REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 111 OF 2018

SAMSON OTIENO OGUCHO......1ST APPELLANT

VINCENT OTIENO OKORO........2ND APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(***Being an appeal against the conviction and sentence of the Chief Magistrate's Court at Kisumu***

(Hon. J. N. Wambilyanga) dated the 20th November 2018 in Kisumu CMMCCRC No. 542 of 2017)

JUDGMENT

SAMSON OTIENO OGUCHO and **VINCENT OTIENO OKORO** were convicted for the offence of **ROBBERY WITH VIOLENCE**, contrary to **Section 296 (2)** of the **Penal Code**. Both of them were sentenced to 20 Years Imprisonment.

1. In their appeal, the 2 Appellants have raised exactly the same issues, and they have also filed identical submissions.

2. The 5 grounds of appeal can be summarized as follows;

(1) The evidence of Identification was unsound,

hence unsafe to base a conviction upon.

(2) The ingredients of the offence of Robbery

with Violence were not supported by the

evidence adduced.

(3) The prosecution witnesses lacked

credibility.

(4) The evidence had many gaps as regards

the place of arrest and the roles played

by the appellants.

(5) The prosecution case was poorly

investigated, hence unsafe to base conviction

upon.

3. Being the first appellate court, I will re-evaluate the evidence on record, whilst taking into account the issues raised by the Appellants.

IDENTIFICATION

4. It is common ground that the incident took place at night, inside a car.

5. The Appellants submitted that there was no evidence about how the Complainant identified them in darkness.

6. They also said that the Complainant did not give descriptions about them, nor did she testify about the length of time she observed the Appellants.

7. Therefore, the Appellants submitted that the evidence on the alleged identification raised more questions than answers, thus being unsafe to base a conviction upon.

8. A perusal of the evidence tendered by the Complainant shows that the vehicle she had boarded, was intercepted by police officers, whilst she was inside it together with the 3 persons, (including the Appellants).

9. The Complainant testified that she had identified the 1st Appellant well, before she was blind-folded. She said that the 1st Appellant was the driver of the vehicle, and that she sat next to him, on the co-driver's seat.

10. As regards the other 2 assailants, **PW1** testified that she saw them when she turned round to look behind, whilst they were inside the vehicle.

11. During cross-examination **PW1** said that the incident took place at night, after 9.30p.m. She also said that the lights inside the vehicle were off.

12. In my considered view, the Complainant most probably identified the 1st accused, who was the driver of the vehicle. I say so because the Complainant conversed with him before entering the vehicle, and she then sat next to him, on the front passenger seat.

13. At the time the Complainant was offered a lift in the assailants' vehicle, she had no reason to worry at all. Therefore, there was nothing that could have posed any hindrance to the positive identification of the 1st accused.

14. However, the same cannot be said about the other 2 assailants, as they were sitting behind the Complainant. It is not clear how long she looked at them, or how well she could see them inside the dark vehicle.

15. Accordingly, if conviction was founded upon the identification of the accused persons, I would have been hesitant to hold that the Complainant had positively identified the 2nd and 3rd accused persons.

INGREDIENTS OF THE OFFENCE

16. As the Appellants have pointed out in their submissions, the offence of **Robbery with Violence** is defined as follows, at **Sections 295** and **296 (2)** of the **Penal Code**;

> ***"295. Any person who steals anything,***
>
> ***and, at or immediately before or***
>
> ***immediately after the time of stealing***
>
> ***it, uses or threatens to use actual***
>
> ***violence to any person or property in***
>
> ***order to obtain or retain the thing stolen***
>
> ***or to prevent or overcome resistance***
>
> ***to its being stolen or retained, is guilty***
>
> ***of the felony termed robbery."***
>
> ***"296 (2) If the offender is armed with any***
>
> ***dangerous or offensive weapon or***

instrument, or is in company with

one or more other person or persons,

or if immediately before or immediately

after the time of the robbery, he wounds,

beats, strikes or uses any other personal

violence to any person, he shall be

sentenced to death."

17. In the circumstances, the Appellants submitted that the key ingredient of the offence was *"stealing"*.

18. If the assailants stole an Itel mobile phone and Kshs 1,200/= from the Complainant, the Appellants submitted that those items ought to have been recovered from them, as it was said that they had been arrested in the act.

19. However, it is only the sum of Kshs 750/= which was recovered from the Appellants' co-accused, **ROLEX**.

20. The Appellants submitted that the prosecution failed to prove the connection between the money which was recovered and the money that had allegedly been stolen from the Complainant.

21. The Appellants' view was that the denominations of the money adding up to Kshs 1,200/= ought to have been disclosed to the police before the police recovered the money. Secondly, the Appellants argued that the Complainant should have demonstrated the unique features of the money which was recovered from Rolex, so that the court could verify that what was recovered is what had been stolen.

22. During cross-examination the Complainant said that she had Kshs 500/= in one pocket, and Kshs 700/= in another pocket.

23. She did not know how the money disappeared, but she was aware that the accused persons carried out a search on her.

24. PW2, PC GEORGE NJOROGE, testified that the police recovered Kshs 750/= and 7 mobile phones, after intercepting the assailants.

25. PW1 had lost an Itel phone, and 2 of the 7 mobile phones that were recovered were Itel. It is one of those 2 Itel phones that was said to belong to the Complainant.

