



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL CASE NO. 17 OF 2018

MARTIN ODUOR ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against death sentence by Hon. Barasa (PM) at Eldoret Law Courts in the offence of Robbery with violence Contrary to Section 296 (2) of the Penal Code delivered on 14th March 2018)

JUDGMENT

1. The appellant (**MARTIN ODUOR ONYANGO**) was convicted on a charge of robbery with violence Contrary to Section 296 (2) of the Penal Code and sentenced to death.

The particulars of the charge were that on 4th January 2016 at **KINGONGO** estate, **ELDORET WEST** Sub-county, within **UASIN GISHU** County, jointly with others not before court, he robbed **TOBIAS WANJALA** of a hooper worth Ksh.5000/- and immediately after the time of such robbery, wounded the said **TOBIAS WANJALA**.

He denied the charge.

2. **TOBIAS WANJALA WASEMA** (PW1) was asleep inside his house within Kingongo. On 14.01.2016, when he heard the sound of his gate being opened at about 1.30am. He woke up his wife and peeped through the window – he saw some seven people getting into the compound and head for his house. There were security lights on the road which illuminated the compound very well. The men forced open his door, and when PW1 tried to raise an alarm, they aimed to cut him on the head with something which looked like a panga. He blocked the weapon using his right hand, and the hand got chopped off completely.

3. The gang had locked up the other tenants houses from outside. They took away PW1's hooper, then left PW1 lost consciousness and woke up at Moi Teaching Referral Hospital. He stated;

“I saw the person who cut me. I had seen him clearly through the window before he entered my house, while still carrying the panga. He moved closer to me with the panga and tried to cut me on the head but I blocked it... his accomplices ran away leaving him in my house. I struggled with him before he cut me with the panga. The house was dark but my wife put on electric light. By the time the lights were put on, the man was still in the house heading towards the door. I saw him clearly inside the house. He had a black trouser and a black top... I saw him at close range...he is somebody I used to see prior to the incident, we lived in the same estate. I have been seeing him close to one year prior to the incident...”

4. On cross examination PW1 was categorical that he knew the appellant very well and even gave his name to police when he recorded his statement. He clarified that his wife switched on the lights as he was struggling with the appellant. PW1 also explained that in the course of the struggle, he grabbed a wallet from his attacker and found the appellant's national identity card, (which he did not hand over to police immediately) and he never handed it over to police.

5. PW2 **MARGARET ONYANGO OCHIENG**, who was the landlord confirmed that her rental houses at Kingongo fell under attack of robbery where the tenants were locked up in their houses. She was woken up by her husband as the robbers got into the compound, and heard the tenants screaming. By the time she and her husband got out to give help, she realized that one tenant's hand had been chopped off and he had lost consciousness – she named the tenant as **TOBIAS**.

She however did not see the robbers and she did not know the appellant. However she confirmed that a wallet was recovered at the scene although she did not see the identity card.

6. **DR PAUL RONO** (PW3) who examined PW1 confirmed that he had been chopped off and he classified the degree of injury as grievous

harm.

The P3 form and discharge summary were produced as exhibit at the trial.

7. In his sworn defence, the appellant stated that while he was at his place of business some eight people confronted him, one person asked “*Ni huyu*” and someone answered in the affirmative, before they all set upon him beating him until he lost consciousness. They took away his bicycle, wallet and National Identity Card. When he came to, he was at the police station. He maintained that he was a resident of **TYRE MBILI** estate and operated a boda boda bicycle. He told the trial court that he did not know PW1 nor did they live in the same estate.

8. The trial court in its judgment noted that although the incident occurred at night, the scene was well lit by electricity lights which illuminated the compound and enabled PW1 to see the appellant through the window even before he got into the house.

9. Further, that the appellant was someone he used to see in the locality even before the incident and got to see him at close range on that night.

The trial magistrate was cautious about relying on the evidence of a single identifying witness but pointed out that;

a) The witness was consistent in explaining what happened on that night and how was able to identify the appellant the appellant.

b) The compound was well lit

c) The appellant was not a stranger to PW1

The trial magistrate thus concluded that the circumstances were optimal for positive identification and this was identification by recognition, therefore more reliable, and there was no possibility of mistaken identity.

10. The trial magistrate also took into account the fact that the appellant’s wallet was recovered at the scene, but that the national identity was not handed over to police and declined to rely on the wallet or identity card. However he pointed out that even without those two items the evidence on record was still sufficient to sustain a conviction.

11. The appellant was aggrieved by the findings and appealed on grounds that the evidence was fatally insufficient.

b) Circumstances for identification were not favourable

c) the alleged recognition lacked cogent facts

d) He was not represented by counsel

e) The death sentence was illegal and violated the Bill of Rights under the spirit of the Constitution of 2010.

f) Prosecution witness evidence was contradictory.

12. The appellant canvassed his appeal through written submission saying although the complainant claimed to be with his wife, she was not called as a witness to support his claims about opportunity for identification, and no reason was given for failure to call her.

It was his contention that she was a crucial witness and the court ought to draw an inference that if she was called as a witness, her evidence would have been adverse to the prosecution.

