



IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NUMBER 204 OF 2013

VINCENT OTIENO ODUOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 295 of 2012

in the Senior Principal Magistrate's Court at Mumias delivered

by Hon. L.Nafula (PM) on 6th November, 2013)

JUDGMENT

Background

1. **VINCENT OTIENO ODUOR**, the appellant herein has filed this appeal against conviction and death sentence on a charge of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code.

The particulars of the charge are that:-

“On the 31.3.12 at Buhuru Market area in Mumias District of Kakamega County jointly with others not before the court robbed Levy Marko Kataka a motor cycle KMCH 049B, make Platina Bajaj Blue in color valued at Kshs. 105,000/-, a Nokia 1208 mobile phone valued at Kshs. 2,300/-, a wallet containing cash. Kshs. 5,000/-, National ID card and a pair of shoes all valued at Kshs. 115,000/- and at the time of such robbery strangled the said Levy Marko Kataka

2. Appellant was also charged with handling motor cycle KMCH 049B, make Platina Bajaj Blue in color knowing or having reason to believe that it was stolen.

The prosecution's case

3. The prosecution called 5 witnesses in support of the charges. **PW1, Levy Marko Kataka**, the complainant herein stated that on 31.3.12 at about 3.00 pm, one Kennedy asked him to take him to various places to meet someone who never turned up. That at about 8.30 pm, the said Kennedy asked him to stop so that he could make a call and when he did, he was attacked by two unknown persons who strangled him with a rope causing him to lose consciousness. That when he came to, Kennedy and the 2 attackers had escaped. His hands and legs were tied with a rope and his motorcycle KMCH 049B, make Platina Bajaj Blue in color was missing. That he reported the matter to police the following day and was treated for the injuries he had sustained. He recalled that on 5.4.12, one Rashid Chitechi to whom he had reported the matter informed him that Kennedy had been arrested and his motorcycle had been recovered. That appellant who he knew as Kennedy was later charged. **PW2 Rashid Chitechi** stated that he saw the motor cycle allegedly stolen from complainant at Ogalo Police Post and the police informed him and complainant that it had been recovered from the appellant who was in custody. **PW3 CPL Francis Mitai** of Ogalo Police Post stated that on 7.4.12, complainant reported that one Vincent Otieno had robbed him of his motorcycle. That his colleague CPL Ngare stated that he knew the suspect and they went to the appellant's home where they conducted a search but did not recover complainant's motor cycle. That the appellant later led the witness to a house, in Sigomere, allegedly belonging to his 2nd wife, where complainant's motor cycle was recovered from. **PW4PC John Munyao**, the investigating officer testified that on 6.4.12, complainant reported that he had been robbed by 3 people one of whom was a pastor. That the witness asked his colleagues at Ogalo Police Post to arrest the suspect and on 7.4.12, the appellant was taken to the police station together with complainant's motorcycle that was allegedly recovered from him. That after investigations, he charged the appellant. **PW5 Kizito Sifuna**, a clinical officer examined complainant on 1.4.12 and filled a P3 form (PEXH. 4) which shows that complainant had tenderness and a bruise on the neck.

4. When put on his defence, the appellant gave an unsworn testimony in which he denied the offences. He stated he was arrested for

allegedly defrauding a herbalist who he had sought to treat his ailing brother but was charged with offences that he did not commit.

5. *In a judgment* 6.11.13, appellant was convicted and sentenced to suffer death.

The Appeal

6. The conviction and sentence provoked this appeal. In his grounds of appeal filed on 14.11.13, appellant raised 10 grounds of appeal which I have summarized into 8 grounds as follows:-

- 1) *That he pleaded not guilty to the charges*
- 2) *That the trial court based his conviction on malicious, farfetched, uncorroborated and fabricated evidence*
- 3) *That no initial report regarding the robbery was made*
- 4) *That no proof of ownership of the motor cycle is question was tendered*
- 5) *That complainant did not produce his driving licence*
- 6) *That complainant went to hospital days after the incident*
- 7) *That the sentence was harsh, unconstitutional and inhumane*
- 8) *That his defence was not considered*

7. When the appeal came up for hearing on 4.9.18, appellant relied wholly on the grounds of appeal and submissions filed on 2.3.17. His submission raise new constitutional issues that his rights under Articles 49(1) and 50 (2)(j) were breached.

8. Mr. Juma, learned State Counsel opposed the appeal and urged the court to fully refer to the evidence on record.

Analysis and Determination

9. This being a court of first appeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal's decision in the case of **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 of 2005** where the court stated as follows:-

***“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.*”**

10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions for the appellant.

