REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Criminal Appeal 26 of 2007

DAVID OUMA OBUYA.....APPELLANT

VERSUS

REPUBLIC……..…..RESPONDENT

(An appeal from original conviction and sentence by the Senior Resident Magistrate's court at Ndhiwa in Criminal Case No. 226 of 2006- P.C. Biwott, Ag. SRM)

JUDGEMENT

The appellant, **David Ouma Obuya** and two others, **Enos Omondi Omuga** and **Benard ochieng Golo** were arraigned before the Senior Resident magistrate's court at Ndhiwa on or about the 3rd of November, 2006. The appellant faced two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. In count one it was alleged that on 28th October, 2006 at Adek Market of West Kochieng sub-location of Homa Bay District within Nyanza Province, he robbed **Mary Atieno** cash 3,000/- and at or immediately before or immediately after the time of such robbery wounded the said **Mary Atieno Musa.** With regard to the second count it was alleged that on the same day and place he robbed **Tobias Ochieng Omolo** of a bicycle make Atlas F/No. E549817, Auja, Speaker, Amplifier and battery make heavy duty all valued at kshs.11,800/-. The appellant also faced a charge of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code.** The particulars thereof were that on the same day and place he unlawfully assaulted **Walter Omondi** thereby occasioning him actual bodily harm. The appellant and his co-accused aforesaid then faced a joint count of assault causing actual bodily harm. It was alleged that on the same day and place they jointly and unlawfully assaulted one **Evans Jagero Jagero** occasioning him actual bodily harm. Finally, the appellant alone faced the alternative count of handling stolen goods contrary to **Section 322(2)** of the **Penal Code**. The particulars given were that on 30th October, 2006 at West Kochieng sublocation of Homa Bay District within Nyanza Province, otherwise than in the course of stealing, dishonesty received or retained a bicycle make Atlas F/No.E549817 and a battery make heavy duty knowing or having reason to

believe them to be stolen goods.

The appellant and co-accused pleaded not guilty to the charges and they were tried. The prosecution called a total of twelve witnesses. **Mary Atieno Musa (PW1)** and **Tobias Ochieng Omolo (PW2)** were the complainants in counts one and two. Their evidence was that on 28th October, 2006 at about 8p.m. they were in the home of PW1 together with PW2, PW3, PW4 PW5 and PW6. Suddenly the appellant entered the house and confronted them. He was armed with a panga and rungu. He proceeded to attack PW1 and **Evans Jagero Jagero (PW5)** with both the rungu and panga. As the appellant was doing all these, his co-accused stood by the door assumably/probably? to ensure that none of the victims escaped from the house. However the victims somehow managed to escape leaving behind a bicycle and heavy duty battery. Having escaped, they reported the attack at Ndhiwa Police station. The report was received at the police station by **P.C. Shadrack Odhiambo(PW10).** Prior to that the complainants had reported the incident to the local Assistant chief, **Samson Amolo Awiti (PW9)**. Since he knew the culprits complained of as they all came from his area of jurisdiction he caused their immediate arrest with the assistance of the local Administration Police Officers led by **Corporal James O. Ononda (PW11)** of Kamata AP. Post. At the time of the arrest, they recovered from the house of the appellant the bicycle belonging to **Tobias Ochieng Omolo.** After the complainant had filed their reports with Ndhiwa Police Station, they were referred to Homa Bay District Hospital and they were attended to by **Joel Suter(PW7),** a clinical officer. From his examination of the complainants he formed the opinion that PW1, PW2, PW3 and PW5 had sustained injuries. He assessed the degree of injuries as harm and that they were caused by a blunt object . Apparently during the attack, PW1 lost kshs.3000/- that was on the table. As the complainants fled, they left behind a bicycle and heavy duty battery that were subsequently recovered from the house of the appellant. The appellant and co-accused upon being arrested were subsequently charged as aforesaid.

At the conclusion of the prosecution case, the learned trial magistrate found a prima facie case established in respect of the appellant and his co-accused in counts two, three and four and placed them on their defence. However he acquitted the appellant of count one.

The appellant in his defence, gave a sworn statement of defence and called no witnesses. In his defence he stated that the complainants had taken away his wife and singled out PW2 in particular. Otherwise he denied robbing PW2 or assaulting him together with PW1, PW3 and PW5. He alleged that the battery and bicycle were left outside the door of his house by the same people who ran away from his house with his wife on that material night.

The learned magistrate having carefully pondered over the evidence by both the prosecution and defence was convinced that the prosecution had made out a case against the appellant. He therefore found the appellant guilty in respect of count two, convicted him and sentenced him to death. The learned magistrate similarly found the appellant and his co-accused guilty in respect of count three, convicted them and sentenced each one of them to two years imprisonment. Finally the appellant was again convicted in respect of count four and sentenced to two years imprisonment.

