



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO 73 OF 2019

ABEL CLIFF MAGENA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal against the conviction and sentence at Kisii Law Courts before Hon. S.K. Onjoro (SRM) the judgment was delivered on 7<sup>th</sup> of August 2019)*

JUDGMENT

1. The appellant, **Abel Cliff Magena** was charged in Kisii Chief Magistrates Court Criminal Case No. 21 of 2018 with the offence of robbery with violence, contrary to **Section 296(2) of the Penal Code, Cap 63, Laws of Kenya**, and was sentenced to 15 years imprisonment. The particulars of the charge were that on 1<sup>st</sup> January 2017 at Kereri area, Kisii township within Kisii County robbed SARAH BOSIBORI AROGO of a handbag valued at Kshs 1,000/- and cash Kshs 3,100/- and immediately before such robbery beat the said SARAH BOSIBORI AROGO.
2. He had also faced an alternative charge of handling stolen property contrary to section **322 (1) (2) of the Penal Code**. The particulars of the charge were that on 1<sup>st</sup> January 2017 at Kereri area, Kisii township within Kisii County otherwise in the cause of stealing dishonestly retained one handbag valued at Kshs 1,000/- and cash Kshs 2,700/- knowing or having reason to believe them to be stolen property.
3. The appellant pleaded not guilty to the offence and the matter proceeded to trial where the prosecution called 4 witnesses to prove its case against the appellant. After a full trial, the appellant was found guilty as convicted on the main count and sentenced to 15 years imprisonment. The appellant aggrieved with his conviction and sentence has raised 10 grounds of appeal in his Memorandum of Appeal filed in court on 22<sup>nd</sup> August 2019.
4. This being the first appellate court I am to reanalyze and reexamine the evidence on record and come to a conclusion while taking cognizance of the fact that I did not have the opportunity to see the demeanor of the witnesses (*see Okeno v Republic [1972] EA 32*).
5. The prosecution evidence was as follows. Sarah Bosibori Arogo (Pw1) testified that on the material day she boarded the appellant's motorcycle to Elimu Centre at 6am. While they were between Kereri Girls High School and Kisii School the appellant diverted towards a rough road. She told court that the appellant started speeding and she jumped off. She testified that:

*'He came to where I was and started strangling me, he said if I shouted he will stab me. I managed to free from his grip and screamed. He choked me severally. I got free and he went towards the main road. He then came back speeding intending to hit me and I jumped aside. He then got a hold of my neck but I screamed again.'*
6. She testified that the appellant afraid that people heard her screams so he grabbed her bag and took off. She ran towards the main road found another motor cyclist and told him what transpired and together they followed the appellant. She pointed out the appellant to the motor cyclist who asked the other riders to join in the pursuit of the appellant. They saw the appellant at a petrol station. At that point she called her brother in law, Douglas Mongare Elijah Mongare (Pw2), who came and picked her up. She testified that the appellant took her bag which had her personal effects (hair comb, oils, lipstick and pens) and Kshs 3,100. Pw2 later came back with her bag, she was treated at Kisii Level 6 hospital.
7. Pw2 testified that he received a call from Pw1 informing of the incident and he left and met with the other riders. He dropped Pw1 home and proceeded with the hunt for the appellant. They followed the appellant and arrested him at Omorema but he denied attacking Pw1. Pw1 was therefore brought and she identified the appellant. The appellant took them to his home and he entered his house. He testified that after a few minutes a young boy came out with a bag and gave it to them. When they went into the house to get the appellant they found he had escaped.

8. Daniel Nyameino (Pw3) told court that he is a clinician at Kisii Teaching and Referral Hospital. He recalled that on 2<sup>nd</sup> January he examined Pw1 who had a history of being assaulted by a person known to her. Pw1 had bruises on the right knee and pain on the neck. The left ankle joint was bruised and swollen. Wafula Ojiambo No. 96293, the investigating officer (PW4) testified that the appellant was brought to the police station by members of the public who had arrested him. He took statement of the witnesses and preferred the current charge against the appellant.

9. The trial court upon evaluating the evidence led by the prosecution witnesses, found that the appellant had a case to answer and placed him on his defence. The appellant denied committing the offence and testified that he was at his home at 2:00 p.m. when some people came into his home, bundled him up and put him in the boot of a car claiming that he had committed an offence.

10. The appeal came up for hearing on 30<sup>th</sup> October 2019. The appellant relied on his written submissions and also made oral submissions while the prosecution made oral submissions. The appellant in his written submission contends that Pw1 testified that the incident occurred at 6:00 a.m. but was silent on the source of light. He also submitted that the people who arrested him did not come to court and neither was the motor bike brought to court. The child who through the bag did not say where he got the bag.

