



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

HIGH COURT CRIMINAL APPEAL NO 1 OF 2016

BETWEEN

BERNARD ODHIAMBO OWITI.....1ST APPELLANT

MORRIS OCHIENG.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Homa Bay Criminal Case No 18 of 2015 decision by S.Ndegwa (PM) on 3/3/2016)

JUDGMENT

1. **BERNARD ODHIAMBO OWITI (1ST APPELLANT) and MORRIS OCHIEN'G (2ND APPELLANT)** were convicted on a charge of robbery with violence contrary to section 296 (2) and sentenced to death. The charge against them stated that on 4th January 2015 within **HOMA BAY** township they jointly with others robbed **PATRICK BARAKA AMOLO** of 1 D-Light machine and its solar panel, 2 M-Kopa radios, a torch, one techno mobile phone one engine fuel line,, one bulb and its power pack all estimate at the value of Kshs. 40,000/- and at the time of such robbery wounded the said **PATRICK BARAKA AMOLLO**. The appellants denied the charge.

2. **PATRICK BARAKA AMOLO (PW1)** told the trial court that on 04/01/2105 at 11.00pm while asleep inside the house in **Paya Estate** within Homa Bay town the 2nd appellant whom he had known for about a month by the nick-name **BALLOTELI** knocked at the door requesting to be allowed to come in and sleep. However PW1 turned down his request so he went away.

3. Shortly PW1 heard some commotion between the 2nd appellant and the watchman who was demanding that he leaves and the 2nd appellant threatened to fight him. The commotion which lasted about 30 minutes ceased and the 2nd appellant left. Shortly PW1 heard the 1st appellant's voice demanding that he opens the door. He recognised his voice as they had been in remand custody together. Before PW1 could respond, the 1st appellant forced open the door and came in accompanied with five others. He was able to identify and recognise the 1st appellant with the aid of moonlight-he however could not identify the rest of the group.

4. The 1st appellant spoke to PW1 harshly and the group dragged him out of the house even as the other two people who were sleeping with him took flight. The 1st appellant then drew out a knife and stabbed PW1 on the hand and the group led by is and 2nd appellant (who had a stick) beat him up and dragged him towards the road where there was a solar powered security light. They carried away the solar panels and the 1st appellant picked a stick which he used to pierce PW1's hand.

5. PW1 explained that he had known the 1st appellant for seven months that they were together in remand custody while the 2nd appellant was employed by one **JAKOM** aka **COLLINS OMONDI** as a car washer and that he had actually known him for 3 months and they even used to share cigarettes. On cross examination by the 1st appellant PW1 stated:

“I recognised and even called you by your name Bernard and asked you why you were beating me. I clearly heard and recognised your voice”

6. Upon re-examination PW1 stated that he was able to see the appellant well with the aid of a bright moon which was shining.

7. **COLLINS OMONDI** aka (PW2) **JAKOM** operated a kiosk at the beach which served as fish storage and had employed the 2nd appellant and PW1. On 4/01/2015 he received a call from one **ORIMBA** that his kiosk had been broken into and as he rushed to the scene, he met PW1 who joined him back to the scene. He observed that PW1 had a stick lodged in his hand and upon taking stock he realized that his fuel line, Techno phone, engine power pack, M-Kopa radio, Solar panel, M-Kopa machine, memory card, ear phone and M-Kopa bulbs

were missing. PW1 narrated to him how he was attacked by the appellants. He confirmed that he had employed the appellant (whom he also referred to as **BALLOTELI**) for about 8 months. He also confirmed that it was a dark night.

8. **ELIJAH ODHIAMBO OWUOR** (PW3) was on duty as a night watchman at **PAYA** beach when he was attracted by an unfamiliar sound near his place of work. Upon flashing his torch he saw a group of six people standing outside **JAKOM'S** house (among them was the 2nd appellant who was armed with a knife). The rest of the gang members had pangas and It seemed like they wanted to break into the premises and the 2nd appellant threatened him with the knife so he retreated and hid for a while.

9. He later saw that the door to PW1's premises had been damaged. He confirmed that there was moonlight which enabled him to see the 2nd appellant (whom he had known for 4 months as PW2's employee pick something from the trench before escaping. He also confirmed that the 1st appellant whom he knew as **BERNARD** and he had previously interacted with him at the beach, was also in the gang door was forced open and the door. He was about 20-30 metres away and could see them very well

10. **DENNIS OTIENO WERE** (PW5) was sleeping in the same house as PW1 when he heard someone demanding that the door be opened. They refused to open, but the door was forcefully opened and the 2nd appellant walked in accompanied by two others and they dragged PW1 out of the house. He heard the 2nd appellant say "Let's take things" and they ferried away the items earlier mentioned in this judgment. PW5 and the other man fled to Homa Bay police station leaving PW1 under assault.

11. He stated that the 1st appellant was among those who entered into the house and assaulted PW1 using a paddle. He saw them with the aid of the solar light and on cross examination PW5 said he had hidden in a room adjacent to the one where PW1 was and which was used to store old iron sheets, nets and basins. He hid behind the old iron sheets so the gang members could not see him. He knew the 2nd appellant as his brother's (PW2) employee.

