REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Criminal Appeal 57 & 160 of 2007

EDWIN ODHIAMBO OGONYO……1ST APPELLANT

SAMUEL OTIENO ODHIAMBO……..……2ND APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

[From original conviction and sentence from SRM'S Court at Winam Criminal Case No. 1589 of 2005]

Coram

Mwera, Karanja –JJ

Musau for state

Court clerk Raymond/Laban

Appellants in person

J U D G M E N T

These appeals arise from the decision and judgment of the Senior Resident Magistrate at Winam in SRMCC NO. 1589 of 2005 in which the appellants, **Edwin Odhiambo Ogonyo** and **Samuel Otieno Odhiambo,** were jointly charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code, in that on the 1st July 2005 at 0600 hrs at Lower Railways Estate Kisumu District, Nyanza Province robbed **Pamela Ogonji** of a handbag containing Kshs. 3,100/=, one mobile phone make Nokia and one VCD Video deck make Sony all valued at Kshs. 19,000/= and immediately after the robbery wounded the said **Pamela Achieng Ogonji.**

The first appellant (Edwin) faced an additional count of possession of cannabis-sativa contrary to section 3 (1) of the Narcotic Drugs & Psychotropic Substances Control Act, in that on the 26th July 2005 at about 0400 hrs at Milimani Railways Estate Kisumu was found in possession of one roll of cannabis-sativa.

The second appellant (Samuel) also faced additional count of resisting arrest contrary to section 253 (b) of the Penal Code, in that on the 29th September 2005 at about 0030 hrs at Obunga slums Kisumu resisted being arrested by **Cpl. Ombongi, PC George Oloo** and **PC Holo** all police officers who were at the time acting in execution of their duty.

The appellants pleaded not guilty to all the counts and after trial were convicted and sentenced to death on count one.

The first appellant was also sentenced to serve 1½ years imprisonment for count two and the second appellant to serve two years imprisonment for count three.

Being dissatisfied with the convictions and sentences, the appellants preferred separate appeals which were consolidated and heard together.

The first appellant's grounds of appeal are contained in the petition of appeal filed herein on 5th April 2007 by his lawyers **Onsongo & Company Advocates.**

The second appellant's grounds of appeal are those contained in his petition of appeal filed herein on the same 5th April 2007.

Mr. Onsongo, learned counsel, argued the grounds on behalf of the first appellant. The second appellant appeared in person and concurred with what was stated by the learned Senior Principal State Counsel, **Mr. Musau,** who appeared for the respondent**.**

On the outset, the learned State counsel conceded the appeal on the basis of violation of the appellant's Constitutional rights under section 77.

Mr. Onsongo, concentrated his arguments on the said violation of the appellant's rights and added that there was non-compliance with the provisions of section 77 (2) of the constitution and section 198 of the Criminal Procedure Code by the learned trial magistrate. He contended that the entire trial was unsatisfactory and indicated that he was prepared for a re-trial.

The learned State Counsel indicated that a re-trial would be appropriate since all the witnesses may easily be availed.

We have considered the arguments and positions taken by the learned counsel for the first appellant and the learned Senior Principal State Counsel but we remind ourselves that as a first appellate court our obligation is to reconsider the evidence and make our own conclusions bearing in mind that the trial court had the advantage of hearing and seeing the witnesses **(see, Okeno –VS- Republic [1972] EA 32 and Achira –VS- Republic [2003] KLR 707).**

Towards that end, the prosecution case was briefly that the complainant **Pamela Achieng Ogonji (PW1)** a resident of Lower Railways Estate Kisumu and a hotel manager by occupation was on the material date at her house when she went to an outside bathroom at about 5.45 a.m. Upon her return to the house she found two men therein. She identified the two appellants as the two men. There was electricity in the house and she had previously known the two appellants. She asked them what they wanted. They reacted by picking up her video deck. She made an attempt to take it back but was cut with a knife on her left knee. She raised alarm by screaming but the appellants fled. She gave chase and some of her stolen items were dropped down by the fleeing appellants. She returned to her house and found that her wallet containing Kshs. 3,100/=, personal documents, a radio and a cell phone had been stolen. She reported to the police.

James Tolo (PW2), a clinical officer at the Kisumu District Hospital confirmed having examined and treated the complainant for the injuries suffered during the incident while the complainant's neighbour **Maurice Noel Ochieng (PW3)** confirmed that the complainant had been robbed of her property and in the process suffered injury. She told him that the assailants were the first and second appellants whom he had previously known.

Cpl John Ombongi (PW4) of the Kisumu Railways Police Station received the complainant's report and in the process was informed by the complainant the names of the suspects.

