REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 164 of 2011

JOHN ONCHONGA MONARI ……..…..…… APPELLANT

AND

REPUBLIC …… RESPONDENT

(Being an appeal from the original conviction and sentence dated and delivered on

4th August 2011 by Hon. Mr. Were, SRM in Keroka SRMCR Case No.304 of 2011)

JUDGMENT

1. The appellant herein, John Onchonga Monari was arraigned before the SRM's Court at Keroka on one count of robbery with violence contrary to **section 295** as read with **section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the 11th day of March 2011 at Nyambunwa area in Masaba District within Nyanza Province jointly with another not before the court, while armed with dangerous weapons, namely iron bars robbed Stephen Nyaigoti Ohachi of cash Kshs.10,000/= and two mobile phones make Nokia china and Nokia 1100 both valued at Kshs.7500/= and immediately before or immediately after the time of such robbery used actual violence to the said Stephen Nyaigoti Ohachi.

2. The appellant pleaded not guilty to the offence. The prosecution called 3 witnesses from whose testimonies the facts and the evidence of this case emerge. Briefly, on or about 11th March 2011 at about 9.00 p.m., PW1, Stephen Nyaigoti Ohachi (Stephen) alighted from a motor vehicle at the Birongo junction. As Stephen alighted, he found the appellant in the company of one other person. Stephen asked the two if they had a motorcycle which could take him home. The appellant and the other person assured Stephen that there would be a motor cycle soon. The two encouraged Stephen to walk with them as they were expecting the motorcycle any time. Stephen agreed with them and the three walked on up to a place called Nyambunwa but no motorcycle was in sight. After the trio passed Nyambunwa, the appellant suddenly held Stephen's hands from behind while the other person held Stephen on the mouth with a piece of wood. That other person was called Misati alias Nyaome. Misati then took Stephen's Kshs.10,000/= and 2 Nokia phones – a Nokia 1100 and Nokia Double line. The appellant and his colleague then ran away into the night, leaving Stephen at the scene.

3. Stephen went home and slept. On the next morning, he went and made a report at the AP camp at Muturumesi. Stephen stated that he knew both the appellant and Misati well because he often used their motor cycle (boda boda) services. The appellant and his accomplice disappeared from home and was not arrested until 26th March 2011. On the said date, the appellant was taken to Muturumesi AP camp by members of the public on suspicion that he had violently robbed somebody. At the AP camp, the appellant was received by No.232268 APC Samuel Thuranira who testified as PW2. On receiving the

appellant, APC Thuranira subjected him to interrogation in relation to the earlier robbery with violence report made by Stephen on 14th March 2011. After the preliminary interrogation, APC Thuranira re-arrested the appellant from the members of the public and thereafter escorted him to Keroka police station.

4. Number 57597 Cpl. Simon Munyao, who testified as PW3 stated that he received the appellant at Keroka police station and after re-arresting him, he handed the appellant over to the investigating officer. The appellant was then charged with the present offence. Cpl. Munyao stated that the appellant was taken to Keroka police station on 25th March 2011 while APC Thuranira stated that the appellant was taken to the police station on 25th March 2011.

5. Before Stephen concluded his testimony, he stated that he went for treatment at Masaba District Hospital on 13th March 2011 and then made a report to Keroka police station on 14th March 2011. Stephen was issued with a P3 form which was later filled, though the same was never produced in evidence. During cross-examination, Stephen stated that he and the appellant together with the appellant's companion walked for about 1 km before he (Stephen) was attacked by the appellant and Misati. Stephen also stated that the appellant's nickname is Colonel.

6. At the close of the prosecution's case, the trial court found that the appellant had a case to answer. The appellant was accordingly put on his defence. The appellant gave sworn evidence. He testified that he was arrested at Birongo Bar on or about 20th March 2011 by an Administrative police man. Upon arrest, the appellant said he was taken to the AP Camp at Muturumesi and soon thereafter he was charged.

7. Regarding the allegations that he robbed Stephen on or about 11th March 2011, the appellant stated that on 11th March 2011, he was at his home from around 4.00 p.m. and that even at 9.00 p.m. when the alleged offence is said to have been committed, he was at his home. That he was at home with his 3 brothers.

8. During cross examination, the appellant stated that he did not know Misati and further that he did not know Stephen and only met him in court. He also said that the sole reason why Stephen took the matter to court was because Misati snatched a girl from him during an encounter at a bar, although in the very same breath, the appellant stated that he did not know Stephen. He further stated that he met Misati at the bar and that Stephen, whom the appellant also stated he did not know, sorted out the matter.

9. After carefully considering and analyzing all the evidence that was placed before it, the trial court reached the conclusion that the prosecution had proved its case beyond any reasonable doubt. Accordingly, the trial court convicted the appellant as charged and sentenced him to ten (10) years in jail.

