



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

Criminal Appeal 55 of 2009
PETER ORIAH OLOGORAPPLICANT
=VERSUS=
REPUBLIC.....RESPONDENT

*(An appeal from the decision of Hon. G.A. Mmasi Esq. Senior Resident Magistrate
delivered on 3rd April 2009 in the Senior Resident Magistrate's Court Case No. 4752 of 2008
at Eldoret Law Courts)*

JUDGMENT

I. Background

(1) The Appellant, original Accused person

appeared before the Senior Resident Magistrate's Court on the 3rd October 2008 charged with the offence of:-

Robbery with Violence

Contrary to Section 296(2) of the Penal Code.

Particulars of offence

On the 17th day of September 2007 at 5.00 p.m. at Sabor Forest in Keiyo District within Rift Valley Province jointly with others not before Court robbed Christopher Kipkosgei Kitur Kshs 4,500/=, a mobile phone make Motorola C 118 all valued at Kshs 9,500/= and at or immediately before or immediately after the time of such robbery wounded the said Christopher Kipkosgei Kitur.

(2) A plea of not guilty was entered and a trial was duly held between 21st November 2008 to 3rd April 2009 when a sentence to Suffer Death was pronounced against the Appellant.

(3) Being dissatisfied with the conviction and sentence, the Appellant filed appeal on 7th April, 2009.

II. **Facts**

(4) This is an unfortunate case as it clearly demonstrates that investigations in this matter were lacking. It may perhaps have been due to the post election violence which is doubtful.

(5) The Complainant is a male adult and an employee of the Ministry of Environment. On the 17th September 2007, he was on his way home at about 5.00 p.m. when he met two persons who emerged from the Sabor Forest. He recognized one of them as a headman and identified him in Court (dock identification) as being the assailant. The two attacked him, covered him with a jacket then robbed him of a mobile phone Motorola C 118 worth Kshs 2,800/= and Kshs 5,000/=, total Kshs 7,800/=. (The charge sheet stated value stolen was 9,500/=. This should have been amended during trial and the charge sheet re-read to the Appellant before the trial proceeded further).

(6) It seems the Complainant lost consciousness and found himself at the District hospital. He was treated released and taken to Kaptagat Police Station. He was informed that his father had pointed out and arrested the accused persons and or caused his arrest.

(7) The Complainant's colleague on hearing of the incident rushed to the scene on the material day. P.W.4 stated that this information was received on 18th September 2007 whilst he was on duty as a ranger. At the scene they found good Samaritans had taken the Appellant to hospital. They were given a jacket which the neighbours claim had been found at the scene. Then P.W.4 and colleagues were able to take the Complainant to hospital and make a report to the Police.

(8) On 19th September 2001, they obtained information that one of the suspects was in the bush. They arrested him and found

him with a mobile phone. This

suspect, named James, gave information that it was one Peter who assaulted the Complainant. This suspect was taken to the Police, rearrested then taken to Court. The mobile phone and jacket were also handed over to the police.

- (9) In cross-examination P.W.4 confirmed that the incident of robbery occurred on 17th September 2007.
- (10) Another colleague to the Complainant, P.W.5 a Forest guard cum driver stated that he was on off duty. In the evening of the 19th September 2008, (we believe this must have been a typographical error by the trial Magistrate and the year ought to read 2007), he was informed that the complainant had been beaten. On a tip off a suspect by the name James was arrested. He was taken to the Police Station and led them to where one, Peter was staying. Hestated in examination in chief that nothing was recovered from him. In cross-examination he stated that one James, the suspect lived together with the Appellant and had jointly committed the offence.
- (11) Apart from the Investigating Officer, P.W. 6's evidence, no other witnesses were called. A clinical officer never attended the Court to give evidence.
- (12) The Investigating Officer on receiving the Complaint stated that he investigated this case between September 2007 to September 2008, a total of 12 months. This was because the Appellant had been hiding for the said period. He was spotted at the IDP Camp and the father to the Complainant arrested him and handed him over to the Kaptagat Police Station. Nothing was recovered from the accused nor had he known the accused before.
- (13) In his defence the Appellant denied the offence. He was a cyclist taxi service rider. His bicycle was taken away from him together with his cash.
- (14) The trial Magistrate convicted him and sentenced him to suffer death
(3rd April, 2009). The Appellant appealed
to this High Court (7th April, 2009).

III. Petition of Appeal

- (15) The Appellant pleaded not guilty. In summary, his petition stated:
- (i) That he pleaded not guilty
 - (ii) P.W.2, P.W.4 and P.W.5 gave hearsay evidence
 - (iii) Investigating Officer failed to visit the scene of Crime
 - (iv) Too much reliance was given to P.W.3 the father to the Complainant and arresting Civilian
 - (v) No identification parade was conducted
 - (vi) His Defence was disregarded
 - (vii) There was no medical evidence to confirm the Complainant was injured
 - (viii) Proceedings of the Lower Court and Judgment was sought for by the Appellant

IV. Reply

- (16) In reply to this the Republic conceded to the Appeal. What was of concern was that the Appellant was identified from the dock by only one single witness being the Complainant. Where this occurs, the trial Magistrate must take great precaution and warn herself/himself of relying on the evidence of a single identifying witness.
- (17) Further, the Complainant as the only single witness would have been led by the Prosecution in giving in-depth details of the attacker. It was then noted by the Republic that no occurrence book was produced to Court to confirm a report was made of the incident. Lastly the exhibits were recovered namely a jacket and mobile phone but these were never produced to Court.

V. Opinion

- (18) A trial Magistrate has enormous powers by which to ensure justice is rendered. These powers include calling and recalling of witnesses to Court to give evidence under Section 146 (4) of the Evidence Act Cap 80 Laws of Kenya. It also includes powers for purposes of obtaining proper evidence Section 173 (1),

“... a Magistrate, in order to discover or to obtain proper evidence (may) ask any question he pleases in any form, at any time, if any witness or of the parties about any fact whether or not it is otherwise admissible;”

- (19) We say so as it seems there were two attackers on the Complainant, one was arrested and found in possession of a mobile phone handed to the Police. If the said suspect was arrested and released/acquitted or convicted, that suspect is permitted to come to Court as a witness. If the Police do not call the said suspect as a witness, the trial Court may.
- (20) As a result, the only identifying witness was the Complainant. The Prosecution therefore required to have held an identification parade for the Complainant to identify the accused. The Prosecution failed to produce the mobile phone and jacket recovered, failed to visit the scene and failed to prove that the Complainant sustained injuries. The Complainant said he lost consciousness whilst the other witnesses claim he was injured on his mouth and legs. No medical evidence was called to prove these injuries. No weapon or instrument used to harm the Complainant was named in the charge. It was imperative that Violence be proved scientifically.
- (21) The reliance of hearsay evidence in this matter was unfortunate. One called James was spoken of but never called as a witness to this case. In evidence, where a witness is not called his/her name should not be mentioned to Court. If it does it amounts to hearsay when they are not called to Court. This evidence should have been expunged or discredited by the trial Magistrate.
- (22) We are of the opinion that the appeal against conviction and sentence is allowed and conviction and sentence cannot stand. Accordingly the conviction is quashed and sentence set aside. The Appellant is at liberty unless otherwise lawfully held.

DATED AND DELIVERED THIS 22ND DAY OF JULY 2010 AT ELDORET.

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M.A. ANG'AWA
JUDGE

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P.M. MWILU
JUDGE

Advocate

- (i) *J.K. Chirchir instructed by the office of the Attorney General for the State (Respondent) - Present*
- (ii) *Peter Oriah Ologor (Appellant in person) - Present*