



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Criminal Appeal 128 of 2008

CALEB OUMA OJWOK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in SRM'S court at Nyando criminal case No. 410 of 2007]

Coram

J.W. Mwera, J.R. Karanja – JJ

Ms Oundo for the state

Court clerks George/Laban

Appellant present in person

J U D G M E N T

Caleb Ouma Ojuok (herein the appellant) was charged with another with the offence of robbery with violence contrary to section 296 (2) of the Penal Code, in that on the 7th April 2007 at Ayweyo sub-location, Nyando District jointly with others not before the court robbed **Isaiah Orinda Ogolla** of a mobile phone make Nokia 1110, a Kodak camera, assorted shop goods and cash Kshs.9,260/= all valued at kshs.16,250/= and at or immediately before or immediately after the time of such robbery assaulted Isaiah Orinda Ogolla.

There was a second count of assault causing actual bodily harm contrary to section 251 in which it was alleged that the appellant and the co-accused had unlawfully assaulted **Dorothy Orinda** thereby occasioning her bodily harm.

The appellant appeared before the Senior Resident Magistrate at Nyando and after pleading not guilty to both counts was tried, convicted and sentenced on count one i.e. Robbery with Violence.

There is no indication in the judgment of the trial court that the appellant was convicted on the second count of assault and sentenced accordingly.

We therefore assume that the appellant was not convicted on the second count.

Be that as it may, the appellant was dissatisfied with the conviction and sentence on the first count and

preferred the present appeal based on the grounds contained in his petition of appeal filed herein on 26th September 2008.

The grounds are essentially a complaint on the insufficiency of the prosecution evidence of identification. At the hearing of the appeal, the appellant represented himself and relied on his written submissions.

Miss Oundo, learned Senior State Counsel, represented the respondent and opposed the appeal while contending that the appellant was identified by PW1 and PW2 and that a cap belonging to him was found at the scene.

The learned state counsel further contended that the appellant fled from his house only to be arrested later at Chemelil thereby indicating that he was not an innocent person. In any event, the learned state counsel contended that the appellant's defence was rebutted by PW3 and PW4 as well as PW1 and PW2 who heard his name being called out at the scene of the offence.

At this point, our obligation is to re-consider the evidence and make our own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. **(See Okeno –VS- Republic [1972] EA 32).**

It was the prosecution's case that on that material date at about 1.00 a.m., the complainant **Isaiah Orinda Ogolla (PW1)** and his wife **Dorothy Atieno Orinda (PW2)** were asleep in a house behind their shop when they were attacked by a group of people who assaulted them and stole shop goods, a mobile phone and money Kshs.9,650/=.

The attackers had torches but neither the complainant nor his wife identified any of them.

However, the complainant heard the voice of a person called Austin Ochieng Ademba who was the person who cut both his knees with a panga (machete).

The complainant's wife (PW2) attempted to scream but was hit with a stick on the left side of the head and sustained a cut injury. She was blindfolded and led into the shop where she slipped and fell down. It was at that moment that she heard the sound of stones hitting the roof thereby causing the attackers to flee.

The complainant's hands were also tied up in the process. Neighbours who were throwing stones on the roof arrived at the scene and rescued the complainant and his wife.

The neighbours cornered one of the attackers who managed to escape leaving behind his cap and shoe which had fallen down.

The complainant heard the said attacker being called by name "**Owala Ojuok, Ouma Ojuok**". He (complainant) also heard another attacker being called "**Austin Pierre Dogo**".

The complainant's wife heard the name "Austin". After being rescued, the complainant and his wife were taken to hospital. Thereafter, they were shown some shoes and match boxes recovered by some young men. A panga was also found at the scene.

The complainant said that the shoes belonged to Austin who was his cousin brother. The shoes and match boxes were found with a brother to Austin who was arrested. His name was Eddy.

The cap and shoe left behind by the attackers were said to belong to the appellant.

The complainant and the police went in search of the appellant at his house but did not find him. He was later traced and arrested at Chemelil.

Dalmas Mboya Olunya (PW3) was one of those neighbours who answered the complainant's distress

call. He was asleep in his house at the time. He got up and ran to the village to awaken and inform some young men that the complainant was being killed. He proceeded to the scene accompanied by the young men and on the way saw some people carrying away goods from the complainant's shop into a bush.

He (PW3) said that he saw and recognized two people among them the appellant herein. He also recognized the person called Austin who flashed a torch and put it off. He (PW3) and others followed Austin upto his house. Somebody in the house threw out some match boxes and opened the door.

Olunya (PW3) and his group entered the house and found Eddy, the brother of Austin. A pair of shoes was found inside the house.

Eddy was apprehended and thereafter Olunya (PW3) and group went looking for the appellant but did not find him in his house.

Olunya said that the appellant was his cousin and had earlier in the day been seen with Austin wearing a red striped T-shirt and a cap with a letter "A". It was the same cap that was found at the scene and was worn by the appellant on the material night of the offence.

