



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

CRIMINAL APPEAL NO. 26 OF 2017

ELISTAS EREGAE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 273 of 2014 by

the Senior Resident Magistrate – Hon. W. Washika delivered

on 29th January 2015 at Lodwar)

JUDGEMENT

1. The Appellant **ELISTAS EREGAE** was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** the particulars of which were that on the 7th day of May 2014 at Kakuma Refugee in Turkana West District within Turkana County jointly with others not before the court robbed **PATRICK OWAA** of a bicycle make PHOENIX FRAME NO. BS100900571, 50 kg wheat flour and Kshs.2,500/= all valued at Kshs.19,000/= being the property of **PATRICK OWAA**.

2. He pleaded not guilty, was tried, convicted and sentenced to serve ten (10) years imprisonment. Being dissatisfied with the said conviction and sentence he filed this appeal and raised the following grounds:-

- a) The prosecution case was full of contradictions.*
- b) His defence was dismissed without cogent reasons.*
- c) The prosecution case was not proved to the required degree.*

3. When the appeal came up for hearing before me the Appellant who was not represented filed handwritten submissions which he relied upon while Mr. Kahuthu for the State opposed the appeal.

SUBMISSIONS

4. On behalf of the Appellant it was submitted that the evidence of **PW1** was not consistent or reliable and further that very vital prosecution witnesses were not called. The court was therefore urged to find an adverse inference against the prosecution case as held in the case of **BUKENYA v UGANDA [1972] EA 594**. It was stated that the person who was found with the bicycle by the police was released and never called as a witness so as to give an account on how he came to possess the said bicycle. It was finally stated that he was not properly identified and that no identification parade was conducted to fortify his identification.

5. On behalf of the prosecution it was submitted that there was no contradiction in the prosecution and reliance was placed on the case of **GAMBA SHAKANTA & ANOTHER v REPUBLIC, CRIMINAL APPEAL NO. 92 OF 2017** but without submitting copy thereof to support the contention that witnesses must not reproduce exact details and any inconsistency signify honesty on the part of the witness.

PROCEEDINGS

6. This being a first appeal the court is required to re-evaluate the evidence tendered before the trial court and to come to its own conclusion though giving an allowance that it did not have the advantage of seeing and hearing witnesses as was stated in the case of **OKENO v**

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M RUWALA v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.”

7. The prosecution case was that on 7/5/2014 at 0200 hours as **PW1 PATRICK OWAA VINCENT** was sleeping, he was attacked by unknown six (6) people armed with crude weapons who broke to his house. It was his evidence that he was able to see the attackers through the use of moon light and a torch which the attackers had. He was in his house with his wife and when the attackers heard a police motor vehicle on patrol they left his house enabling him to report to the police. After one month he saw someone riding his bicycle which he identified. He went with the rider to the police who said he had borrowed it.

8. **PW2 PAULINE ASINYEN** stated that on 1/6/2014 the accused took a bicycle to her to keep for him and after two days he came alone for it and gave it to one Abednego who went with it to town from where he was arrested. **PW3 PC BERNARD KULUNDU** received the report from **PW2** and on 3/6/2014 the same came to the station accompanied by another person saying that he had found him with his stolen bicycle. It is this person who led to the arrest of the Applicant who told him that he had bought the same from a Sudanese within Kakuma Refugee Camp. He stated in cross-examination that the complainant identified the Appellant as the attacker.

9. When put on his defence the Appellant gave unsworn statement and stated that he was arrested by the police over an offence he did not commit.

ANALYSIS AND DETERMINATION

10. From the record of appeal and the submissions herein I have identified the following issues for determination:-

- 1) *Whether the charges against the Appellant were proper.*
- 2) *Whether the Appellant was properly identified.*
- 3) *Whether the prosecution case against the same was proved on the required degree.*

11. On whether the charge sheet against the Appellant was defective; it is noted that the Appellant was charged with the offence of robbery with violence contrary to **Section 296 (2)** but it is clear from the charge sheet herein that vital ingredients of the offence were missing thereby making the offence as charged that of robbery thereby falling foul of the Court of Appeal decision in **ISAAC OMAMBIA V REPUBLIC [1995] eKLR** in which the court stated:-

“In this regard, it is pertinent to draw attention to the following provisions of Section 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: "Every charge or information shall contain, and shall be sufficient if it contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence".

12. The question which the court has to answer is as to whether the defect was one which would be cured under the provisions of **Section 382** of the **Criminal Procedure Code** and as was expounded in the case of **JMA v REPUBLIC [2009] KLR 671** to wit:-

“It is not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the Criminal Procedure Code was meant to cure such an irregularity where prejudice to the Appellant is not discernible.”

13. Whereas the Appellant was charged with the offence of robbery with violence it is worth noting that he was convicted of the offence of simple robbery and therefore find that no prejudice was suffered by the Appellant. The defect on the charge sheet was not fatal as the Appellant was able to defend himself despite the same missing essential ingredients.

14. On whether the Appellant was properly identified;- the evidence before the trial court is that the complainant was attacked at night. **PW1** alleged that there was moon light and that the attackers had a torch which aided him in identifying them. It is however clear that there was no evidence to show the intensity of the said lighting and whether the conditions were ideal for identification. The complainant did not know the Appellant before the date of attack, save for the evidence of **PW2** there is no any other evidence connecting the Appellant with the offence charged as the person whom he allegedly gave the bicycle and from whom the same was recovered was never called to testify, neither was there any identification parade conducted upon the arrest of the Appellant so as to connect him with the offence charged.

15. In convicting the Appellant the trial court was not sure that the prosecution case was proved beyond reasonable doubt as it had this to say:-

“The prosecution case is believable as prosecution witnesses 1 – 3 evidence is corroborative . . . at this point the prosecution case seems reliable.” (Emphasis added)

It is trite law that the prosecution must prove its case beyond reasonable doubt and not to present a case which “seems” or is “believable”.

Having analyzed the evidence tendered before the trial court, I am satisfied that the Appellant was not positively identified and vital prosecution witnesses who would have connected him to the offence were not called thereby making an adverse inference that had they been called their testimony would have been adverse to the prosecution case coupled with the fact that a bicycle is an item which can exchange hands very fast thereby eliminating the doctrine of recent possession in the case against the Appellant.

16. It therefore follows that the Appellant's conviction was not safe and find merit in the appeal herein which I hereby allow and quash the conviction and set aside the sentence. The Appellant shall be set free forthwith unless otherwise lawfully held and it is so ordered.

Dated, delivered and signed at Lodwar this 5th day of March, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

_____ *for the Respondent*

_____ *for the Appellant*

Accused - _____

_____ *- Court assistant*