11. The appeal was opposed by the prosecution. Mr. Otieno, State Counsel, submitted that the prosecution had proved its case beyond reasonable doubt. He advanced that the appellant was arrested immediately after committing the offence. Pw1 was able to follow the appellant and Pw2 recovered the bag stolen from the complainant. Although the appellant managed to escape he had been identified and was arrested.

#### **DETERMINATION**

12. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of **Oluoch v Republic [1985] KLR 549** where it was held that:

***Robbery with violence is committed in any of the following circumstances:***

***a) The offender is armed with any dangerous and offensive weapon or instrument; or***

***b) The offender is in company with one or more person or persons; or***

***c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person .....***"

13. Positive identification, other than the ingredients for robbery with violence, is also crucial to the prosecution case. In **Suleiman Kamau Nyambura v Republic [2015] eKLR** the court held that:

***"In addition [to the ingredients], and what is crucial in a criminal trial is also the requirement to prove in addition to there being one of the set out ingredient of robbery with violence is the need to positively identify the assailant/s in question."***

14. In this case the only witness who saw the appellant was Pw1 who gave testimony that the appellant beat her up and stole her handbag. Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely be the basis of a conviction (see **Wamunga v Republic [1989] KLR 424**).

15. Pw1 testified that the incident took place at 6:00 a.m. but no evidence was led as to the source of light. I find that the evidence of Pw1 on the issue of identification was consistent as she was the appellant on his bike, after she jumped off he got off the bike and started to strangle her. He left her and returned again with the bike in speed wanting to hit and she jumped aside and then he got hold of her neck and strangled her again. She screamed and then he left her. She managed to run to the road and got another motor bike and they followed the appellant. She called Pw2 who came and she pointed the appellant to him, Pw2 and other riders followed the appellant. She was not present when he was arrested but she pointed him to those who followed him.

16. The appellant was also linked to the offence by virtue of being in possession the complainant's bag which contained her personal effects – hair comb, oils, lip stick and pens. Pw2 was present when the appellant person was arrested testified that the appellant led them to his house. The Court of Appeal in the case of Isaac **Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v. Republic Cr App. No. 272 of 2005** stated as follows:

***"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.***

***In other words, there must be positive proof:***

***i. that the property was found with the suspect;***

***ii. that the property is positively the property of the complainant;***

***iii. that the property was stolen from the complainant;***

*iv. that the property was recently stolen from the complainant.*

*The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”*

17. Pw2 testified that the appellant entered his house after he was arrested and thereafter a young boy came out and gave them the stolen items and told them that the appellant was in the house. However when they entered the house the appellant had escaped. The appellant was later arrested on the same day by member of the public and Pw1 identified the items found at the appellant’s home as hers. The appellant did not offer any explanation of how he came into possession of the stolen items that could shake the prosecution case. The Court of Appeal in ***Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008***, observed that;

*“Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden.”*

18. The appellant also submitted that the prosecution cases was marred with contradictions and inconsistencies that ought to have been resolved in his favor. He pointed out that Pw2 testified that Pw1 was brought to identify the appellant after he was arrested contrary to Pw1’s evidence which was clear that she was not there when the appellant was arrested and was informed of his arrest via phone. The Court of Appeal in ***Erick Onyango Ondeng’ v Republic NBA CA CRA No. 5 of 2013 [2014] eKLR*** observed that:

*“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.” (Emphasis mine)*

I find that the contradictions in regard to Pw1 and Pw2 do not impeach their credibility as witnesses.

19. Although the appellant was dissatisfied that the prosecution failed to call the other members of public who arrested him this court is alive to the provisions of **section 143 of Evidence Act (Cap 80) Laws of Kenya**. The section provides that:-

*“143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact”*

*Although the prosecution must avail all witness necessary to establish the truth and whose evidence appear essential to the just decision of the case, no particular number of witnesses is required for the proof of any fact; and that the prosecution is not obliged to call a superfluity of witnesses (see **Richard Munene v Republic [2018] eKLR**). Although the prosecution did not call all persons who made the arrest they led sufficient evidence to establish their case.*

20. Ultimately, having considered all the evidence adduced before the trial court, the grounds of appeal raised by the appellant, the submissions and the law, I affirm the appellant’s conviction. On the issue of sentence I note that the trial court considered the appellant’s mitigation and the circumstance of the offence before meting out the sentence. The offence committed is serious. Considering all the facts mitigation and period spent in remand, I reduce the sentence imposed to 13 years from the date of sentence. It so ordered.

**Dated, signed and delivered at Kisii this 12<sup>th</sup> day of February 2020**

**R. E. OUGO**

**JUDGE**

**In the presence;**

**Appellant In Person**

**Mr. Otieno Senior State Counsel of DPP**

**Ms Rael Court Assistant**