



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 18 OF 2010

PETER ONYANGO OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case number 417 of 2009 of the Chief Magistrate's Court at Kisumu)

Coram

Karanja, Aroni – JJ

Mr. Gumo for state

Court clerk Laban / Ochollah

Appellants in person

JUDGMENT

On the 30th August 2009 at about 10:00 p.m. at Otongolo area within Kisumu District, a group of people armed with offensive weapons namely metal bars attacked and robbed **George Onyango** of his motor cycle registration number KBE 955Q make T. V. star, a mobile phone make Nokia 1110, a driving license and cash Kshs. 2,800/= all valued at Kshs. 91,800/= and at or immediately or immediately after the time of such robbery, the group used actual violence to the said George Onyango. These are the particulars of the charge of robbery with violence contrary to Section 296 (2) of the Penal Code preferred against **Peter Onyango Ochieng** (herein, the appellant) and another. The two appeared before the Chief Magistrate Kisumu and pleaded not guilty to the charge. They were tried by the Senior Resident Magistrate Kisumu who convicted the appellant and sentenced him to death as by law prescribed. The co-accused was acquitted under Section 210 of the Criminal Procedure Code. Being dissatisfied with the conviction and sentence, the appellant filed this appeal basically on grounds that the prosecution evidence of identification was not given proper consideration by the learned trial magistrate and that the prosecution failed to call the arresting officer as a witness. Further, the learned trial magistrate failed to consider that there was no independent witness and also failed to warn herself of the danger of convicting on the evidence of a single witness.

The appellant appeared in person at the hearing of the appeal and relied on his written submissions. The learned Assistant Deputy Public Prosecutor, **Mr. Gumo**, appeared for the State / Respondent and opposed the appeal by submitting that the complainant was alone at the material time of the robbery but relied on the bright lights from his motorcycle to identify the appellant. Also, prior to the attack, the complainant had already identified the appellant and mentioned him as the person who was the first to attack.

The learned State Counsel further submitted that although the complainant lost consciousness, he had already identified the appellant and was able to also identify him at an identification parade.

The learned State Counsel noted that in convicting the appellant, the trial court relied on the evidence of a sole identifying witness but that it held the view that there was absolutely no mistake in the identification of the appellant whose description of being a brown medium sized person had already been given to the police.

The learned State Counsel therefore contended that the appellant's conviction was safe and asked for the dismissal of this appeal.

The duty of this court is to re-examine the evidence and draw our own conclusions. In doing so, we bear in mind that the trial court had the advantage of seeing and hearing the witnesses. The prosecution case was that on the material date and time, the complainant **George Onyango Adero (PW1)**, was traveling from Maseno to Kisumu riding his motor cycle registration number KBE 955 Q and on arrival at Otongolo just as he was about to go over road-bumps five people emerged from the side of the road and confronted him. His attempt to accelerate was thwarted by a person who hit him on the head. He fell down and was cut on the head by a second person. The group of five viciously assaulted him using metal bars such that he lost consciousness and when he regained it found that his motorcycle had been stolen. He was picked from the scene by police officers and taken to Nyanza Provincial Hospital.

The complainant stated that he was able to identify the person who first hit him. He said that his motor cycle's lights enabled him to identify that person while he was two meters away. He gave the description of the person as brown and medium sized and said that the person wore a round cap on the head. He identified the person as having been the appellant. He pointed out the appellant at an identification parade conducted at the Central Police Station Kisumu. He said that he had not previously known the appellant. Apart from his motor cycle, the complainant also lost his mobile phone, driving license and money. He said that the actual owner of the motorcycle was Gilbert (PW2).

Gilbert Odhiambo Obwolo (PW2) confirmed that the motorcycle belonged to him but had purchased it for his nephew called **John Ouma**. It was John who informed him that the motorcycle had been stolen from the complainant. He (PW2) travelled to Kisumu on receiving the information and took the necessary documents respecting the motor cycle to the police. These included the purchase receipt, the delivery note and the certificate of insurance. The motor cycle was later recovered and after being photographed was released to him by the police.

John Ouma Ogutu (PW3) operates a motor cycle transport business and had given the material motor cycle to the complainant, to take a customer to Maseno. It was on the way to Kisumu from Maseno that the complainant was robbed of the motor cycle. John (PW3) received the information from one Nelson and went to report the matter to the police at the Central Police Station. Thereafter, he proceeded to the provincial hospital where the complainant was receiving treatment for injuries sustained during the robbery.

John said that the stolen motor cycle was recovered in Siaya following information from a workshop where it was taken for repairs. The mechanic mentioned the "**owner**" of the motor cycle which had at the time been offered for sale.

John and a friend accompanied by the police went to the home of the alleged "owner" and when he saw them he fled. He was however pursued by the police and apprehended. He was identified as the appellant's co-accused. The motor cycle was however not recovered in his home.

P. C. Norman Cherotich (PW4) of Kogelo Patrol Base was one of those who accompanied John to the homestead of the suspect Boaz. He (PW4) confirmed that the suspect was pursued and apprehended after taking to his heels on being found at his home. He (PW4) also confirmed that the stolen motor cycle was recovered but said that it was found abandoned along the Ngiya – Kogelo road near the Pendeza Afforestation Project. He also said that on interrogation, Boaz mentioned one Ochieng Ojuro whom they did not find but instead found his employer called Lameck. Lameck gave them Ojuro's phone number and on being called Ojuro was asked to surrender the motor cycle at Kogelo Patrol

Base. However, Ojuro failed to turn up at the police base and on being called a second time, he said that he had left the motor cycle along Ngiya – Kogelo road near the said Pendeza Afforestation Project.

