



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

CRIMINAL APPEALS NO. 181, 182 & 189 OF 2007

MICHAEL ONYANGO OBONDO.....1st APPELLANT
DUNCAN OUMA OCHIENG2nd APPELLANT
DUNCAN OUMA ANGANG'O.....3rd APPELLANT
VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case number 1886 of 2005 of the Senior Resident Magistrate's Court at Nyando)

Coram

Karanja, Aroni – JJ

Miss Oundo for state

Court clerk Laban / Ochollah

Appellants in person

JUDGMENT

The appellants, **Michael Onyango Obondo**, **Duncan Ouma Ochieng** and **Duncan Ouma Angang'o** appeared before the Senior Resident Magistrate at Nyando charged with a single count of robbery with violence contrary to Section 296 (2) of the Penal Code (i.e. Count 1), four counts of breaking and committing a felony contrary to Section 306 (a) of the Penal Code (i.e. Count 2, 3, 4, and 5) and a single count of burglary and stealing contrary to Section 304 (2) and Section 279 (b) of the Penal Code (i.e. count 6).

In count one, it was alleged that on the 12th December 2005 at Muhoroni location Nyando, jointly with others not before court while armed with dangerous weapon namely a knife robbed **Bernard Ouma** of one bicycle make Hero Jet valued at Kshs. 4,000/= the property of the said Bernard Ouma and at the time of such robbery used actual violence to the said Bernard Ouma.

In counts two, three and four, it was alleged that on the night of 11th /12th December 2005 at Muhoroni Township, jointly with others not before court, broke and entered the shops of **Margaret Anyango**, **Roslyne Akinyi Ogado** and **Rose Apondi Okoth** with intent to steal and did steal from therein various items belonging to the said persons respectively.

In count five, it was alleged that on the night of 4th December 2005 at Muhoroni Nyando jointly with others not before court, broke and entered the store of **Eunice Akinyi Shikuku** with intent to steal and did steal from therein assorted items belonging to the said person.

In count six, it is alleged that on the 29th / 30th September 2005 at Muhoroni township Nyando, jointly with others not before court, broke and entered into the dwelling house of **Alice Auma Ouma** with intent to steal from therein and did steal assorted items belonging to the said person. There were five alternative counts of handling stolen goods contrary to Section 322 (2) of the penal code but all were defective for duplicity in that the elements of receipt and retention were combined in a single charge (**See, Selimia Mbeu Owuor & Another =vs= Republic CR. APP NO. 68 OF 1999**)

Be that as it may, the appellants pleaded not guilty to all the counts. They were tried, convicted and sentenced to death on count one.

On count two, the first and second appellant were convicted and sentenced to three (3) years imprisonment.

On count three, the second appellant was convicted and sentenced to three (3) years imprisonment.

On count five, the first appellant was convicted on the alternative count and sentenced to three (3) years imprisonment.

On count six, the second appellant was convicted on the alternative count and sentenced to three years imprisonment.

The learned trial magistrate ordered that the prison terms be served concurrently even though she was required to hold in abeyance the sentences in counts 2 to 6 in view of the death sentence in count 1 (**See, Boru & Another vs Republic [2005] KLR 649**).

Being dissatisfied with the conviction and sentences, the three appellants filed separate appeals which were consolidated and heard together. There was an amended petition of appeal filed on behalf of the third appellant by the firm of **Olago – Aluoch & Co Advocates**.

In a broad sense, the grounds of appeal respecting all the appellants raise issues pertaining to the prosecution evidence of recovery and identification, the failure by the prosecution to avail key witnesses and the failure by the trial magistrate to consider the defence raised by each of the appellants.

The first and second appellants appeared in person during the hearing of the appeal and relied on written submissions to argue their case.

The third appellant was represented by the learned counsel, **Mr. Aringo** while the learned Principal State Counsel **Miss Oundo** appeared for the Republic.

In his oral submissions, Mr. Aringo pointed out that even though the learned trial magistrate made a finding that the appellants had a case to answer, she failed to indicate specific findings on each count thereby making the appellants unaware of the charge on which they were to defend themselves.

Mr. Aringo took issue with the alleged recovery of a knife said to belong to PW4 and contended that PW4 failed to show how he identified the knife which is a common item.

Learned counsel submitted that the third appellant was implicated by the first appellant who was an accomplice whose evidence required corroboration yet none existed.

On identification, learned counsel submitted that although the learned trial magistrate reminded herself of the principles required in identification, she failed to apply the same standards.

In general, Mr. Aringo submitted that the conviction of the third appellant was against the weight of the evidence and was therefore unsafe. He contended that there was no evidence of the occurrence of the robbery and if any existed, it was inconclusive.

