REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCCRA NO. 48 OF 2015

(Consolidated With Criminal Appeal No. 47 of 2015)

(CORAM: J.A. MAKAU - J.)

STEPHEN ODERO OHUDO.....1ST APPELLANT

ADREA OTIENO OKELLO.....2ND APPELLANT

VS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence dated 10.10.2014 in Criminal Case No. 99 of 2013 in Siaya Law Court before Hon. J.N.Sani-Ag.SRM)

J U D G M E N T

1. The appellants; **STEPHEN ODERA OHUDO,** the 1st appellant and **ADREA OTIENO OKELLO,** the 2nd appellant were the first and second accused respectively in the trial court before the Lower Court. They were charged with one count of robbery with violence contrary to **Section 296(2) of the Penal Code.** The particulars of the charge were that on the 20th day of February 2013 at Nyamninia sub-location, in Gem Sub-County within Siaya County, jointly robbed Jeckonia Ogara Ndonji a bag containing Kshs. 2,000/=, electric cable, bar soap, bread and two electric sockets all valued at Ksh. 20,700/= and immediately after the time of such robbery wounded the said **JECKONIA OGARA NDONJI**. The 1st appellant faced an alternative count of handling stolen goods contrary to **Section 322(1)(2) of the Penal Code**. The particulars of the alternative count were that: - on the 21st day of February 2013 at Nyamninia sub-location, in Gem Sub-County within Siaya County, otherwise than in the course of stealing dishonestly received or retained a bag containing electric cable, two sockets, knowing or having reasons to believe them to be stolen goods.

2. After full trial, the Learned Trial Magistrate convicted the Appellants with the main count and sentenced them to suffer death.

3. The conviction and sentence provoked the appellants to prefer the appeal by filing separate appeals but with almost similar grounds of appeal which can be summarized as follows: -

(a) That the conditions prevailing were not conducive for positive identification.

(b) That there was no direct circumstantial evidence linking the appellants with the offence of robbery.

(c) That the appellants' defence was not considered.

(d) That the prosecution did not prove their case beyond reasonable doubt.

4. At the hearing of the appeal, the appellants appeared in person whereas Mr. Ombati, Learned State Counsel, appeared for the state.

5. The facts of the prosecution case form part of the record of appeal and I need not reproduce the same but I shall in this appeal summarize the prosecution case and the defence.

6. The prosecution case is as follows: that on 20th February 2013 at 5.15am, the complainant Jeckonia Ogara Ndonji alighted at Muhanda Stage from Nairobi; and started walking carrying his bag. That after 200metres, someone flashed a torch at him and he stopped, two people were ahead of him, two others followed him and three were at a distance. The complainant did not know any of them. Two of the people asked the complainant where he was going as one of them flashed a torch enabling him to see a panga. He then cried for help. That the 2nd accused then hit him on the head and at the back with a metal rod and all of them ran away leaving the 1st accused who started cutting the complainant with a panga on the head and pulled his bag also demanding the complainant's phone. The complainant then went back to the stage as it was not so dark and took transport to Yala Hospital, reported the incident to police and Assistant Chief of Nyamninia sub-location. The police called the complainant to the scene where they found some paper bag from which they only found the certificate and the slip. The bag had initially a soap, bread, 2 socket switches and electric cable. The complainant was later informed of the recovery of the bag with the electric cable, the two switches and keys. The complainant at the scene could recognize the 1st accused and the 2nd accused through the aid of torch light. That the appellants were subsequently arrested and charged with this offence.

7. The 1st Appellant denied the offence and stated that at midnight of 20th February 2013, he was asleep when the village elder with others knocked at his door demanding he opens the door, as they had arrested other people with a green bag. That the 1st appellant was then arrested and taken to police with others. That the following day, he took police to his house where search was done and nothing was recovered but they took the 1st appellant's father's panga. He was later charged with this offence.

8. The 2nd appellant denied the offence stating that on 21st February 2013 at around 8.00pm he went to watch football match and returned later when his friend called him to attend a funeral but he declined. That the following day he heard someone had been robbed that night. The Assistant Chief went to the 2nd appellant's house with the 1st appellant and the 2nd appellant was arrested on allegation he was with the 2nd appellant.

9. I am first appellate court and I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the case of **Kiilu and Another V. R (2005) 1 KLR 174** where the court of Appeal held thus:-

> ***"an Appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."***
>
> ***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

10. At the hearing of the appeal, the 1st appellant submitted orally that the complainant did not mention

his assailants, that he did not prove the recovered items were his, the intensity of light was not disclosed that enabled the complainant to see the appellants; PW4 did not witness what happened, that PW1 the Investigating Officer did not conduct an identification parade; that no inventory was produced to show the 1st appellant had property of the complainant; that the complainant did not tell the Clinical Officer he was able to identify the assailants and that there was no evidence connecting the 1st appellant with the stolen items.

