



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO 9 OF 2017**

**JAMES AYIEGO OBURE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal from the conviction and sentence of the PM's Court at Ogembo Law Court before Hon N. Wairimu of Judgment dated 29<sup>th</sup> June 2015)**

**JUDGMENT**

1. James Ayiego Obure the appellant was charged with the offence of Robbery with Violence contrary to section 296 (2) of the Penal Code. The particulars of the offence are that; "On the 31<sup>st</sup> day of August 2013 at Otendo village in Gucha South district within Kisii county, jointly with another not before the court robbed Dympna Bwari Tienga of Kshs. 50,000/- , one mkopa solar, one mobile phone make Bird all valued at Kshs. 68,000 and at or immediately or before or immediately after the time of such robbery beat the said Dympna Bwari Tinega.
2. The appellant was convicted and sentenced to death. The appellant appeal is against the said conviction and sentence. His grounds of appeal are summarised as follows;
  - i. Ground 1- that his conviction was based on flawed and fictitious evidence
  - ii. Ground 2- that the trial court did not take into account that there was a long existing vendetta between the complainant's family and his over parental land
  - iii. Ground 3- that trial court overlooked his defence without cogent reasons
3. As a court of first appeal am required to re-evaluate the evidence adduced during the trail and come up with my own conclusion bearing in mind that I did not see or hear the witnesses (see **Okeno vs. R [1972] E.A.**).
4. The prosecution called 4 witnesses. Pw1 and Pw2 testified that on the night of 31.8.2013 they were at Pw1 house. Both were in bed but separate rooms. It was raining. Pw1 heard people speaking in her sitting room. Suddenly a torch was flashed in Pw1 face. She asked who they were. She was pulled out of the bed and slapped on the face by the man who was with her. Screamed and the others in the sitting room joined him. They ordered her to give them money. She showed them a box which had 50,000/-. The 2<sup>nd</sup> man took the 50000/- from the metal box, he also took a M-kopa solar and her bird phone. Pw1 was pulled outside in the rain she was hit on the left legs with an iron rod and she fell down. Pw1 testified that she saw the 3 men as they walked away. She identified James Obure by his voice. She testified that James the appellant is always with her the whole day as he parks his motor cycle outside his shop. He is also her uncle. She knows him well since 2004. He is the one who kept hitting her. After the robbers left she called for help from Bethesda her sister in law who was with her in her house. Pw1 reported to Maroo police station. Pw2 testified that she heard Pw1 scream and then someone entered her room. Another person flashed a torch at him and she saw his face. She identified him as Naftali Omweri the 2 accused. He ordered her to keep quiet or they would kill her. They took Pw1 outside. 50000/- a M-kopa and a phone was stolen. At the police station she reported that the 2 accused was one of the persons who robbed them.
5. Pw3 produced Pw1's P3 form. Pw1 had been treated at Etago sub county hospital for injuries on her left leg which was swollen. The injury was accessed as harm. Pw4 testified that whilst at Maroo police post he accompanied Corporal Chelimo to the house of Pw1. He recovered a metal bar used and a metallic torch. The next day members of public brought the appellant to their station and he arrested him, another suspect was brought in at 1pm the same day. He gave the complainant a P3 form to go to hospital.
6. The appellant gave an unsworn statement in his defence that; he is from Moraa sub location. His father bought land from Morwanyi. He has been tiling the said land. Marwani Ongoya told him to stop tiling the said land and asked him to go where he was born. On the 31.8.2012 he went to the shamba and he found the son's wife, she saw him left and returned with members of community policing he was told he is required at the police station. When he got to the police station he found the man's son and his wife. He was taken to Etago police station.

Morwani Ongoya and his son's wife went to the station and asked him if he will stop tilling the land. He declined and Morwani told him that he would ensure he was in custody until he gets his title. He was charged the next day.

7. The appellant filed written submissions which I have read and considered. Mr. Orina in response submitted that the conviction was on voice identification of a single witness. That the evidence was not sufficient to sustain a conviction. That it was difficult circumstances as the incident happened at night. The complainant was woken up in her sleep and there was only one light said to be held by the appellant. That Pw2 identified another accused and not the appellant. The appellant raised a defence of land dispute between him and the complainant's family. The arrest was by members of public and there was not much investigations. That the court should have exercised extreme caution the conviction was unsafe.

8. I have re-evaluated the evidence and considered the submissions made. Evidence from Pw1 and Pw2 is that Pw1 was robbed of money 50,000/-, a M-kopa solar and a phone on the 13.8.2013. Pw1 testified that the appellant and others persons her stole from her and injured her on her left leg. That she identified the appellant by his voice and that the appellant is a person known to her as he always parks his motor cycle just outside her shop. The trial court in convicting the appellant stated as follows;

**“On the 2<sup>nd</sup> issue of whether the persons who robbed the complainant could be and were positively identified by the complainant, the complainant stated that the 1<sup>st</sup> accused was known to her and she was able to identify him, Pw2 stated that she was able to see and identify the 2<sup>nd</sup> accused because his accomplice shone a light on him while he was moving around in her room since she knew him. Pw4 stated that while he was carrying out his investigations, he was convinced that the complainant and her witness were able to identify the people who robbed them and that when they interviewed the wife of the 3<sup>rd</sup> suspect, she confirmed that the torch that was recovered from the scene belonged to her husband who was not arrested and charged together with the other accused persons’.**

The Court of Appeal in the case of **“Mbelle –vs- Republic’ KLR** held as follows; *“ In dealing with the evidence of identification by voice, the court should ensure that;*

*a) The voice was that of the accused;*

*b) The witness was familiar with the voice and recognised it;*

*c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who said it”*

9. Pw1's evidence was that she heard people talking in her house. It was raining. A torch was flashed on her face. That she asked who it was and she got no answer. She was pulled out of bed and slapped severally. She saw they were 3 men as they walked away. She was able to identify one of them by his voice. She did not state what the appellant told her so as to be able to identify his voice. Did he speak to her, there is no record of what he told her. According to her it is the 2<sup>nd</sup> man who ordered her to give them money. It was also at 9pm there was no description of the light that was inside or outside the house if any, that enabled Pw1 to see her assailants. The prosecution did not also adduce evidence of how the appellant was arrested, who led to his arrest and under what circumstance he was arrested. A conviction on this evidence is unsafe. I therefore set aside the conviction and sentence against James Ayiego Obure. He is free to go unless lawfully held.

Dated signed and delivered this **14<sup>th</sup>** day of **November 2018**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**In person Appellant**

**Mr. Otieno For the State**

**Ms. Rael Court clerk**