



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL APPEAL NO.27 OF 2019

JOSHUA OTANCHO OCHENGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Original conviction and sentence of 40 years imprisonment by Hon. B. R. KIPYEGON (SRM) in KERICHO CR. Case No.5404 of 2018 delivered on 23/8/2019)

JUDGEMENT

1. The Appellant was convicted with the offence of Robbery with Violence Contrary to Section 296 (2) of the Penal Code and he was sentence to 40 years imprisonment on 23/8/2019.
2. The particulars of the charge were that on 22/10/2018 at Nyabangi Location in Belgut Sub-Location within Kericho County, while armed with a panga, the Appellant robbed **BERNARD KOECH** of a Motor Cycle Reg. No.KMEN 293 U make Bajaj Boxer Red in colour worth KShs.90,000/= and at the time of robbery applied violence against the said **BERNARD KOECH**.
3. The Appellant was faced with a second count of handling suspected stolen goods Contrary to Section 331 of the Penal Code in that on 22/11/2018, at Nyamira Township, Nyamira Sub-County within Nyamira Town, otherwise than in the court of stealing, the appellant dishonestly retained one Motor Cycle Reg. No. KMEN 293 U make Bajaj Boxer red in Colour knowing or having reason to believe the same to be stolen goods.
4. The prosecution called five witnesses. The prosecution evidence in summary was that on 22/10/2018, the Complainant (PW.1) was at work at Chepnyoga. When he was going to his home at 7.30 pm, the Appellant stopped him along the road at Nyabangi and he cut him on the back head and on his hand without uttering award.
5. PW.1 said he knew the Appellant as a Tea Plucker at Cosmas' Farm. PW.1 lost consciousness and when he regained consciousness, he found himself at Litein A.I.C. Hospital the next day.
6. **PW.2 VINCENT KIPKEMOI KORIR** who was the owner of Motor Cycle said he had employed PW.1 to work for him. PW.2 said he learnt PW.1 had been robbed when he went to Hospital. PW.1 told him it is the appellant who had robbed and injured him. PW.2 reported the matter to Sosiot Police Station.
7. On 21/11/2018, PW.2 said the Appellant was arrested with the Motor Cycle at Nyamira. He said he did not know the Appellant and that he first saw him at Nyamira Police Station after he was arrested with the Motor Cycle.
8. The Appellant in his defence in form of submissions in which he tried to find fault with the prosecution evidence. The Trial Court found the Appellant guilty as charged with the offence of robbery with violence Contrary to Section 296 (2) of the Penal Code and sentenced him to forty (40) years imprisonment.
9. The Appellant has appealed to this Court against both conviction and sentence on the following grounds.

(i) THAT the evidence of the prosecution was inconsistent and not sufficiently cogent to satisfy the burden of proof required.

(ii) THAT the prosecution witnesses contradicted themselves and were totally uncooperative.

10. The parties filed written submissions in the appeal. The appellant submitted that the evidence of PW.1 is fabrication since he said the person who attacked him had a weapon and yet he said that he never saw the weapon.

11. The Appellant also submitted that there was a contradiction on the dates the attack took place and also the date the report was made to Sosiot Police Station.

12. The Appellant also submitted that the prosecution evidence was in uncorroborated and further that the Appellant ought to have been accorded the benefit of doubt and acquitted.

13. The Respondent submitted in writing that the prosecution evidence was sufficient as the complainant was able to recognize the Appellant when he stopped him at 7.30 pm on 22/10/2018 and wounded him using a weapon.

14. The Respondent also submitted that the Appellant was known to the Complainant as a Tea Plucker. Further that PW.1 told PW.2 that it was the Appellant who injured and robbed him and the Motor Cycle was recovered one month later and the Appellant arrested and charged with this offence.

15. The Respondent relied on the case of *ANJONONI AND OTHERS -VS- REPUBLIC [1980] KLR 59* where the Court found recognition of an assailant is more satisfactory and more reliable than identification of a stranger.

16. The Prosecution also submitted that the Appellant was found in possession of the Motor Cycle barely a month after the robbery and further that the ingredients of robbery with violence Contrary to Section 296 (2) were proved as the Appellant had a weapon and he injured the Complainant during the robbery.

17. This being a first appeal, the duty of the first Appellate Court is to re-evaluate the evidence before the Trial Court and to arrive at my own conclusion as to whether or not to support the findings of the Trial Court while bearing in mind that the Trial Court had the advantage of seeing the witnesses (see Okeno -vs- Republic.

18. The issues for determination in this appeal are as follows:-

(i) Whether the Appellant was properly identified.

(ii) Whether the prosecution proved the case to required standard in Criminal Cases.

19. On the issue of identification, I find that the Complainant knew the Appellant prior to the incident and he was able to recognize him at the time of the attack.

20. I find that recognition is more reliable than identification of a stranger. The Appellant was found operating the Motor Cycle one month after the robbery and this further corroborated the evidence of the Complainant.

21. The submissions by the Appellant that the prosecution evidence was contradictory does not hold any water since the evidence is clear that the appellant was robbed on 22/10/2018 and on 22/11/2018, the Appellant was arrested in possession of the Motor Cycle at Nyamira County. I find that the Appellant did not challenge the prosecution evidence and his defence submissions merely attempted to criticize the prosecution evidence.

22. I find that the prosecution evidence was cogent and is based on recognition of the Appellant. The Complainant upon gaining consciousness reported that it was the Appellant who had robbed him and further, the Appellant was arrested on 22/11/2018 in possession of the Motor Cycle.

23. I find that the prosecution established the elements of the charge of robbery since the Appellant was armed and he inflicted injury on the Complainant immediately before the robbery.

24. It is immaterial that the Complainant did not see the weapon. There is evidence that the Complainant sustained serious injuries which left him unconscious. PW.3 testified on the injuries and hence the testimony of the Complainant on the injuries sustained was corroborated.

25. The discrepancies referred to by the appellant are minor and they do not object the veracity of the prosecution evidence.

26. I find that there is evidence that the Complainant was injured and robbed on 22/10/2018 and that the Appellant was properly identified as the person who inflicted the injuries on the Complainant and robbed him of Motor Cycle Reg. No. KMEN 293 u make Bajaj Boxer. Further the Appellant was arrested while in possession of the Motor Cycle on 22/11/2018 month after the robbery.

27. The Appeal herein lacks in merit and the same is dismissed.

28. This Court upholds both the conviction and sentence of 40 years imprisonment.

Delivered, signed and dated at Kericho this 9th day of April, 2021.

A. N. ONGERI

JUDGE