REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 57 OF 2018

MORRIS OGUYO OBANJO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence

imposed in Maseno Criminal Case Number 245 of 2017

by Hon. R.S.Kipngeno (SRM) on 20.5.18)

JUDGMENT

The Trial

1. Appellant has filed this appeal against *judgment, conviction and sentence* on a charge of robbery with violence contrary to section 296(2) of the Penal Code Cap 63 Laws of Kenya.

PROSECUTION CASE

2. The prosecution called a total of four (4) witnesses in support of the charge. **PW1 Jacob Nyamongo**, the complainant recalled that on 7th June, 2017 at about 9.00 pm, he arrived home with a friend and were attacked at his gate by 5 men that he did not now before the material night. He stated that 2 of the men had pistols, 2 had pangas and one had a metal rod. He also stated that he was struck with the metal rod and robbed of a phone and Kshs. 2,700/- after which the men escaped. It was his evidence that his friend raised an alarm and members of public that went to their rescue caught up with the appellant from whom was recovered a pair of pliers and a metal rod and he was handed over to the police and was later charged. The witness stated that he identified the appellant with the assistance of moonlight and torch light from the appellant's phone. **PW2 Nicholas Marabu Nyandikisi** testified that he was in company of the complainant when they were attacked and that he managed to give chase and arrest the appellant from whom he recovered a metal rod. **PW3 Mercy Jakobul** a clinical officer examined complainant and found him with a cut wound on the scalp. The witness produced complainant's P3 Form in which she assessed the degree of injury as harm. **PW4 PC Waithera Virginia**, the investigating officer stated that appellant was escorted to the police station by PW1 and PW2 at 11.00 pm on 7.6.17 and they reported that he had robbed PW1 and injured him. The witness stated that the appellant was searched by her colleague and from him was recovered a metal rod and a pair of pliers. The witness confirmed the evidence by PW1 and

PW2 that the appellant had been injured by the time he arrived at the police station.

DEFENCE CASE

3. At the close of the prosecution case, appellant was ruled to have a case to answer and was placed on his defence. In his sworn defence appellant stated that on the material night, he was going home when he was attacked by the complainant and PW2 who caused him serious injuries including loss of three teeth after which he was taken to Maseno police station and was charged with an offence that he did not commit.

4. The learned trial Magistrate considered the evidence and on 20.5.18, finding the charge proved, sentenced Appellant to 20 years imprisonment.

The Appeal

5. Aggrieved by this decision, appellant lodged the instant appeal. In the petition of appeal filed on 6th June, 2018, appellant raised 7 grounds. In his written submission filed on 13th December, 2018, the appellant condensed the grounds of appeal to four grounds **THAT**: -

1. Plea was not read in a language that he did not understand

2. That circumstances of identification were not favourable

3. He was convicted on unsound circumstantial evidence

4. His defence was not considered

6. When the Appeal came up for hearing on 13th December, 2018, Appellant indicated that he was relying wholly on the grounds of appeal and submissions filed on 13th December, 2018. Mr. Muia, learned counsel for the state submitted that the prosecution case had been proved beyond reasonable doubt in that appellant was identified by PW1 and PW2 as one of the assailants.

ANALYSIS AND DETERMINATION

7. This being a court of first appeal, I am guided by the ruling of the Court of Appeal decision in the case of **OKENO VS. REPUBLIC [1972] E.A.32**. The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that. In dealing with this appeal, I will consider the grounds of appeal as follows: -

a. Language

8. Section 198 of the Criminal Procedure Code provides that:

(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.

9. **Article 49 (1)** of the Constitution on the other hand provides that an arrested person has the right;

(a) To be informed promptly, in a language that the person understands, of; the reason for the arrest, the right to remain silent and the consequences of not remaining silent.

10. I have perused the original court record and while the language used is not indicated, there's evidence that the appellant responded to the plea and stated that "SI KWELI". In my mind the plea was properly taken in a language understood by the appellant. In any case, appellant was not convicted on his own plea of guilt. The fact that the appellant cross-examined the prosecution witnesses during the trial leads to the

conclusion that the trial was conducted in a language understood by him.

11. From the foregoing, I do not detect violation of the provision of **Article 49 (1)** of the Constitution and Section 198 (1) of the Criminal Procedure Code in any way.

b. Identification of appellant

12. In the case of **Maitanyi –vs- Republic (1986) KLR 198** the Court of Appeal stated: -

> **"……That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.**

13. This position was restated in the recent case of **John Muriithi Nyagah v Republic [2014] eKLR**, where the Court of Appeal held: -

> **"in testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc."**

14. It is on record that PW1 and PW2 did not know appellant before the material date. The incident took place between 9.00 and 10.00 pm. Complainant told court that there was moonlight and that the appellant had a phone torch which assisted him to identify the appellant. PW2 did not give details of how he was able to identify the appellant as one of the assailants. The trial court did not make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the appellant before arriving at the conclusion that the appellant had been positively identified. In my considered view, the quality of identification evidence was critical and the trial magistrate erred in placing reliance on identification that was flawed.

c. Recovery of the metal rod

15. Complainant told court that a metal rod and a pair of pliers were recovered from the appellant by members of public that arrested appellant whereas PW2 stated that he gave chase of the robbers and arrested the appellant from whom he recovered a metal rod. PW3 on the other hand, stated that appellant was searched by her colleague at the police station and from him was recovered a metal rod and a pair of pliers.

16. The court record shows that the trial court heavily relied on the evidence of the recovery of the metal rod in its finding that the appellant was one of the assailants. At the close of the prosecution case, it was not clear if the metal rod and a pair of pliers were recovered by members of public, by PW2 or by a police officer at the station. Clearly, the trial court erred in placing reliance on such contradictory evidence regarding recovery and erred in not giving the appellant the benefit of doubt.

d. Was appellant's defence considered?

17. As stated hereinabove, appellant stated that he was returning home on the material night at about 9.30 pm when he was attacked by PW1, PW2 and others who then handed him over to police and alleged that he had robbed them. There is evidence that appellant was assaulted and serious injured on the material night. In view of unsatisfactory identification evidence and the contradictory prosecution case, I am of the considered opinion that the learned trial magistrate ought to have appropriately considered the defence and as stated hereinabove given the appellant the benefit of the doubt.

Disposition

18. From the foregoing, I have come to the conclusion that the prosecution case was not proved beyond reasonable doubt. Accordingly, I quash the conviction and set aside the sentence and unless otherwise lawfully held, order that appellant shall be released and set free forthwith.

T.W.CHERERE

JUDGE

DELIVERED AND SIGNED IN KISUMU THIS 14TH DAY OF MARCH 2019

F.A.OCHIENG

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - In Person

For state - Muia