



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO.226 OF 2009

BETWEEN

JAMES OMONDI OKOMO
APPELLANT

AND

REPUBLIC
RESPONDENT

(Being an appeal from the original conviction and sentence in Kisii CMCR. Case No.664 of 2009 by Hon. RM, Njeri Thuku dated 30th October 2009)

JUDGMENT

1. The appellant herein, **James Omondi Okomo** was charged with one count of stealing from a person contrary to **section 279 (a)** of the **Penal Code**. The particulars of the offence were that on the 15th December 2008 at Umoja Complex Building in Kisii Central District, within Nyanza Province, jointly with others not before court, stole Kshs.480,000/= from **JUSTINA WAMUCIE**.
2. The appellant denied the charge, thus giving way to a full trial. The prosecution called 6 witnesses while the defence called one witness, namely the appellant.
3. After analyzing the evidence that was placed before her, the trial court was satisfied that the prosecution had proved its case beyond any reasonable doubt against the appellant. The appellant was accordingly convicted as charged and sentenced to 3 years imprisonment.
4. The appellant was aggrieved by the conviction and sentence and brought this appeal. The Petition of Appeal, dated 5th November 2009 and filed in court on 11th November 2009 sets out the following 12 grounds of appeal:-
 1. *That the learned trial magistrate erred in law and fact by observing that the prosecution did establish their case on the strength of IDENTIFICATION evidence notwithstanding the conditions coupled with circumstances prevailing at the time of the act were not conclusive to sustain positive identification.*
 2. *That the learned trial magistrate erred in law and fact in placing reliance to a single witness.*

3. That the learned trial magistrate erred in law and fact in placing reliance to convict on the purported identification parade but failed to note that the parade was worthless as it contravenes the parade rules stipulated.

4. That the learned trial magistrate erred in law and fact by failing/hijacking the judgment from the trial magistrate convicting me without informing me the whereabouts of the trial magistrate.

5. Hon. Magistrate failed to note that the charge sheet was a DEFECTIVE ONE.

6. The trial magistrate failed in law and in facts entertained PLEA after 13 day arrest, while the case was not a CAPITAL offence.

7. That the trial magistrate erred in law and fact when he acted outside the law, proceed hearing the case without exhibits.

8. That the learned trial magistrate erred in law and fact by failing to note that there was no circumstance or direct evidence connecting the appellant with this offence.

9. That the learned trial magistrate erred in law and fact by failing to evaluate the appellant's statement of defense which was strong enough to secure an acquittal if carefully put in light.

10. That the learned trial magistrate erred in law and fact when she failed to take note of the fact that the evidence of PW1 (the complainant) was not credible going by her first report to the police. She did not give any description of those who took her money neither did she give any name. Hers was dock identification which in law is rendered worthless especially when the conviction and sentence meted out is solely relied upon a single person's evidence.

11. That the learned trial magistrate erred in law and fact when she failed to consider the fact that PW5 in her evidence in chief stated that two suspects one by name Karagacha a former employee of PW1 were arrested on the day of the incident and were later released by the police. PW1 did state that she didn't understand how and why the said suspects were released then. These two people should have given the court the right to picture what really happened owing to the doctrine of recent possession and or incident.

12. That the learned trial magistrate erred in law and fact by failing to take cognizance of the fact that PW5 who is and was purported to be a key witness did not witness PW1 being snatched her money. This is only a witness who was told what had earlier happened.

5. The prosecution's case was that on the 15th December 2008, **PW1, Justina Wamucie** who runs a fabric materials business at Gilta Plaza in Kisii Town, closed her shop at about 7.00 p.m. and headed to her home at Umoja Complex. She was carrying a paper bag in her hand. As she was opening the gate to her house, using the left hand, the appellant came around and snatched the paper bag from PW1's hand. The appellant was known to PW1 by appearance. In the paper bag was about Kshs.480,000/=. The appellant used to visit PW1's employee by the name **Josephat Karagacha**. The appellant used to pick up Karagacha from work in the evenings.

6. About one week earlier, PW1 had sacked Karagacha over some issues at work. PW1 screamed when the appellant snatched the paper bag from her. She also tried to chase the appellant, but he outsmarted her
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and escaped. Soon thereafter, PW1 saw Josephat Karagacha from a distance. Both the appellant and Karagacha had earlier in the day at about 4.00 p.m. been seen around PW1's gate by **Martha Wambui, PW5**. PW1 reported the incident to Kisii Police station. Josephat Karagacha was arrested that same evening, but he was later released.