11. The 2nd appellant put in written submissions in which he urged that he was convicted on a defective charge as the particulars of the offence did not contain all the ingredients of the offence under **Section 296(2) of the Penal Code**; that the conditions prevailing at the time of the commission of the offence were not conducive for positive identification; and that the prosecution did not prove their case beyond reasonable doubt.

12. Mr. Ombati, Learned State Counsel, opposed the appeal and stated the charge was amended and the appellants given an opportunity to plead and that the trial court complied with the provisions of **Section 214 of the Criminal Procedure Code**; that the charge is not defective, that the prosecution proved the case beyond any reasonable doubt, that the appellants were identified; that the 1st appellant was found in possession of the stolen items and that the prosecution's witnesses placed the appellant on totality at the scene of the crime.

13. The appellants contend that the charge which they faced **under Section 296(2) of the Penal Code** is defective. The particulars of the charge are as follows: -

> ***"that on the 20th day of February 2013 at Nyamninia sub-location, in Gem Sub-County within Siaya County, jointly robbed Jeckonia Ogara Ndonji a bag containing Kshs. 2,000/=, electric cable, bar soap, bread and two electric sockets all valued at Ksh. 20,700/= and immediately after the time of such robbery wounded the said JECKONIA OGARA NDONJI."***

14. The appellants contend that the charge and the particulars are defective and ought to have been rejected. That the charge do not disclose whether there was any dangerous or offensive weapon used at the time of the commission of the alleged offence, and that the amended charge does not appear in the trial court proceedings.

15. In **Johana Ndungu V Republic, Criminal Appeal No. 116 of 1993**, the Court of Appeal summed up the ingredients for the case of robbery with violence to be as follows: -

> ***a) if the offender is armed with any dangerous or offensive weapon or instrument or***
>
> ***b) if he is in company with one or more other person or persons or***
>
> ***c) if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person.***

16. I have perused the court record as regards the application for amendment of the charge to capture the right provisions of the law. None of the appellants raised any objections to the amendment of the charge. The charge was read and explained to the appellants, plea taken and plea of not guilty entered accordingly. The accused were explained their rights to recall witnesses for further cross-examination or have the matter begin afresh to which they sought the matter to proceed from where it had reached.

> **Section 214(1)(i)(ii) of the Criminal Procedure Code** provides: -
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> ***"214. (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances***

of the case:

Provided that –

i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

I have perused the court file and I have indeed found the amended charge in the court file. The new charge is part of the proceedings at the Lower Court and the appellant's contention that the amended charged is not part of the court proceedings is unfounded. I therefore, find the charge is not defective and that the appellants were not prejudiced by the amendment of the charge as **Section 214 of the Criminal Procedure Code** was complied with and the appellants' rights were not violated in any way.

17. **Whether the prevailing conditions were conducive for positive identification?** In **Cleophas Otieno Wamunga V Republic(1989) KLR 424**, the Court of Appeal addressed itself thus: -

"The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery CJ. In the well-known case of R. Vs Tur006Efc bull 1976(3) All E.A. 549 at Pg.552 where he said "Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

Further in the case of **Paul Etole and Another V Republic, CRA. No. 24 of 2000**, *Pg 2 and 3*, it was held thus: -

"The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution, before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."

18. In **Republic V Turnbull and Others(1976) 3 ALLER 54G**, 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 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?"

19. I have carefully examined the evidence of the identification by the complainant, PW3 and PW5. The complainant knew the appellant persons before as he used to see them at Muhanda Shopping Centre but did not know their names. The incident took place at around 5.15am when it was still dark. The compliant did not have any light nor was there any source of light but he stated someone flashed a torch at him and he stopped as two people stood ahead, then two behind him and three others at a distance. The complainant did not give details or the basis of identifying the people he saw. He did not for instance give any description of the 1st or the 2nd Appellant to PW2, the Assistant Chief of the Area or PW6 a village elder or the police though he claimed he knew the appellants before the incident. He did not state how long the appellants were under his observation, at what distance and in what light or whether the observation was impeded or not in any way. From the evidence of PW1, the complainant, the incident took a short time. He did not state in his evidence whether the torch light was shone on the face of any of his attackers so as to see him and identify him.