Part of the sentencing above was irregular in so far as the appellant was concerned. It has always been said that where an accused person is convicted on more than one capital charge, the sensible thing the trial court should do is to sentence him to death on only one of the counts and leave others in abeyance including any sentence of imprisonment. See for instance **Moru Ndege Boru and another v republic(2005) eKLR.** In the circumstances of this case the learned trial magistrate should have ordered the suspension of the imprisonment sentences in respect of counts three and four having imposed the death sentence in respect of count two on the appellant.

Be that as it may, the appellant was aggrieved by the conviction and sentence. Hence he preferred this appeal. In his petition of

appeal he faults his conviction by the trial magistrate on grounds that the case was not proved against him to the required standard, that the learned magistrate failed to evaluate and scrutinize the evidence on record properly and that the sentences imposed were harsh and manifestly excessive.

When the appeal came up for hearing before us on 16th March, 2010, the appellant chose to canvass the appeal by way of written submissions. We have carefully read and considered the same. On its part, the state through **Mr. Kemo**, learned Senior Principal State counsel conceded to the appeal on the grounds that the alleged stolen items by admission of PW12 were surrendered to the police station by the appellant who claimed to have been assaulted. He gave an explanation as to how he had come by the said items. The evidence was not also clear as to how the said items were stolen. Finally counsel was of the view that the prosecution case was riddled with contradictions as to make the conviction of the appellant unsafe.

On our part, we have endeavored to reconsider the evidence, re-evaluate it and come to our own conclusions since this is a first appeal-see **Okeno V Republic(1972) E.A. 32.** It matters not therefore that the state conceded the appeal.

We wish to start with the medical evidence tendered. It would appear that the medical evidence tendered by the clinical officer was not conclusive as to the injuries that PW4 and PW6 sustained. The clinical officer received and examined the said complainants after seven days. The clinical officer confirmed that the said complainants had no physical injuries that showed that any assault or violence had been visited upon them and that he filled the P.3 forms according to what he was told by them.

The evidence with regard to the exhibits allegedly recovered and the ones taken to the police station at Ndhiwa is contradictory. If the appellant was the robber, he could not have taken the battery and or the bicycle to Ndhiwa Police Station. PW12 testified to the fact that it was the appellant who infact brought the said items to the Police Station. The rest of the other witnesses however testified that the appellant was arrested with the bicycle and had only taken the battery to the station. That was the evidence of PW1, and PW2. Yet PW7 the arresting officer testified that the house of the appellant was searched and nothing was recovered. Amongst these witnesses, who is being truthful and candid to court?

There were other rampant and glaring contradictions in the prosecution case. PW1 alleged that she lost to the robbers kshs.3,000/= whereas the other witnesses present in the house with her saw only khs.2,000/-. Whereas some witnesses stated that the property stolen belonged to the church, others said it was for PW2. The bicycle and battery that was exhibited in court according to some witnesses, the appellant was arrested with them whereas to others the items were taken to the police station by the appellant himself. Even no description or proper identification of the items was made by either the complainant PW1 or other witnesses. These contradictions and or omissions made the witnesses to turn out as people who were unreliable and should not have been believed by the trial court.

The trial magistrate too misapprehended the evidence of the prosecution witnesses and in particular PW9, the investigating officer. He testified that in the course of his investigations, he discovered that the complainants had love affairs with the appellant's wife who had even taken off with one of them. He stated that the investigations were carried out when the appellant was at the police station and that he got the information from the neighbors of the appellant. The other piece of evidence was by PW12 who booked the report from the appellant. According to him, the appellant reported to him that his wife was being taken away by some people and when he raised an alarm they ran away abandoning a bicycle and a battery outside his house after assaulting him. He later surrendered the two items to the station. PW12 then advised him to go and seek treatment at the hospital. However before he could take the p3 form he was arrested and charged. The evidence of PW9 and PW12 no doubt bolstered the appellant's defence. Had the learned magistrate given it proper treatment,

we are certain that he could have come to an entirely different conclusion. Though he rejected the defence, the learned magistrate advanced no or no good reasons for the same. Infact in the process he shifted the burden of proof to the appellant when he stated that the appellant **"…did not call his wife or sister-in-law as witnesses though wished to rely on them…."** The cardinal rule of our criminal justice system is that the burden of proof never shifts from the prosecution to the accused save in very few and rare cases. This was not one of those cases. The burden of proof always rests with the prosecution.

In all the circumstances we find no basis of upholding the appellant's conviction and we agree with the learned Senior Principal State counsel, **Mr. Kemo**, who readily conceded the appeal. We allow the appeal, quash the conviction and set aside the sentences of death and imprisonment imposed on the appellant. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **KISII** this 24th day of April, 2010

D. MUSINGA **M.A. MAKHANDIA**

JUDGE. **JUDGE.**