IN THE HIGH COURT OF KENYA
AT KISUMU
Criminal Appeal 212 of 2004

PETER OTIENO TITO …….. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

[From Original Conviction and Sentence in Criminal Case Number 343 of 2004 of the Chief Magistrate's Court at Kisumu]

CORAM

Mwera, Karanja J. J.

Musau for State

Court Clerk – Raymond/Laban

Appellant in person

JUDGMENT

The appellant, Peter Otieno Tito, appeared before the Senior Resident Magistrate at Kisumu charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code, in that on the night of 28th/29th December 2001, at Gangu Sub location South West Alego Siaya District Nyanza Province, jointly with others not before court, they robbed John Omita Orinda of shop goods valued at Kshs. 70,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said John Omita Orinda by beating him to death.

After trial, the appellant was found guilty, convicted and sentenced to death. Not being satisfied with the conviction and sentence he lodged the present appeal on the basis of the grounds stated in his petition of appeal dated 29th September 2004.

The grounds are as follows:-

(i) That the trial magistrate erred in convicting on evidence of purported identification by recognition while the circumstances were not conducive.

(ii) That the trial magistrate erred in not appreciating that the prosecution cases was below standard in that the area sub chief was not called to testify

(iii) That there were no exhibits found in the possession of the appellant to connect him to the offence

(iv) That the trial magistrate erred in convicting on the basis of hearsay evidence of PW4.

(v) That the offence being a capital charge should have been investigated by an inspector of police and not a police constable.

(vi) That the trial court erred by convicting without observing both the weight and strength of the appellant's sworn defence

At the hearing, the appellant represented himself and

presented submissions written in Kiswahili to augment his grounds of appeal.

The State was represented by the Learned Senior Principal State Counsel, Mr. Musau, who supported the appellant's conviction and stated that PW2 and PW3 were able to see and recognize the appellant and another as they came out of the victim's house carrying boxes. He stated that PW2 and PW3 had torches which they flashed and saw the appellant who was previously known to them. He further stated that the appellant approached PW4 with the intention of selling shop goods believed to have come from the shop of the deceased victim. He contended that the appellant was convicted on sound evidence.

We have considered all the arguments for and against the appeal. Our primary duty at this point is to re-examine and re-evaluate the entire evidence with a view to arriving at our own findings and conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

The case for the prosecution was that on the material date at about 1:30 a.m Nancy Awino Orinda (PW2) was asleep inside her house when she heard screams emanating from the house of the late John Orinda (deceased) who was her brother in –law. She woke up and proceeded to the house of her son Charles Ochieng Orinda (PW3) and alerted him. They both proceeded to the deceased's house and on the way saw a group of six people whom they could not identify. The six by-passed them while running away. As they approached the house of the deceased, they saw two people coming out from therein carrying away an iron-box and some boxes. They recognized the two as Charles Obeto Tito and Peter Otieno Tito (appellant). They entered the house of the deceased and found his shop goods scattered. He operated the shop inside the house as he was a cripple. They found him lying on his stomach while naked. He had suffered injury on the chest which resulted in his death.

The matter was reported to the assistant chief and eventually the police. The appellant was later arrested and charged accordingly.

The case for the appellant was that he was taken to court on 30th January 2002, and charged with the present offence which he knew nothing about. He said that he is called Tito Otieno and a fisherman at Utonga beach West Alego Siaya District. On the 19th January 2002, he returned home from Utonga beach and at 3:00 p.m. proceeded to the home of PW2 where they were to meet with the chief and assistant chief over a land dispute involving himself and the husband of PW2. He found a funeral going on at the homestead. He went to a grave and prayed. He then went to the dias and found the Chief, PW2 and others. The land case started. It involved land number 735 which he had refused to sell. He told PW2 that she had been cultivating the land for the last five years and should vacate. He was then told by

the Chief to go home if he did not want money. He went home and was arrested at 9:00p.m by the chief and his assistant

There having been no particular dispute that the offence of robbery with violence was committed against the deceased who was in the process fatally injured, the issue arising for determination was whether the appellant was identified as one of those who were responsible.

Nancy (PW2) and Charles (PW3) saw a group of six people running away and another two coming out of the deceased's house carrying property. They entered the house and found shop goods scattered therein. They found the deceased lying down on the ground. Dr. Keli Aloo (PW1) confirmed that the deceased's death was caused by injury to his chest.

