



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL APPEAL NO. 32 OF 2019

ERICK JOSHUA OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment, conviction and sentence of Hon. R. K. Langat, Senior Resident Magistrate in Rongo Senior Resident Magistrates Court Criminal Case No. 201 of 2018 delivered on 30/01/2019)

JUDGMENT

1. **Erick Joshua Ochieng**, is the Appellant in this appeal. He was charged with *robbery with violence* and an alternative count of *handling stolen goods*.

2. The particulars of the charge of robbery with violence were as follows: -

On 1st day of June 2018, at Koderobara Sub-location in Rongo sub-county within Migori County in the republic of Kenya, while armed with a rungu unlawfully an intentionally robbed SETH DANDE OLUOCH of his Itel mobile phone IMME No. 355518094906247 valued at Kshs. 2000/= and Kshs. 1500/= and immediately before such robbery you used actual violence to the said SETH DANDE OLUOCH.

3. The Appellant denied the charges and he was tried with a total of six witnesses tendering evidence in support of the prosecution's case. **PW1** was a Clinical Officer stationed at Rongo Sub-County Hospital who filled and produced the complainant's P3 Form. A village elder testified as **PW2**. **PW3** and **PW5** were casual labourers engaged by the complainant. **PW3** was also a neighbour to the Appellant. **PW4** was the complainant one **Seth Dande Oluoch**. The complainant was a cousin to the Appellant. The Investigating Officer who testified as **PW6** was one **No. XXX PC. Rogers Wafula** attached at Kamagambo Police Station. For the purposes of this appeal I will refer to the witnesses in the sequence in which they testified.

4. At the close of the prosecution's case the Appellant was placed on his defence and gave sworn defence. He admitted meeting **PW4**, but denied robbing him. He instead stated that it was **PW4** who confronted him as he was asleep in his house. The Appellant did not call any witness.

5. By a judgment rendered on 30/01/2019 the Appellant was found guilty of robbery with violence and accordingly convicted. He was sentenced to 30 years' imprisonment.

6. Dissatisfied with the conviction and sentence the Appellant lodged an appeal upon grant of leave by this Court. He contended that he was not properly identified as the assailant, that his right under **Article 50(2)(h)** of the **Constitution** was infringed as he was not given an Advocate at State's expense. He further contended that his defence was not considered and that the offence was not proved. He prayed that his appeal be allowed.

7. The State opposed the appeal and contended that the charge was rightly proved and the Appellant placed at the scene of crime as the assailant. It was submitted that the defence was rightly considered and rejected. The State further submitted that the sentence was constitutional as mitigations were considered. This Court was called upon to uphold the conviction and sentence and to dismiss the appeal.

8. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

9. In discharging the foregone duty, I have carefully read and understood the proceedings and judgment of the trial court as well as this appeal. I must state that the trial court captured the evidence quite well and I hereby incorporate the same as part of this judgment by reference. I will endeavor to deal with the following issues: -

- (a) Whether the Appellant was the assailant;**
- (b) Whether the offence was proved as required in law; and**
- (c) The sentence.**

I will consider each of the above issues singly.

(a) Whether the Appellant was the assailant:

10. As said I have carefully gone through the evidence and the impugned judgment. PW4 was attacked during the day. He knew the Appellant well as his cousin. PW4 was by then undertaking some contractual works near the weighbridge in Rongo town and had employed PW3 and PW5 as his casual labourers. PW4 also used to see the Appellant who was mostly at the Rongo stage. He even assisted the Appellant severally.

11. The trial court analyzed the evidence well. It correctly captured the facts of the case and being guided by binding decisions applied the correct legal principles on identification by recognition. The court further rightly found that the evidence of PW4 was corroborated by PW3 and PW5. (See **R vs. Turnbull & Others (1973) 3 ALL ER 549**).

12. Having revisited the evidence, the law and the defence, I am in total agreement with the trial court that the Appellant was rightly placed at the scene of crime as the assailant. The recognition of the Appellant was not in error.

(b) Whether the offence was proved as required in law:

13. The Appellant was convicted on the count of robbery with violence. The offence of robbery with violence is a creation of **Sections 295 and 296(2)** of the Penal Code. For clarity purposes I reproduce the sections as tailored: -

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, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

14. The offence of robbery with violence is made up of two parts. The first part is the *robbery* and the other part is the *violence*.

15. *Robbery* is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: *Theft* and *the use of or threat to use actual violence*.

16. On the other hand, the offence of *robbery with violence* is committed when robbery is proved and further if any one of the following three ingredients are established: -

(a) The offender is armed with any dangerous or offensive weapon or instrument, or

(b) The offender is in the company of one or more other person or persons, or

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

17. In this case there is credible evidence that although the Appellant was alone he was armed with a wooden stick which he used to hit PW4 on the legs until he fell. The wooden stick was dangerous or offensive weapon in the circumstances of the case.

18. There is further evidence that the Appellant used actual violence on PW4. PW4 so testified. PW1 produced various exhibits including treatment notes and a P3 Form in confirming that PW4 sustained serious injuries. PW3 and PW5 further found PW4 injured and carried him to hospital in Rongo town.

19. As to whether there was theft, there is as well evidence to that end. PW4 lost a total of Kshs. 1, 500/= and his phone. The money was never recovered, but the phone. From the record it can only be reasonable and believable that PW4 lost the items in the attack and that constitutes theft.

20. The upshot is that all the ingredients of the offence of robbery with violence against the Appellant were proved. The Appellant was hence rightly found guilty and convicted.

21. Before I consider the appeal on sentence, I will look at whether **Article 50(2)(h)** of the **Constitution** was infringed. The Appellant was charged on 04/06/2018. By then the **Legal Aid Act No. 6 of 2016** was in place. The Appellant had the option of applying for consideration of legal representation under the said **Act**. Failure to do cannot be visited upon the trial court.

22. The appeal on conviction is hereby disallowed.

(c) The Sentence:

23. The Appellant was sentenced to 30 years' imprisonment. I have also carefully perused the sentencing proceedings. The court considered the mitigations and the circumstances under which the offences were committed. It then rendered the sentence.

24. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

25. I have considered all the issues in this matter and noted that the sentencing court took into account all the relevant issues. I do not see how I can fault the sentencing court on its exercise of discretion. The appeal on sentence fails.

26. The upshot is that the entire appeal is unsuccessful. It is hereby dismissed.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of February, 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Erick Joshua Ochieng, the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant