



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Criminal Appeal 157 of 2008

FREDRICK OTIENO OPENDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the Conviction and Sentence in Criminal Case No. 705 of 2008, of the S.R.M's Court at Bondo., D. Mikoyan Esq. - S.R.M.]

Coram:

Karanja, Aroni-JJ

Mr. Musau State Counsel for the State.

Appellant present in person.

Court Clerk: Laban/George

J U D G M E N T

The appellant, **Fredrick Otieno Opendo**, appeared before the Senior Resident magistrate at Bondo charged with two counts of robbery with violence contrary to section 296 (2) of the penal code.

In the first count, the particulars were that on the 29th June 2008 at Bondo township, Bondo District, jointly with others not before court while armed with a dangerous weapon namely a knife robbed **Selina Awino Munga** of her mobile phone make Motorola C115 and Kshs. 320/= all valued at Kshs. 1,620/=, and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Selina Awino Munga.

In the second count, the particulars were more or less similar to those in count. The victim was **George Omondi Otieno** who was robbed of his mobile phone make Motorola C113 and a wallet containing an ID Card and Kshs. 220/= all valued at Kshs. 2,020/=.

A plea of not guilty was entered in both counts and after a full trial, the appellant was convicted on both counts and sentenced to death. The sentence on the second count was rightly held in abeyance.

Being dissatisfied with both the conviction and sentence, the appellant preferred the present appeal on the basis of the grounds contained in the petition of appeal filed herein on 14th November 2008.

The grounds are essentially a complaint on the prosecution evidence of identification and complaint on the reliance and admission of hearsay and contradictory evidence by the learned trial magistrate.

There is also the complaint that no evidence from a medical officer was availed and that the appellant's defence was not given consideration by the learned trial magistrate.

The appellant appeared before us in person and presented written submissions which he relied on in support of his grounds of appeal.

The learned Senior Principal State Counsel, **Mr. Musau**, appeared for the state and conceded the appeal on the basic ground that the prosecution evidence of identification was unsatisfactory and inadequate. He noted that the appellant was suspected by an Officer Commanding Station (O.C.S) merely because he was found in possession of some money yet it was shown that he worked in a butchery and the money could have been part of the proceeds of the butchery.

Our duty as the first appellate court is to reconsider the evidence and make our own conclusions. We however, bear in mind that the trial court had the advantage of seeing and hearing the witnesses.

Briefly, the prosecution case was that on the material date 11.00 p.m., the O.C.S Bondo Police Station **Chief Inspector Boniface Kutswa (PW1)** was approached by the two complainants **Selina Awino (PW2)** and **George Omondi (PW3)** who informed him that they had been robbed by a group of about seven people near a junction to the local slaughter house.

George was a bicycle (boda-boda) taxi operator while Selina was his passenger.

The two were travelling in the bicycle taxi when the offence occurred.

Selina said that the bicycle had a headlamp. She was heading home from her work as a barmaid. It was about 10.14 p.m. and along a Murram road they were stopped by a group of about six people. On being stopped, the bicycle's headlamp went off. The cyclist (George) was slapped. She (PW2) alighted from the bicycle and was held by two of the offenders. Her mobile phone and money Kshs. 300/= were taken away. She said that she managed to identify one of those who held her and that she did so with the help of security lights from a nearby shop. She said that the person was familiar to her and was the appellant herein who was arrested in a house and found in possession of some money with clothes similar to those worn by one of the offenders.

George (PW3) said that they were stopped by people who represented themselves as police officers. He said that they were about five to six robbers and that one of them slapped him on the face. His mobile phone and a wallet containing money and an ID Card were taken away. He said that he managed to see the offender who was searching Selina (PW2). He implied that he saw and identified the said offender with the help of light from a spotlight and that he (offender) was wearing a black jacket and red T-shirt. George identified the appellant as the said offender.

On receiving the report from Selina and George, the O.C.S (PW1) proceeded to the scene and found nobody. He moved to some Estates near the slaughter house. He was in the company of George when they spotted a group of five men who scampered in different directions when a torch was flashed.

George suspected the five people one of whom ran into a nearby house.

The O.C.S said that he went to that house and found a person who mentioned the appellant and on the following day the appellant's employer **Mary Auma (PW4)** reported that the appellant had failed to remit the proceeds of her butchery on the previous day. The appellant was indeed found with some money which was then kept by the O.C.S.

The O.C.S indicated that some items were recovered including the stolen ID Card. He did not link the appellant with the recovery but suspected him after was found with a sum of Kshs. 8,279/=.

In his defence, the appellant made an unsworn statement and said that he worked in a butchery and was arrested in his house when police officers woke him up from his sleep. The police searched the house and found Kshs. 8,270/= being proceeds from the butchery. He was arrested and eventually charged with the present offence which he denied having committed.

David Otieno Ochieng (DW2) confirmed that he was with the appellant upto 8.00 p.m. on the material date and that they went to their respective homes after parting.

From all the foregoing evidence we are satisfied that the offence of robbery with violence under section 296 (2) of the penal code was established in terms of the decision in the case of **Johana Ndungu –VS- Republic Criminal Appeal No. 116 of 1995**.

As long as any one of the ingredients of the charge was established the offence became complete notwithstanding the absence of medical evidence (See, ground seven (7) of the appellant's petition).

The basic issue for determination was whether the appellant was positively identified as having participated in the concurrent acts of robbery.

We are not convinced that the evidence of identification by both Selina (PW2) and George (PW3) was reliable and satisfactory.

The conditions for identification were not favourable. The offences occurred in darkness and the possible sources of light were the bicycle's headlamp which was disabled and could not help in identification of the offenders. Nearby security lights were only mentioned by Selina (PW2) without any clue as to their distance from the scene and their strength (intensity) in helping in the identification of the offenders.

George (PW3) talked of a spotlight flash without stating its intensity and position *vis-a-vis* the offender allegedly identified by him.

It was clear in our minds that both Selina and George may not have identified any of the offenders and instead resorted to conjecture by way of dock identification of the appellant.

There having been no direct evidence of identification at the scene of the offences, the prosecution was left with what it thought was sufficient circumstantial evidence i.e. the supposed recovery of some money from the appellant and some clothes similar to those worn by the offenders.

This evidence was insufficient. Firstly, it was confirmed by Mary (PW4) that the appellant was her employee and had gone home with part of the proceeds of her butchery. Secondly, there was no description given to the police by Selina (PW2) or even George (PW3) of the types of clothes that the offenders or any one of them wore on that material night. Therefore, the "recovery" of clothes said to be similar to those worn by the offenders inside the house of the appellant did not provide any probative value to the prosecution case.

The learned Senior Principal State Counsel clearly saw the discrepancy in the prosecution case and readily conceded the appeal. He was very

right in doing so.

In the end result, we allow this appeal by quashing the conviction on both counts and setting aside the sentence.

The appellant is set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Kisumu this 16th day of March 2010.

J.R. KARANJA
JUDGE

A.A ARONI
JUDGE

JRK/va