



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: D.S. MAJANJA J.**

**CRIMINAL APPEAL NO. 85 OF 2018**

**BETWEEN**

**EZEKIEL MOKUA OBACHI .....1<sup>ST</sup> APPELLANT**

**DANIEL NYAKUNDI OMARI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from the original conviction and sentence of Hon. M. M. Nafula, SRM dated 23<sup>rd</sup> November 2017 at the Magistrate's Court at Ogembo in Criminal Case No. 1843 of 2016)***

**JUDGMENT**

1. The appellant, **EZEKIEL MOKUA OBACHI** and **DANIEL NYAKUNDI OMARI** were charged and convicted of the offence of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on 10<sup>th</sup> July 2016 at Maroo Village, Gucha South Sub-County within Kisii County, the appellants jointly with others not before the court while armed with dangerous weapons namely a blunt object and a wire robbed **PAUL OMARI MOKONO** of a motor cycle registration number **KMDY 334F** make Bajaj red in colour valued at Kshs. 100,500/-, cash Kshs. 35,750, one cell phone make TECNO valued at Kshs. 2,500/- and a long trouser valued at Kshs. 500/- all valued at Kshs. 139,250/- and immediately before the time of such robbery used actual violence against the said **PAUL OMARI MOKONO**.
2. The appellants were sentenced to life imprisonment and have now lodged this appeal. The appellants complain that the prosecution did not prove its case beyond reasonable doubt. Counsel for the 1<sup>st</sup> appellant submitted that the complainant, in his testimony, did not lead evidence to show that anything had been stolen from him. He pointed out that none of the stolen items were recovered and that complainant did not mention their names in the first report to the police.
3. Counsel for the respondent conceded the appeal on the ground that the assailants were not properly identified particularly given that the report of the incident was made two months after the robbery and that totality of the evidence was insufficient to support a conviction.
4. Notwithstanding the concession, I must satisfy myself that the concession is well founded and in doing so I am alive to the duty of the first appellate court. It is that I am required to re-appraise the evidence and reach my own conclusions as to whether to sustain the conviction bearing in mind that I neither heard or saw the witnesses testify (*Okeno v Republic [1972] EA 32*).
5. The complainant, Paul Omari Mokono (PW 1) testified that on 10<sup>th</sup> July 2016, he borrowed a motorcycle from Samuel Ocharo (PW 2) to take the appellant to Nyansembe. As he proceeded there with the appellants on board, they alighted and before he could react, he was hit on the back of the head and he collapsed. He later found himself at his cousin's home where he could not recall what happened. After treatment at home, he finally reported the matter at Nyamarambe Police Station on 7<sup>th</sup> September 2016.
6. PW 2 confirmed that PW 1 borrowed the motorcycle from him on the afternoon of 10<sup>th</sup> July 2016 after informing him that he was going to Nyansembe. PW 1 did not return that evening and he was unable to answer his call, He was later informed by other boda boda riders that they had seen someone fitting the description of the PW 1 at Maroo Police Post and when he went there he found PW 1 in a state of distress with injuries on the neck as if he had been strangled. He told the court that PW 1 later told him that he had found the people who had stolen the motorcycle. In cross-examination he confirmed that he reported the loss of his motorcycle on 11<sup>th</sup> July 2016.
7. PW 1's brother, Vincent Ombogo Ayiega (PW 3) recalled that on the material day while he was at work, PW 2 called him to inquire

about the whereabouts PW 1 and the motorcycle. Since he did not know, he asked him to call again. He tried to contact PW 1 without success. It is only one the next day, he was informed by other boda boda riders that a person had been found in a sugarcane plantation in Awendo. As he was on his way, he was informed that the person was at Maroo Police Police. He found that it was his brother who had been assaulted and was unconscious. He escorted him to Etago Hospital for treatment but was referred to Kisii Level 6 Hospital where he was treated and discharged on the same day. PW 3 testified that PW 1 could not remember what took place but when he started recalling what happened, he mentioned that he had been injured by the 1<sup>st</sup> appellant.

