



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.1 OF 2014

(An appeal from original conviction and sentence of Ogembo SPM'S C Criminal Case No. 716 of 2012 by Hon. Ogolla Ogembo Ag. CM dated 12TH March, 2014)

DUNCAN OKERIO SAMWELAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was convicted by Ogembo Chief Magistrate of 2 counts of offences of robbery with violence contrary to **Section 296 (2) of the Penal Code** and sentenced to suffer death in the manner authorized by the law. The particulars of the 1st count were that on 26th April 2012 at Mogonga Trading Centre, Igorera Sub-Location in Kenyena District within Kisii County jointly with others not before the court, being armed with dangerous weapons namely pangas and knives robbed Risper Moraa Onyoni of ITEL MOBILE PHONE, S. NO. IMEI 863150010562741, IMEI 8631500105562758, IMEI ISVI valued at Kshs. 4000/=, two bed sheets valued at Kshs. 500/=, cash Kshs. 700/= and at the time of such robbery threatened to use actual violence against the said Risper Moraa Anyona.

2. The particulars of the 2nd count were that on 26th April 2012 at Mogonga village, Igorera Sub-location in Kenyena District within Kisii County jointly with others not before the court being armed with dangerous weapons namely pangas and knives robbed Bonface Okindo of Sanyo Plasma LCD TV S/NO. 10X31217, LG DVD S/NO. 882B, AMPEX WOOFER SYSTEM S/NO. 2007101501660, NOKIA 1200 MOBILE PHONE, NOKIA 2600 MOBILE PHONE, CASH KSHS. 11,000/= and at the time of such robbery threatened to use actual violence on the said Bonface Okindo.

3. The appellant also faced the alternative charge of handling stolen property the particulars being that on 26th April 2012 at Magena trading Centre in Kenyena District within Kisii County otherwise than in the course of stealing, dishonestly retained LGDVD S/NO. 882B, ELECTRIC EXTENSION MAKE AIRSTATI, AMPEX WOOFER S/NO. 2007101501660, SANYO PLASMA LCDE TV S/NO. 10X31217, NINE SEAT COVERS (ORANGE) 11 CUSHIONS, A BLANKET, JACKET, NOKIA MOBILE PHONE S/N 2MEC 863150010562741 ZMEC 863150010562758, IMEI ISVI, CASH KSHS. 580/= PLASTIC CHAIR (BLUE), GUM-BOOTS having reason to believe them stolen goods or goods unlawfully obtained.

4. The appellant pleaded not guilty to all the charges and after a full hearing, the learned chief magistrate convicted him of both counts of robbery with violence and sentenced him to death.

5. Being dissatisfied with the conviction and sentence, the appellant filed the instant appeal and listed the

following grounds of appeal in his petition of appeal:

- i. The trial magistrate misdirected himself when evaluating the entire evidence on record before occasioning a miscarriage of justice.**
- ii. The trial magistrate failed to consider the evidence adduced by the appellant by merely dismissing it without considering and giving its due effects.**
- iii. The trial magistrate erred in law and fact by finding the appellant guilty of the offence charged as the evidence on record never supported the charge.**
- iv. The trial magistrate erred in law and fact by finding the appellant guilty of the offence charged when no identification was ever done in the parade.**

6. When the appeal came up for hearing before me on 14th July 2016, parties agreed to canvass the appeal by way of written submissions which we duly filed and on 10th November they highlighted the said submissions.

7. Briefly, the appellant's counsel Mr. Ondari, submitted that appellant was not properly identified at the scene of the crime and therefore he could only be charged with the offence of handling stolen property and not robbery with violence.

8. It was submitted that the appellant's constitutional rights to a fair trial under article 50 of the constitution were violated in view of the court's indication, during the trial, that hearing would be conducted at Kisii Prison.

9. It was the appellant's submission that a prison is not an area gazetted as a court within the meaning of the constitution and therefore, any proceedings taken in prison would be null and void as that would be tantamount to convicting the appellant before the end of his trial.