7. **PW5, Martha Wambui** stated that at about 4.00 p.m. on 15th December 2009, she had just taken

delivery of cooking gas to PW1's house. As she left in the company of one Kamau, she saw Josephat Karagacha with another gentleman. Karagacha was pointing at PW1's house which is situated upstairs on Finance Building. When PW5 tried to greet Karagacha, whom she knew as a former employee of PW1, Karagacha did not respond. PW5 stated that she also used to see the other man who was with Karagacha on that afternoon. When PW5 learnt of the loss by PW1, her mind first went to Karagacha and his friend who had been sighted near PW1's house in the afternoon of that same day. PW5 confirmed that she knew the appellant because he used to visit Karagacha at PW1's place of business where she also used to be.

8. When PW1 made the report of the incident to Kisii police station, the report was received by **PW4, Number 87979 Police Constable Nicholas Koech**. After booking the report, PW4 and his colleagues visited the scene of crime and thereafter commenced investigations. PW4 recorded witness statements and then handed over the investigations to the Criminal Investigations department (CID) to proceed with further investigations.

9. The investigations were taken over by **PW3, Number 47332, Senior Sergeant Benson Naibei** of CID-Kisii. During the ensuing investigations, PW3 established that the appellant had been arrested and was being held at Kakamega Police station. He made arrangements to meet the complainant and they both went to Kakamega police station for purposes of conducting an identification parade.

10. The identification parade was conducted by **PW2, Number 231518 Inspector Godfrey Manyesa** of Provincial CID, Office Kakamega. The parade was conducted on 23rd March 2009 at about 4.30 p.m. The appellant willingly participated in the parade which comprised 8 people who were all prisoners being held in custody at Kakamega. The appellant stood between members 3 and 4 of the parade. PW1 was able to identify the appellant by touching. After the parade, the appellant expressed his satisfaction with the way the parade had been conducted.

The identification parade form was signed by the appellant and countersigned by PW4. PW1 had identified the appellant by touching him on the right shoulder and saying "**Ndiye huyu**"; meaning "**He is the one.**" The identification parade form was produced as **P. Exhibit 1**.

11. PW2 also stated that on being asked whether he wished to have an advocate attend the parade, the appellant said that he did not have one. PW2 also said that the identification parade was conducted in the basement where the police cells are located; and that the 8 members of the parade had many similar features to those of the appellant.

12. **PW6, Number 61062 Police Constable Johnson Wambulwa**, attached to PCIO's Office, Kisumu in the flying squad section was on patrol duties on 19th March 2009 together with Cpl. Randu, P.C Ranya and PC Kerongo. They were on patrol in the Kondele area of Kisumu Town when they were called back to Kisumu town to assist the OCS, Chief Inspector Wanyama to apprehend a suspect who had been arrested in town. PW6 and his colleagues rushed to the place where they found the appellant under arrest. They took the appellant for interrogation. The appellant had been involved in a spate of highway robberies on the Kisumu-Kakamega Highway. Later, officers from Kakamega police station picked up the appellant for further interrogations in connection with those offences. PW6 also said that officers from Kisii were also looking for the appellant. PW6 handed the appellant over to Kisii Police station. He was then charged with the offence of which he was convicted and sentenced to serve 3 years' imprisonment.

13. The appellant gave unsworn evidence and told the court that on 19th March 2009, he was in Kisumu driving around with his 3 sisters, Maurine Awino Okengo, Michelle Atieno and Dorine Juma in motor vehicle **Registration Number KAZ 161 E**, a Nissan sunny. They were headed for shopping at Yatin Supermarket. The appellant said he had kshs.30,000/= on him for the shopping. A little while later, they were stopped by the OCS, Kisumu Police station who asked for the owner of the motor vehicle. The appellant said the motor vehicle belonged to him. The OCS said the motor vehicle had been used in a spate of robberies in Kisii, Kakamega and Kisumu. Then the appellant called the owner of the motor vehicle who came and took it. The appellant was taken to the police station, but not before the OCS took his mobile phone and the Kshs.30,000/=.

14. The following day, the appellant was taken to Kakamega Police Station and a few days later, an identification parade was arranged. PW1 identified the appellant from the parade. He stated that he was not given a chance to invite his relatives or advocate being present at the parade. The appellant asked the court to acquit him of the offence.

15. Concerning the identification parade, PW2 stated that when the appellant was asked if he wished his advocate to be around during the parade, the appellant told him that he did not have an advocate.