8. Godfrey Munyoro (PW 4), a clinical officer at Etago Hospital, testified produced the treatment notes for PW 1. According to the records, PW 1 was brought the 12<sup>th</sup> July 2016 under police escort. He looked sick and his clothes were stained with mud. He was disoriented and had a circumferential neck bruise which indicated strangulation, his left hand was bruised and his shoulder tendered. He also had bruises on the right shoulder. PW 4 also prepared the P3 medical form on 11<sup>th</sup> September 2016 after examining PW 1.

9. Corporal Lauren Ouya (PW 5) testified that the Investigating officer had been transferred. He gave an account of the investigation. In cross-examination, he stated that the first report of the incident was by PW 2 who reported on 11<sup>th</sup> July 2016.

10. The 1<sup>st</sup> appellant did not give his defence as he jumped bail and was only arrested after the judgment had been delivered. The 2<sup>nd</sup> appellant in his unsworn statement denied the offence and stated that he was arrested on 20<sup>th</sup> September 2016 at Sirare.

11. The offence of robbery with violence under **section 296(2)** of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR*, *Oluoch v Republic [1985] KLR 549* and *Ganzi & 2 Others v Republic [2005] 1 KLR 52*).

12. In this case it is clear that PW 1 was in possession of the motorcycle belonging to PW 2 when it was stolen from him after he was assaulted by two persons and became unconscious. The level of violence inflicted on him including attempted strangulation was confirmed by PW 2 and PW 4. Although he did not mention that he had money and a phone in his evidence in chief, he admitted in cross-examination that he had cash and a phone. I am satisfied the elements of robbery with violence were satisfied by the prosecution.

13. The main issue is whether the prosecution proved that the appellants were the assailants. It is not clear from the evidence what time the incident took place but it appeared to have taken place in the late afternoon or early evening. The appellants were not strangers to PW 1. In fact, the 1<sup>st</sup> appellant was the uncle to PW 1. PW 1 was not related to the 2<sup>nd</sup> appellant but he had been with him on that day and had carried both him and the 1st appellant. The appellants' contention, which is supported by the respondent, is that the evidence when the matter was first reported, whether the appellant was named as the assailants went to the quality of the evidence and hence undermined the conviction.

14. I have considered the evidence. According to the P3 form, PW 1 reported to the police station on 11<sup>th</sup> July 2016. The initial treatment notes show that he was taken to Etago Hospital on 12<sup>th</sup> July 2016 at about 9.00pm. The initial treatment notes show that he was attacked by three unknown assailants. It is clear though that at the time he was disoriented and may not have been able to recall the assailants. PW 3 testified that PW 1 was able to recall what happened about a week after he was discharged from Kisii Level 5 Hospital. However, it was not until 20<sup>th</sup> September 2016 that the appellants were arrested. The trial court did not have the benefit of the Investigating Officer's evidence to account for when the appellants were reported and why they were arrested over two months later yet they were known to PW 1. All these facts have a bearing on the quality of the evidence in assessing the issue of identification.

15. I also note that the 1<sup>st</sup> appellant was not given an opportunity to present his defence to the charges against him. Although he had jumped bail, when he was arrested and brought before the court, the judgment had been read and the court proceeded to convict and sentence him. His right to a fair trial guaranteed under **Article 50** of the Constitution was violated when he was denied the opportunity to present his defence.

16. I therefore allow the appeal, quash the conviction and sentence. The appellants are set free unless otherwise lawfully held on a separate warrant.

**DATED and DELIVERED at KISII this 3<sup>rd</sup> day of APRIL 2019**

**D.S MAJANJA**

**JUDGE**

Mr Nyandika, Advocate for the 1<sup>st</sup> appellant.

2<sup>nd</sup> appellant in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.