



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 103 OF 2018

NICHOLAS ODHIAMBO OMERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the original conviction and sentence in Criminal Case No. 2705 of 2016

Republic vs NICHOLAS ODHAMBO ALIAS OMERA in the Principal Magistrates' Court

at Kapsabet by M. C. KESSE, Principal Magistrate on the 31st day of October 2018]

JUDGMENT

1. NICHOLAS ODHIAMBO OMERA (the appellant) was convicted on a charge of robbery with violence Contrary to Section 296 (2) and sentenced to death. The particulars of the charge were that on 5th August 2016 at **KAPSABET** township **KCB** area within **NANDI** county, he jointly with another not before the court, robbed **GIDDY ONDARI** of Motor cycle registration **No. KMDV 282 M** make **HONDA, RED IN COLOUR**, engine **No. SDH, 52FM1 – 363-21360** chasis **No. BF – OJA 3094FS401357** valued at Ksh.100,000, and at or immediately before, or immediately after the time for such robbery used actual violence to the said **GIDDY ONDARI** by cutting him on the head using a panga.

He denied the charge.

2. GIDDY WINTER ONDARI (PW1) was a boda boda rider employed by **KIM ONGOTE** (PW2, using motor cycle Registration **No. KMDV 282 M Honda** (Red). On 5.08.2016 at about 10.30pm, he was at the stage opposite **SASA PETROL STATION**, waiting for a client, when 2 youthful male approached him and requested to be taken to **KCB**.

However when he got to **KCB**, as he waited for them to pay him, one of the passengers attacked him using an axe to cut his head, and he lost consciousness. He woke up 2 weeks later to find himself at **Moi Teaching and Referral Hospital (MTRH)** the incident occurred at night and PW1 did not even know the passengers.

He left hospital one month later, half paralyzed, but was readmitted in February 2017.

3. At the stage, PW1 had seen one **OBADIAH** who tried to stop him but his 2 passengers did not want him to stop. It is this **OBADIAH** who later told him he knew the 2 passengers he had ferried and that **OMERA** was one of them. However PW1 did not know **OMERA**, as it was a dark night and he could not tell who he was ferrying. He was robbed of the motor cycle which was never recovered.

4. KIM ONGOTE (PW2) confirmed he had given his motor cycle **KMDV 282 Honda (Red in colour)** to PW1 to operate boda boda business.

On 5.8.2016 he received information that PW1 had been robbed of the motor cycle and was hospitalized. A search for the motor cycle yielded nought. Meanwhile **OBADIAH** informed him that he had seen PW1 ferrying the appellant on the motor cycle and that shortly thereafter he heard that PW1 was injured. **OBADIAH** named the passenger as **OMERA**.

5. A search was mounted for the appellant who upon seeing PW2, ran towards the Police Station and PW2 followed him there PW2 produced receipts for the motor cycle, a logbook and an inspection sheet as Exhibit. The motor cycle was never recovered.

6. **OBADIAH KIPRONO ROTICH** (PW3) had just locked up his shop on 05.08.2016 at about 10:30pm and gone through **SASA** Petrol Station and **CHOMA** when he saw **TOTI GIDDY** who was ferrying 2 passengers and he tried to stop **GIDDY**, but the passengers beckoned to the rider to ride on.

PW3 then went to **DESTINY**, boarded a motor cycle and went home. 15 minutes later, he received a call from **KIM** (PW2) that the motor cycle had been stolen and **GIDDY TOTI** was hospital with injuries.

PW3 knew one of the passengers as **OMERA** who had a reputation as a bad boy. The other was **GLADE**.

Meanwhile an earnest search was mounted for the attackers and using a mole, they were able to get information that the appellant had called his girlfriend **ZENA**.

On cross examination PW3 stated;

“I saw you on the motor cycle at night. You were at Naivas. The security lights were on. I knew the motor cycle very well...”

7. On re-examination, he was categorical that the motor cycle he saw belonged to PW2 and he knew the registration number as **KMDV 282M** as he had bought it together with PW2. He also knew the appellant very well as he had a “bad boy” reputation, having brushed with the law in past occasions.

8. **ZENA JEPKOECH** (PW4) was outside **CLUB DESTINY** on 5.8.16 at about 10.30pm, when she saw the appellant boarding a motor cycle from **DESTINY** going towards the mosque. He was with another person, she recognized him because he called her and there was electricity light burning and to crown it all, he was his ex-boyfriend.

9. On 15.8.2016, the appellant called **ZENA**, but her husband **ALEX OLUOCH** received the call and told her to go to **KICHINJIO** and that was how the appellant was lured to his arrest. She clarified that **OMERA** is **NICHOLAS ODHIAMBO**.

On cross examination she stated;

“You came close to me and you showed me a panga.

The victim (PW1) was examined by **DANSON GITONGA** at Kapsabet County Hospital who found that he had a deep cut wound on the left side of the head with massive bleeding. He also had left sided body weakness and associated numbness

He confirmed that PW1 had lost consciousness after the attack and the possible weapon was a sharp object. The degree of injury was assessed as harm.

10. Const. **OMONDI TULA** (PW6) received a report about the incident and later the appellant who had been apprehended was handed over to him.

