



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Criminal Appeal 66 of 2008**

**EDWIN OTIENO ONYANGO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Criminal Case No.4173 of 2006 of the Chief Magistrate's Court at Makadara by E.K. Usui- Senior Resident Magistrate)*

**JUDGMENT**

The appellant, **EDWIN OTIENO ONYANGO**, was convicted for the offence of Robbery with violence contrary to **section 296(2) of the Penal Code**. He was then sentenced to suffer death as by law prescribed.

In his appeal, he has challenged the alleged identification by the 2 eye-witnesses. He has also raised concerns about the failure by the trial court to give due consideration to the inconsistent evidence tendered by the prosecution witnesses. Finally, the appellant submitted that the learned trial magistrate failed to take account of his defence.

In a nutshell, the charge sheet cited the weapon as being a gun but the complainant did not mention any gun. But the lady who was accompanying the complainant said that the 4 men who attacked him had a gun.

The lady (**PW 2**) had said that before the gang of 4 men attacked them, as **PW 1** was escorting her home, the appellant had been with both **PW 1** and **PW 2** at a pub. On the other hand **PW 1** said that the appellant had not been with them at the bar before the incident.

If the appellant had been with the 2 witnesses at the bar earlier that day, the appellant says that it would have been most improbable for him to then have robbed the 2 people, as it would have been obvious that they would identify him.

The defence was that **PW 1** was the boy-friend to **PW 2**. He got annoyed with the appellant when the appellant talked to **PW 2**, and when **PW 2** bought a drink for the appellant. For that reason, the appellant says that **PW 1** decided to frame him.

Mr. Wasuna, the learned advocate for the appellant also submitted that **PW 1** and **PW 2** gave inconsistent stories about the incident. **PW 1** said that **PW 2** was present when the robbers attacked him. But **PW 2** said that she had run away, and that she only came to learn later, that **PW 1** had been attacked.

There was also the question as to whether or not **PW 2** was the girlfriend to **PW 1**. Whilst **PW 1** said

that **PW 2** was his girlfriend; the lady said that **PW 1** was only escorting her towards her home because it was late.

In answer to the appeal, Ms Maina, learned state counsel, submitted that the conviction and sentence were safe.

**PW 4** is said to have corroborated the evidence of the complainant, about the fact that he had been hit in his left eye.

**PW 1** is said to have recognized the appellant as he used to see him often in the area, before the attack took place. And on the material night, there was sufficient lighting from the security lights. The fact of the said lights was verified by the Investigating Officer.

This court was asked to disbelieve the appellant as he had mis-led the court about his age. He had said that he was below 18 years of age. However, the doctor who examined him found otherwise.

In contrast, **PW 1** was described as an honest man, just like the learned trial magistrate held, after observing his demeanour when he was testifying.

Finally, although there was a discrepancy between the date cited by **PW 1** and **PW 2**, with the date cited in the charge sheet, the respondent invited us to hold that that defect was not fatal. The respondent said that the defect was curable pursuant to **section 382 of the Criminal Procedure Code**.

Being the first appellate court, we have re-evaluated all the evidence on record. The particulars of the offence, as cited on the charge sheet, were as follows;

**“EDWIN OTIENO ONYANGO:**

***On the 15<sup>th</sup> day of July 2006 at Githurai 44 Estate, Nairobi within Nairobi Area, jointly with others not before the court, while armed with a dangerous weapon namely a pistol robbed MOHAMMED MBOTI SAKWA a Nokia 2100 mobile phone and cash Kshs.7,000/- all valued at Kshs.12,500/-, and at or immediately before or immediately after such robbery, used actual violence to the said MOHAMMED MBOTI SAKWA.”***

The complainant was **PW 1**. He said that the incident took place on 1<sup>st</sup> July 2006 at about 9.30p.m.

He was going home. He was accompanied by his girlfriend, **PW 2**, when 4 men appeared. The men surrounded **PW 1** and **PW 2**. One of the men hit **PW 1** in the left eye, causing it to bleed. The men then stole **PW 1**'s phone and money.

**PW 1** said that he was standing right under the security light when he was attacked. The said lighting enabled him to recognize the appellant, who was one of the 4 men. **PW 1** explained that he recognized the appellant because **PW 1** used to see the appellant often, in the area where the incident occurred.

**PW 1** testified that a person named Makau directed him to the appellant's house.

However, the appellant was not arrested until after 3 days.

During cross-examination, **PW 1** denied having framed the appellant because he (**PW 1**) was bitter with the appellant after **PW 2** bought beer for the appellant. Indeed, **PW 1** even denied having been at the pub together with the appellant.

