



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

CRIMINAL APPEAL NOS.53 & 55 OF 2010

1. **BOAZ ONYANGO**.....1ST
APPELLANT
2. **FREDRICK OSODO OMONDI**.....2ND
APPELLANT

VERSUS

REPUBLIC.....**PROSECUTOR**
R

[Appeal from Original Conviction and Sentence of Bondo SRM's Court by: E. S. Olwande SRM

in
Criminal Case No.155 of 2009]

J U D G E M E N T

On the 30th of January, 2009 the appellants **Boaz Onyango, Fredrick Osodo Omondi and Martin Ochieng Owori** were arraigned before the Senior Resident Magistrate's Court in Criminal Case No.155 of 2009 and charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence being that on the 27th of January, 2009 at Uhanya Beach Market in Bondo District within Nyanza Province, jointly while armed with dangerous weapons that is pangas and bars robbed off **Martha Otieno** Kshs.1800/= cash, 2kgs chippy cooking fat, 4kgs of kimbo fat and other shop all valued at Kshs.2000/= and at or immediately after the time of said robbery cut the said **Martha Otieno** on the forehead and right hand elbow. The appellants pleaded not guilty to the charge were tried, convicted and sentenced to death.

Being dissatisfied with both the conviction and sentence the appellants each preferred their appeal to this court on similar grounds that may be summarized as follows:

- **The doctrine of recent possession relied upon by the magistrate does not measure upto the required standard;**
- **Prevailing condition at the time of the commission of the offence was not conducive to positive identification.**
- **No description or explanation was given regarding the appellants to the police to support the alleged recognition;**
- **Contradiction in the prosecution case was overwhelming;**
- **The learned trial magistrate ignored and failed to appreciate defence case.**

At the hearing of the appeal all the 3 appellants adopted their written submissions and responded orally to the submissions by learned State Counsel **Mr. P. Kiprof**. The submissions by the appellants were similar in substance and may be summarized as follows:

- **The complainant did not give names of the suspects to the police;**
- **The scene of crime was not conducive to positive identification. No evidence was adduced in regard to the density of light that enabled identification. No details of time duration was given that enabled the complainant to identify the assailants. Circumstances did not given an opportunity for such identification to take place;**
- **Exhibits allegedly recovered in a rental house yet no neighbours or landlord was called as a witness. The other suspects were released and never charged. No details given of who was the owner of the house;**
- **The prosecution did not discharge the burden of proof as required.**

On his part the learned State Counsel objected to the appeal on the following grounds:

- **The complainant was close to the assailants at the time of the attack and was able to recognize them using a torch;**
- **The 1st appellant passed through security lights as he pursued the complainant;**
- **Evidence was overwhelming;**
- **The complainant was injured and treated.**

We have considered the submissions by the appellants and The learned State Counsel as summarised above. This being the first appellate court we have in line with the requirement in law and as enumerated in the case of **Okeno versus Republic (1972) E.A. at P.32**, reconsidered the evidence a fresh, examined and analysed the same in order to arrive at independent conclusions,

From the evidence on record, the complainant (**PW1**) was robbed and injured on the morning of 27th January, 2009 while asleep in her shop. The attackers demanded money, cut her and took away several things. She had a torch which she shone on the attackers who were dressed in dark clothes. They identified themselves as police officers. One opened his jacket and she saw an iron inside. She identified Kwege, Odhiambo and Omondi. She also recognized one outside as he attempted to run away. She screamed and attracted neighbours and an administration police who came to her aid. The question however is whether there is sufficient evidence proving that the appellants were the assailants.

PW1 states in her evidence partly:

· **“When they first entered Odhiambo was in front. I saw Odhiambo by my torch. I told Kwege I had sold all the scratch cards;**

· **.....I realised they were not officers Omondi hit me on the head and armed with a panga;**

· **.....Kwege ordered me to stand up and give them money. I told him I have no money. He aimed his panga at my neck but I blocked the blow with my hand and he cut me twice on the hand. I fell down and they pushed me under the table again;**

· **.....I crawled out of the shop. It had rained heavily.**

· **.....When I stepped on the mud I saw someone standing about 6 metres from the door. He was smoking. He saw me and he came to me. He tried to hold me but I jumped and ran away as I was running he stabbed me on the back with a knife. I continued to run while screaming for help but no one came out. He kept following me. We passed 2 areas with security lights and I was able to see the person who was pursuing me it was Onyango.**

· **..... I suddenly heard Onyango running back away from me.....I followed him screaming.”**

PW1 was able to identify the items stolen from her at the chief’s camp. She also identified the 3 appellants alongside one other person.

PW2 Daniel Ochieng Tiang on his part stated:

- He is a Chief of Yimbo Division.

- When they got to the house where the appellants were asleep one attempted to escape but they caught him.
- They arrested 6 people although 2 were released.
- In the house they found the exhibits in a sack.
- They recovered 3 pangas , knives and a torch.
- This identified the goods as being the ones stolen from her shop.

PW 3 Charles Mbeya stated:

- He is a Clinical Officer.
- On 29th January 2009. PW1 went to him with a history of having been assaulted on 27th January 2009.
- PW1 had multiple cut wounds that had been stitched, one cut wound on right forehead measuring 4cm x ½.
- A cut wound on the right thumb, middle finger and posterior chest.
- He classified injury as harm.

