



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Criminal Appeal 48 of 2006

RAPHAEL ODONGO ORONO APPELLANT

VERSUS

REPUBLIC RESPONDENT

[From original conviction and sentence in Criminal Case number 2381 of 2007 of the Senior Resident Magistrate's Court at Winam]

JUDGMENT

The appellant, Raphael Odongo Oron, appeared before the Senior Resident Magistrate at Winam charged with attempted robbery with violence contrary to Section 297 (2) of the Penal Code in that on the 11th October 2007 at Auji bridge in Kisumu District Nyanza province, jointly with another not before Court, while armed with clubs attempted to rob Charles Ondieki Makori of a mobile phone make Nokia 2650 serial number 355672003482947 and before the time of such robbery wounded the said Charles Ondieki Makori.

After the trial, the appellant was convicted of the lesser offence of attempted robbery with violence under Section 297 (1) and sentenced to serve seven years imprisonment. He is dissatisfied with the conviction and sentence and hence the present appeal. He complains that this was an assault case and the doctor who testified is not the one who treated the complainant. He also complains that the trial court relied on uncorroborated evidence of members of one family and that the trial court failed to consider his defence. He represented himself at the hearing of the appeal and tendered written submissions to fortify his case.

The respondent was represented by the learned Senior State Counsel, M/s Oundo, who stated that there was clear evidence from PW1 and PW2 showing that the appellant attempted to rob PW1 of a mobile phone. She said that the appellant was identified with the aid of a spotlight and that a struggle ensued between the complainant and appellant who was apprehended by PW3 and PW4 when they found him still engaged in the struggle. He was rescued by the complainant from being lynched by members of the public.

The learned State Counsel further stated that the P3 form confirmed that the complainant was injured and that whatever transpired on that material night satisfied the ingredients of Section 297 (2) of the Penal Code. She contended that the trial court erred in law by substituting the original charge with one under Section 297(1) of the Penal Code after finding that the case had been proved beyond reasonable doubt.

She further contended that the P3 form was produced by PW5 under Section 77 of the Evidence Act and that all witnesses including the family members were competent.

She also contended that the appellant's defence was considered and dismissed and that there was adequate evidence against the appellant whose appeal lacks merit.

As a first appellate court, the obligation arising is to re-examine and re-evaluate the evidence with a view to arriving at own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

Towards that end the prosecution's evidence was that on the material date at 7:30 p.m. the complainant Charles Ondieki Makori (PW1) and his wife Margaret Ondieki (PW2) were at Manyatta Estate Kisumu when they were stopped by a group of young men and asked for their identification cards. Margaret (PW2) ran towards their nearby home while the young men set upon Charles (PW1). Their son Ezekiel Makori (PW4) was attracted by the screams of his mother (PW2). He and Dennis Otieno Opondo (PW3) rushed to the scene and found the appellant stepping on the complainant (PW1). They attacked him (appellant) and his colleague. Members of the Public appeared at the scene and attempted to lynch the appellant after he had been beaten up. He was rescued by the complainant and handed to the police.

The complainant was examined at the New Nyanza Provincial General Hospital and a P3 form completed. It showed that he had suffered bodily injuries classified as harm.

P. C. E. Kirui (PW6) arrested and charged the appellant with the present offence. He (appellant) denied the offence saying that the complainant is his customer. He said that he operates a bicycle taxi (boda – boda) and had gone to see the complainant on the material date over a debt. They did the calculations as to the amount owed and a disagreement arose. The complainant screamed saying that he (appellant) was ashaming him in front of tenants. He (complainant) made noise when the appellant refused to leave the scene. People gathered and the complainant told them that the appellant was robbing him. He (appellant) was pulled outside and met the police at the gate. He was then framed and charged with this offence.

The issue arising for determination is whether the offence of attempted robbery with violence was committed against the complainant (PW1) and if so, whether the appellant was responsible.

In his testimony, the complainant stated that they were stopped and asked for identity cards. He was then hit on the head with a piece of wood and made an attempt to run away. He was however put down and stepped on by the appellant. His wife (PW2) said that she was ahead when she heard men asking the complainant to show his identity card. She fled towards her homestead when the men attacked the complainant.

Neither the complainant (PW1) nor his wife (PW2) stated that the attackers demanded any property from any one of them. However, the complainant stated that he was searched by the appellant's colleague and nothing was taken away from him even though his Nokia 2650 mobile phone was on the wallet of his belt. He said in cross-examination that he had money and was asked about the mobile phone but these were not stolen from him.

The complainant's wife (PW2) returned to the scene with others and found the complainant being beaten up by the appellant and another. The appellant was apprehended but his colleague escaped. Dennis (PW3) and Ezekiel (PW4) proceeded to the scene and found the complainant floored on the ground and being stepped on by the appellant. They (PW3 and PW4) also attacked the appellant and his colleague before a mob arrived at the scene and beat up the appellant.

The appellant did not deny having been engaged in an incident with the complainant on that material date.

His contention is that he had gone for a debt owed to him by the complainant and when they disagreed on the amount and payment he was framed.

The allegation that the appellant wanted to rob the complainant of his mobile phone appears to have emanated from Dennis (PW3). He said that the complainant alleged that the appellant wanted to rob him (complainant) of a mobile phone.

But, the complainant did not say as much. He said that the appellant asked for a mobile phone for reasons he (complainant) could not know. He (appellant) did not however take away the phone or make any attempt to take it away.

There is a suggestion from the foregoing that on one hand the appellant attempted to steal the complainant's mobile phone and on the other hand he did not make such an attempt. The complainant said that he was assaulted by the appellant and his colleague. The fact was confirmed by his wife (PW2) his son (PW4) and Dennis (PW3).

The clinical officer (PW5) produced a P3 form on behalf of the doctor who examined the complainant and who was not available to testify. There was no objection from the appellant for the clinical officer to produce the P3 form. He went ahead to cross – examine her appropriately. Her producing the P3 form on behalf of the doctor who completed and signed it did not occasion any prejudice to the appellant.

Although the evidence that the complainant was assaulted and occasioned bodily harm is cogent, there is some doubt as to whether the assault was in furtherance of an act of robbery or attempt thereof.

Whereas this court concurs with the trial court when it found that the complainant was injured by the appellant, it does not concur with the finding that the appellant did not manage to get the mobile phone he targeted.

The evidence did not show that the mobile phone was targeted otherwise it would have been stolen or an attempt made to steal it no sooner had the complainant been asked to stop and show his identity.

While it may be said that the appellant and his colleague were mischievous in asking for the complainant's identity card, it does not follow that they intended to commit an offence of robbery. Suspicion existed but suspicion alone is not adequate evidence of commission of an offence.

This court's finding is that the appellant committed an offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. He is convicted thereof in accordance with Section 179 (2) of the Criminal Procedure Code.

To that extent, the conviction for the offence of attempted robbery under section 297 (1) of the Penal Code is quashed and substituted with that for assault causing actual body harm contrary to Section 251 of the Penal Code which carries a maximum sentence of five years imprisonment.

The sentence of seven years imprisonment is thus reduced to three years imprisonment.

Those are the orders of the court.

Dated, signed and delivered at Kisumu this 31st day of October 2008

J. R. KARANJA

JUDGE

JRK/aao