REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU
Crimnal Appeal 148 of 2005

JAMES OLUOCH OWUOTH ……. APPELLANT

VERSUS

REPUBLIC …… RESPONDNET

[From original conviction and sentence in Criminal Case number 9 of 2005 of the Senior Resident

Magistrate's Court at Oyugis dated 10th November 2005 by R. Ngetich –SRM (Esq)

CORAM

Musinga, Karanja J. J.

Mr. Kemo, Senior Principal State Counsel for the State

Court Clerk – Atemba/Laban

Appellant in person

JUDGMENT

The appellant, James Oluoch Owuodho, alias Harambee was charged with three counts of robbery with violence contrary to Section 296(2) of the Penal Code, in that on the 30th June 2004 at Ringa area of Rachuonyo District, Nyanza Province, jointly with others not before court while armed with dangerous weapons namely a pistol robbed John Gesanda Monari (in count one) of a motor vehicle registration number KAS 558 make Toyota Canter valued at Kshs. 3 Million. Concillia Ayot (in count two) of a sagem mobile phone and a pair of shoes all valued at Kshs. 4,000/= and Lilian Atieno Otieno

(in count three) of cash Kshs. 3,000/=, an identity card number 5849127, a bank plate, ATM card, and a bunch of keys all valued at Kshs. 4,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said John Gesanda Monari, Concillia Ayot and Lilian Atieno Otieno.

The appellant pleaded not guilty to all the three counts and was tried by the Senior Resident Magistrate at Oyugis. He was found not to have a case to answer in count one and acquitted in accordance with Section 210 of Criminal Procedure Code. He was found not guilty as charged in count three and was acquitted in accordance with Section 215 Criminal Procedure Code. He was however found guilty as charged in count two and convicted accordingly. He was then sentenced to death in respect thereof.

Being dissatisfied with the conviction and sentence he has now appealed to this court on the basis of the grounds set out in his petition of appeal filed herein on the 15th November 2005. He generally complains about the insufficiency of the evidence relied upon by the trial court to convict him and in particular raised issue with the evidence of identification.

He filed supplementary grounds of appeal on the 25th October 2007 in which he complains of the violation of his constitutional rights as enshrined in Section 72(3) (b) of the Constitution of Kenya.

At the hearing of the appeal, the appellant appeared in person and argued that the prosecution did not offer any explanation as to why he was held in police custody for a period of twenty eight days before being taken to court. He further argued that the evidence of PW2 contradicted the charge and that she did not say that he had a mark on his face which mark was used to identify him. She also did not say that the headlights of the stolen vehicle had been switched on and did not provide evidence to show that she reported the incident at the Oyugis Police Station. The appellant contended that he was arrested on instructions from the Nyanza P. C. I. O who did not testify in court. He further contended that the alleged car jacked vehicle was not produced in evidence neither was it photographed. He said that there was the theft of the subject vehicle along the Kisii / Kisumu Highway was not sufficiently proved.

The learned State Counsel Mr. Kemo appeared for the State and opposed the appeal. He argued that the prosecution evidence was founded on the testimony of PW2 who identified the appellant in the course of the robbery. He said that PW2 and PW1 were teachers travelling back to Oyugis from Kisumu after attending a schools musical festival. He said that they were in a vehicle, which was commandeered into a bush by the robbers who then stole from the occupants. He went on to say that PW2 saw and identified the appellant with the help of the vehicle's light. She also identified him at an identification parade properly conducted. He contended that PW2 had no reason to frame the appellant, as she had not previously known him. He further contended that the appellant's defence was considered and rejected by the trial court.

As usual, we are under obligation to re-examine and re-evaluate the evidence with a view to arriving at our own findings and conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. The prosecution called a total of nine witnesses. They included teachers Lilian Atieno (PW1), Concillia Atieno Oyoti (PW2), Isabella Amollo Oketch (PW4), Carilus Ondango Otieno (PW5) an inspector of schools, Alphonse Odoyo Ofumo (PW3) a student, Dennis Ochieng (PW6), IP Henry Anunda (PW7), PC Wanjala Wanyonyi (PW8) and S/Sgt Simon Simotwo (PW9). The prosecution case was that on the material date at about 10.00 pm a group of teachers accompanied by their pupils were heading back to Oyugis town after attending a music festival in Kisumu. They were in a vehicle and on reaching a place called Mabera found the road blocked by logs. The vehicle stopped and immediately thereafter a group of between four and five people emerged from a nearby bush and attacked them. The group commandeered the vehicle and drove it into a bushy area where they continued to beat and rob the occupants of their belongings. The occupants were eventually left abandoned in the bush. The incident was reported to the police and in the course of investigation, the appellant was arrested and charged accordingly.

