REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 205 of 2003

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 241 of 2002 – J. S. Kaburu [S.P.M.]

JOSEPH ODHIAMBO OMONDI…….……..APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

JUDGMENT OF THE COURT

The appellant, Joseph Odhiambo Omondi was charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of the offence were that on 31st of January 2002 at Koinange Estate, Nakuru, the appellant while being armed with a dangerous or offensive weapon namely a kitchen knife robbed Aisha Ali Bajabir of one Satellite receiver and two remote controls and a bag all valued at Kshs 6,000/= and at or immediately before or immediately after the time to such robbery threatened to use violence to the said Aisha Ali Bajabir. The appellant pleaded not guilty to the charge. After a full trial, the appellant was found guilty as charged and sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant raised four grounds of appeal challenging the decision of the trial magistrate in convicting him. He was aggrieved that he had been convicted in the absence of the evidence from essential witnesses. He faulted the trial magistrate for convicting him in the absence of evidence of a medical report. He faulted the manner in which the trial against him was conducted by the subordinate court and was of the view that the trial against him was conducted in an oppressive manner that he had no hope of getting justice from the said court. At the hearing of the appeal, the appellant, with the leave of the court, presented to this court written submissions in support of his appeal. He also made oral submissions urging this court to allow his appeal. He submitted that the prosecution had not established the case against him to the required legal standard. The thrust of the appellant's argument is that the members of the public who allegedly arrested him with the property which was allegedly robbed from the house of the complainant, were not called to testify by the prosecution. He was of the view that, in the absence of their evidence, the prosecution failed to establish a connection between him and the properties which were allegedly robbed from the complainant.

Mr. Koech, Learned State Counsel submitted that the prosecution had proved the case against the appellant on the charge of robbery with violence to the required standard. He submitted that the appellant was identified by two witnesses who saw the robbery take place. It was his submission that the robbery took place at 4.00 p.m. It was therefore in broad daylight. The appellant was apprehended by the members of the public about thirty minutes after the said robbery and led the said members of the public to the house of the complainant where he had robbed the said items. He further submitted that the

appellant was armed with a knife at the time of the robbery and threatened the two witnesses who were in the house with harm unless they gave him money. He submitted that the said knife was recovered with items which were robbed from the house of the complainant. He therefore urged this court not to disturb the conviction of the appellant but to confirm his said conviction and sentence.

We will revert back to the arguments made by the appellant and by the State after briefly setting out the facts of this case. On the 31st of January 2002 at 4.00 p.m., PW2 Aisha Ali Bajabir and PW5 Florence Ibosa were in the house of PW1 Ali Omar Bajabir at Shabab Estate. PW2 is the wife to PW1. The two witnesses testified that while they were at the house, one person entered the house and threatened them with a knife while demanding to be given money. PW2 gave money to the person. They testified that the person then attempted to lock them in a room but the door could not lock. They then saw the person enter into the sitting room where he took a Satellite Dish decoder, two remote controls and a suitcase. The person then left the house. PW2 testified that she was frightened and did not go out of the house after the robbery incident. (PW5) Florence Ibosa who was working in the house of PW1 and PW2, testified that after the robbery she went outside and told the people that they had been robbed. After about thirty minutes a group of people came to the house with the appellant together with the goods which were robbed from the house. PW2 and PW5 identified the said property as the ones which were robbed from their house. They also testified that the appellant was the one who had threatened them and robbed from them the said items. They however did not testify how they were able to identify the appellant, either by giving his description or the clothes that he was wearing at the time.

PW3 George Omwanga testified that as he was at his place of work, he saw people beating a person claiming that he was a robber. He rang the police who came to the scene and took the appellant to the police station. At the scene where the appellant was being beaten, he saw two remote controls, a suit case and a video deck (*most probably he meant the Satellite Dish Decoder*). He also saw a knife besides the appellant as he was being beaten by the members of the public. PW1 testified that when he was informed that his house had been robbed, he rushed to his house and found the appellant outside the house being beaten by a mob. At the scene, he saw a knife, a suit case, satellite dish decoder and two remote controls. He identified the properties to be his. He testified that he immediately called the police who arrived at the scene and took the appellant to the police station. He testified that he was informed that the appellant had been arrested about five hundred metres from his house. PW4 Police Constable James Mureithi testified that he was at the Nakuru police station when the appellant was brought to the police station by PW1 and PW3 on allegations that he had robbed from the house of PW1. He testified that the appellant had injuries which were inflicted by the members of the public who beat him up. He took the appellant to the hospital where he was treated and discharged. He produced the items which were allegedly recovered in the possession of the appellant as exhibits in the trial. When the appellant was put on his defence, he chose to keep quiet.