10. Being aggrieved by both conviction and sentence, the appellant has come to this court on appeal on the following grounds:-

1) That the learned trial magistrate erred in both law and fact in convicting the appellant on evidence of recognition/identification under difficult circumstances;

2) That the learned trial magistrate erred in both law and fact in failing to appreciate that the prosecution did not prove its case beyond any reasonable doubt against the appellant;

3) That the learned trial magistrate erred in law and fact in failing to appreciate that no exhibits were recovered from the appellant.

4) That the learned trial magistrate erred in law and fact in failing to appreciate that the case against the appellant was a frame-up because of differences between the appellant and the complainant.

11. The appellant therefore prays that the appeal be allowed, the conviction quashed and the sentence of ten (10) years imprisonment set aside.

12. This is a first appeal, and on a first appeal, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter, bearing in mind the fact that it has no opportunity of seeing and hearing the witnesses who testified in the court below. See generally **Pandya –vs- R [1957] EA 336**; a case that was cited and applied in **Okeno –vs- Republic [1972] EA 32**.

13. When this appeal came up for hearing before us on 19th July 2012, the appellant was duly warned of the consequences of proceeding with his appeal should the court find that there was sufficient evidence laid before the trial court to sustain the conviction under **Section 296 (2)** of the **Penal Code** with the attendant possibility of enhancing the sentence to one of death. The court repeated the warning three times seeking to ensure that the appellant understood the provision. Despite the warning, the appellant elected to proceed with the appeal and we heard him.

14. The appellant put in written submissions and contended that the ingredients for the offence under **section 296 (2)** of the **Penal Code** were not proved and that in the circumstances, the trial court erred in convicting him of such a serious offence. Under **section 296 (2),** the prosecution need prove only one of the following ingredients, that is to say that:-

a) The offender is armed with dangerous or offensive weapons; or

b) The offender is in company with one or more other person or persons; or

c) If, at or immediately before or immediately after the time of the robbery, the offender wounds, beats strikes or uses any other personal violence to any person.

15. The question that arises for determination is whether the prosecution proved any of the above ingredients to warrant a finding of guilt for the offence as charged.

16. The appellant also submitted that the conditions prevailing on the night of the alleged attack were such that positive identification/recognition was not possible. The appellant contended that Stephen did not even mention his name as opposed to Stephen mentioning the name of Misati who is still at large. The appellant also pointed out that there were glaring inconsistencies in the prosecution evidence, especially as between the testimonies of PW2 and PW3 regarding the date when the appellant was arrested and presented to the police at Keroka: was it 25th or 26th March 2011?

17. The appellant also contended that the prosecution did not adduce any medical evidence to confirm Stephen's allegation that he was injured during the attack on him at 9.00 p.m. on 11th March 2011. For the above reasons, the appellant urged us to allow his appeal.

18. Principal State Counsel, Mr. Jacob Mutai, appearing for the respondent vehemently opposed the appeal. Counsel submitted that the prosecution case was that Stephen was attacked by both the appellant and Misati, the latter still being at large. That Stephen knew both appellant and Misati well because he used their boda boda services often. That this was a case of recognition as opposed to identification and that in such a case, it was much easier for Stephen to tell who his attackers were.

19. Secondly, counsel submitted that Stephen was in the company of the appellant for a considerable period of time, having walked together for about a kilometer before the appellant and Misati robbed him. Counsel submitted that the trial court properly warned itself of the dangers of convicting on the evidence of a single identifying witness, before coming to the conclusion that such evidence was sufficient to found a conviction.

20. On the issue of lack of exhibits, counsel submitted that for the reason that the appellant and his accomplice disappeared from the area for about 2 weeks, it was not possible to make any recoveries, as the appellant had already disposed of the stolen items, namely cash Kshs.10,000/= and the 2 Nokia

phones.

21. Regarding the appellant's allegation that the case against him was a frame-up, counsel submitted that the allegations of a frame-up could possibly not be true since if there indeed were differences between the appellant and Stephen, the appellant would have confronted Stephen with relevant questions during cross examination to support the existence of such differences. Counsel urged us to dismiss such allegations as mere afterthoughts.

22. On sentence, counsel submitted that since the trial court found the appellant guilty under **section 296 (2)** of the **Penal Code**,the only lawful sentence that should have been meted out to the appellant was one of death as by law provided. Counsel urged us to find that the sentence of 10 years imprisonment for a violent robbery under **section 296 (2)** of the **Penal Code** was unlawful, and to set it aside and substitute the same with a death sentence.