The defence case was that the appellant was a second hand clothes dealer and on 21st September 2004, proceeded to carry on business at Daraja Mbili market. He was later informed by his wife that an administration police officer from Ringa chief's camp had been to his house looking for him, he saw the A .P on the following day and was informed that the D.C.I.O Kisumu wanted to see him. He was taken to Oyugis Police Station where he stayed upto 23rd September 2004 ,when he was taken to Kisumu Central Police Station where he stayed for two weeks. He was later taken to P.C.I.O's office. He found the P.C.I.O in the company of one Felix Owuor his neighbour and PW2. He was asked whether he knew Felix. He answered that Felix and him had a land dispute. He was thereafter returned to the cells and after four days was informed that he would be released. He was however made to sign a form and taken to an identification parade along with eight of his cellmates. He was purportedly identified at the parade by PW2. He was taken back to the cells for a further nine days and then taken to court in Kisumu on 18th October 2004. He was arrested at the instigation of the said Felix and had not done anything wrong. He produced a document (DEX.1) to confirm the land dispute with Felix.

The basic issue arising for determination is whether the offence of robbery was committed against Concillia Atieno Oyoti (PW2) and if so, whether the appellant was positively identified as one of those responsible. The evidence adduced by the said Concillia (PW2) showed that she was in a group of teachers and pupils who had boarded a motor vehicle to return to Oyugis town after a schools musical festival in Kisumu town. On the way, they found part of the road blocked with logs thereby necessitating the driver to stop the vehicle. Soon thereafter, a group of armed people emerged from a nearby bush and confronted them. The group assaulted them and commandeered the vehicle into a bushy area where they (group) continued with the assault and took away personal belongings.

The evidence was not at all or substantially disputed. It was corroborated by that of Lilian (PW1), Alphonce (PW3), Isabella (PW4), Carilus (PW5) and Dennis (pw6). It established and proved the necessary ingredients of Section 296 (2) of the Penal Code in terms of the decision in the case of **Johana Ndungu =vs= Republic C/APP 116/95**. We so find.

The trial court did correctly make a similar finding that the offence of robbery was committed against PW2 and then proceeded to examine the issue of identification of the accused.

The sole evidence of identification was that of the complainant (PW2). The offence occurred in the night at about 10:00p.m. This pointed to the fact that the alleged identification of the accused (appellant) was under difficult circumstances. The complainant (PW2) was not alone at the time of the offence. However, none of her fellow travellers (i.e. PW1, PW3, PW4, PW5 & PW6) corroborated her evidence of identification against the appellant. The arresting officer S/Sgt Simotwo (PW9) said that he arrested the appellant on 7th September 2004, on the orders of the P. C. I. O. Nyanza. He did not say that he found him in possession of any of the stolen items.

There was neither direct nor circumstantial evidence to corroborate the complainant's (PW2) evidence of identification. Nonetheless, the complainant (PW2) said that she was able to identify the man whom she gave her purse, money and mobile phone. She said that she saw him as he came towards her and that he was the appellant. She further said that the vehicle's front lights were projected towards where they lay and also that she came face to face with the appellant as he moved from the vehicle. She also said that she gave a description of the appellant to the police and stated that he had a mark near his nose.

The complainant (PW2) did not however say where the appellant was standing as the vehicle's front lights projected towards where she was. Was the appellant standing in front of the headlights? Was he facing the headlights or the people lying down on the ground?. The complainant did not also say how she saw the appellant face to face as she moved from the vehicle. What aided her to see and identify the appellant as she moved away from the vehicle?. P. C. Wanyonyi (PW8) and S/Sgt Simotwo (PW9) and even I. P. Anunda (PW7) did not say that they were given the appellant's description by PW2. Yet, PW2 alleged that she gave the description to the police.

In our opinion, the evidence of identification by PW2 was laden with uncertainties as to render it incapable of any belief in the absence of corroboration. Her purported identification of the appellant in the identification parade was therefore an exercise in futility and probably pre-arranged, considering his defence when he stated that he found PW2 and another person in the office of the P. C. I. O. Nyanza and four days thereafter he was placed in an identification parade with cellmates.

The finding by the trial court that the appellant was positively identified by PW2 was erroneous and unsupported by facts.

The trial court did not treat the complainant's (PW2) evidence of identification with great care and caution considering that it was uncorroborated and that of a single witnesses in unfavourable circumstances. Even if the court considered the evidence believable in the absence of corroboration it was incumbent upon itself to warn itself of the danger of acting on the uncorroborated evidence of a single witness. It did not do so.

The law pertaining to the foregoing was clearly set out in the cases of **Abdala Bin Wendo & Another =vs= Republic (1953) 20 EACA 166 and Roria =vs= Republic (1967) EA 583.**

In the end result, we hold that the conviction of the appellant was not based on sound and credible evidence. It is hereby quashed and the accompanying sentence set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 30th day of July 2008.

D. MUSINGA **J. R. KARANJA**

JUDGE **JUDGE**

JRK/aao