REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISUMU

Criminal Appeal 398 of 2003

EVANS OTIENO OGUTU alias MWALIMU……..…. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

[From original conviction and sentence in Criminal Case number 140 of 2003 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, Evans Otieno Ogutu alias Mwalimu, appeared before the Senior Resident Magistrate at Kisumu charged with two counts of robbery as follows:-

(i) Robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the night of 7th February 2003 at Nyalenda Estate Kisumu Nyanza province jointly with others not before court while armed with dangerous weapons namely pangas and knives, robbed one Topsonic Radio Cassette, one amplifier, Assorted electrical appliances, 239 compact cassettes, two T – shirts, a pair of spectacles, cash Kshs. 2,300/= and a bag all valued at Kshs. 52,150/= the property of Michael Ochieng Opondo and at or immediately before or immediately after the time of such robbery used actual violence against the said Michael Ochieng Opondo.

(ii) **Robbery with violence contrary to Section 296 (2) of the Penal Code, in that on the night of 7th February 2003 at Nyalenda Estate Kisumu Nyanza Province, jointly with others not before court while armed with dangerous weapons namely pangas and knives, robbed one pair of shoes and cash Kshs. 800/= all valued at Kshs. 2,600/= the property of Kennedy Omondi and at or immediately before or immediately after the time of such robbery used actual violence against the said Kennedy Omondi**.

After pleading not guilty to both counts, the appellant was tried, convicted and sentenced to death on both counts.

We may at this point mention that the sentence respecting the second count should have been held in abeyance in view of the death sentence in count one. A human being lives and dies only once. In the case of **Boru & Another =vs= Republic [2005] 1 KLR 649**, it was held that where an accused person is convicted on more than one capital charge, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance including any sentence of imprisonment.

The foregoing notwithstanding, the appellant being dissatisfied with the conviction and sentence lodged the present appeal on the basis of the grounds contained in his petition of appeal filed herein on 17th September 2003.

At most, the appellant complains that the evidence relied upon by the trial magistrate to convict him was insufficient and that the circumstances favouring positive identification were non-existent at the scene of the crime. He also complains that the trial magistrate failed to consider his defence.

The appellant represented himself at the hearing of the appeal and elected to address the court after the respondent's submissions.

M/s Oundo, the learned Senior State Counsel, appeared for the respondent and supported the conviction. While noting that it was erroneous for the trial magistrate to impose the death sentence twice, she nonetheless submitted that the ingredients of Section 296 (2) of the Penal Code were established and that the appellant was identified by recognition. The learned State Counsel said that PW1 and PW3 closed their business, packed their wares and proceeded home in a taxi-cab. On arrival at their doorstep, they were accosted by a group of people posing as police officers and members of a vigilante group.

The group ordered PW1 and PW3 to lie down. PW3 had a torch which he shone at the group and together with PW1 saw and recognized the appellant whom they had previously known by his name of Mwalimu.

The two complainants were assaulted and their goods taken away. They screamed and caused the group to run away. They reported to the police and were given P3 forms. They were later called to the police station where they found their stolen goods.

The learned State Counsel continued to say that it was not clear how the goods were recovered but contended that the appellant was identified.

In response to the foregoing arguments, the appellant merely stated that his name was not mentioned to the police. His attempt to introduce a new ground of appeal based on the conduct of the prosecution case by a police officer below the rank of Inspector of Police was shot down by the court on the basis of non-compliance with Section 350(2) of the Criminal Procedure Code.

So much for the arguments. This is a first appeal. Our role is to re-examine and re-evaluate the evidence with a view to arriving at our own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

The prosecution case was founded on the following evidence:-

The first complainant Michael Ochieng Opondo (PW3) is a resident of Nyalenda, Kisumu and a vendor of tapes at the Kisumu bus stage. His employee was the second complainant Kennedy Omondi (PW1). On the material date they closed business at about 12:30 a.m. They packed their property in bags and boxes and hired a taxi-cab to take them home. On reaching home, they alighted from the taxi-cab and while waiting for their door to be opened, a group of people appeared at the scene claiming that they were police officers and members of a vigilante group.

The first complainant had a torch which he flashed at the group and saw them carrying pangas (machetes). He recognized one called Nyayo Jalango or Langat, another called Mwalimu who is the appellant herein and yet another called Steve. The second complainant, recognized four people among them the appellant called Mwalimu. The two complainants were beaten up and ordered to lie down. Their screams caused the group to escape taking with them the complainants' property.

The complainants reported to the police and recorded statements. They were later called to the police station where they saw and identified some of their recovered stolen items (PEX1, 2, & 3).

Dominic Sawa (PW2) is a trader at Kibuye Market and on the 8th February 2003 he was at his place of business when his employee called Tito Otieno brought a radio-cassette which had been purchased from a person who had initially been paid Kshs. 1,500/=. He (PW2) gave a further Kshs. 1, 500/= when the speakers and a receipt were brought to them. Later, the police came looking for him. He sent word to his employee (Tito) to take the radio to the police and he did so. Both of them were arrested. He (PW2) said that he did not know the person who had sold the radio to his employee.

In the course of investigations, P. C. Johnson Wangulwa (PW4) found the radio having been recovered by his colleague I. P Okello (PW6). He called the first complainant who identified the radio as belonging to him. He also identified a handbag and red – jacket. All these items were produced in court as prosecution exhibits No 1 – 3.

The appellant was eventually charged with the present offences after it had been confirmed that the complainants had suffered injuries during the criminal transaction.

A senior clinical officer at Kisumu District hospital James Tollo (PW5) filled and signed the appropriate P3 forms (PEX 4 & 5).

In his defence, the appellant said that he lived at Manyatta and was a hawker. He was arrested for assault by a Chief and taken to the police station where he was charged with the present offences which he knows nothing about.

From the foregoing, it is apparent that the occurrence of the concurrent acts of robbery is not disputed.

Indeed, the complainants were accosted and attacked by a group of armed people who ended up stealing their respective property.

The P3 forms (PEX 4 & 5) confirmed that actual violence leading to injury was used against both complainants.

We hereby do find, as did the trial court, that the ingredients of the offence of robbery with violence contrary to Section 296 (2) Penal Code were fully established by the prosecution.

The issue arising for determination is whether the appellant was positively identified as having been among the robbers.

The evidence by the two complainants (PW1 & PW3) clearly shows that they were able to see and identify the appellant and others when a torch in the possession of the first complainant (PW3) was flashed at them.

The flash from the torch provided favourable conditions for identification in as much as it was bright.

Besides, the identification of the appellant by the two complainants was by recognition.

The appellant was previously known to the complainants. They knew him by his nick name of "**Mwalimu**".

In the case of R**. V. Turnbull (1976) 3 WLR 455** which was cited by the learned trial magistrate, it was stated that: -

"Recognition may be more reliable than identification of the stranger, but when the witness is purporting to recognize someone whom he knows the jury should still be reminded that mistake in recognition of close relatives and friends are sometimes made".

Having the above legal principles in mind, we are of the considered view that the evidence of identification against the appellant was corroborative, cogent and reliable. We therefore hold, as did the trial court, that the appellant was positively identified as having been one of those who committed the offences. His defence is unsustainable in the circumstances.

We uphold the conviction by the trial court but order that the sentence in count two be held in abeyance.

Otherwise, the appeal is dismissed.

Dated, signed and delivered at Kisumu this 16th day of December 2008

J. W. MWERA J. R. KARANJA

JUDGE JUDGE

JRK /aao