20. PW3, a minor aged 16years testified that on their way home, they saw three people ahead of them and flashed his torch and saw the 1st appellant (Odera) cutting an old man with a panga and that the three were the old man, Andrea and Stephen and they then ran away. PW5 at stated around 5.00am he saw Stephen Odera (the 1st accused), 'Mandela' the 2nd accused, Erick and heard someone crying near the accused persons. PW3's evidence, required corroboration being a minor. His evidence contradicts the evidence of PW1 as regards the number of people who were near PW1. PW1 talked of four people apart from himself whereas PW3 talked only of two people. It is further contradicting the evidence of PW5 who stated the appellants were near where someone was crying. PW3 did not state how he was able to identify the appellants. He stated he flashed his torch and saw the 1st accused cutting the old man with a panga. He did not state the intensity of his torch light and how far he was from the scene of the incident and for how long the appellants were under his observation. I find the evidence of PW3 required corroboration and the same was not corroborated and as such it would be unsafe to rely on the same unless corroborated.

21. It is trite law that for a proper identification parade to be conducted the identifying witness must first give a description of the person he claims he was able to identify before the parade is held. That way there will be a basis of testing the evidence of identification to confirm whether there was enough material basis upon which the parade was held in the first place and the person was identified. In this case, there was no evidence of description of the assailant having been given by the complainant, considering the complainant stated he used to see the appellants at Muhanda Shopping Centre, I find the omission of giving, description and conducting identification parade smacked on the complainant's inability to describe the 1st and the 2nd appellant to the Assistant Chief and the police before their arrest.

22. I find the conditions at the material night were not conducive to positive identification of the assailants and that PW3's evidence required corroboration to be of probative value. I find that due to the weaknesses which I have pointed out in the identification evidence that it is possible that mistake in recognition of the appellants was made by the prosecution witnesses.

23. **Whether the prosecution proved their case beyond reasonable doubt?** The other evidence in support of the prosecution case is the recovery of the items alleged to belong to the complainant from the house of the 1st appellant. PW1 stated the 1st appellant pulled his bag which contained Kshs. 2,000/=,a result slip, a leaving certificate, but near the scene of robbery they, recovered the certificate and the slip but not the bag, a soap, bread, 2 socket switches and electric cable. PW1 was later told what was recovered was the bag, two switches and keys which were identified and marked as MF1-1, 2, 3, 4(a), 4(b), 4(c) and 4(d). PW1 did not know from whom the bag was recovered. PW1 did not give

descriptions of his alleged green bag nor the electric cable to the Assistant Chief or the police nor did he in his evidence before the trial court claim any of the items to be his. PW2 did not state what description PW1 gave them as regards his stolen items. The bag was recovered from the 1st appellant by PW2. PW3 who claims to have witnessed the robbery did not mention seeing the 1st appellant stealing a bag from the complainant. PW5 did not place the appellants at the scene of the robbery but stated the appellants were near where the person was crying for help. PW6 similarly did not have description of the bag and electric cable allegedly stolen from PW1. PW7, the Investigating Officer did not have description of items PW1 was robbed of save it was a bag, electric cable, two switches, school leaving certificate and cash of Kshs. 2,000/=. The 1st appellant in his evidence stated none of the items were recovered from his house.

24. The trial court based the appellants' conviction on the doctrine of recent possession. The trial court found that the 1st appellant was found in possession of the stolen items. In **Isaac Ng'anga Alias Peter Ng'ang'a Kahiga V Republic, Criminal Appeal No. 272 of 2005**, the Court of Appeal held: -

> ***"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."***

25. I find in the instant case, it was incumbent upon the prosecution to prove that the bag, electric cable or the items purportedly recovered from the 1st appellant's possession belonged to the complainant. The bag, electric cable and keys are commodities found in most of the trading centres and the homesteads and as such are readily available. In this case, upon examination of the evidence of PW1, the complainant never laid any claim over any of the exhibits as his own nor did he state how he could identify them as the ones robbed from him. In my view, the prosecution did not prove that the recovered items allegedly in the 1st appellant's possession actually belonged to the complainant. Consequently, I find the circumstantial evidence before the trial court was not sufficient basis to warrant the conviction of the appellants.

26. **The upshot is that I find the appeals by both the appellants have merits and are hereby allowed. Accordingly, I quash the conviction and set aside the sentences meted out against the appellants. I direct that the appellants be hereby set at liberty unless otherwise lawfully held.**

DATED AND SIGNED AT SIAYA THIS 16TH DAY OF MARCH 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 16TH DAY OF MARCH 2017.

In the presence of:

1st Appellant: In person -Present

2nd Appellant: In person -Present

Mr. Ombati: for State

Court Assistants:

1. George Ngayo

2. Patience B. Ochieng

3. Sarah Ooro

J.A. MAKAU

JUDGE