REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
Criminal Appeal 68 of 2007

YUSUF MUSA ANDIWA …… 1st APPELLANT

CALEB ONYANGO MATOKA……..…….2nd APPELLANT

VERSUS

REPUBLIC ……..……..……. RESPONDENT

[From original conviction and sentence in Criminal Case number 511 of 2006 of the

Senior Resident Magistrate's Court at Nyando]

JUDGMENT

The appellants, Yusuf Musa Andiwa and Caleb Onyango Matoka appeared before the Senior Resident Magistrate at Nyando charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the 13th March 2006 at Kabar East Sub –location Nyando District Nyanza Province, jointly with others not before court while armed with dangerous weapons namely pangas and rungus robbed Fanuel Owuor Ogendo of cash Kshs. 600/= a cap and a pair of shoes all valued at Kshs. 3,800/= and at the time of such robbery used actual violence to the said Fanuel Owuor Ogendo.

The first appellant (Yusuf) faced an alternative count of handling stolen goods contrary to Section 332 (2) of the Penal Code, in that on the 14th March 2006 at Masogo D. O's office Nyando District Nyanza Province otherwise than in the course of stealing dishonestly received or retained one pair of shoes valued at Kshs. 1,800/= knowing or having reason to believe to be stolen property.

The alternative count as framed was defective and bad for duplicity **(See Selimia Mbeu Owuor & Another =vs= Republic NBI CR/APP NO. 65/99 (C/A) (Unreported).**

Nonetheless, after trial, the appellants were convicted for the minor offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code and were each sentenced to serve four years imprisonment.

Being dissatisfied with the conviction and sentence, the appellant preferred the present appeals on the basis of the grounds contained in their respective memorandum of appeal filed herein on the 28th May 2007.

The grounds are basically an attack on the insufficiency of the prosecution's evidence and a complaint that essential witnesses were not available to testify.

There is also a complaint that the P3 form was produced by an unqualified person.

At the hearing of the appeal, the appellants appeared in person. The first appellant (Yusuf) presented written submissions and awaited the respondent's response.

The second appellant (Caleb) responded orally to the submissions by the respondent.

The respondent was represented by M/s Oundo, Senior State Counsel, who opposed the appeals and stated that the evidence adduced against the appellants by the complainant and PW2 proved beyond reasonable doubt that an offence of robbery with violence was committed against the complainant by the appellants. She stated that the ingredients of the offence were established and that the complainant's evidence was sufficient even though the arresting and investigations officers were not called to testify. She stated that the appellant's defence was considered and dismissed but that the trial magistrate erred in reducing the charge to a minor offence. She contended that the sentence of four years was unlawful and that the present appeals lack merit.

In response, the first appellant stated that he was arrested in connection with knocking down a person with a bicycle but on failing to offer a bribe the matter was changed to stealing. He was later taken to court and charged with the present offence which he did not commit. He said that during the trial, no exhibits were produced and he was not given time to cross – examine the complainant. He said that vital witnesses were not called to testify and that his defence was not considered by the trial court.

On his part, the second appellant stated that he had gone to the local D. O's camp to see the first appellant who had been arrested. He was not given the opportunity to see the first appellant after he failed to provide a soda to a drunk administration police officer. He was arrested while leaving the scene and bundled together with the first appellant. They were taken to court and charged with the present offence. He was not given time to cross-examine the complainant as the exhibit was not produced and the arresting officer who was required to produce it did not testify.

This court is obliged to review the evidence afresh and arrive at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

The prosecution's evidence was that on the material date at about 9:00 p.m. the complainant Fanuel Owuor Ogendo (PW1) and others including the appellants were at a homestead where there was a funeral ceremony. Later, as the complainant was walking home he was attacked by the appellants and his shoes snatched from him. He suffered injuries and went to hospital for treatment. He thereafter informed an Assistant Chief Timothy Juma Matoka (PW2) that he had been attacked and injured by the appellants.

A clinical officer Paul Owiti Ouko (PW3) examined the complainant and complied his finding in a P3 form (PEX 1) which showed that the complainant suffered bodily harm.

The appellants were eventually arrested and charged with the present offence.