PW4 AP CPL. SIMION KOMEN

- Stationed at Usenge A.P. Post.
- On 27th January 2009 at 9.00 in the company of the area chief and other officers went to the house suspected to be where the appellants lived.
- The 4th accused saw them and attempted to ran but was caught.
- They recovered exhibits.
- The chief confirmed they were the suspects.

- The 6 were arrested and exhibits taken to the chief.

PW5 GEOFFREY GITONGA stated:

- Is an inspector of police stationed at Usenge Police Station
- Went to the scene of crime.
- Checked on PW1 when she was being treated.
- complainant PW1 identified her stolen items at the chief's camp.

On their part in defence the appellants stated as follows:

DW1 MARTIN OCHIENG ALUOCH

- On 27th January 2009 at about 11.00 a.m. he was arrested by the area chief along the road.
- After 30 minutes a lady came but could not positively identify them.
- Initially detained at the chief's camp but later transferred to Usenge Police Station.
- Charged after 2 days.

DW2 BOAZ ONYANGO OSODO

- The area chief and A.P. went to his rented house on 27th January 2009 at 11.00 a.m.
- He was asked for an identity card but did not have one.
- Was arrested and put with other people he did not know at the chief's camp.
- Later taken to Usenge Police Station.

DW3 FREDRICK OSAMO OMONDI

- He is a fisherman.

- On 27th January 2009 at 11 a.m. The chief of Usenge and A.P's knocked at his door looking for stolen goods.
- They did not recovery any.
- Police sought for receipts for his T.V. and V.C.D.
- He did not locate the same immediately.
- He was ordered to carry the same was taken to the chief's camp and after 20 minutes he was transferred to Usenge Police.
- The wife could not testify as she left him.

From the evidence of **PW1**, she recognized the 2 appellants using a torch as they demanded money and cut her while inside the shop. She knew them prior to the robbery. We are of the view that the attack against **PW1** by the assailants, with 3 inside her shop and two outside did not create an environment conducive for the complainant **PW1** to have been able to shine a torch on the assailants. In the circumstances this seems remote and highly unlikely and on this score therefore we disagree with the findings of the learned trial magistrate.

The appellants deny having been in possession of the recently stolen items, however their defence does not displace the otherwise cogent and overwhelming evidence by the prosecution witnesses the chief of the area and the police officers who recovered the items from the appellants did not give any explanation of how they came to be in possession of the "recently stolen" goods, barely 6 hours after the robbery. A strong presumption therefore arose that the appellants stole the items. See the case of **Ruhi versus Republic (1985) KLR at 373**. We are in agreement with the trial court on this issue of recent possession. We on our own part find that the doctrine of recent possession was properly proved.

However we fault the sentence metted out by the trial court and the sentiments expressed to the effect that there is only one sentence for the offence.

The learned trial magistrate failed to observe Sections 324 as well as Section 329 of the Criminal Procedure Code.

In **Kenga Foto Mangi vs Republic ----**

“Before we leave the appeal, there is some matter which we must point out to trial judges dealing with capital offences. The judges, as the learned judge herein did, convict and then straight away pass the sentence of death without complying with the provisions of Section 324 of the Criminal Procedure Code. The provisions gives an accused person the right to move a motion in arrest of judgment which in short really means that though there is only one penalty for the offence of murder, namely death, yet an accused person may nevertheless show that he or she ought not to be sentenced to death.”

In the case of **Godfrey Ngotho Mutiso versus Republic Criminal Appeal No.77/08** the Court of Appeal dealt with the question of the death penalty.

The Court of Appeal in the case stated:

“.....on our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that Section 204 of the Penal Code which provides for a mandatory death sentence is anti-ethical or the constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare that Section 204 shall, to that extend that it provides that the death penalty is the only sentence in respect to the crime of murder is inconsistent with the latter and spirit of the constitution.....”

“.....we doubt if different arguments could be raised in respect of other capital offences such as treason under Section 40(3), robbery with violence under section 296(2) and attempted robbery with violence under section 297(2) of the Penal Code.....”

“.....the learned judge of the Superior Court simply imposed the death penalty upon convicting the appellant. In doing so the learned judge was in error because under Section 329 of the Criminal Procedure Code, he was entitled, before passing sentence, to have received such evidence as he thought fit in order to inform himself as to the correct sentence to pass.”

In view of the sentiments of the Court of Appeal in the two cases quoted above – **Kenga Foto Mangi vs Republic & Godfrey Ngotho Mutiso vs Republic** (supra) as well as the content of Section 329 CPC and we have appeared ourselves and before confirming the sentence by the lower court or otherwise, we shall in line with Section 324 and 329 of the Criminal Procedure Code ask the appellant to address the court on the issue of the death penalty in order for this court to consider whether or not to confirm the death sentence or substitute it with another lawful sentence.

Dated and Delivered this 23rd .Day of September, 2011.

R. N. NAMBUYE

JUDGE

ALI-ARONI

JUDGE

In the presence of:

.....for State

..... Appellant present in person.