26. However, although 7 phones were recovered, the inventory prepared by **PW2** showed six (6) phones.

27. When **PW2** was asked why the inventory had only six phones, he said that that was because one Itel phone had already been returned to the claimant before the inventory was prepared.

28. PW4, IP THOMAS MUTURI, who had been the In-Charge of Flying Squad Centre, Kisumu, also testified that the police recovered 7 phones from the assailants.

29. However, the inventory listed only six phones. The explanation for that was, that the Itel phone belonging to the Complainant, had been given back to her, so that she could use it to call her parents.

30. PW4 pointed out that the accused persons were present when he prepared the inventory, and they signed it.

31. During cross-examination, **PW4** said that the accused persons were arrested when the crime was still going on.

32. PW4 said that the Complainant had informed him that Rolex is the person who had taken money from her. That information prompted the police to search the 3 accused persons; and it is then that the police recovered Kshs 750/=.

33. At the time of the arrest of the accused persons, the Complainant was found inside the same vehicle. She was blind-folded and her mouth was strapped with masking tape. Her hands were tied with a rope.

34. If the Appellants were arrested whilst the offence was still being committed, and because the Complainant was in their company, I hold the considered opinion that there was no need for the police to conduct an Investigation Parade. Therefore, even if there might have been a possibility that the Complainant had not positively identified either of the Appellants, that would not have been significant in the circumstances prevailing.

35. The need for an Identification Parade arises when a suspect is arrested in the absence of the Complainant or of any identifying witness who had seen the suspect when the offence was being committed. It is in those circumstances that it becomes useful to ascertain whether or not the identifying witness could pick out the suspect from a parade.

36. I now revert to the issue concerning the ingredients of the offence of **Robbery with Violence**; with particular emphasis on the aspect of *"Stealing."*

37. As the Appellants submitted, if they were arrested whilst they were still committing the offence, the police should have been able to recover the items which they had just stolen from the Complainant.

38. However, the police only recovered Kshs 750/=, out of the sum of Kshs 1,200/= which the Complainant lost to the robbers.

39. As regards the failure by the Complainant to testify about some unique features which would have identified the recovered money as hers, I hold that it would be most impractical to expect people to always mark unique features of money which they have, as if they were anticipating that they would be robbed.

40. It is in cases such as those in which a person has asked for a bribe that the law enforcement officers could arrange to provide the Complainant with money which has unique features that would enable them easily disprove any assertions by the suspect, that the money in his possession belonged to him.

41. Therefore, the absence of any unique features on the money recovered from the robbers herein did not weaken the prosecution case in any manner.

42. That is all the more so, when it is noted that none of those who were arrested and charged, claimed ownership of the money.

CREDIBILITY OF WITNESSES

43. The Appellants submitted that the Complainant did not meet the test of credibility, because the evidence did not establish that her phone was lost and was then recovered.

44. As the Appellants submitted, when the evidence tendered by the witness or witnesses had inconsistencies, contradictions or material discrepancy, the court could not distinguish between the truth and untruth.

45. In this case the Appellants pointed at the difference between the inventory, (which cited 6 phones) and the oral testimony in court, (which cited 7 phones).

46. Secondly, the Appellants pointed at the difference between the money stolen (being Kshs 1,200/=) and the money recovered (being Kshs 750/=).

47. The prosecution witnesses were all consistent in their testimonies regarding the Complainant's phone, an Itel, which was recovered. They all said that the said phone was one of the 7 that was recovered from the robbers, although it was then not listed in the inventory.

48. Similarly, all the prosecution witnesses testified that only Kshs 750/= was recovered from the robbers, even though the Complainant had lost Kshs 1,200/= to the said robbers.

49. Having found that the evidence tendered by the prosecution was consistent, I find that that gives rise to one concern, ironically.

50. The said concern is that the phone which had been stolen from the Complainant was immediately returned to the Complainant, yet the Investigating Officer should have appreciated that the said phone was an essential exhibit at the trial.

51. In my understanding, when an inventory is prepared, the person preparing it would want it to incorporate every item which was recovered from the suspects. Therefore, the reason put forward to explain the omission of the Complainant's phone from the inventory, does not sound convincing.

52. Meanwhile, the Complainant had testified that she had carried 700/= in one pocket and another Kshs 500/= in the other pocket.

53. She said that although she did not know how the money disappeared from her pockets, the accused had searched her.

54. If the robbers stole money from the pocket which had 500/=, it would mean that they also got a further Kshs 250/= from the Complainant's other pocket.

55. But if the robbers stole money from the pocket with Kshs 700/=, it would mean that they took Kshs 50/= from the Complainant's other pocket.

56. I find it difficult to appreciate the selective stealing from the Complainant's pockets, which yielded a total of Kshs 750/= when the police searched the robbers.

57. In the result, although the evidence largely points at the Appellants, as being amongst the persons who robbed the Complainant, I find that the prosecution did not prove the case against the Appellants beyond any reasonable doubt. Accordingly, the benefit of the little doubt that I have, must be given to the Appellants, as I hereby do.

58. I therefore allow the appeal, quash the convictions of both Appellants, and set aside the sentence against both of them.

59. I order that unless they are or either of them is otherwise lawfully held, the Appellants shall be set at liberty forthwith.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 2ND DAY OF JUNE 2021

FRED A. OCHIENG

JUDGE