Joash Odhiambo Randa (PW4) was with Olunya (PW3) when they went to the scene. He saw Austin run out of the complainant's shop carrying a soda bottle which he threw at him. Another person was behind Austin. He (PW4) had a rungu (club) which he used to hit the other person whom he tried to get hold of. The person overpowered him and ran off. He (PW4) said that he knew the person as a village mate called Ouma Ojuok. He recognized him as there was moonlight. He (PW4) said that the person was the appellant who after being hit fell down and left behind his cap and shoes.

A village elder **Joseph Kitanda (PW5)** was informed of the robbery at 2.15 a.m. by Olunya (PW3), Randa (PW4) and another called Philip Osoro. The three informed him that they had found a thief known as Austin whom they had not caught.

The village elder proceeded to the house of the said Austin and found his brother Eddy.

The village elder advised that the matter be referred to the chief. He visited the scene where a panga allegedly used to cut the complainant was found. Also found at the scene was a cap.

P.C. Peter Langat (PW6) formerly based at Boya Police Station received the robbery report and commenced investigations together with his colleagues. They visited the scene where a panga, a cap and a sandal shoe were found.

P.C. Langat said that the complainant informed him that he was able to identify one of the robbers from the clothes he (robber) was wearing.

P.C. Langat arrested the suspect called Eddy who was the appellant's co-accused. He (PW6) said that the appellant was arrested later by other police officers.

A clinical officer **Fredrick Apida (PW7)** of Masogo Health Centre examined the complainant and his wife and confirmed that they had suffered injuries.

In his defence, the appellant said that he was a welder and on 13th July 2007 while working at Chemelil Round About and heading home at 6.00 p.m. was arrested by police officers manning a road block. He was later taken to Boya Police Station and eventually arraigned in court for offences he knew nothing about.

He contended that he was never seen at the scene of the offence as alleged by the prosecution witnesses. He said that the recovered shoes did not belong to him.

From all the foregoing, it is apparent that the issue that arose for determination was whether the offence

of robbery was committed against the complainant and if so, whether the appellant was positively identified as having been part of the offenders.

We are satisfied that the prosecution evidence sufficiently established the material ingredients of the offence of robbery with violence contrary to section 296 (2) of the Penal Code in terms of the decision in the case of **Johana Ndungu VS- Republic Criminal Appeal No. 116 of 1995 (unreported)**.

On the alleged identification of the appellant, there was the evidence of Olunya (PW3) and Randa (PW4). These were the key identifying witnesses.

The complainant (PW1) and his wife (PW2) were unable to make any positive identification of the attackers even though the complainant alleged that he heard the voice of a person called Austin Ochieng Ademba and his wife (complainant's) heard the name Austin being called out by those who pursued the attackers.

The complainant also alleged that he heard Olunya (PW3) calling out the name "***Austin Pierre Dogo***". He (complainant) also heard the name Owala Ojuok or Ouma Ojuok being called out.

Despite the said allegations regarding names, the complainant and his wife were still unable to identify anybody and had to rely on what they were told by those who arrived at the scene to rescue them.

These included Olunya (PW3) and Randa (PW4). Olunya said that he recognized two of the attackers while he was three (3) meters away from the complainant's shop. He said that one of those was the appellant and the other person called Austin.

Olunya, mentioned a brief torch flash made by Austin who had a torch. He did not say whether he saw and recognized the two attackers with the help of the brief torch flash and how intense it was to provide favourable condition for identification.

In cross-examination, he (PW3) indicated that he identified the appellant from his cap.

Randa (PW4) said that he saw the appellant and tried to get hold of him after hitting him with a rungu but all in vain. He (PW4) said that the appellant overpowered him and ran off. He knew him by the name Ouma Ojuok.

Randa implied that he recognized the appellant as there was moonlight. He however did not say anything about the intensity of the moonlight. Was it bright enough to facilitate positive identification of a known person or any other person?

In our view, we are far from being satisfied that the appellant's alleged identification by Olunya (PW3) and Randa (PW4) was proper, safe and free from the possibility of error or mistaken identity.

Even in cases of recognition there must be shown to the satisfaction of the court that favourable conditions and adequate opportunity for the identification of a suspect existed at the time and scene of the offence.

The village elder (PW5) was never at the scene when the offence occurred. He could not therefore have made any positive identification of the appellant as thought by the learned trial magistrate. He only received the report of the robbery and visited the scene.

There was an attempt to link the appellant to the offence on the basis of the recovery of a cap and shoes at the scene.

The cap and shoe were allegedly left behind while the attackers escaped. It was alleged that the items belonged to the appellant.

However, there was insufficient evidence to link the appellant with the exclusive ownership of the said items. These could not therefore have provided cogent and credible circumstantial evidence against the appellant who swore in his defence that the items did not belong to him neither did he take part in the offence which he knew nothing about.

Ultimately, we do find that the evidence of identification against the appellant was not reliable and sufficient for a conviction.

Consequently, we hereby quash the appellant's conviction by the trial court and set aside the sentence.

The appellant may be released forthwith unless otherwise lawfully held.

Delivered, dated and signed this 8th day of December, 2009.

J.W. MWERA J.R. KARANJA

JUDGE JUDGE

J.R.K/va