



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 48 OF 2015

[consolidated with Criminal appeal No. 47 of 2015]

1. BENJAMIN OKORODEI

2. BONFACE OGENA OILE ALIAS OBARA.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No.1802 of 2013 of the Chief Magistrate's Court at Busia by Hon. R.M. Washika Wachira– Senior Resident Magistrate)

JUDGMENT

1. **BENJAMIN OKORODEI** and **BONFACE OGENA OILE ALIAS OBARA**, the appellants, were convicted for the offence of robbery contrary to section 296(2) of the Penal Code.

2. The particulars of the offence were that on 15th October 2013 at **OKAME** bridge **CHAKOL** Division, in Busia County, jointly while armed with a panga, robbed **ANDREW ODOTO AMERIKWEAI** of a motor cycle registration number KMCQ265U valued at Kshs. 83,000/= and after the said robbery, caused the death of the said **ANDREW ODOTO AMERIKWEAI**.

3. The appellants were sentenced to suffer death after trial and conviction. They have appealed against both conviction and sentence.

4. The appellants were in person. They had filed their appeals separately but at the time of hearing the two appeals were consolidated. They raised seven similar grounds of appeal which I have summarized as follows:

- a) That the learned trial magistrate erred in law and in fact by disregarding the violation of the appellants' rights to fair trial.
- b) That the learned trial magistrate erred in law and in fact by relying on circumstantial evidence.
- c) That the learned trial magistrate erred in law and in fact by relying on hearsay and contradictory evidence.
- d) That the learned trial magistrate erred in law and in fact by relying wholly on medical evidence with no probative value.
- e) That the learned trial magistrate erred in law and in fact by disregarding the defence.

5. The state opposed the appeal through M/s Ngari, the learned counsel.

6. The facts of the prosecution case were briefly as follows:

The two appellants approached the deceased herein to ferry them on a motor cycle taxi commonly known as boda boda. Other boda boda operators knew the appellants for they hailed from the same area. When they went away with the deceased, he never returned but was discovered the next morning at a bridge with serious injuries. At the scene, the deceased said that he was attacked by the appellants. He repeated the same at the hospital where he was undergoing treatment. The first appellant was arrested with the ignition key of the motor cycle the deceased had ferried them on while the second appellant led to the recovery of the motor cycle.

7. Both appellants denied involvement in the offences.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.

9. The issue of legal representation at the expense of the state has been adequately addressed by the Court of Appeal. For an accused to qualify for such representation, he/she must demonstrate the inability to hire his/ her counsel. In the case of **KARISA CHENGO, JEFFERSON KALAMA KENGHA & KITSAO CHARO NGATI vs. REPUBLIC [2015] eKLR** this is what the Court of Appeal said:

We are of the considered view that in addition to situations where ‘substantial injustice would otherwise result.’ persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.”

It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State’s expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result’ and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise. [Emphasis added]

In the instant case, the appellants made an application to be provided with a counsel by the state but did not demonstrate their inability to hire one. They appear to have abandoned the application for when the matter came up for hearing, they never raised this issue again. This ground lacks merit.

10. The appellants complained that the learned trial magistrate erred by relying on circumstantial evidence. It would appear that the appellants do not understand what circumstantial evidence is. The definition of circumstantial evidence was well captured in the case of **MOHAMED & 3 OTHERS vs. REPUBLIC [2005]1 KLR 722** by Osiemo Judge as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

11. Before any court can base a conviction on circumstantial evidence, there are basic requirements to observe. This were spelled out in the case **SAWE vs. REP [2003] KLR 354**, where the Court of Appeal held as follows:

a) In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

b) Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

c) The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

d)...

e)...

f) Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

It is abundantly clear therefore that circumstantial evidence is as good as any other evidence as long as it is subjected to the necessary tests.

12. The ingredients of the offence of robbery contrary to section 296(2) of the Penal Code were enunciated by the court of appeal in the case of **JOHANA NDUNGU vs. REPUBLIC [1996] eKLR** as follows:

Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

1. If the offender is armed with any dangerous or offensive weapon or instrument, or

2. If he is in company with one or more other person or persons, or

3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

Though medical evidence was called, it was superfluous to the evidence adduced in the instant case for the contention by the prosecution was that the offence was perpetrated by more than one person who were armed. The allegation by the appellants, that the learned trial magistrate wholly depended on the medical evidence, was not supported by the judgment and the evidence on record.

13. The evidence of **Maloba Moses Onyango (PW1)** was that the two appellants were known to him prior to 15th October 2013. He knew their homes. At about 7.30 pm the duo were standing near where he was with other boda boda operators. The second appellant approached Andrew Odoto Amerikweai, now deceased to be ferried. The deceased was his employee. When the deceased ferried the appellants he did not return. The following morning he was found near Asiniani River and the motor cycle was missing. **Collins Madaadi Ochieng (PW4)** gave evidence to the same effect. This witness mentioned the second appellant by name giving an impression he was known to him. This evidence was not challenged.

14. The following morning after learning of the misfortune that befell Andrew Odoto Amerikweai, **Maloba Moses Onyango (PW1)** and other boda boda operators went to the home of the second appellant. They took him and went with him to the home of the first appellant who on seeing them ran into some sugar cane plantation. They pursued but did not get him.

15. While the deceased was undergoing treatment at Alupe Hospital, he told **Maloba Moses Onyango (PW1)** that the second appellant held him as the first appellant cut him with a panga. In his evidence, **Collins Madaadi Ochieng (PW4)** said that when he found the deceased at the scene, he told him that he was attacked by both appellants.

16. The evidence of **Maloba Moses Onyango (PW1)** was that it was the second appellant who led them to the river where the motor cycle was recovered. This was the gist of the evidence of **Collins Madaadi Ochieng (PW4)**.

17. **Vincent Ekamuran Etyang (PW2)** is a village elder at Kumku village in Kalima Sub location. He testified that on 16th October 2013 at about 7.00 pm he was informed of a young man who was looking for employment. He went and found the first appellant who was untidy and did not have any shoes on his feet. He interrogated him and members of public wanted to lynch him for to them he appeared a bad man. In one hand he had a motor cycle ignition key. The first appellant was new to him. This key turned out to be for the motor cycle that was robbed of from the late Andrew Odoto Amerikweai.

18. **Dr. Faith Atieno (PW8)** produced the post mortem report in respect of the deceased. It indicated that he died of subdural haematoma secondary to head injuries.

19. Each appellant gave only one sentence in defence. It amounted to denial of any involvement in the offence.

20. I have recapitulated the salient areas of the evidence on record and it has emerged that there was more direct evidence than circumstantial. The learned trial magistrate weighed the defence of the appellants with the evidence on record. She arrived at the correct verdict. There was overwhelming evidence against both appellants for the offence of robbery contrary to section 296 (2) of the Penal Code.

21. The upshot of the foregoing analysis of the evidence on record is that the appeal by both appellants is dismissed.

DELIVERED and SIGNED at BUSIA this 3rd day of May, 2018

KIARIE WAWERU KIARIE

JUDGE