10. The appellant's counsel further submitted that the appellant was not accorded a legal representation even though he was facing a capital charges which attracts mandatory death sentence upon conviction. Mr. Ondari submitted that the 2nd count of robbery with violence was not proved to the required standards because none of the witnesses identified the appellant at the scene. It was argued that the circumstances under which the appellant was arrested were questionable thereby necessitating the need for court to reconsider the same.

11. Mr. Otieno, counsel for the state submitted that the identification of the appellant was properly done by PW1, who identified him using the light from the flash light that the appellant's colleague had on the night of the robbery. It was submitted that the appellant was known to PW1 who recognized him as her attacker on the night in question.

12. Mr. Otieno also submitted that apart from identification by PW1, the doctrine of recent possession also applied in this case as the stolen items were found in possession of the appellant shortly after the robbery.

13. On the issue of the trial not taking place in open court, Mr. Otieno submitted that only part of the trial that involved the recalling of prosecution witnesses took place at Kisii GK Prison after the court found that the appellant had become a nuisance to other suspects in the court cells thereby making it impossible to conduct the trial in open court.

14. On lack of legal representation, Mr. Otieno stated that the appellant was duly represented by a legal counsel at the trial before the lower court, but that in any event only persons charged with murder were entitled to get legal representation, at the expense of the state.

15. This is a first appeal and therefore, in line with the decision in **Okeno vs Republic (1973) E.A 353**,

this court is mandated to re-analyze the evidence tendered before the trial court with a view to making its own independent conclusions while bearing in mind the fact that it neither heard nor saw the witnesses testify.

16. The prosecution called a total of 6 witnesses whose evidence was as follows:

17. PW1 RISPER MORAA ONYONI was on 26th April 2012 asleep in her house when she was startled from her sleep by the presence of 2 men inside her house who demanded that she gives them money. She managed to identify the appellant as one of the robbers when his colleague flashed his face twice with the spotlight/torch. She stated that she had seen the appellant at Magena area 3 times before the robbery and therefore she was able to identify him as a man she had seen before. She stated that the robbers took her bed sheet, Itech phone and Kshs. 700/= before leaving her house which they locked from outside. No sooner had the robbers left her house than PW1 heard her neighbor one Karen scream before another neighbor, Lydia, opened her door. The said Karen was injured and was escorted to hospital for treatment. Police from Ogembo police station came to the scene and recorded witness statements the same night. PW1 described the appellant to the area chief and the police who upon going to the appellant's house, found him sleeping on a bed sheet that PW1 identified as her bed sheet that had been stolen the previous night. A mobile phone belonging to PW1 was also recovered from the appellant's house and she was able to identify it from the identity number 28638522 she had inscribed on it. Several other items were also recovered from the appellant's house namely: a flat screen TV, amplifier, 2 speakers, LG Video deck, 11 cushions, 1 blanket and electric cable. PW1 confirmed that she was able to identify the appellant during the robbery as she had seen him 3 times before the night of the attack as he used to take beer at a bar where she worked.

18. PW2 BONFACE OKINDO ONDARA testified that he was in his house on the night of 26th April 2012 when at about 2.30 a.m. his door was hit with stones before 2 people stormed into his bedroom armed with pangas which one of them used to slap his wife before ordering her to give them money. He stated that the robbers took away his 2 phones, a TV, DVD, hoofer, 2 speakers and Kshs. 11,000/=. He further stated that they were later led to the appellant's house where they found him on bed alone and that his TV, DVD, hoofer and 2 speakers were recovered in the appellant's house. He identified the items as his because he had marked his name on TV, DVD and hoofer. He also produced receipts which were marked as exhibits 4, 11 (a), 11 (b) and 12. He also stated that a phone belonging to PW1 was also recovered in the appellant's house. PW2 however stated that he was not able to identify any of the robbers on the night of the robbery.

19. PW3 EVERLINE NYAROSA OKINDO is the wife of PW2. She confirmed that on the night of the robbery, one of the robbers slapped her with a panga after which they ordered her to give them Kshs. 11,000/=. She noted that the robbers also took away phones, TV, DVD, AMPLIFIER (HOOFER) and 2 speakers. She stated that PW1 was able to identify one of the robbers.

20. PW4 ZACKARY OMBASO was asleep in his house when at about 2.30 a.m. PW3 called him to inform him of the robbery whereupon he went to the house of PW3 and noted that they had been robbed.