23. We have ourselves carefully reconsidered and evaluated the evidence afresh. We have also carefully considered and weighed the judgment of the trial magistrate. From the above, it is clear to us that the prosecution case against the appellant rests entirely on the question of identification/recognition by a single identifying witness. There is also the question of sentence should we find that the evidence that was placed before the trial court was sufficient to sustain the offence of robbery under **section 296 (2)** of the **Penal Code**.

24. In the case of **Maitanyi –vs- Republic [1968] EA 198**, the Court of Appeal held that where identification/recognition is based on the evidence of a single identifying witness, such evidence must be subjected to intense testing. The court relied on the well known case of **Abdalla bin Wendo –vs- R [1953] 20 EACA 166** in which the court expressed itself thus:-

" – Subject to well known exceptions, 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 the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error ---".

25. In the instant case, it is not in dispute that a robbery took place, and that no recoveries were made. Stephen told the court that when he alighted at the junction where the appellant, Misati and other boda boda riders normally operated their motor cycles, he found the appellant and Misati and enquired from them if they could take him home on the motor bike. They assured Stephen that one motor bike which had taken a passenger home would be coming soon and that in the meantime they could walk together as they expected the motor bike to return any time. According to Stephen, the three of them walked for about a kilometer, but no motor bike came. Then suddenly, the appellant grabbed Stephen's hands at the back, as Misati covered Stephen's mouth with a piece of wood and also at the same time removed the money and the mobile phones from Stephen's pocket. During cross examination, the appellant never suggested to Stephen that the case against him was a frame-up. Stephen also confirmed that he knew the appellant and Misati well and that they were the only persons whom Stephen found at the junction. Stephen also confirmed that they walked together for about 1 km before he was attacked.

26. We are thus satisfied that there was no mistaken identity about the appellant. He was accompanied by Misati. We do find that because of the prior knowledge Stephen had of the appellant and Misati, he did not hesitate to walk with them when they suggested to him that they cover some of the distance on foot as they anticipated the arrival of the motor bike which the appellant and Misati had assured Stephen was coming soon. We find no merit in the appellant's contention that this case was a frame-up because of an existing grudge between him and Stephen. We are satisfied that Stephen's testimony was credible and to a large measure that testimony is supported by the appellant's own sworn testimony.

27. The next issue for determination is whether the ingredients for the offence under **section 296 (2)** of

the **Penal Code** were proved and what impact the non-recovery of any of the allegedly stolen items has on the whole of this case against the appellant? Further, was the failure to call medical evidence fatal to the prosecution's case?

28. In the instant case, it is clear that the appellant was in the company of one Misati. It is also in evidence that at the time of the robbery, the appellant used personal violence on Stephen by grabbing his hands behind and by Misati placing a piece of wood on Stephen's mouth as they ransacked his pockets and took away cash Kshs.10,000/= and the two Nokia mobile phones. We are convinced that in the circumstances of this case, the piece of wood that was placed on Stephen's mouth to prevent him from in anyway screaming for help was a dangerous weapon. It does not matter that the stolen items were not recovered. In this case, there was a lapse of time between the date of the crime and the arrest of the appellant, and most likely, the appellant and his colleague must have already disposed of the items by the time of the appellant's arrest. We have also considered the appellant's contention that the prosecution failure to call medical evidence is fatal to their case. While appreciating that it would have been desirable to adduce such evidence, we do not think that such failure is fatal to the prosecution's case. In the case of **Cheya & another –vs- Republic [1973] EA 500**, the High Court of Tanzania (admittedly a court of concurrent jurisdiction to our own) that it is possible to establish a fact (in that case the fact of death and the cause of it) otherwise than by medical evidence. We subscribe wholly to that view and find that in the instant case, the fact of the robbery has been established by the testimony of Stephen, which testimony we have accepted to be credible and true.

29. The last issue for determination is whether the sentence of 10 years imprisonment should be enhanced to a death sentence. We note that the trial court does not explain the reason for imposing a term of imprisonment after finding the appellant guilty of the offence of robbery with violence. The prescribed sentence for the offence is death. The Learned Principal State Counsel has requested us to impose the proper sentence in this case because the trial court misapprehended the law in meting out 10 years imprisonment. We agree and exercise our powers under **Section 354** of the **CPC** to correct the sentence. Accordingly, we set aside the sentence of 10 years imprisonment and in its place, we sentence the appellant to suffer death as by law provided.

30. In a nutshell, we find no merit in the appeal. The same is accordingly dismissed on both conviction and sentence.

31. It is so ordered.

Dated and delivered at Kisii this 25th day of October, 2012

RUTH NEKOYE SITATI **R. LAGAT KORIR**

JUDGE. **JUDGE.**

In the presence of:

Present in person for Appellant

Mr. Mutua (present) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI **R. LAGAT KORIR**

JUDGE. **JUDGE.**