On 26th July 2005 Cpl. Ombongi arrested the first appellant and found him in possession of a half roll of cannabis-sativa (bhang) and on the 28th September 2005 he (PW4) proceeded to Obunga with his colleagues where he arrested the second appellant who was violent and put up resistance at the time. Cpl. Ombongi charged the appellants after completing investigations.

A Government chemist **Wandera Chrispus Didero (PW5)** confirmed that the substance recovered from the first appellant was indeed cannabis –sativa.

IP Robert Owino (PW6) conducted the identification parade respecting the second appellant while **PC George Oloo (PW7)** of Kisumu Railways Police Station was in the company of **Cpl. Ombongi (PW4)** when they arrested the two appellants on different dates. He confirmed more or less what was stated by Cpl. Ombongi.

John Otieno Ouma (PW8) was also a neighbour of the complainant. He confirmed that the complainant was robbed of her property and injured in the process. He did not see the robbers.

In his defence, the first appellant denied the offence and said that he was at home on the 25th July 2005 when he went to see a friend within the neighbourhood. He was arrested while returning home but was not told the reason for the arrest. He said that he was not found in possession of cannabis-sativa and that on the material date of the robbery he was in their house.

The first appellant's mother **Sophie Auma Odongo (DW1)** confirmed that the first appellant was in their house on the material date and time of the robbery.

The second appellant stated in his defence that police officers went to his house and entered therein. They then took his two pairs of shoes and a JVC video deck. He was not given time to produce a receipt and was instead arrested and charged with the present offences.

After considering the evidence in its totality, the learned trial magistrate concluded that the prosecution had proved its case against the appellants beyond reasonable doubt. Accordingly, the appellants were convicted and sentenced on all the three counts.

For reasons which will become apparent later in the judgment, we elect to firstly consider the ground of appeal relating to the procedural defects attributed to the trial court.

It was the appellant's contention that the trial court failed to comply with the requirements of section 77 (2) of the Constitution and section 198 of the Criminal Procedure Code.

The learned State Counsel readily agreed with that contention.

We have carefully perused the record of the trial court and are now inclined, nay, compelled to agree with the contention.

Right from the time the plea was taken on the 1st August 2005 and throughout the trial there is no indication of the language used.

We do not hesitate in stating that the trial of the appellants was grossly flawed thereby rendering the entire process null and void. In so stating, we find refuge in the following statement of the Court of Appeal in the matter of language in the case of **Rwaru Mwangi –VS- Republic Criminal Appeal No. 18 of 2006 (unreported) thus:-**

"**it has its foundation in the Constitution and in the Criminal Procedure Code, cap 75. The burden is therefore on the trial court itself to show that an accused person has himself selected the language he wishes to speak during the trial. Section 77 of the constitution in relevant parts states as follows:-**

(a) …….

(b) Shall be informed as soon as reasonably practicable in the language that he understands and in detail of the nature of the offence with which he is charged.

(c) …….

(d) ……

(e) Shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used in the trial of the charge".

The mode of taking and recording evidence in trials is also provided for in Part V of the Criminal Procedure Code. As relates to subordinate courts, section 198 of the Code provides:-

"**198.**

(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.

(2) If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the court to interpret as much thereof as appears necessary.

(4) The language of the High Court shall be English and the language of a subordinate court shall be English or Swahili.

In our view, the only way a trial court would demonstrate compliance with these provisions is to show, on the face of the record at the beginning of the trial, the language which the accused person has chosen to speak".

Where a trial is declared a nullity a re-trial may be ordered. This now explains why we decided to firstly consider the procedural aspect of the appeals.

In the case of **Bernard Lolimo Ekimal –VS- Republic Criminal Appeal No. 151 of 2004 (unreported),** the Court of Appeal stated:-

"**There are many decisions on the question of what appropriate case could attract an order of re-trial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case, an order for retrial should only be made where interests of justice require it".**

In this case, the appellants have shown their willingness to undergo a re-trial of the case. They therefore imply that they shall not suffer prejudice.

The state had indicated that it would be possible to secure the witnesses for a re-trial.

We say that considering the evidence adduced during the trial by the prosecution, the possibility of a conviction cannot be overruled.

Consequently, the interest of justice herein requires that there be a re-trial of the entire case.

In sum, the appeals are allowed. The convictions of the appellants by the trial court are quashed and the sentences set aside.

The appellants shall remain in custody pending a re-trial of the case before the Chief Magistrate's Court Kisumu and in any event not before the Senior Resident Magistrate's Court at Winam.

Ordered accordingly.

[Delivered and signed this 19th day of November, 2009.]

J.W. Mwera **J.R. Karanja**

JUDGE **JUDGE**

JRK/va