



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 48 OF 2018

PETER NYAKUNDI OBWORO.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Judgement of Hon. B. M. Kimtai – SRM

dated and delivered on the 23rd day of November 2018 in the

Original Keroka PM Criminal Case No. 905 of 2017}

JUDGEMENT

The appellant was sentenced to a term of thirty years' imprisonment for robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars of the charge were that on 17th October 2017 at 2145 hours at Simbauti village Borabu Sub-county in Nyamira County jointly with another not before court robbed Simion Kurende Nyangau of Kshs. 1,700/= and at the time of such robbery wounded the said Simion Kurende Nyangau.

To prove its case, the prosecution called five witnesses and briefly the prosecution's case was that on the material day at about 9.30pm the complainant (Pw1), a tea picker, was coming from a funeral. On reaching the road he was approached by the appellant who was a "boda boda". The appellant invited him to board the motor cycle and because he knew him having travelled on his motor cycle twice before, the complainant accepted the offer. There was another pillion passenger on the motor cycle. The complainant paid Kshs. 20/= but midway through their journey the appellant stopped. Then the other passenger hit the complainant and when he (the complainant) made to run away the appellant pursued him and ransacked his pockets and removed his money. The complainant saved himself by squeezing the appellant's genitals and ran away screaming. The appellant and his accomplice also fled the scene leaving the motor cycle and one shoe belonging to the appellant behind. Villagers who responded to the complainant's shouts for help went to the scene and pushed the motor cycle from the scene. When word reached the villager elder (Pw2) he called his neighbour Kennedy Musira (Pw3) who happened to be a nurse and they went to the complainant's house. Pw3 gave him first aid. According to Pw3 the complainant was bleeding and his eyes were swollen. Both the village elder (Pw2) and Pw3 confirmed that there was a motor cycle that had been abandoned along the road. The appellant was arrested when he went for the motor cycle and the shoe the following day.

Corporal Jackson Kisoi (Pw5) testified that on 18th October 2017 he received a report about the incident from the complainant. He told the court that the complainant informed him that he was attacked by two people one a motor cyclist who abandoned his motor cycle and shoe at the scene and who was arrested when he went for his shoe and motorcycle the next day. The witness testified that later the appellant was taken to the station by members of "Nyumba Kumi" who also handed over the shoe and motor cycle found at the scene.

When the accused was put on his defence he made an unsworn statement wherein he stated that on the material day and time he was at home asleep; that the next morning as he was going to the shop someone called him and when he turned he saw two people he did not know. They arrested him and took him to Manga Police Station. On 23rd October 2017 he was arraigned in court. he denied he knew the complainant

After considering and evaluating the evidence by both sides the trial Magistrate came to the conclusion that the prosecution had proved its case beyond reasonable doubt, convicted the appellant and subsequently sentenced him to thirty years' imprisonment. Being aggrieved by the conviction and sentence the appellant preferred this appeal. The same is premised on the following grounds: -

"1. THAT the Learned Trial Magistrate erred in Law and Fact by convicting the appellant on the basis of Evidence that was full of contradiction without analysing the same.

2. **THAT the Learned Magistrate erred in Law and Fact by relying on hearsay evidence as a basis of conviction and sentence.**
3. **THAT the Learned Magistrate erred in Law and Fact by giving undue weight to the prosecution evidence.**
4. **THAT the Learned Magistrate erred in Law and Fact in totally disregarding the testimony of the Appellant without giving any reason for the disregard.**
5. **THAT the Learned Magistrate erred in Law and Fact by not considering the Appellant's Mitigation.**
6. **THAT the conviction and sentence is irregular and bad in law.**
7. **THAT the Learned Magistrate erred in Law and Fact by failing to give the Appellant the benefit of doubt in this case.**
8. **The Learned Magistrate erred in Law and Fact by failing to notice that the Appellant had no legal representation in proceeding involving a such serious offence and advice the Appellant of getting legal representation at that juncture as a right enshrined in the constitution of Kenya 2010."**

The appeal is opposed. At the hearing the appellant relied on written submissions to which prosecution counsel replied orally.

I have considered the grounds of appeal and the rival submissions carefully. I have also as the first appellate court reconsidered and evaluated the evidence in the trial court so as to arrive at my own independent determination. I have in doing so made provision for the fact that I did not see or hear the witnesses give evidence.

There is no doubt that the complainant was beaten and robbed by two people with who he was riding on a motor cycle with. Evidence was led which confirmed that he sustained injuries on the back, thorax, lower limbs and abdomen. All the ingredients of the offence of robbery with violence were proved and the only issue is whether the appellant was positively identified as one of the perpetrators of the offence. After considering and re-evaluating the evidence in the trial court I am satisfied that the complainant positively identified the appellant as one of his attackers. Although it was at night and therefore dark the complainant spent a considerable time with his attackers and that gave him sufficient opportunity to know who they were. The appellant had carried the complainant on two previous occasions and the complainant therefore knew him. It was the fact that he recognized the appellant that led to the complainant agreeing to board the motor cycle. This evidence of recognition is further corroborated by evidence from Pw2 and Pw3 that the appellant was arrested when the next day he went looking for the motor cycle and a shoe he had left at the scene. These had been abandoned by the attackers when the complainant shouted for help and villagers ran to rescue him. The fact that he went to claim the abandoned motor cycle and shoe confirms that he was the one riding the motor cycle during the attack. It squarely places him at the scene of the robbery. His unsworn statement cannot stand up to this very cogent evidence and I am satisfied that the charge against him was proved beyond reasonable doubt. The appeal against conviction is therefore dismissed.

On the sentence it is my finding that given the circumstances of the offence, the value of the thing stolen, the nature of injuries inflicted upon the complainant and that the appellant was a first offender the sentence of thirty years' imprisonment was excessive. That sentence is set aside and substituted with one of imprisonment for three (3) years from 23rd November 2018.

Right of Appeal to the court of Appeal explained.

Signed, dated and delivered in Nyamira this 6th day of June 2019.

E. N. MAINA

JUDGE