Learned Counsel also contended that there was no proof of the ownership of the bicycle and although the third appellant proved that he had been injured in different circumstances, the burden of proof was shifted to him.

In opposing the appeals, the learned State Counsel contended that there was overwhelming evidence upon which the conviction was based and submitted that the first appellant was known to PW1. There was no mistake in his identification. There was ample time for identification of the appellants as they had by passed the complainant who was riding a bicycle. During the attack the complainant bit and injured the third appellant's finger. Violence was meted out against the complainant. He sustained serious cut wound. The assailants were armed. Therefore, the offence of robbery was sufficiently proved.

The learned State Counsel also submitted that the learned trial magistrate correctly relied on the evidence of identification. The evidence irresistibly pointed out the appellants as the assailants. There was sufficient light. In addition, there was evidence of possession. The first appellant was arrested after being found with the stolen items. He therefore led the police to the second and third appellants. PW4 showed how he identified the knife as his property.

Learned State Counsel contended that it was not a legal requirement for the learned trial magistrate to make a specific finding of a case to answer on each count. In any event, the appellants knew the charges on which they defended themselves.

We have considered the rival submissions. Both oral and written. Our duty as a first appellate court is to re-examine the evidence and draw our own conclusion. We however, bear in mind that the trial court had the advantage of seeing and hearing the witnesses.

The case for the prosecution was that on the 12th December 2005 at about 6:40 a.m. the complainant in count one, **Bernard Ouma Manga (PW1)** left his house for work. He was riding his bicycle and carrying a panga (machete) and an empty 50 kg sack. He arrived at a junction and continued riding. On the way near a bend (corner) he by-passed two people riding along the highway but he decided to stop and give them the right to pass. They rode ahead of him. He followed slowly behind. They were on one bicycle but one was a passenger being carried on the frame of the bicycle. They were carrying cushions and a

box. They continued riding with the complainant behind them. About a kilometer from a place called Kasuna, another cyclist emerged from a nearby sugar plantation carrying almost similar items to those being carried by the two men ahead of the complainant. The third person joined the two who still rode ahead but after a short distance slowed down. The complainant attempted to by pass them but his path was blocked by the two men whom he identified as the first and third accused (first and third appellant). The first appellant was the passenger while the third appellant was the rider. The time was 7:00 a.m. suddenly, the first appellant attacked the complainant and cut him on the head with a panga. The third appellant seized the complainant's bicycle. In the struggle that followed, the complainant bit the third appellant's finger. The two appellants assaulted the complainant and were joined in doing so by the third person whom the complainant identified as the second accused (second appellant). The complainant lost consciousness in the process. He was semiconscious when good samaritans arrived and took him to Awasi Police Station. He said that he had previously known the first appellant by his name of Onyango Obando and that it was him (first appellant) who cut him on the head.

The good samaritans were one **Edward Kasongo** and one **Ibrahim**. They did not report to the police immediately as they had to first take the complainant to hospital. At the hospital, the complainant met two police officers called **Saisi** and **Bett**. He was unable to speak to them when they asked him what had happened. He was transferred from the Muhoroni hospital to Kisumu District Hospital and then to New Nyanza Hospital where he was admitted for two days. Later, the appellants were arrested at Awasi and he confirmed that they were those who assaulted him. His bicycle was not recovered.

On the night of 11th / 12th December 2005, **Margaret Anyango Owuor (PW2)**, **Roselyne Akinyi Oganda (PW3)**, **Maurice Arina (PW4)** and **Rose Apondi Okoth (PW5)** had closed their business premises situated within Muhoroni township / market but on the following day they each learnt that their respective premises had been broken into and property stolen from therein. They all reported to the police and were told that suspected stolen items had been found with some suspects. Among the items included kitchenware i.e. kettles, cooking pans, plates, cups belonging to Margaret (PW2), cloth materials belonging to Roselyne (PW3), knife belonging to Maurice (PW4) and cushions, mattresses, blankets and cutlery belonging to Rose (PW5). The arrested suspects included the three appellants.

On 4th December 2005, **Eunice Akinyi (PW6)**, was in her house when she went to sleep at 9:00 p.m. she woke up at 4:00 a.m. only to find that her store had been broken into and property stolen from therein.

On 15th December 2005 she went to the police station and found that her stolen mountain bike had been recovered.

Simeon Onyango Malo (PW7), closed his butchery at 9:00 p.m. on 10th December 2005 but on the following morning he found that it had been broken into and property stolen from therein. He later went to Awasi Police Station to view some recovered stolen items. None of the items belonged to him.

Alice Auma Ouma (PW8), left her house at Muhoroni on the 26th September 2005 at 1:30 p.m. heading to Kibigori for a funeral but on the 29th September 2005 she was informed that her house had been broken into. She returned to her house and confirmed that it had been broken into and property stolen from therein. She went to Muhoroni Police station on 16th December 2005 where she found her stolen radio. She was told that some suspect had been arrested.