21. PW5 was **CPL. JOSHUA MUSAU** who investigated the case and recorded witness statements. He stated that PW1 was able to identify and give the physical descriptions of the appellant to one of the village elders who confirmed that he knew the appellant and upon proceeding to the appellant's house, they found him lying on bed while watching a television whereupon the stolen items which the complainants identified as theirs were recovered from his (appellant's) house.

22. PW6 SAMSON ABUGA is the elder who was able to identify the appellant to be the person fitting the description given by PW1 and offered to lead the police to the appellant's where they found him lying on bed watching a TV and having items which the complainants identified as theirs which included the TV, DVD, HOOFER, SPEAKER, MOBILE PHONES and CUSHIONS. On cross examination, PW6 said he was able to identify the appellant from the description given to him by PW1 after which he led the police to the appellant's house.

23. At the close of prosecution's case, the appellant was placed on his defence and he opted to give a sworn statement. He denied that he fitted the description that PW1 had given about him and stated that he was arrested at the shop where he had taken his jacket for repairs. He denied having rented the house in which the alleged stolen items were recovered as neither the landlord nor caretaker of the house had been summoned to testify in the case. He denied that any stolen items were recovered from him and stated that he was not subjected to an identification parade and neither was an inventory of the items that were allegedly recovered from his (appellant's) house taken.

24. DW2 was PC ZACKAYO KIPCHEUM from Ogembo police station. He produced various OB entries showing that several items found in the appellant's house belonged to the complainants.

Analysis and determination.

25. I have anxiously considered this appeal, and noted that the issues that require my determination can be summarized as follows:

a) Identification

b) Recent possession.

26. On identification, the robbery took place at night. PW1 was the only identifying witness. She testified that she recognized the appellant as one of the robbers because the appellant's colleague flashed the torch which he had on his (appellant's) face and she was able to recognize him as she had seen him 3 times before the night of the robbery incident since the appellant frequent the bar where she worked.

27. PW1 gave the description of the appellant to the area chief who was able to figure out who fitted the said description after which he led the police to the house of the appellant where they found him sleeping on a bed – sheet that was identified by PW1 as belonging to her. Other items belonging to PW2 and PW1 were also found in possession of the appellant.

28. In the case of **Abdullah Bin Wendo and Another vs – Republic (1953) 20 EACA 166** and **Ceophas Otieno Wamunga vs Republic Criminal Appeal No. 20 of 1989**, it was held that evidence of identification should be tested with great care especially when it is known that the conditions favouring a correct identification were difficult.

29. In the instant case, the identification was by way of recognition. PW1 was able to recognize the appellant and she gave his description to the chief who was able to lead the investigators to the appellant's house where they recovered the complainant's stolen items.

30. From the above foregoing, I am satisfied that the appellant was positively identified by PW1 because, apart from identification by recognition, the doctrine of recent possession is also applicable in this case because the stolen items belonging to PW1 and PW2 were recovered in the appellant's house where he was found lying on bed and on a bed sheet that PW1 identified to be hers. Besides the bed sheet, the appellant was found in possession of PW1's phone and a TV, 2 phones, DVD player and 2 speakers belonging to PW2. It is worthy to note that the said items were found in the appellant's possession barely a few hours after the said robbery incidents. The recovery was conducted by independent witnesses PW5 and PW6 whose evidence was consistent, credible and cogent. In a nutshell the appellant was found in possession of the stolen items based a few hour after the said robbery incidents.

31. In the case of **Reuben Taabu Anjononi & 2 Others vs Republic (1980) KLR 59**, it was held:

“Proper identification of robbers is always an important issue in case of Capital robbery. Being night time, the conditions of identification of robbers in this case were not favourable. This was however a case of identification of assailants; recognition of assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other.”

32. Similarly, in the instant case, I am certain that PW1 recognized the appellant which is a more reliable form of identification. PW1 was able to give accurate description of the appellant that led the investigators to the house where the appellant was. The identification by PW1 was accurate, based on her personal knowledge of the appellant and not crowded by any guess work or speculation. I am therefore satisfied that PW1 was able to visually recognize the appellant on the night of the robbery and there was therefore no need for the police to conduct an identification parade. In the case of **Republic vs Mwango S/O Manaa (1936) 3 EA CA 29**, it was held that an identification parade must only be conducted where the identity of the accused is doubtful.