**PW 2** also said that the incident took place on 1<sup>st</sup> July 2006. She was with **PW 1** at a pub within Githurai 44 Estate.

According to **PW 2**, some 4 men attacked them when **PW 1** was escorting her home. At the time of the said attack;

***“There were lights from our security light in the plot where I lived. “***

In effect, the lighting was not just above them, as **PW 1** had asserted. Perhaps the reason why **PW 1** had said that he was attacked when he was standing;

***“right under the security light.....”***; is

because, ***“he was drunk”***, as **PW 2** said in her evidence.

**PW 2** said that the robbers pulled out a pistol, which they pointed at her. The robbers then ordered **PW 1**, **PW 2** and other people (who were on the road) to lie down.

**PW 2** ran away home, leaving **PW 1** behind. It is only later, when **PW 2** returned to the scene that she learnt that **PW 1** had been injured.

But **PW 2** also testified that she identified the attackers because they had been inside the pub where **PW 1** was with **PW 2**. This is what **PW 2** said;

***“I booked at our attackers. I had seen them in the pub where we were. We sat near them. One of them approached me for beer. I gave him 20/-, they must have followed us from the pub.”***

Of course, that piece of evidence does not conform with that given by **PW 1**.

During cross-examination, **PW 2** said that **PW 2** had stabbed **PW 1** with a knife.

**PW 3** was the Investigating Officer. He visited the scene of crime and verified that there was a security light at the spot.

**PW 3** said that it took 3 days to arrest the appellant because during those 3 days, the complainant was still being treated. According to **PW 3**, the actual arrest was effected ***“between 15<sup>th</sup> and 23<sup>rd</sup>”***

**PW 3** said that the appellant was arrested after he had been identified by **PW 1**.

**PW 3’s** evidence was that **PW 1** identified the appellant by name.

**PW 4** is a medical doctor. He examined **PW 1** on 31<sup>st</sup> July 2006. According to **PW 4**, the said medical examination took place some 15 days after **PW 1** had been assaulted.

In his assessment, the injuries on **PW 1** were caused by a blunt object, although **PW 4** was not sure about the exact object or instrument that was used to inflict the injury.

**PW 5** was the arresting officer. He said that the appellant was arrested after **PW 1** pointed him out at the Shinyalu Busaa Club.

After **PW 5** testified, the prosecution closed its case. When the appellant was put to his defence, he said that he was 19 years old. He confirmed that he was arrested on 23d July 2006, as had been stated by **PW 5**.

The appellant said that **PW 1** was upset with him because **PW 2** had been his (the appellant’s) girlfriend.

If the doctor examined the complainant 15 days after the alleged assault; and since the doctor

conducted the medical examination on 31<sup>st</sup> July 2006, that would imply that the complainant was assaulted on or about 15<sup>th</sup> July 2006.

In the charge sheet, it was indicated that the offence was committed on 15<sup>th</sup> July 2006.

Therefore, the evidence of the doctor is in consonance with the particulars of the charge sheet.

However, the complainant and the only other eye-witness said that the offence was committed on 1<sup>st</sup> July 2006. In the event, the evidence tendered did not support the charge.

In any event, **PW 1** was drunk when he was attacked. That fact was stated by **PW 2**, who had been with him at the pub before the incident. Therefore, the alleged recognition by **PW 1** is doubtful.

It is noteworthy that on 23<sup>rd</sup> July 2006, when the appellant was arrested by **PW 5**, the complainant had visited **PW 2**. This is what **PW 2** said about the said visit;

***“On 23<sup>rd</sup> July 2006, at about 4p.m, I was in my house. Complainant approached and asked if I remembered our attackers. I told him I could recognize one man who had bothered me in the pub as I had also seen him in the group that attacked us.”***

Surely, if **PW 1** had recognized the appellant as one of the robbers, he would not have needed the help of **PW 2** to recall his identity.

Furthermore, although **PW 2** allegedly saw the appellant stabbing **PW 1** with a knife, the doctor who examined **PW 1** did not find any injury that was consistent with a stab wound.

The doctor only found evidence of an injury caused by a blunt object.

In conclusion therefore, there are too many inconsistencies in the prosecution case. The conviction is thus unsafe. We quash it, and also set aside the sentence. We order that the appellant be set at liberty forthwith, unless he was otherwise lawfully held.

**Dated, Signed and Delivered at Nairobi, this 19th day of November, 2012.**

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**FRED A. OCHIENG**

**JUDGE**