



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

Criminal Appeal 49 of 2008

MICHEL OUMA ODONGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

***[Appeal from the Conviction and Sentence in Criminal Case of the C.M's Court at Kisumu dated:
9.5.2008 A. N. ONGINJO (MRS). - P.M.***

C.M.'S Cr. Case No. 17 OF 2008]

Coram:

J.W. Mwera - J.

J.R. Karanja - J.

Mr. Musau Senior Principal State Counsel for the State.

Appellant present in person.

Court Clerk: George/Laban:

JUDGMENT

Micheal Ouma Opondo (herein the Appellant), was charged with two counts of robbery with violence contrary to S. 296(2) of the Penal Code, in that on the 9th January 2008 along Mosque Road near Easy Coach in Kisumu Nyanza Province, jointly with others not before court while armed with dangerous weapons namely a toy pistol and panga robbed George Otieno Odeny (**Count one**) of his mobile phone make Motorola C113 valued at KShs.1,500/= and KShs.1,050/= cash all valued at KShs.2,550/= and Trufena Odunga Okal (**Count two**) of her mobile phone Nokia 112 valued at KShs.2,600/= and cash KShs.1,000/=, all valued at KShs 3,600/= and at or immediately before or immediately after the time of such robbery used actual violence to the said George Otieno Odeny and Trufena Odunga Okal.

The Appellant pleaded not guilty to both counts. He was tried, convicted on both counts and sentenced

to death by the Principal Magistrate at Kisumu. He now appears before us by way of this appeal against the said conviction and sentence. The grounds of appeal are contained in the petition of appeal filed herein on the 20th May 2008. The Appellant represented himself and presented written submission in support of the said grounds of appeal.

The Respondent opposed the appeal through the Learned Senior Principal State Counsel, Mr. Musau.

We are obliged to reconsider the evidence and make our own conclusions and in doing so, bear in mind that the trial court had the advantage of seeing and hearing the witnesses (See **Okeno Vs. Rep. (1972) E.A. 32 and Achua Vs. Rep. (2003) KLR 707**).

The prosecution case was based on the facts that follow;-

George Atieno Adeny (PW1) who is the first complainant but referred to as **George Otieno Odeny** in the particulars of the charge was at the material time a driver with Bedrock Security and was on the material date at about 6.30 a.m. walking to his place of work accompanied by his wife **Trufena Odunga Okalo** (PW2) who is the second complainant. They were heading towards the Swan Centre and near the Arya Nursery School they were confronted by three young men one of whom produced a pistol and pointed it at the first complainant's head. The first complainant was then ordered to sit down by a person holding a panga (machete). His mobile phone make Motorola C113 and KShs.1,000/- were taken away from him by the young men who went away after returning the phone's sim card.

The second complainant was asked for money and phone after a panga was placed on her neck. Her mobile phone make Nokia 1112 was taken away. By sheer luck, a police vehicle arrived at the scene and was stopped by the two complainants. They led the police officers towards the direction that the offenders had gone and one of them was apprehended near the Swan Centre by members of the public. A toy pistol was recovered from him together with the money stolen from the first complainant. He was identified as the Appellant herein.

P.C. **Japheth Sewiery** (PW3) of the Central Police Station Kisumu was on patrol duties on the material date at about 6.30 a.m. He was with his colleagues when they were stopped by the first complainant who informed them that he had just been robbed by three people. They accompanied the first complainant towards the direction that the offenders had gone and one was traced. Two others escaped. The one who was traced was the Appellant. He was found in possession of a toy pistol hidden under his trousers. He was actually rescued from wrath of the members of the public by P.C. Sewiery (PW3), he was also found in possession of Kshs.1,000/= hidden in his socks. **Sgt. Joseph Wendo (PW4)** investigated the case and thereafter charged the Appellant with the present offence.

The Learned trial magistrate considered the foregoing facts and ruled that the Appellant had a case to answer. He was placed on his defence and elected to make unsworn statement without calling a witness he said that he stayed at Manyatta Estate Kisumu and was a bicycle transport operator. He left home to get his bicycle and on arrival at Swan Centre some people passed him while running Highway. Patrol Officers also passed him. He arrived at a petrol station and an officer walking on foot shouted and alleged that he was one of the offenders. He was arrested and taken to the police station where a toy pistol was "planted" on him. He knew nothing about the offence.

The Learned trial magistrate examined the entire evidence in its totality and convicted the Appellant on the basis of the evidence adduced by both complainants. The grounds of appeal and the arguments in support thereof are essentially on attack of the prosecution evidence of identification and its contradictory nature.

The Appellant also complained of non-corroboration of the evidence of recovery of the money and the failure by the trial magistrate to consider his defence.

The Learned Senior Principal State Counsel, contended that the Appellant was positively identified by the complainants. He argued that after the alarm was raised, the Appellant was apprehended by PW3 while

being pursued by members of the public and upon being searched was found with a toy pistol and part of the complainant's stolen money.

We have carefully considered the foregoing arguments in the light of the evidence and are satisfied that the ingredients of the offence of robbery with violence contrary to S.296(2) of the Penal Code were duly established in terms of the decision in the case of **Johana Ndungu Vs. Rep. Criminal Appeal No. 116 of 1995 (Unreported)**.

The prosecution evidence sufficiently established without any dispute that concurrent acts of robbery were committed against the two complainants by a group of three people armed with a panga and a toy pistol.

On the crucial issue of identification of the appellant as having been one of the three offenders, there was cogent and reliable evidence from the complainants that the appellant was apprehended immediately after committing the offences. He was pursued by the first complainant and a police officer (PW3) and apprehended.

The police officer (PW3) searched him and found the toy pistol which had been used to threaten the complainants and money which was stolen from the first complainant.

The Appellant made no attempt to explain his possession of the first complainant's stolen money. His allegation that the toy pistol was "planted" on him was unbelievable in the light of the evidence by the first complainant (PW1) and the police officer (PW3). The complainants (PW1) and (PW2) clearly identified the appellant during the offence. They both stated that he was the person with the pistol.

The offences occurred at about 6.30 a.m. It was during day break. The conditions for the identification of the appellant were favourable. The defence raised by the appellant was incapable of dislodging and discrediting the prosecution evidence against him.

In the end result, we see no reason to interfere with the decision of the Learned trial magistrate. It was proper and lawful.

This appeal is devoid of merit and is hereby dismissed.

Dated Delivered and Signed in Kisumu this 12th Day of May 2009.

J.W. MWERA

JUDGE

J. R. Karanja

JUDGE

JRK/mo.

Delivered, signed and dated this 12th day of May, 2009.

J. W. Mwera

JUDGE

J. R. Karanja

JUDGE

J.R.K./mo.