13. It was his further submission that the opportunity for identification was not favourable as it was not established how long PW1 had him under his observation, how often he had seen the appellant prior to the incident and being a single identifying witness, there was the possibility of error. That in any event he never told PW2 that he had recognized his attackers.

14. The appellant also questioned the credibility of PW1, wondering how he could have managed to grab the wallet off him, yet his hand had been chopped off. He cast doubt on claims about the wallet being taken from him at the scene of attack saying PW1 said in cross examination that;

“There is a wallet which was recovered at that time where members of public were beating you up. This is in town...”

15. In opposing the appeal, **Ms Mumu** submitted that the prosecution proved the key ingredients in a charge of robbery with violence, namely that the appellant was in a gang of seven, the victim was injured through use of a dangerous weapon, and robbed of his property. It was her submission that PW1 had ample opportunity to see and recognize the appellant and the identification was by recognition – especially because none of the gang members covered their faces. That there was no contradiction on the evidence.

She urged this court not to interfere with the sentence saying it was legal and merited.

16. I have considered the respective arguments.

(1) The complainant claimed to have been in the company of this wife during the entire incident. Infact it was courtesy of his wife switching on the lights that he was able to confirm that the person attacking him was the same one he had seen outside. Given his evidence of the circumstances surrounding the incident, I think his wife was a critical witness to confirm whether his claims of the lighting system was true. Indeed it is curious that none of the other neighbours who rushed to his aid, and whose doors had been locked from outside, was called as a witness, at least to confirm whether the compound was well lit.

17. Curiously the land lady who came out of the house upon being woken by the sound of screaming tenants never made reference to the lighting system.

18. In **BEKENYA and 5 OTHERS V UGANDA, 1972 E.A** the court stated as follows.

(ii) the prosecution must make available witnesses necessary to establish the truth, even if their evidence may be inconsistent;

(iii) the court has the right, and the duty, to call witnesses whose evidence appears essential to the just decision of the case;

(iv) where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

19. No reason was given for the failure to call the wife or any of the other tenants, and the only reasonable inference to draw is that were she to be called, she would most probably have given evidence adverse to the prosecution.

20. There is also the issue on PW1's credibility. He stated that during a struggle with the attacker, he grabbed a wallet from him, and realized it contained the appellant's identity card. He initially stated that he never gave the wallet or National Identity Card to police.

Later he tried to improve on this and said that actually the wallet and National Identity Card were picked at his door step by neighbours who went to his aid. Needless to say none of the neighbours testified to confirm this.

He then tried to patch up this by recording a further statement saying that after he recovered he took the wallet and identity card to police. The trial magistrate properly rejected placing any reliance on this items as being evidence to confirm that the appellant was at the scene.

However it is important to note that later on PW1 on cross examination stated that he picked the wallet as he was being taken to hospital – contradicting his evidence that he lost consciousness and when he woke up he was in hospital.

21. This evidence is then contradicted by the land lady and in fact gives credit to the evidence of the appellant to when she stated on cross examination

“...Later I was told that one of the robbers had been found. I was told the arrested thief was Thomas. We went to town where the thief was. There is a wallet which was recovered at the site where members of the public were beating you up. This was in town...”

22. She then identified the very wallet PW1 had produced from his pocket claiming he picked it from the appellant or at his door step on the night of the attack. It would then give credence to what the appellant stated that eight men accosted him, beat him up and took away his wallet and identity card. These were definitely PW1's sympathizers who then gave the identity card and wallet to PW1, leading to his now techni-coloured story of how he got the wallet.

23. Which then leads to the next question regarding identification by recognition. PW1 claimed he knew the appellant as they lived in the same estate of **Kingongo** and he had seen him around the area for about a year prior to the attack. He even claimed to know the appellant by name.

24. The appellant denied being a resident of Kingongo, saying he lived in **Tyre Mbili**. No further evidence was led to confirm whether indeed the appellant resided in either of the places – that burden fell on the prosecution. PW1 did not clarify where within the estate he used to see the appellant, or what he had seen him doing. Was he just roaming about, was he selling some items, was he a boda operator – in what context and under what circumstances did he see him.

25. This then leads to the next question – did PW1 really know the appellant, or was he just so fixated by the idea that the appellant was the culprit, and once he was given the identity card he put a name to the face? I ask this because, despite PW1 saying that he told those who went to his aid that the appellant was his attacker, PW2 who is the one that even organized for his hospitalization stated on cross examination that she was informed the attacker was one **THOMAS**.

26. When PW1 was recalled for cross examination stated;

“...I may not have known your name but you are someone I used to see in the estate. I didn't know where you lived...”

27. Which version of PW1's evidence was to be believed. He created the impression that having been given the appellant's identity card by his sympathizers he claimed to have known the appellant by name yet he did not. PW1's credibility is questionable, to the extent that I would

describe him as an unreliable witness.

28. Consequently it was unsafe to rely on his evidence especially with regard to identification. I hold and find that the conviction was unsafe and it is quashed. The sentence be and is hereby set aside.

The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at ELDORET this 6th day of June 2019.

H. A. OMONDI

JUDGE