



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

Criminal Appeal 28 of 2007

JOHN OTIENO OLOO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in Criminal Case number 1149 of 2005 of the Principal Magistrate's Court at Siaya)

CORAM

Mwera, Karanja J. J.

Musau for State

Court Clerk – Raymond/Laban

Appellant in person

JUDGMENT

John Otieno Oloo, the appellant, appeared before the Principal Magistrate at Siaya charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code, in that on the 31st October 2005, at Ugunja Township Siaya District Nyanza Province, jointly with others while armed with dangerous weapons namely pangas and rungas robbed Joseph Oluoch Odhiambo of a mobile phone make Nokia 1160, a radio make, National, a suit case, a Kodak camera, a pair of shoes, a coat, a bag, a rain jacket and Kshs. 750/= all valued at Kshs. 25,750/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Joseph Oluoch Odhiambo.

After trial, the appellant was convicted and sentenced to suffer death. He is dissatisfied with the conviction and sentence and has lodged the present appeal on the basis of the grounds set out in the

petition of appeal filed on 12th February 2007. He basically complains about the prosecution's evidence of identification and prosecution's failure to call some witnesses. He also complains about the non-consideration of his defence by the trial court. He appeared in person at the hearing and presented written submissions to augment the grounds of appeal.

The learned Senior Principal State Counsel, Mr. Musau, appeared for the State. He did not support the conviction and stated that the evidence against the appellant was inadequate and suspect. He said that the identifying witnesses (i.e. PW2, PW3 & PW4) were minors and their evidence was not corroborated. He also said that the identification parade was not proper.

We are expected as a first appellate court 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.

In that regard, the prosecution's case was that the complainant Joseph Oluoch Odhiambo (PW1) arrived home at 8:30 p.m and was surprised to see his house lit by a lamp. He had not left it lit. He knocked the main door and a stranger told him to get in. He saw a man go to the kitchen and join others. His children were inside the house. He sensed danger and sought help from a neighbour. He was not assisted. He returned to his house and as he stood by the front door he was attacked and injured by a group of six people carrying clubs. His mobile phone, money and other items were taken away before the attackers fled. He thereafter reported to the police and in the course of investigations, the appellant was arrested and charged accordingly.

The appellant's case was that on the 16th November 2005, he was from the Siaya District Hospital and boarded a vehicle to Rangala. He arrived at his destination and was immediately confronted by police officers who arrested him. He was taken to his house which was searched and nothing recovered. He was later taken to Ukwala Police Station where he was thoroughly beaten. He was returned to Siaya Police Station and placed in an identification parade where he was allegedly identified by three people known to him.

There having been no particular dispute that the offence was committed, the issue that arose for determination was whether the appellant was positively identified as having been among the offenders.

The complainant (PW1) said that he was attacked, injured and robbed of his property by a group of about six people.

The clinical officer Thomas Ngege (PW6) confirmed that the complainant suffered serious injuries after being attacked.

The necessary ingredients of the offence of robbery with violence under Section 296(2) of the Penal Code were established by the prosecution's evidence.

With regard to the identification of the offenders, the complainant (PW1) was specific. He said that:-

“I did not identify any of the robbers as they blinded my face with the torches”.

The evidence which implicated the appellant was that of a child aged 13 years old Claris Awino (PW2), a child aged 15 years Jared Ochieng Oluoch (PW3) and a young person (teenager) aged 17 years Alice Atieno Oluoch (PW4).

The lower court record does not show that Claris (PW2) and Jared (PW3) were examined as to their capability of understanding the meaning of an oath.

However, they gave evidence on oath and were cross-examined by the appellant. We do not think that the failure by the trial magistrate to comply with the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap 15 Laws of Kenya) occasioned any miscarriage of justice.

Be that as it may, Claris (PW2) said that on the material date at about 8:00p.m she was with Jared (PW3) and Alice (PW4). They had just finished eating. She wanted to visit the toilet outside the house but Jared (PW3) made the move first. He opened the door and six people entered the house. The first of them took them to the sitting room. She said that she saw him well and that it was the appellant. She said that the lamp was on at the time. She had not previously known him. She said that the offenders were in the house for about twenty minutes.

Jared (PW3) said that when he opened the door a person held and pulled opened it wide. The person then entered the house and was followed by others. He said that the person was the appellant and is the one who took him to the sitting room through a corridor lit with a lantern lamp. He said that he had not previously known the appellant but he saw him as the available lamp was illuminating the sitting room very well. He said that the attackers were in the home for about one hour.

The foregoing evidence by Claris (PW2) and Jared (PW3) being that of children required corroboration in terms of Section 124 of the Evidence Act.

The corroboration came from the teenager Alice (PW4). She is a sister to the complainant and was with Claris (PW2) and Jared (PW3) at the material time. She said that when Jared (PW3) opened the door, a person held it from outside and then entered the house holding a rungu. The person was followed by others and was the appellant. She said that the appellant told her not to fear and then proceeded to reduce the intensity of the lantern lamp before telling them to lie down. She said that she clearly saw the appellant for about twenty minutes. She thus corroborated the evidence of identification of the appellant by the children Claris (PW2) and Jared (PW3).

The evidence of Claris (PW2) was also supported by that of Jared (PW3) and vice verse.

Even in the absence of corroboration of evidence of a child, a trial court may still rely on it provided it warns itself of the danger of acting on such uncorroborated evidence. **(See Kibangeny =vs= Republic [1959] E. A. 92 [C.A.] and Kinyua =vs= Republic (2003) KLR 301)**. We would warn ourselves of the danger and act on the uncorroborated evidence of PW2 and PW3 if the teenager (PW4) is also regarded as being a child.

We are of the view that the lamp inside the complainant's house provided adequate light thereby creating favourable conditions for identification of the attackers and more so, the appellant.

Not only did favourable conditions exist but also did adequate opportunity for identification. The evidence showed that the attackers were inside the complainant's house for about twenty minutes to one hour.

We agree with and uphold the finding of the trial court that the appellant was positively identified by Claris (PW2), Jared (PW3) and Alice (PW4). The identification was confirmed in a subsequent identification parade conducted by I. P. Jack Wafula (PW5) which in our opinion was properly conducted.

With respect to the learned Senior Principal State Counsel, we are unable to agree with him that the evidence against the appellant was inadequate and suspect. The evidence was cogent and sound. It led to a proper and lawful conviction **of the appellant. This appeal is without merit and is hereby dismissed.**

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

J. W. MWERA

J. R. KARANJA

JUDGE

JUDGE

JRK/aao