



No. 2800

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL APPEAL NO. 197 OF 2010

ABRAHAM OGUTU OCHOLLA APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

JUDGMENT

(Being an Appeal from the original conviction of sentence of the Principal Magistrate's Court

at Oyugis Hon. R. Ngetich in Criminal Case No. 1095 of 2009 delivered on 30th September, 2010)

“The appellant,” Abraham Ogutu Ocholla was charged before the Principal Magistrate’s Court, Oyugis with the offence of Robbery with violence contrary to section 296 (1) of the **Penal Code**. The particulars attendant to the charge were that on 17th November, 2009 at Kasewe “B” Sub location in Rachuonyo District within Nyanza Province while armed with a dangerous weapon namely a Somali sword, he robbed **Martha Auma Anyango** one mobile phone make Nokia 1100 and cash Kshs.400/- all valued at Kshs. 3,900/- and immediately before the time of such robbery, used actual violence on the said **Martha Auma Anyango**. The appellant denied the charge.

The prosecution case in brief was that on the material day at around 2.00a.m, the complainant (PW2) was asleep in her house when she heard something move in her ceiling. Suddenly a person jumped out of an opening in the ceiling and fell on her on the bed. He immediately grabbed her throat and whispered to her to keep quiet and not to scream. She could not scream as he was twisting her neck. She struggled with the person though and they both fell down from the bed. While on the ground the person tightly held her throat and she lost consciousness. After about 30 minutes she came round, woke up and hit the window as she could not scream. A visitor who was in one of the houses in the homestead, **Dan Okinyi Misera, (PW3)** came to her rescue. He pushed the door open and found her unconscious, flashed a spotlight in the house and when he checked where the complainant normally kept her mobile phone, he found it missing. He came out of the house and flashed the spotlight and saw somebody running. He pursued the person

while screaming and caught up with him at the church and arrested him with the assistance of the other members of the public who had joined in the chase. The person so arrested was the appellant. He was arrested 70 meters away from PW2's compound. He was found in possession of the complainant's Nokia 1100 mobile phone, a blanket as well as a sword which he had apparently stolen from the house of the complainant. The complainant's neighbour called the police who then re-arrested the appellant. The complainant testified that it was the accused who had cut open the ceiling board while he used to work for her. She realized that the window of the house was open and that the appellant may have gained entry through the window. The complainant was treated for the injuries she sustained at **Rachuonyo district hospital**.

APC Augustine Rono, (PW5) received the report and proceeded to the scene. He found the appellant having been arrested by members of public while in possession of a mobile phone, sword and a blanket. He re-arrested him and took him to **Oyugis Police Station**. He handed him over to **PC Elphas Adange**. In the course of his investigations, he issued the complainant with **P3 form** which was duly filled by **Brian Muema (PW1)**, a Clinical Officer. He upon examination of the complainant formed the opinion that she had sustained multiple injuries and a blunt object was used to inflict the same.

In his defence, the appellant chose to adduce sworn evidence. He testified that on the material day he was going to his home after attending court case involving the complainant. On the way, he had slept at **Mary Adhiambo's** house and proceeded with his journey at 6.00a.m the following day. As he walked on, he saw the complainant with 5 people. The complainant ordered them to arrest him. He was then beaten and taken to the complainant's home. The complainant's son then summoned the police and he was re-arrested, taken to the police station and later charged for the offence he never committed.

The learned Magistrate having carefully evaluated the evidence led by both the prosecution and defence was persuaded that the charge against the appellant had been sufficiently proved. She therefore, proceeded to find the appellant guilty and convicted him accordingly. Upon conviction, she sentenced him to the mandatory death sentence.

Aggrieved by the conviction and sentence aforesaid, the appellant mounted this appeal on 4 grounds to wit;-

“1. That the learned trial Magistrate erred in both law and facts by entering a conviction against me the appellant though the prosecution side failed to prove the case beyond any reasonable.

2. That the complainant in this case (PW2) testified that the alleged offence took place at night in the darkness but she failed to quote or identify the type of light she used to identify me the appellant during the time of robbery.

3. That the learned trial Magistrate further erred in both law and facts by not considering that the evidence which was adduced during trial were purely circumstantial.

4. That the complainant PW2 and her care taker PW3 alleged in their evidence that I was arrested by the members of the public which the prosecution failed to call any of them as a witness to clear the doubts...”

The appeal came before us for hearing on 31st March, 2011. The appellant elected to canvass the same by way of written submissions. We have carefully read and considered them.

Mr. Mutai, learned Senior State Counsel conceded to the appeal on the grounds that the conviction was not safe as it was based on the evidence of the complainant only. The complainant and appellant had a previous relationship. He was previously an employee of the complainant and they had differed. The

account the complainant gave sounded incredible. From the look of things, there were past differences between the two and given the facts and serious charge of robbery, the trial court ought to have considered all the facts carefully.

This being a first appeal, it is the duty of this court to re-examine and re-evaluate the recorded evidence and reach its own conclusions on that evidence on whether we think that the conviction was right or otherwise. In doing so, we have to bear in mind that we neither saw nor heard the witnesses and the appellant testify; that privilege is reserved for the trial court and on appeal, this court must give due deference to that factor. It matters not that the appeal has even been conceded to.

We have no doubt at all that the learned State Counsel was right in conceding to the appeal on the grounds advanced. The conviction of the appellant appears to have been based on PW2's alleged recognition of the appellant in the house as well as the alleged chase and arrest of the appellant by members of the public and PW3.