Recent possession

33. In the case of **Arum vs Republic CA at Kisumu CR. Appeal No. 35 of 2005**, it was held that the doctrine of recent possession is applicable in the following circumstances.

- a) **property was found with the suspect.**
- b) **The property was positively identified by the complainant.**
- c) **The property was stolen from the complainant**
- d) **The property was recently stolen from the complainant.**

34. In the instant case, the stolen property was recovered from the appellant's house a few hours after the said robbery and they were positively identified by the complainants.

35. The appellant did not give any reasonable explanation for his being in possession of the stolen property.

36. In the case of **Matu vs Republic 2004 (1) KLR** referred to in **Arnold Odhiambo Ogolla & Another vs Republic (2013) eKLR**, it was observed:

“That the appellant had been in possession of goods stolen from the complainant kiosk and he would not offer any acceptable explanation on how he had come by that property. The inevitable conclusion therefore was that the appellant had participated in the robbery (sic)....”

37. In the case of **George Otieno Dida alias Stevo & Another vs Republic [2011] eKLR** the appellants who were found in possession of stolen property about 4 hours after the robbery were convicted based on recent possession even though no identification was done by the complainant of the assailants.

38. The appellant's defence that he was arrested at a shop where he had gone to repair his jacket was not credible and consisted of mere denial which did not oust the otherwise consistent and unchallenged evidence of independent prosecution witnesses that the appellant was found with the stolen items in his house.

39. The appellant also raised the issue of his constitutional rights being infringed in view of the fact that the court had on 18th July 2013 ruled that the hearing of the case would be conducted at the Kisii GK prison. In view of the fact that the appellant was found to be causing a lot of disruption of peace at the court cells. The trial court observed as follows in its said ruling:

“I have considered the application by the prosecution and also the evidence made on oath of the 2 officers working at the cells. This court can confirm that indeed yesterday and today there was a serious disruption of peace at the cells drawing the attention of everyone at the compound. The allegations raised against accused, thought he is denying, are weighty and intolerable. Prima facie, I am convinced that this situation can not be allowed to continue, as even previously, the prosecution has made similar complaints e.g. 24-6-013. Since, the prosecution has principally called all its witnesses I do not see any prejudice that the accused

may suffer if the recall of the witnesses PW1, 2, 3 and 4 is done in prison. I accordingly rule that the remaining evidence herein shall be done inside Kisii GK Prison. Hearing on 2.8.2013.”

40. I note that at the time the application was made to have the trial conducted in prison due to the appellant's disruptive behavior, the appellant was represented by advocate Ondari who did not raise any objection to the trial being conducted away from the court premises.

41. It is however not clear if the proceedings that took place after the above ruling were conducted in prison or in court building what is very clear however is that the appellant's counsel, Mr. Ondari, cross examined the witnesses who had been recalled by the appellant for further cross examination and the said witnesses were thereafter re-examined by the prosecutor. The proceedings went on smoothly to the end at the judgment and sentence stage without any hitches or objections from the appellant.

42. I find that even though the trial court made an order that subsequent proceedings would be conducted at Kisii GK Prison, the record of appeal does not show if indeed the trial court proceeded with the hearing of the case in prison. Nowhere is it indicated that the case proceeded inside prison or that the court convened this sittings at the prison.

43. Turning to the appellant's claim that he was not accorded his constitutional right to legal representation, I find that this claim was not merited because, as I have already stated in this judgment, the appellant was represented at the trial before the lower court by Mr. Ondari who cross-examined the prosecution witnesses.

44. Having found that the appellant was positively identified by PW1 as one of the people who robbed her on the material night and having found that the doctrine of recent possession is applicable in this case, I find that the prosecution's case was proved to the required standards. In a nutshell I find that the instant appeal lacks merit and I hereby dismiss it.

Dated, signed and delivered in open court this 13th day of March, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

Miss Mbelete for the State

Mr. Bigogo for the Appellant

Omwoyo court clerk