The foregoing facts clearly established the ingredients of Section 296(2) of the Penal Code.

It was apparent that the six people running away and the two people coming out of the deceased's house carrying property removed from therein were responsible for the offence.

Nancy (PW2) and Charles (PW3) are mother and son. They proceeded to the house of the deceased with torches or spotlight. They did not identify any of the six people but were positive with regard to the identification of the other two people. Nancy (PW2) stated:-

"We went to the direction of his house (deceased) before reaching the house a group of 6 people came from that direction towards us. They passed us and ran towards the big gate. I did not see these people and neither could identify them. As we moved towards the house we were going to, other 2 people came out of the house. I gathered courage and put on my spotlight. I saw them and I was able to recognize them. They were Charles Obeto Tito he was carrying a big box with markings cigarette and a panga on the other hand. The 2nd person was Peter Otieno Tito. He was also carrying a box and an iron box. We were afraid because we were only the two of us we left the people pass and we went inside the house which was dark".

Nancy (PW2) identified Peter Otieno Tito as the appellant herein whom she had previously known.

Charles (PW3) stated:-

"We went to my uncle's house before reaching there we saw about six (6) people running 50 metres away. When we got close to the house we met two (2) people coming out. We had a spotlight and we saw them. They were Charles Otito and Peter Otieno Otito".

The foregoing evidence by Nancy (PW2) and Charles (PW3) was corroborative. It showed that though the offence occurred in darkness, they were in possession of torches which enabled them see and identify the appellant as having been one of the two people seen coming out of the deceased's house carrying away boxes.

Nancy (PW2) gathered courage and switched on her spotlight so as to identify the two people coming out of the deceased's house. Charles (PW3) also indicated that his torch was also switched on. Both identified the appellant by recognition. He was a person previously known to them. They, in effect, discredited his defence and rendered it an afterthought. Theirs was a case of recognition as opposed to identification. Recognition of an assailant is regarded as being more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other. **(See Anjononi =vs= Republic [1980] KLR 59).**

Other than direct evidence of identification against the appellant, there was also indirect evidence linking him to the offence. This was found in the testimony of Pismas Ooko (PW4) who said that on the 29th December 2001 at 7:00 a.m while undertaking hotel business the appellant arrived with a bicycle carrying two jerrycans and a carton box and offered to sell to him (PW4) some sugar, wheat flour and tea leaves. He declined the offer and later heard that a person had been killed nearby and goods stolen from

his shop.

Ooko (PW4) further said that the appellant persisted with his offer and sent an emissary to him but he still refused to buy the items saying that he had no money.

Sugar, wheat flour and tea leaves are common items found in any shop. Although it was not known where the sugar, wheat flour and tea leaves offered for sale by the appellant come from, the fact that a nearby shop had been raided and shop goods stolen from therein raised reasonable suspicion that the items must have been part of those goods stolen from the deceased's shop cum house. This was fortified by the fact that the appellant was in a great hurry to dispose of the items. The offence occurred on the night of 28th / 29th December 2001 at about 1:30 a.m and a few hours thereafter at 7:00 a.m on 29th December 2001, the appellant was already out looking for buyers of ordinary shop goods. He never said anything about that segment of the evidence in his defence. He confined himself to the alleged land dispute. The evidence was sufficient to establish his guilt and corroborated the evidence of identification adduced by Nancy (PW2) and Charles (PW3).

Basically, the evidence against the appellant was cogent and credible. It established beyond reasonable doubt that he was among the group of people who robbed and killed the deceased. His conviction by the trial court was proper and lawful and we uphold it. He raised the issue of the original charge sheet indicating that he was arrested on 19th December 2001, while the offence occurred on 28th December 2001, thereby implying that he was in police custody at the time of the offence.

We have perused the charge sheet and indeed it indicates the date of arrest as having been the 19th December 2001. However, we think that, that was a typographical error and the date should have been 21st January 2002 as stated by P. C. John Mburu (PW5) of Siaya Police station. The same charge sheet shows that the robbery report was made on 29th December 2001 vide O/B No. 24 of 29th December 2001. The appellant could not have been arrested before the offence was committed. The date 19th December 2001, was obviously an error.

All in all, the appeal is devoid of merit and is dismissed.

Dated, signed and delivered at Kisumu this 29th day of July 2008

J. W. MWERA **J. R. KARANJA**

JUDGE JUDGE

JRK/aao