REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO.112 OF 2000
(From Original Conviction and Sentence in Criminal Case No.134 of 1999 of the Chief Magistrate's Court at Mombasa – L. Achode, Mrs. – S.R.M.)

JOHN OMONDI alias LAWI……..APPELLANT

= V E R S U S =

REPUBLIC……..RESPONDENT

JUDGMENT OF COURT

The appellant JOHN OMONDI alias LAWI was charged with two counts of Robbery with Violence contrary to Section 296(2) of the Penal Code and also with Assault Causing Actual Bodily Harm contrary to Section 251 of the Penal Code. The allegation was that the appellant and others who were not before the trial court on 6.1.1999 robbed Ramadhan Juma, In count one and Abdalla Chivuga in count two. The assault charge was in relation to one James Kisianga and was alleged to have been committed two days later on 8.1.1999.

The facts presented by the prosecution were that on 6.1.1999 at about 7 p.m., PW.1 Ramadhan Juma and PW.2, Abdalla Chivuga were, as they, walked home, set upon by a gang of about 7 young people who robbed the first complainant of a shirt, a head cap and one stop watch, all valued Kshs.850/- and the second complainant, a wallet containing Kshs.780/- and an identity card. The two complainants identified one of the attackers. They reported the matter to the Police at Changamwe Police Station.

Meanwhile, on the 8.1.1999 the complainant in the 3rd count, James Kisianga, was walking to a kiosk at Changamwe when he met with the appellant on the way. The appellant asked the complainant PW.4, whether the complainant was a thief and when he did not receive an answer, the appellant cut the complainant on the side of the neck. Complainant went to the Police Station at Changamwe and reported the assault. He filled a P3 and took it to the Police Station after receiving the same from them when he reported. He did not know the attacker's name but he used to see him in the estate. He stated further that when the appellant cut him, he appeared drunk.

In court in his evidence he said he had healed and he had no scar. He, when he reported, to the Police gave the name of "Lawi" as the man who cut him.

All the three complainants in their evidence identified the appellant as the person who with others robbed PW.1 and PW.2 and assaulted PW.4.

The appellant in his defence gave an unsworn statement and stated how he was arrested by people who were looking for either "Peter" or "Lawi" and who believed that he was either of the two. He was taken to the Police Station and subsequently charged with the offences. He knew nothing of the offences and that

no identification parade had been staged for any complainants to pick him.

The trial Magistrate considered the evidence against the appellant adduced by PW.1 and PW.2 and concluded that their evidence corroborated each other's on the issue of theft and also on the fact that appellant used violence against them during the time of robbing them. She also noted in the evidence that the robbers were more than one. The trial Magistrate further noted PW.1's and PW.2's evidence to the effect that before the robbery they knew the appellant by appearance since they used to see him at the estate where he appeared to reside and where he used to roam about. The trial Magistrate further accepted the evidence that the appellant broke ahead from the group of the attackers to seek for a match box from the complainants before he ordered the complainants to stop. The time was 7 p.m. but it was that time of the year when the sun was not setting early, so that it was still day light and this enabled the complainants to mark the appellant's face and features more easily and more permanently. The trial Magistrate also considered the issue of identification as related to the appellant's arrest. A parade was not necessary because when PW.1 and PW.2 reported the robbery, they also indicated that they knew the person who appeared to lead others in attacking them. The Police told them to go and arrest him and bring him to the Station and they went and did so. There was no necessity for identification parade therefore. The trial Magistrate also noted that the appellant in his defence really said little in response to the evidence from the witnesses. He said nothing as to why the witnesses should frame him without any ill will existing between them and the appellant. The trial court thus ruled out any mistaken identification and confirmed same to be reliable, clear and positive. She found the same safe to rely on in proving the case. It is on this evidence that she proceeded to convict the appellant on robbery with violence contrary to Section 296(2) of the Penal Code.

We have considered the grounds upon which the trial Magistrate convicted the appellant. She considered the evidence of PW.1 and PW.2 on the manner the attackers robbed them. She considered the circumstances under which the complainants were robbed. She was satisfied that the circumstances were good for positive identification. The evidence on it came from two witnesses PW.1 and PW.2 and the two corroborated each other and she had no reason not to accept and rely on their evidence. She was entitled to do so and we find no fault in the manner she approached the issue of identification. She also found that no identification parade was necessary as the appellant was arrested and taken to the Police Station by the complainants themselves. She accepted from the evidence that the appellant was in the company of several others during the robbery. She also accepted and established that the appellant and his gang were armed with pangas with which they hit the complainants apparently not using the sharp edges. They forcefully inspected the complainants' pockets using threats and the violence aforementioned. When complainant, PW.1 started to shout for help, the appellant and his group threatened to kill them unless they surrendered their money and kept quiet. The trial court finally established the fact the complainants were robbed of items recorded in the charge sheet which included cash money. The trial Magistrate made a final finding that the charges of robbery with violence contrary to Section 296(2) of the Penal Code, was proved beyond a reasonable doubt and proceeded to convict.

Having carefully considered the evidence, grounds and the points of law the trial Magistrate considered before she convicted, as analyzed above, we are of the opinion that she was completely entitled to convict. We see no fault in her judgment and have therefore no reasons of fact and/or law upon which we could interfere with her judgment and sentence in relation to the two counts of robbery with violence in count one and two after carefully considering jointly the appellant's grounds of appeal.

As to the charge of assault causing actual bodily harm, there was adequate evidence, including medical evidence to prove the charge. The trial Magistrate convicted the appellant on it. We have looked at the evidence and are satisfied that she was right to convict the appellant on it if evidence was the only issue that she ought to have considered. We have examined the circumstances under which the charge was raised. It is our strong view that it was completely unnecessary and risky for the Prosecution to include the charge of assault in a charge sheet containing a count of a serious offence such as robbery with violence unless the same arose from the same transaction. It is not easy to think that the accused could, during the trial, pay any or adequate attention to charge of assault at the expense of that of robbery. Furthermore, the assault charge appears to have occurred on a different date to a different person not affected by the robbery. It is possible therefore that the accused's attention to defend himself to both

charges could easily be divided and possibly confused and the joinder of the counts could lead to the prejudice of the accused's defence. Under those circumstances this court might not leave the resulting convictions to stand.

We have however considered the situation in this case and whether or not it affected the accused's defence. The accused's defence is that he was arrested for nothing and charged with offences he knew nothing about. He fully cross-examined the witnesses on evidence of robbery and assault. He showed open alertness to issues before the court and those against him.

Having considered the kind of defence he finally raised to the charges, we have firmly come to the conclusion the joinder of the charges in this case did not in any cause prejudice or injustice to the accused in any way. We accordingly confirm the conviction on assault causing actual bodily harm.

We note that the trial Magistrate withheld sentencing the appellant in respect to counts two and three until the appellant appeals in respect to the sentence in count one. In that process she failed to pronounce sentence to the counts two and three. We are of the view, however, that she should have pronounced the sentence and then proceeded to put the sentences in abeyance. We accordingly hereby sentence the appellant to death in respect to count two. We also sentence him to two years imprisonment in respect to count three. The sentences to count two and three are hereby held in abeyance upon the 1st sentence being served. It is so ordered.

Dated and delivered at Mombasa this 17th day of September, 2002.

D. A. ONYANCHA

J U D G E

J. KHAMINWA

COMMISSIONER OF ASSIZE