



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO. 451 of 1999

PETER ONYANGO OKECH APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Being an appeal from Original Conviction and Sentence in Criminal case no. 1002 of 1999 of the Senior Resident Magistrate's Court Mombasa – B. Maloba)

J U D G M E N T

The appellant Peter Onyango Okech was charged in Chief Magistrate's court Criminal Case no. 1002 of 1999 with the offence of Robbery with Violence contrary to section 291(2) of the Penal Code. The particulars of the charge were that on 28th April 1998 at about 10.15 p.m. at Nyali Estate of Mombasa District within Coast Province jointly with others not before the court while armed with pistols and knives robbed Basta Piero of his three wrist watches, one gold chain and cash shs.45,000/- all valued at Shs.90,000/- and at or immediately after used actual violence to the said Basta Piero. He was tried, convicted of the charge and sentenced to death.

He then appealed against conviction and sentence and put forward 7 grounds to support his appeal. At the hearing of the appeal he appeared in person and offered written submissions in which he contended, inter alia, that he was not at the scene of robbery on the material date. He insisted in his submissions that he was not on duty at the complainants residential premises on the material day. He pleaded with this court to peruse the record of proceedings and judgment in the lower court as well as his submissions in this court and allow the appeal.

Mr. Ogoti who appeared for the respondent opposed the appeal and supported the conviction and sentence. He contended that the appellant was on duty as a security guard on the day of robbery and had opened the complainant's gate for the robbers to gain entry. He had further disappeared from the place of duty after the robbery. According to the prosecution the appellant had used opportunity to rob the complainant.

Six prosecution witnesses testified at the trial. The complainant stated that when he arrived at his house on 20th April at 8.30 p.m. the accused/appellant opened the gate for him. Two people who had guns then pounced on him and demanded ignition keys of his vehicle from him. These are the people who entered his house and robbed him of the items stated in the charge sheet. There was a second guard at the complainant's premises whose hands were tied by the robbers. It is noted that apart from asserting that the accused/appellant was the guard who opened the gate for the robbers the complainant did not give the descriptions of the guard at the time of robbery. The evidence of PW4 Inspect Lucas Waitthaka as to who

was manning the gate at the time of robbery and the events which took place during robbery was hearsay and should not have been admitted by the Honourable Magistrate.

Whereas it is possible that the appellant was on duty and present during robbery there was no evidence that he actively participated in prosecuting the robbery. Indeed while the act of disappearing from duty after the robbery gives rise to strange suspicion as to his involvement this is not a sufficient corroboration of the allegations of robbery. The appellant was charged with a substantive count. The prosecution did not prove each and every element contained in the charge. If the appellant was present at the scene of the robbery and failed to prevent the committal of the crime or report to police the incident he should have been charged with probably an alternative count. The Honorable Magistrate appeared to shift the burden of proof to the accused. Indeed it is noted that in her concluding remarks she did not state that she had found the accused guilty of the charge beyond reasonable doubt. In view of the absence of any other independent testimony on record to corroborate the testimony of the complainant we are inclined to give the benefit of doubt to the appellant.

We accordingly allow the appeal quash the sentence passed against him and acquit him of the charge. The appellant shall be released immediately unless he is otherwise lawfully held.

Judgment delivered at Mombasa this 26th day of September, 2002.

G.A OMWITSA

COMMISSIONER OF ASSIZE

J. KHAMINWA

COMMISSIONER OF ASSIZE

Judgement read in the presence of appellant and Ms. Mwaniki for respondent.