11. In dealing with this appeal, I have identified the following issues for determination.

- a. Was complainant robbed
- b. Did complainant identify the robbers or anyone of them
- c. Did the appellant lead police to the recovery of complainant's motorcycle
- d. Was the appellant's defence considered

Was complainant robbed

12. Complainant stated he was robbed. Although he was alone during the incident, he reported the matter to PW2, PW3 and PW4 and I therefore have no doubt that he was robbed.

Did complainant identify the robbers or anyone of them

13. The significance of accurate visual identification was underscored in the case of **R –vs- Turnbull and others (1976) 3 All ER 549**, an English case, in which Lord Widgery C.J. had this to say:-

***“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting*”**

the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance".

14. In his initial report to PW2, complainant reported that he was robbed by a pastor whose name and description he did not state. When complainant later reported the incident to PW4 PC John Munyao, the investigating officer, he informed him that he had been robbed by 3 people one of whom was a pastor whose name and description he did not state. PW3 CPL Francis Mitai of Ogalo Police Post who arrested the appellant stated that the note addressed to him by PW4 specifically stated that the suspect to be arrested was one Vincent Otieno, the appellant herein.

15. Complainant stated that he was with the one of the persons that robbed him (appellant) from 3.00 pm up to 8.30 pm when he was robbed. He therefore had adequate time to see him and it would have been expected of him to give the assailant's description to ensure its correctness and to avoid the dangers of mistaken identity. That was however not done. Complainant only stated that the persons that robbed him included one Kennedy who was a pastor. He did not give the description of any of the robbers but purportedly identified the appellant at the police station as one of the 3 persons that had robbed.

16. In his testimony, appellant stated that he was arrested for allegedly defrauding a herbalist who he had sought to treat his ailing brother but was charged with offences that he did not commit. He also denied that he was Kennedy. He similarly denied that he was a pastor.

17. It is not clear at what point the suspect who complainant identified as Kennedy turned out to be the appellant herein. PW4 PC John Munyao, the investigating officer, who wrote a note to his colleagues at Ogalo Police Post to arrest Vincent Otieno, the appellant herein, did not clarify where he got the said name from yet it was unknown to the complainant.

18. From the totality of the evidence on record, I have come to the conclusion that complainant did not identify the persons that robbed him and the trial court erred in concluding that the appellant was known and identified by the complainant.

Did the appellant lead police to the recovery of complainant's motorcycle

19. As stated hereinabove, PW3 stated that his colleague one CPL Ngare led him to appellant's home where they conducted a search but did not recover complainant's motor cycle. The witness stated that appellant later led them to a house, in Sigomere, where complainant's motor cycle was recovered from. Appellant has denied leading PW3 to the recovery of complainant's motor cycle. CPL Ngare who was in company of PW3 during the alleged recovery of the motor cycle was not called as a witness to corroborate PW3's evidence. The trial court questioned the prosecution's failure to call the alleged wife of the appellant, from whose house complainant's motor cycle was recovered, as a witness, but concluded that it would not have made a difference since the appellant had been properly identified. I have considered the court's finding on this issue and I find that the court fell into error in basing the conviction on PW3's uncorroborated evidence of recovery of the motor cycle. I have no doubt that the appellant's alleged wife was a crucial witness to this case and failure to call her leaves the court with the uncorroborated evidence of PW3. In placing reliance of such uncorroborated evidence, the learned trial magistrate, in my considered view, misapplied the doctrine of recent possession and thereby arrived at an erroneous conclusion.

Was the appellant's defence considered?

20. In his defence, the appellant stated that he was arrested for allegedly defrauding a herbalist but was charged with offences that he did not commit. He did not identify the appellant as the said herbalist.

21. The learned trial magistrate ruled that the defence was an afterthought since the appellant did not cross-examine the complainant on it. The learned trial magistrate was of the mistaken belief that the herbalist was the complainant which was not the case. The appellant was therefore under no obligation to cross-examine the complainant on the defence that he put forward. I find that had the learned trial magistrate carefully considered the totality of the prosecution and defence case; she would have had no reason to dismiss the defence as a general denial.

22. As a result, it is clear to this court that the prosecution did not discharge its burden to prove the case against the appellant beyond any reasonable doubt.

23. Accordingly, the appellant's conviction is quashed and sentence set aside and unless otherwise lawfully held, it is ordered that he shall be released and set free forthwith.

It is so ordered.

DATED AND SIGNED AT KAKAMEGA THIS 7th DAY OF September 2018

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - Erick and George

Appellant - Present in Person

For the State - Mr Juma