Of course it has been constantly said that the ***"...proper identification of robbers is always an important issue in a case of capital robbery. Being night time, the conditions for identification of robbers in this case were not favourable. This was, however, a case of identification, of assailants; recognition of assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other..."***. See **Anjononi V Republic (1980) KLR 59**. On the foregoing, must be added a rider that recognition may be more reliable than identification of a stranger; but, even when witnesses are purporting to recognize someone who they know, mistakes are often made even of close relatives and friends.

In this case it was the evidence of the complainant that she was asleep in her house at night when allegedly the appellant descended on her from the roof. He held her by the neck and they struggled even landing on the floor from the bed. Whilst on the floor, he squeezed her throat until she passed out. At this point, it would appear the appellant picked her phone, blanket, sword and disappeared. When she came round, she unsuccessfully looked for her torch. Eventually, in darkness, she went to a window and knocked, thereby attracting the attention of her visitor (PW3), who came to her rescue. From the foregoing, it is quite clear that the alleged happenings and or goings on in her house were all in darkness. There is no evidence at all that there was any source of light in that house. Indeed that fact is confirmed by the complainant herself when she came around and tried to look for a torch to no avail. That being the case, there is no way that the complainant would have been able to recognize the appellant even if he used to work for her previously. These circumstances therefore rule out the possibility of the complainant having visually recognized the appellant.

The complainant claims to have recognized the appellant by voice. Of course evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would however be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it. See **Choge V Republic (1985) KLR1**. According to the complainant ***"...I told the visitor (meaning PW3) that the person who attacked me is Babu because I know him. I recognized his voice because he used to be my servant..."***. That is all that she said with regard to her alleged recognition of the appellant by voice. If we apply the parameters set out in the aforesaid authority to the circumstances of the alleged recognition of the appellant's voice outlined above, there can only be one conclusion; there is no way that the complainant would have recognized the voice of the appellant. The complainant did not say what was it that the appellant said that enabled her recognize his voice. If anything it would appear the appellant on landing on the complainant, whispered to her to keep quite. A whisper and normal voice are two different things. How could she have been able to recognize the appellant's voice when he only whispered? There is no evidence that the complainant was familiar with the appellant's voice or whisper. Yes, the appellant may have worked for her in the past. However, that perse does not mean that she became familiar with his voice or whisper. After all, it is not even indicated for how long the appellant had previously worked for the complainant and in what capacity. Further and as we have said, the conditions obtaining at the time of the commission of the offence were such that the complainant could not have been in a position to identify or recognize anybody

even by voice. It was about 1a.m when suddenly a person dropped from the ceiling onto her bed where she was sleeping. That person immediately went for her throat and strangled her until she passed out. By the time she came round, that person had already left. In those circumstances, how could she have recognized the appellant? There was no such possibility.

Then there is the issue of the appellant having been pursued by PW3 and arrested near a church about 70 metres from the house of the complainant. The evidence of chase and arrest of a suspect is of course good evidence and can form a basis for conviction. However, for such evidence to be of use, it must be demonstrated that there was no break in the chase. There must be no break in the chain link and that at all times the suspect was in full view of whoever was chasing him. In this case, there are several inconsistencies and contradictions in the evidence of the chase and eventual arrest of the appellant between PW2 and PW3 such that we are left wondering whether indeed there was such an occurrence. According to PW2, PW3 did not know the appellant. After she knocked on the window and PW3 came to her assistance, he then left to go and call a neighbour. Sometimes later he heard PW3 scream and run after the appellant with neighbours. On his part, PW3 testified on the issue that when he went to the complainant's house, he found her unconscious. He came out of the house and flushed the spotlight. He saw a person running and he pursued him whilst screaming. He pursued him for 50 meters before he managed to get him. It was then that members of the public and the complainant came to the scene. If the complainant was unconscious, how was she first able to knock at the window to attract the attention of PW3? If the complainant was unconscious, how was she able to tell PW3 that she had been attacked by the appellant? If PW3 then went to call a neighbour, at what time was he able to see the appellant and pursue him? Even assuming that he indeed pursued and arrested the appellant, is it possible perhaps that the appellant was a mere night runner going about his routine business and not necessarily the person who attacked and robbed the complainant. Did PW3 pursue the appellant alone or in the company of neighbours? If he was with neighbours, how come none of them volunteered to testify? Further, there is no evidence that in his or their pursuit of the appellant he or they never lost sight of him.

To us this chase and eventual arrest of the appellant by PW3 and or neighbours is a mere make up story to frame the appellant. We are fortified in this conclusion by the fact that just before the appellant was allegedly arrested in the circumstances outlined above if at all, he had just come from attending a court a case in which he had been pitted against the complainant. Though the details of the case and the outcome thereof were not given in his evidence, the complainant did not dispute or contest that assertion. It may well be that, the outcome of the case did not go down well with the complainant, hence her plot for revenge which may have included framing the appellant with the case.

We are further fortified in this view by the sentiments of **Lyon J** expressed way back in 1960 in the case **R V Eria Sebwato (1960) E.A. 174**. He said “...*that this accused, well known to the complainant, should go with seven other men to commit an organized robbery in a house where he was well known seems to me to be inexplicable. He must have known he was bound to be recognized, and that, in my view, casts doubt on the evidence of the complainant and his wife...*”. We agree.

This appeal is allowed; conviction quashed and sentence imposed set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Judgment dated, signed and delivered at Kisii this 20th day of May, 2011.

ASIKE-MAKHANDIA

RUTH NEKOYE SITATI

JUDGE

JUDGE