On 12th December 2005 at about 2:00 p.m., **P. C. Joash Barasa (PW9)** was on duty at Awasi Police Station when he received a report from one **Moita** that some suspects had been spotted carrying some items on a bicycle and that the complainant (PW1) was found bleeding and taken to hospital.

P. C. Joash and his colleagues were led by the said Moita to the home of a suspect (i.e. first appellant). He was not present but some suspected stolen items were found in a sugar cane farm near his house. Later, an assistant Chief informed P. C. Joash and his team that the first appellant had been spotted at a sugarcane farm near his house. The team rushed to the scene but the first appellant took to his heels. He was chased caught and taken to Awasi Police Station where he said that they were four thieves. He led the police party to the third appellant at a house near Awasi shopping centre. The third appellant was arrested. He had a bleeding left finger covered with cellotape and was in possession of a dagger. Both the first and third appellants then led the police to the house of the second appellant but they did not find him. They found his wife. The house was searched and additional suspected stolen items were found therein. The wife of the second appellant was arrested but was released when the second appellant surrendered and was arrested.

The suspected stolen items were later identified by their respective owners and the three appellants charged accordingly. Put on their defence, the first appellant (Michael) said that he was in his house on

12th December 2005 when people including his neighbours Aoko Moita went there. They asked him his relationship with Moita. He said that he owed Moita a sum of Kshs. 3,000/=. He was told to accompany the group to the police station to resolve the issue. He was placed in the police cells but later requested the officer commanding station to allow him to go and pay his debt. He was taken to court on 20th December 2005 where false charges were read to him.

The second appellant (**Duncan Ouma Ochieng**) said that on the 12th December 2005 he returned to his house from the shops when neighbours informed him that the police were looking for him and had taken away his bicycle and arrested a woman. He went to the police station to look for his bicycle. He was placed in the cells and informed that the bicycle had been stolen. He was taken to court on 20th December 2005 and heard the charges. He knew nothing about them.

The third appellant (**Duncan Ouma Angang'o**) said that he was in his carpentry workshop on 4th December 2005 where he injured his hand. He went to hospital and was given a note. On 12th December 2005 he went to his brother's house but found not the brother but his (brother's) wife. He was tired and slept on a matt. After about fifteen minutes some people unknown to him arrived there and asked for his brother who was still away. These people searched the house and took a kitchen knife. They went away with him saying that he would be released if his brother showed up. He was taken to court on 20th December 2005 where he heard of the strange charges.

From all the foregoing evidence and with regard to the first count we are satisfied that indeed the complainant (PW1) was attacked and robbed of his bicycle by a group of about three people who were on bicycles riding along a road. He was also on his bicycle along the same road. The group of three was armed with a panga (machete). He was injured in the process and had to be admitted in hospital for a day or two. All these facts were not disputed so that the offence of robbery with violence contrary to Section 296 (2) of the Penal Code was clearly established.

The main issue for determination was that of identification of the three robbers. The offence occurred in broad daylight at about 7:00 a.m. The complainant had already encountered the assailants prior to the incident. He therefore had adequate opportunity to see and identify them. Indeed, he recognized one of them called Onyango Obando and pointed him out as the first appellant. He said that it was the first appellant who cut him on the head with the panga. He said that it was the first appellant who was the passenger on a bicycle on which the third appellant was a rider.

The complainant also said that the second appellant was the cyclist who joined the first and third appellant.

Further, the complainant indicated that he was the one who inflicted an injury on the third appellant's finger as he resisted the robbery.

Worth of note was the fact that upon his arrest, the first appellant led the police into arresting the second and third appellants.

Also, at the time of his arrest by **P. C. Baraza (PW9)**, the third appellant had a fresh injury to his finger. We are therefore satisfied that the evidence of the identification of the three appellants was not only cogent and reliable but also un rebuttable.

The learned trial magistrate carefully went through that evidence of identification and correctly directed herself while relying on the

decisions in the case of **Cleophas Otieno Wamungu =vs= Republic Criminal Appeal No. 20 of 1989** and the case of **Maitanyi =vs= Republic [1986] KLR 198.**

We have no reason to depart from the findings of the learned trial magistrate with regard to the first count. We fully concur with the findings and accordingly affirm them. On the same breathe we have no reason to interfere with the findings pertaining to the remainder of the counts.

In sum, the appeals are dismissed for want of merit. However, the sentences on the remainder of the counts are held in abeyance. Further, in counts five and six the sentences will apply to the main counts rather than the alternative counts.

Ordered accordingly.

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

J. R. KARANJA
JUDGE

ALI-ARONI
JUDGE

JRK/aao