Laws of Kenya allow the appellant to mitigate prior to sentencing.

Dated, delivered and signed at Kisumu this 31st day of January, 2012.

**ALI- ARONI
JUDGE**

**H.K. CHEMITEI
JUDGE**

HCK/va