12. **MICHEAL OCHOLA** (PW4) a clinical officer who examined PW1 confirmed that PW1 suffered injuries which he classified as harm. **CPL PAUL MURIITHI** (PW^) who arrested the appellants confirmed that he had previously arrested the 1st appellant over an assault case and he saw no need for an identification parade as the appellants were well known by the witnesses. He denied claims that there was an existing grudge with the 1st appellant over a girl whom they were both interested in.

13. The 1st appellant in his sworn defence claimed that **CPL MURIITHI** had an affair with his wife and he assaulted the said officer and although the issue was settled through the intervention of the OCS, PW6 retained a grudge against him and the whole incident was a frame-up by PW6. He denied ever being in prison custody with PW1 and said he did not know all the other witness who claimed to know him.

14. The 2nd appellant confirmed he was an employee of PW2 whom he accused of not paying his dues and disputed that PW5 had slept in the premises in question. It was his testimony that he left his place of work on 4/1/2015 at 6pm and spent the night at **PAYE** in a place PW2 had shown him (which was about 20metere away from the kiosk) He claimed that PW3 once paid someone money to stab him although he never reported the matter to police because he was afraid.

15. In her judgment the trial magistrate that the evidence clearly showed that the witnesses were able to see and identify the appellants with the aid of the moonlight, and also as they dragged PW1 towards the road there were solar lights which enabled PW5 to see them from where he hid. Apart from that the appellants were known to the witnesses whom they had interacted with in the past and even voice recognition.

16. The trial magistrate also held that the evidence demonstrated that in the cause of stealing, the attack was executed by the appellants who were in the company of others, they were armed and inflicted injury on PW1 which therefore satisfied the ingredients of robbery with violence.

17. The first appellant's defence was dismissed as an afterthought on grounds that he did not show how the police officer was able to connive with all the other witnesses including the doctor to frame him up.

18. The 2nd appellant's claim that he was being framed up by PW2 over unpaid dues was also dismissed as an afterthought which he never raised in the course of cross examination.

19. The trial magistrate observed that neither appellant offered any explanation as to where they were on the night in question.

20. The appellant now challenge these findings on grounds that there was no proof of the existence of the stolen items and no recovery was made from them. Further that the investigating officer did not carry proper investigations.

21. The appellants filed written submissions in which they reiterated that no attempt was made to prove that the alleged stolen items ever existed as the purported owner did not produce a single receipt. They also pointed out that not even a picture of the alleged broken door was shown to the trial court

22. The 2nd appellant insisted that the genesis of this matter was the unpaid dues owing by his employer and this case was just instituted to silence him.

23. In opposing the appeal, Mr. Oluoch on behalf of the State submitted that the witnesses had known the appellants previously and there was no doubt that the identification was free from any error. He also pointed out that there was sufficient evidence that the appellants were armed and they assaulted tPW1 Further that PW3 clearly saw the appellants escaping with the stolen items using a motor-cycle, so the ingredients of robbery with violence were complete.

24. Having reviewed the evidence I have no doubt in my mind that there was clear opportunity for physical identification under the conditions described by the witnesses- which included a bright moon, a torch, and the solar powered lights. This was not just a momentary glance; all the witnesses spent some time with their visions trained on the appellants.

25. There was also voice identification and although the 1st appellant denied ever being in custody, PW6 confirmed that 2 year prior to this incident he had arrested the 1st appellant on a charge of assault. Indeed the 1st appellant carefully skirted over the issue when cross examining PW1 who was the one who alluded to that opportunity. Yet even if that observation is erroneous, I take note that the interactions were not only limited to PW1, but PW3 also had past interactions with the 1st appellant at the beach.

26. I hold and find that there was adequate opportunity for physical identification which was by recognition.

27. All the prosecution witnesses confirmed that PW1 was assaulted and injured by the appellants who were in a gang of six and were armed with knives, machetes (pangas) and sticks which they used to threaten and eventually inflict injury on the victim. This fact of injury was confirmed by the clinical officer (PW4)

28. I think the trial magistrate aptly described their defences an afterthought which was not put to the prosecution witnesses except PW6 ad there was nothing whatsoever alluded to by the 1st appellant to suggest why the witnesses would connive with PW1 against him.

29. The only issue which remained then was whether this attack was executed so as to steal the property mentioned. As correctly pointed out by the appellants, there was not a single receipt produced to confirm that the said items existed or even where or where they were purchased from.

30. PW5's evidence suggests that this was a revenge attack probably due to some earlier differences with PW1 and his associates. This can be gleaned from his statement:-

“They dragged Patrick out of the house...they were asking him to tell them who had killed their buddy”

31. The evidence in my view on account of this last observation failed to prove a charge of robbery with violence but proved a lesser charge of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code**. Consequently in compliance with the provisions of **Section 179 (2)** of the **Criminal Procedure Code**, the conviction on the charge of robbery with violence is quashed and the death sentence meted out is set aside. The charge is reduced to assault contrary to **Section 251** of the **Penal Code** and they are convicted on the reduced charge. They shall serve 2 years imprisonment each which shall run from the date of conviction in the trial court.

Delivered, dated and signed this 15th day of May 2017, at Homa Bay

H.A.OMONDI

JUDGE