Indeed, the motor cycle was recovered and taken to Kogelo Patrol Base.

Cpl. Gilbert Kamondi (PW5) of the scenes of crime section Nyanza P. C. I. O. Office took photographs of the motor cycle after it was recovered and taken to Kisumu Police Station.

Sgt. Harrison Muli (PW6) of Kisumu Police Station investigated the case and in doing so visited the scene of the offence at Otongolo and obtained necessary information from the complainant who was then admitted to the New Nyanza General Hospital.

On 2nd September 2009, the appellant was apprehended by Administration Police Officers and handed to him (PW6) and on the 8th September 2009 he was informed that the motor cycle was recovered in Siaya and a second suspect arrested.

The recovered motor cycle and the second suspect were brought to Kisumu.

Sgt Muli (PW6) organized an identification parade on the 12th September 2009. The parade was conducted by **I. P. Samwel Maosa (PW7)**. He (PW7) said that the appellant was the suspect while the identifying witness was the complainant. After the exercise in which the appellant was identified by the complainant, I. P. Maosa completed the necessary parade forms.

The forms were signed by the appellant and counter signed by I. P. Maosa. Thereafter, Sgt Muli (PW6) preferred the present charge against the appellant and his co-accused Boaz Ouma.

I. P. Maosa (PW7) culminated the prosecution case against the appellant. The defence case was that on the 2nd September 2008 at about 5:00 p.m., the appellant left for Kisumu town aboard a matatu which was impounded and taken to Kisumu Police Station on allegation that an informer had made a report against the appellant. After staying in the police cells for one week, the appellant was joined by his co-accused who had been brought from Siaya and who was not known to him.

In essence, the defence case was a denial of the appellant's involvement in the offence and a suggestion that he was arrested without good cause.

From the entire evidence, it was an undisputed fact that the offence of robbery with violence was committed against the complainant (PW1). Indeed, the complainant was waylaid by a group of people armed with metal bars who assaulted and stole his property including the motor cycle. All these facts constituted the necessary ingredients of the offence.

The issue that fell for determination by the trial court was whether the appellant was positively identified as one of those who offended the complainant on that material date and time. The offence occurred in the hours of darkness. Therefore, the circumstances were difficult for identification. However, the complainant said that he identified the appellant who was a stranger to him. He said that he did so with the help of the lights from his motor cycle. He said that the lights were bright enough and implied that the appellant appeared from the front such that the lights shone on him. He said that the appellant was the first person to attack him and that it was after that first attack that the rest of the gang set upon and injured him to the point of losing consciousness.

At the time of the attack, the complainant was alone. Whatever he stated regarding the identification of the appellant was not corroborated by any other evidence. Regard being given to the circumstances under which the offence occurred, corroboration of the complainant's evidence of identification was necessary. However, a trial court would still act on the uncorroborated evidence of a single witness provided it has duly warned itself of the dangers of convicting on such evidence and formed a solid opinion that the evidence is reliable (**see, Abdalla Bin Wendo & Another =vs= Republic [1953] 20 EACA 166, Roria =vs= Republic [1967] EA 583 and Anditi =vs= Republic [1981] KLR 519.**

Herein, there was neither direct or indirect corroboration of the complainant's evidence. The motor cycle was not recovered in his possession. The person who led to its recovery was the co-accused Boaz. He provided useful information for the recovery of the motor cycle. He took to his heels when the police went to his home thereby demonstrating his guilty conscience. He gave the name of Ochieng Ojuro as the person to whom he had given the motor cycle. Surprisingly, the learned trial magistrate ruled that Boaz (the second accused) had no case to answer and acquitted him under Section 210 of the Criminal Procedure Code. The evidence clearly pinpointed at him (Boaz) as having played a big role in the theft of the motor cycle either as a principal offender or as an aider or abettor.

It was not clear from the evidence of the investigating officer (PW6) how the appellant was arrested and for what reasons.

The appellant indicated that he was arrested while inside a matatu on information allegedly given by a police informer.

Sgt Muli (PW6) said that the appellant was brought to the police station after being arrested by Administration police officers. The said officers were not availed as witnesses by the prosecution. Be that as it may, we do not think that the complainant's evidence of identification against the appellant could be relied upon without corroboration. Firstly, even if the motor cycle lights provided favourable conditions for identification there was no indication as to whether there was adequate opportunity for identification. Without adequate opportunity to see and actually identify a person, the presence of favourable conditions would be of no assistance particularly if the alleged identification was that of a stranger. Secondly, the complainant clearly said that the person he identified was a brown medium sized person wearing a cap.

By itself, the cap was capable of hindering or obstructing correct identification and more so, in the hours of darkness. Also, the appellant appeared in person at the hearing of this appeal. In our view, the description of him given by the complainant was most unsuitable. He is not a brown medium sized person. He is a moderately dark small framed person.

It is quite obvious from the foregoing, that the complainant's identification of the appellant was not proper and reliable. His conviction by the learned trial magistrate was unsafe.

It is worthy noting that even though the learned trial magistrate convicted the appellant on the basis of the evidence of a single witness in difficult circumstances she failed to warn herself as she was required to do of the dangers of relying on such evidence in the absence of corroboration. It is no wonder that the conviction is unsustainable.

In sum, this appeal is allowed. The conviction is quashed and the sentence set aside. The appellant be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Kisumu this 19th day of October 2010.

J. R. KARANJA
JUDGE

ALI-ARONI
JUDGE

JRK/aao