



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL CASE NO.966 OF 2010

JARED OTIENO AMBEGO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

[APPEAL FROM ORIGINAL CONVICTION AND SENTENCE FROM BONDO PM'S COURT

J U D G E M E N T

The appellant **JARED OTIENO AMBEGO** together with one other person since acquitted at the trial, were charged with 4 counts of Robbery with Violence with alternative counts of Handing Stolen Property. The alleged robbery took place on the night of 11th of MAY, 2010. It was alleged that they robbed **WILLIAM OYIM KACHI, SARAH OYIM, JACINTA ANYANGO ORWA** and **GRACE ATIENO OYIM** of several items and at or immediately before or immediately after the time of such robbery they used actual force having been armed with an Ak47 rifle, pangas, rungus and iron bars.

The matter went to full trial where the appellant was convicted of all counts of robbery and sentenced to suffer death. The conviction and sentence has given rise to this appeal on the following grounds:

- 1. “That the learned trial magistrate misdirected himself in both law and in facts when he relied on the evidence of confession statement attributed by me without noticing there was no caution administered before taking the same.**
- 2. That the learned trial magistrate erred in law and in facts by taking into consideration the contradicted testimony of PW6 which was unsafe to rely upon to uphold a conviction in a capital offence as this which carries a death penalty when found guilty as charged.**
- 3. That the learned trial magistrate gravely erred himself in both law and in facts when he failed to see that there was no circumstantial evidence to support confession statement allegation which is**

contrary to the judge's rule and unconstitutional to hinge any conviction.

4. That the learned trial magistrate erred himself both in law and in facts by rejecting my alibi defence which was unchallenged by the prosecution side without giving enough reason of doing so."

At the hearing of the appeal the appellant relied on written submissions that may be summarised as follows:

- **The laid down procedures of taking a confession were not followed. - The confession was not taken before court, and he was forced to sign the same at a police station after being beaten, further his relatives did not witness the exercise also and he also denied making the statement at all.**
- **The prosecution failed to call vital witnesses.**
- **None of the stolen items were found in his possession.**
- **The court rejected his defence.**
- **There was no positive identification of the assailants.**

Miss Oundo learned State Counsel conceded to the appeal on the basis that the incident of robbery which took place on the 11th of May, 2010 happened while it was dark and with no lights, and the statement under inquiry linking the appellant to the robbery ought to have been admitted after a trial within a trial to see if it was obtained voluntarily; as the offence is serious and attracting a death penalty and the court ought to have been cautious; and although the stolen phone was recovered from one **Ngesa** who came to testify the said witness was stood down and not recalled which left the prosecution case with gaps.

This is the first appellate court and is charged with the duty of re-considering the evidence afresh, examining and analysing the evidence in order to arrive at an independent opinion. See **OKENO VRS REPUBLIC [1972] E.A. at 32.**

The evidence on record may be summarised as follows:

PW1 GRACE ATIENO AYIM, PW2 WILLIAM OYIM KADI, PW3 SARAH OTIENO OWINO & PW4 JACINTA ANYANGO OWUOR were on the night of 11th May, 2010 robbed by a gang of robbers outside their home as they returned home from work. They lost several properties including cellphones. **PW2** was the husband to the 3 ladies. After the attack they managed to contact the police who arrived at the scene and **PW1 & 2** were taken to hospital.

PW5 CHARLES MBEYA is a clinical officer at Bondo District Hospital. He produced the P3 form of **PW1** who had been examined and treated for injury on the left middle finger with some obvious dislocation. **PW6** Chief inspector of Police Ali Ibrahim testified that on the 21st of May, 2010 at 2.30 p.m. at C.I.D Offices in Bondo he cautioned the appellant explained to him the need to keep quite or give a statement if he wished in the presence of his witnesses and after the caution he took a statement from the appellant in the presence of two of his cousins and which statement the appellant signed on every page. He produced the statement as a confession.

PW7 CORPORAL BENARD MWANYA gave incidence of the report received and the investigation that led to the arrest of the appellant and his co- accused.

At the end of the prosecution case the trial court found that the appellant and his co-accused had a case to answer. They were put on their defence. The appellant herein informed the court that he was arrested on the 18th of May, 2010 by police officers who were accompanied by a customer. They asked to see his

phone. He showed them a Nokia 1280 and they took him to Central Police where he was shown a document with names of people he did not know and he was later charged.

PW1, 2, 3, and 4 testified how they were robbed on the night of 11th may, 2010. **PW5** produced a P3 form indicating injuries sustained by **PW1**. There is therefore no doubt that the four persons were robbed off their items and **PW1** sustained injuries. All the 4 i.e. **PW1-4** stated that the night was dark as the motor vehicle had been switched off at the time of the attack and they did not see the assailants. It is during the cause of investigations that the police came across one of the stolen phone with one **NGESA** who was called to testify but was stepped down and not recalled. **NGESA** according to **PW7** had linked the phone to the appellant as the person who sold the same to him. **PW6**'s statement of inquiry which amounts to a confession then is the only link between the robbery that took place and appellant herein. At the point of production, and admission of the confession the appellant did not object to the same being produced, not even at the defence level.

In the confession the appellant does not admit participation in the robbery. He stated that not knowing where his companions were going and their mission he accompanied them and stood 50 meters away and watched his companions attack and rob. After the said robbery he was given a Nokia 1208 and Kshs.1,000/= for having travelled with one of the accomplices.

The learned State Counsel conceded on the ground that a trial within a trial ought to have been conducted to ascertain whether the statement as obtained voluntarily. From the record the trial court had no reason to conduct a trial within a trial as the appellant neither objected to the same or even denied it at the defence.

The issue of coercion and lack of witnesses at the point the appellant made the statement has been introduced at the appeal level which in our considered view was an after thought. We do concur with the trial court that the requirements of taking an inquiry were all followed. **PW6** is qualified to take confessions and indeed the statement was signed by the appellant and he made the same in the presence of two of his witnesses. The same was therefore properly admitted as evidence.

What is perplexing though having considered the confession, is why this “**innocent person**” did not report the incident to the police or decline the stolen loot. He did none of the two. In our view it is clear from the confession that the appellant was part of the gang that robbed **PW1, 2, 3, and 4** on the night of the 11th of May, 2010. We therefore find that the conviction was safe.

As regards the sentence, we shall give the appellant an opportunity to mitigate against the death sentence in line with Sections 324 and 329 of the Criminal Procedure Code.

Dated and delivered this 31st day of July, 2012.

ALI-ARONI

H. K. CHEMITEI

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In the presence of:

.....**State Counsel**

.....**appellant**