The appellants defence was a denial of having committed the offence. The first appellant indicated that he was arrested on 15th March 2006 for carelessly riding his bicycle. He was taken to the local D. O's camp where he stayed upto 17th March 2006 when he was taken to Awasi where the Chief arrived on 20th March 2006 with a man called Doctor. He was asked whether he knew the man. He answered in the negative and was told that the man would be the complainant in charges he did not know about. The second appellant indicated that he was arrested on 16th March 2006 after he had gone to see the first appellant who was under arrest. His arrest was prompted by his failure to provide an administration police officer with a soda. He said the A. P. was drunk and arrested him for nothing. He was taken to Awasi where the Assistant Chief came with others. He was then shown the complainant and later taken to court where he heard the charge which he knows nothing about.

From all the foregoing, it is noted that the prosecution's case was closed prematurely without the concluding evidence of the arresting and/or investigations officer.

The record shows that the premature closure was prompted by the court's refusal to grant a further adjournment to the prosecution.

The prosecution in an attempt to circumvent the refusal applied to have the case withdrawn under Section 87(a) Criminal Procedure Code but the court declined.

The appellants were thus convicted on the basis of the prosecution's incomplete case.

In the case of **Bwaneka =vs= Uganda 1967 EA 768**, it was held that it is the duty of prosecutors to call as witnesses the police officers who investigated the case and charged the accused.

On that point, Sir Udo Udoma, the then Chief Justice of Uganda, rendered himself thus:-

"Then there is the practice indulged in by the police or other prosecutors when prosecuting in magistrates courts

of not calling police officers who had investigated the case and arrested and charged an accused person involved in such a case. It seems to me that the police, do not attach importance to their duty of investigating cases reported to them, but are content to sit back and wait for a civilian to bring to them someone suspected of or arrested for an alleged commission of a crime

The result of this practice is the tendency for the police to place much more reliance on complaints made to them without themselves enquiring into the matter. Everywhere the police consider it unnecessary to make further investigations into allegations made against a suspected person, one would normally have thought that ultimately in any case it must be the duty of the police to arrest and charge the suspected person with having committed the offence before bringing him before a magistrate for trial.

The prevailing practice of not calling police officers during trials in magistrate's courts to testify as to the part they played in deciding ultimately to arrest and charge an accused person is most unsatisfactory. It gives the impression that the police do not seem to realize that it is their duty to control and conduct all prosecutions in the magistrate's courts in Criminal cases.

…….. It is the duty of prosecutors to make certain that police officers, who had investigated and charged an accused person, do appear in court as witnesses to testify as to the part they played and the circumstances under which they had decided to arrest and charge an accused person.

Criminal prosecutions should not be treated as if they were contests between two private individuals.

In the instant case …… There was no evidence as to which police officer had taken charge of the case and what steps, if any, he had taken when he decided to arrest and charge the appellant. The absence of such evidence necessarily creates a lacuna in the case for the prosecution because it gives the erroneous impression that the central government police officers had nothing to do with the case and had taken no part whatsoever in investigating and deciding on the charge to be preferred against the appellant.

It is to be hoped that in future this practice would be discontinued because without the evidence of an accused person having been arrested and charged by the police, the proceedings of the trial with respect to the prosecution case appear to be incomplete".

In this case, neither the arresting officer nor the investigating officer testified. If one of them had testified it would have been a different scenario but the failure by both to testify was prejudicial to the appellants and fatal to the prosecution case.

It is surprising that the trial magistrate went ahead to place the appellants on their defence despite the prosecution inchoate case. This occasioned a serious miscarriage of justice as to render the present appeals meritable.

That aside, the evidence by the complainant (PW1) and the Assistant Chief (PW2) clearly showed that if any offence was committed against the complainant by the appellants then it was more of assault causing actual bodily harm rather than robbery with violence.

The evidence indicated that the complainant and the appellants were attending a funeral ceremony and in the process the appellants beat up and injured the complainant. The evidence did not establish any theft of the complainant's shoes or any other property by the appellants.

It seems to this court that the matter was blown out of proportion and the present charge preferred against the appellants.

In any event, there was no evidence from either the arresting officer or the investigating officer to show how and why the present charge was preferred rather than that of assault causing actual bodily harm.

The trial magistrate did not err by applying Section 179 of the Criminal Procedure Code and reducing the charge to that of assault causing actual bodily harm contrary to Section 215 Criminal Procedure Code.

The appellants were properly convicted and sentenced of the said lesser or minor offence.

However, for the main reason that the prosecution case was incomplete thereby occasioning a miscarriage of justice, the conviction and sentence cannot stand and are hereby quashed and set aside.

The appeals are allowed. The appellants shall forthwith be set at liberty unless otherwise lawfully held.

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

J. R. KARANJA

JUDGE

JRK/aao