The duty of the first appellate court is criminal cases, is to re-evaluate and reconsider the evidence adduced before the trial court and reach its own independent determination whether or not the conviction of the appellant should be upheld. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment as to the demeanour of the witnesses. (*See* **Njoroge –vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case against the appellant on the charge of robbery with violence to the required standard of proof beyond reasonable doubt. We have re-evaluated the evidence that was adduced by the prosecution and also carefully considered the submissions which were made before us by the appellant and by Mr. Koech on behalf of the State.

In this case, it is the prosecution's case that the appellant threatened PW2 and PW5 with a knife, robbed them, escaped from the house and was apprehended by the members of the public about thirty minutes after the robbery incident. PW2 and PW5 testified that, as the incident took place at 4.00 p.m., they were able to identify the appellant as the person who robbed them. They identified the appellant when he was brought back by the members of the public after about thirty minutes from the time of the robbery. The two witnesses however did not tell the court how they were able to be positive that it was the appellant who had robbed them. They did not give the description of the person who robbed them and which therefore corresponded with the appearance of the appellant. They did not tell the court the clothes

that the appellant was wearing that enabled them to identify him when he was brought back to the house by the members of the public who had allegedly apprehended him.

PW2 and PW5 testified that they were frightened during the entire robbery incident. PW2 testified that because of shock, she did not get out of the house after the robbery incident. We are therefore of the view that in the hectic circumstances of the robbery, and considering that PW2 and PW5 were frightened when they were threatened with a knife, they could not have been in a position to positively identify the appellant as the person who robbed them. We therefore hold that the two witnesses (*PW2 and PW5*) did not positively identify the appellant as the person who robbed them.

The prosecution further adduced evidence to the effect that the suit case, the decoder and the two remote controls were recovered in the possession of the appellant by the members of the public who administered '*mob justice*' on him. This was about thirty minutes after the robbery. No said member of the public however was called by the prosecution to testify as to the circumstances under which the said items were found in possession of the appellant. The three witnesses who testified as to the circumstances of arrest of the appellant, all gave contradictory evidence. PW1 testified that, after being summoned to his home, he found the appellant had been apprehended by the members of the public and taken to his home. He testified that he called the police to the scene who then arrested the appellant. PW3 testified that he was at his place of work when he saw members of the public beating the appellant on allegation that he had robbed someone. He testified that he called the police and assisted them to take the appellant to the police station. Meanwhile PW5, the investigating officer in this case, testified that he was at the police station when PW1 and PW3 brought the appellant to the police station on allegation that he had robbed PW1 and had been beaten by the members of the public.

The evidence of the three witnesses therefore did not illuminate as to the circumstances under which the appellant was apprehended by the members of the public with said properties which were robbed from PW1's house. No witness connected the appellant with the said stolen properties. No witness testified that the said items were found in possession of the appellant. If one of the members of the public, who allegedly apprehended the appellant, had testified that the said stolen properties were in possession of the appellant, we would have had no hesitation in confirming the conviction of the appellant. As it were, no such evidence exists on record. The properties which were robbed from the house of PW1, were found besides the appellant after he had been beaten by the members of the public. It cannot therefore be said that the said properties were found in his possession. They could well have been planted on the appellant.

The appellant chose not to offer any evidence in his defence. In our view, it was incumbent upon the prosecution to prove its case to the required standard of proof beyond reasonable doubt. In this case, the evidence that was adduced by the prosecution raises doubt as to the guilt of the appellant. Crucial witnesses were not called, and therefore we are unable to uphold the conviction of the appellant. The doubts raised in this case will of necessity be resolved in favour of the appellant. His appeal therefore has merit and is allowed. He is acquitted of the charge of robbery with violence. He is ordered set at liberty and released from prison unless otherwise lawfully held.

DATED at NAKURU this 17th day of May 2006.

M. KOOME

JUDGE

L. KIMARU

JUDGE