



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 51 OF 2018

DESMOND ODANGA OMBETE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the conviction and

sentence of the Senior Principal Magistrate's Court at Maseno (Hon. R.S.

Kipng'eno SRM) dated the 22nd May 2018 in Maseno SPMCRC No. 1000 of 2013]

JUDGMENT

The Appellant **DESMOND ODANGA OMBETE**, was convicted for the offence of **Robbery with Violence** contrary to **Section 296(2)** of the **Penal Code**.

1. He and his co-accused, **VICTOR MAMBWA**, were each sentenced to Life Imprisonment.
2. The Appellant has challenged both the conviction and the sentence.
3. The first ground of appeal was that the Complainant never identified the Appellant during the robbery.
4. He noted that the robbery took place in the dead of the night, and that the Complainant was woken up from her sleep. It was the sound of a loud bang on the door which woke up the Complainant.
5. When she went from her bedroom, to go and check what was happening, the Complainant was confronted by many people, who then set upon her, using crude weapons.
6. During the robbery, which was accompanied by the assault on her, light from the spotlights used by the robbers, were shone on the Complainant's face.
7. According to the Appellant, when light was shone in the eyes of a person, the said person would be unable to identify the person shining the light on him or her.
8. In this instance, the Appellant pointed out that the Complainant actually confirmed that she did not see the Appellant during the robbery.
9. He also said that because the Complainant said, during cross-examination, that she had never seen the Appellant prior to the time she saw him in court, that was confirmation that the Complainant had not identified him.
10. The second point raised by the Appellant concerned the Boots which the Complainant's husband identified as his. The said boots were allegedly recovered from the Appellant.
11. Although the witness said that he identified the boots because they had a mark on them, the Appellant submitted that the prosecution never proved that the alleged mark was so unique that it could only be found on the boots belonging to that witness.
12. It was the opinion of the Appellant that the prosecution ought to have provided an Independent Witness.

13. In his view, it was not enough that the witnesses who testified were a husband and wife.
14. Finally, the Appellant submitted that the Complainant failed to testify about the length of time it took her to identify her assailants.
15. In any event, the Appellant believes that in her statement to the police, the Complainant ought to have specified the duration within which she identified the Appellant as being one of the persons who robbed her.
16. In answer to the appeal, Miss Gloria Barasa, learned State Counsel, submitted that all the ingredients of the offence of **Robbery with Violence** had been proved by the prosecution.
17. The Respondent said that the robbery incident lasted for more than an hour, which was therefore, sufficient time for the Complainant to identify the Appellant.
18. Secondly, as the boots belonging to the Complainant's husband were recovered from the Appellant, the Respondent submitted that the *Doctrine of Recent Possession* was properly applied by the trial court, in placing the Appellant at the scene of crime.
19. The boots in question were described by the Respondent as unique; and their ownership was said to have been proved through the production of a receipt.
20. Being the first appellate court, I have re-evaluated all the evidence on record and I have drawn therefrom my own conclusions. However, I have also borne in mind the fact that I did not have the benefit of observing the witnesses when they gave evidence.
21. The Complainant (**PW1**) was asleep inside her house when she was awoken by a very loud bang at the door.
22. At the time, which was about 1.00a.m, **PW1** was alone in the house.
23. Upon being woken up she put on the lights, and then went into the corridor which leads to the sitting room.
24. Along the corridor, **PW1** met a group of people, who shone their spotlights in her face.
25. The said people hit her all over her body, using the crude weapons which they had.
26. They then led her to the bedroom, where she was forced to produce Kshs 32,870/=, after being threatened with death.
27. They also packed other items in the house. Those items included shoes, shirts, sports shoes, bed sheets and blankets.
28. It was the evidence of the Complainant that the incident lasted for almost an hour, and that during that whole time the electric lights were on inside the house.
29. **PW1** testified that when she reported the incident to the police, she told them that she could identify the persons if she saw them.
30. However, when the police organized an Identification Parade, the Complainant was unable to identify any of the suspects.
31. It was that failure by the Complainant to identify any person in the Identification Parade which led the Appellant to submit that the Complainant cannot have identified him at the scene of crime.
32. If the Appellant was in the Identification Parade, and if the Complainant failed to pick him out, that would have been an indication that the Complainant had not identified the Appellant.
33. However, in this case, **PW1** learnt, later, that "*the 1st accused*", who is the Appellant herein, had refused to attend the Parade.
34. It therefore follows that if the Appellant had refused to attend the Parade, he could not have been identified by the Complainant at the said parade.
35. Accordingly, the failure to identify him in the parade does not imply that the Complainant had not identified the Appellant at the scene of crime.
36. **PW2**, Benson, is the husband to the Complainant. On the material day, when the Complainant was robbed, **PW2** was not at home.
37. On 16th August 2013, the witness saw the Appellant with his boots. **PW2** tried to catch the Appellant, but the latter pushed him, causing **PW2** to fall on the boda boda.
38. **PW2** described the boots as follows;

"They are special safety boots that we use at Kenya

Pipe Lines. They had metal at the front. When I was buying the boots I discovered a number 44 written on one which was faded while the other side was not. I had even argued with the person selling them to me over that. One had initial C.E. faded while the other didn't. Both didn't have inner soles."

39. During cross-examination, PW2 read from the statement, and reiterated that he had told the police that his boots had No. 44 (visible); the other had 44 worn out.

40. He further pointed out that he had told the police about the initials and that the boots had no inner soles.

41. In my considered opinion, the features described by the witness were so unique that they could enable the boots stand out from any other boots of a similar kind.

42. The learned trial magistrate had occasion to look at the exhibits. Having done so, he made the following observation;

"I had occasion to look at the exhibits. The boots indeed had a metal front at the toes, but the identifying features mentioned were not readily discernible, and I could not tell, having taken over the matter and proceeded under Section 200(3) of the CPC."

43. I understand that statement to be a confirmation that the identifying features were present on the boots, although they were not readily discernible.

44. Even if the said identifying features were not readily discernible to the learned trial magistrate, the same cannot be said about the owner of the boots, who had used them for over one year.

45. He had noted the features right from the time he was purchasing them. He therefore knew what he was on the look-out for, in order to be able to verify whether or not the boots were his.

46. Secondly, the Appellant was taken to his house immediately after the police arrested him.

47. PW2 accompanied the police, and an impromptu search was conducted at the Appellant's house.

48. The search yielded a pair of shoes belonging to the witness. The said shoes were identified by the blue paint on it.

49. It is significant that PW2 produced a photograph in which he was wearing the same pair of shoes.

50. I am in agreement with the learned trial magistrate that the Appellant was found in possession of shoes belonging to PW2.

51. In the circumstances, as the Appellant was unable to offer an explanation about how he came to be in possession of the property belonging to the witness, and because the said property was recovered not long after the Complainant was robbed, the doctrine of recent possession was properly invoked.

52. Accordingly, the conviction was founded upon solid evidence. It is therefore upheld.

53. I also uphold the sentence as it is within the law.

DATED, SIGNED AND DELIVERED AT KISUMU

This 5th day of February 2019

FRED A. OCHIENG

JUDGE