11. The appellant in his unsworn defence stated that he sells groundnuts and was at the stage on 15.08.2016 when he was apprehended by 3 Motor cycle operators who forced him to go to the Police Station. It was his contention that he had a grudge with **KIM** and **OBADIAH** over **ZENA**, and they had vowed that he would one day regret.

12. The trial magistrate held that the evidence sufficiently proved that PW1 had been robbed of the motor cycle in the course of which he had sustained injuries inflicted by his passengers.

The defence was rejected as being weak and lacking elaboration.

13. The appellant was aggrieved by the findings saying the prosecution did not prove its case beyond reasonable doubt, and the evidence was falsified and skewed.

14. Further that his defence was rejected unfairly. In opposing the appeal, **Miss Mumo** on behalf of the State submits that PW3 clearly saw the appellant being ferried by PW1 on the motor cycle. PW4 also confirmed that she saw the appellant boarding the complainant’s motor cycle and had a panga. She knew him very well as he was her boyfriend.

The complainant was seriously injured after the violent attack thus satisfying an ingredient of robbery with violence.

15. Counsel further submitted that the defence did not shake the prosecution’s case as the appellant claimed had a grudge with PW3 yet he never raised it during cross examination, nor did he make reference to PW4’s evidence who also saw him on that date.

16. The appellant responded that the prosecution witness’s evidence was doubtful because whereas PW3 said he was wearing a white jacket, PW4 said it was green. Further that whereas PW1 claimed they were two passengers, PW4 said he was alone. There is no dispute that PW1 was injured and robbed of the motor cycle on the date in question.

The main issue revolves around identification of his attackers. PW1 had confirmed that he never to see and know who his passengers were. PW3 stated in his evidence in chief that when he saw PW1 coming from Sasa stage and riding towards **NAIVAS – SOGENA EQUITY**

junction, he stopped him to ask why he was working late, he saw PW1 ferrying 2 passengers.

“...One was in a white jacket, another was in a black jacket. The one in a white jacket was in the middle, the one in a black jacket was behind... I knew the passengers. The one after the rider was Omera, ... I know Omera as a bad boy. He usually breaks the law frequently. ...On passenger is in court. He is called Omera, he was seated after the driver...”

He maintained on cross examination

“I saw you on the motorcycle at night. You were at Naivas. The security lights were on...”

PW4 stated;...at about 10.30pm. I was outside club Destiny. I saw Omera boarding a motorcycle from Destiny going towards the Mosque. They boarded a boda boda. I saw him together with another one riding. I recognized him because he called me. There was light, electrical lights were on...before he boarded, he had a panga on the belt of his pocket. He is my ex-boyfriend. In minutes later, I heard someone had been cut at the Mosque and a motor cycle had been stolen... the accused was dressed in a greenish jacket, sportfish in nature and a jeans trouser (blue in colour).”

On cross examination she stated:

“You came so close to me and you showed me a panga... I saw you boarding someone else’s motorcycle. You boarded the motor cycle alone... I saw you with a green jacket and blue trouser.”

It must be borne in mind that the appellant was known to both PW3 and PW4 very well. Both were able in physically identifying him with the aid of electricity lights – but each gives

- a) different description of the clothes he wore
- b) A different account of the number of people on the motor cycle

PW3 suggests that the green jacket was worn by the other passenger which PW4 says the appellant was alone, and was the done wearing the green jacket.

17. Is it possible that the appellant boarded a different motor cycle outside **Destiny**, alighted then went to board PW1’s motor cycle. How far or close is **Sasa Petrol Station Stage** from the **Mosque**?

18. From PW1’s description he left **Sasa** went through **NAIVAS, KNUT, KAPSILE** before getting to **KCB**. He did not mention **Mosque** or **Destiny** – which would suggest that the motor cycle he boarded at Destiny was different from the one he boarded at Sasa. That would explain why PW4 said he was alone.

It is instructive that PW4 did not see the face of the rider nor did she give the motor cycle’s registration number. Whether the appellant then exchanged jackets with his additional company is not clear, but what is very clear is that

- a) He was well known to PW3
- b) PW3 was able to see all the three people on the motor cycle with the aid of security lights
- c) PW3 identified him **NOT** because of his manner of dress, but by physical appearance.

19. I hold and find that the contradiction in the dress description is not fatal as to warrant interfering with the trial court’s finding.

The evidence presented proves that

- a) PW1 was attacked by the appellant who was in the company of another
- b) Before being robbed, there was violence meted on him
- c) He was robbed of the motor cycle
- d) Identification was free from error by observations made in the earlier part of the judgment.
- e) Consequently the conviction was safe and is upheld. Taking into consideration the value of the property, the nature of violence meted, the residual effects of the violence on PW1 who remained unconscious for 2 weeks and was discharged with partial paralysis –and for what – to rob someone who was simply performing his task to earn an honest living of ferrying passengers – I do not think the spirit of **Muruatetu & Anor’ V R Sc.** 2018 can even attempt a curtsy at him. He is not deserving of such consideration and I hold that the service meted out was apt.

20. The appeal therefore lacks merit and is dismissed.

DATED, SIGNED and DELIVERED at ELDORET this 9th day of May 2019.

H. A. OMONDI

JUDGE