16. The trial court carefully considered the evidence on record and reached the conclusion that the prosecution has met the standard of proof required in criminal cases, namely that the case against the appellant had been proved beyond any reasonable doubt. The trial court also concluded that the prosecution case had not been shaken in any material particular by the appellant's cross-examination. The appellant was thus found guilty as charged and convicted.

17. It is now the duty of this court, as the appellate court of first instance to reconsider and evaluate the evidence afresh with a view to making its own decision in the matter. This duty of the first appellate court has been stressed by the higher courts in such cases as **OKENO –VS- REPUBLIC [1972] EA 32.**

18. I have set out the entire evidence that was placed before the trial court. I have reconsidered and evaluated that evidence afresh. I have also considered the 12 grounds of appeal raised by the appellant against the judgment of the trial court.

19. At the hearing of the appeal, the appellant complained that he had been kept in police custody from 19th March 2009 to 23rd April 2009 when he was arraigned in court for plea. The appellant also complained that though PW1 alleged to have known the person who grabbed the paper bag from her, she did not give a description of that person to the police with her first report. It was also one of the grounds of appeal that the case preceded without exhibits, and that in any event, PW5, who was stated to be a key witness did not witness PW1's paper bag being stolen.

20. In response to the appellant's submissions, the learned Senior State Counsel submitted that the conviction of the appellant was safe and was grounded on solid evidence. That PW1 clearly identified the appellant whom she had seen on many occasions at her business premises when he came to fetch one of her employees by the name Karagacha from the business at the close of business. That PW1 easily picked out the appellant from the identification parade that was conducted at Kakamega police station by PW2, a fact which confirmed that PW1 was certain about the person who had stolen from her. That PW1 also told the court that at the material time, there was sufficient electricity light at the gate where the appellant accosted her. This is what PW1 said about the lighting:-

“There were security lights at the entrance of the gate and I saw him as he took away the bag cause when I screamed, he looked at me.”

Elsewhere, in her testimony PW1 stated the following:-

“I had known you for almost 2 months. I did not know your name. You were a friend to my employee You were the person who snatched my paper bag well as you were facing me. One person came to assist me after screaming and I tried holding you and you turned and I saw you again. there was sufficient light from security lights to enable me see you well.”

21. This case therefore turns on identification of the appellant by PW1. I am acutely aware of the

dangers of relying on the evidence of a single witness in convicting an accused person. I note that the trial court did not specifically address itself to this issue. The trial court however found that there was sufficient lighting which enabled PW1 to identify the appellant whom she had been seeing regularly for about 2 months. The trial court also found that the evidence of PW5, Martha Wambui, which in my considered view is circumstantial evidence, corroborated the evidence by PW1 to the effect that the appellant and one Karagacha had been seen at the gate of PW1's house a few hours before the appellant snatched the paper bag containing about Kshs.480,000/= at the same gate from PW1.

22. In my humble view, I am satisfied that the appellant was properly identified by PW1 as the person who snatched the paper bag from her. I am also satisfied that there was sufficient light at the gate which enabled PW1 to positively identify the appellant. PW1 stated that she faced her attacker twice within a short space of time and that when the identification parade was conducted; she easily picked out the appellant from among the other members of the parade.

23. The appellant told the court that the trial court should have ignored the evidence of PW5 because PW5 did not witness the incident. That may be so, but the circumstantial evidence given by PW5, in my view weaves a thread through the event that she witnessed at 4.00 p.m. and the event which took place at 7.00 p.m. on 15th December 2008. PW5 reported to PW1 that she had seen the appellant and Karagacha around PW1's house at 4.00 p.m. and even after the robbery, PW1 said she saw Karagacha in the distance. I am satisfied therefore that the theft was well planned and well thought out.

24. I have considered the defence of the appellant. I am not persuaded that police officers go about arresting innocent people who are driving their sisters around town going for shopping. Although the Kisumu police station OCS was not called as a witness, I am satisfied that there is other sufficient evidence on record to connect the appellant to the offence of which he was convicted. The evidence given by PW1 and PW5 remained unshaken throughout the trial.

25. The Appellant also complained that he was kept in custody for much longer than the law required before being taken to court for plea. This point was not raised during the trial. If it had, the Respondent would have had the chance to give an explanation. The appellant has ambushed the Respondent with the allegations on appeal. I reject that ground of appeal

26. For the above reasons, I see no cause for interfering with the findings of the trial court. The appeal is accordingly dismissed in its entirety.

27. It is so ordered.

DATED AND DELIVERED AT KISII THIS 26TH DAY OF JANUARY, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Absent - Appellant

Mr. Gitonga (present) for Respondent

Mr. Bibu - Court Clerk