



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 89 OF 2014

BETWEEN

GEORGE OKOTH OSODO 1ST APPELLANT

GEORGE ONYANGO OLUOCH 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1053 of 2005 at Senior Principal Magistrate's Court at Oyugis, Hon. R. Ngetich, SRM dated on 6th June 2007)

JUDGMENT

1. The appellants **GEORGE OKOTH OSODO** and **GEORGE ONYANGO OLUOCH** were charged, convicted and sentenced to death for the offence of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence were that on 31st August 2005 at Rakwaro Sub-location in Rachuonyo District within Nyanza Province while armed with dangerous weapons namely stones they jointly robbed **WALTER MUGA NYALIECH** of Kshs. 40,000/- and at or immediately before or immediately after the said robbery used personal violence on the said **WALTER MUGA NYALIECH**.

2. The appellants now appeal against conviction and sentence. As this is the first appeal, I am enjoined to consider the entire evidence, evaluate it and reach an independent conclusion as to whether we should uphold the conviction bearing in mind that we neither heard nor saw the witnesses testify (see *Okeno v Republic [1972] EA 32*). The prosecution evidence was as follows.

3. The complainant, Walter Muga Nyaliech (PW 1), recalled that on 31st August 2005 at about 8.00pm he was in his shop situated at Rakwaro. While he was counting money, two boys came into the shop, assaulted him with a stone on the mouth causing to fall. They stole from him Kshs. 40,000/- which he had counted. He was taken Miriu Health Centre and on the next day he reported the incident to Kendu Bay Police Station where he was issued with a P3 form. Silas Ochieng (PW 7), the Clinical Officer, examined him on 13th September 2005 and confirmed that he had been injured on the upper gum and four incisor teeth were loose, his upper lip and face were swollen. He noted that the injuries were caused by a blunt object and certified that injury as grievous harm. PW 1 further testified that although he knew the boys as they were from the village, he did not know their names. When cross-examined he stated that when the boys came in, there was light and after he was assaulted, he screamed causing his wife, Jane Adhiambo Muga (PW 2) and other neighbours to come to the shop.

4. PW 2 recalled that on that night she was outside the shop when two people came and entered shop. She

could hear them demanding money from PW 1. She started screaming for help causing people to come. The suspects were found and beaten by the crowd and arrested although one of them ran away. She found her husband had been beaten and his money stolen. She testified that she knew the assailants as villagers but did not know their names. When cross-examined, she stated that she was seated in the verandah when the assailants, who she thought were customers, came into the shop.

5. Samwel Onyango Oguma (PW 3) was one of the persons who heard PW 2 screaming. He realised the screaming was coming from the shop. He went there and found the 2nd appellant being held by PW 1's brother. He testified that he knew the 2nd appellant as he had seen him before. He stated in cross-examination that he found other people at the scene when he arrived. George Gendia Nyaliech (PW 4) also heard PW 2 screaming. When he rushed to the scene, he found someone running away but he caught him together with other people who had come. The other assailant escaped. He identified the suspect who was caught as the 2nd appellant. He called the Assistant Chief of Rakwaro Sub-location, Mathews Onyango Obunya (PW 8) who came and arrested the 2nd appellant. PW 8 confirmed that when he came to the shop he found that the 2nd appellant had been arrested by members of the public.

6. Isaac Odongo Obar (PW 5), the Assistant Chief of Karabondi Sub-location, testified that on 1st September 2005 he received information that a shop had been raided at Rakwaro. He informed that one of the suspects, the 1st appellant, had run away and was in hiding. He mobilised youth who located him in an abandoned house and arrested him. Charles Odhiambo (PW 6) received information that his brother, PW 1, had been beaten. When he went to the shop he found that one suspect had been arrested and PW 1 has sustained injuries on his teeth. He was also informed that another suspect has escaped. He assisted to take PW 1 to Miriu Health Centre for treatment.

7. The investigating officer, PC Samson Mwema, recalled that on 1st September 2005, he was at Kendu Bay Police Station when he received PW 1 and PW 8 who had come to complain about a robbery that had taken place at his shop on the previous day. He confirmed that PW 1 was seriously injured on his mouth and he issued a P3 form. He went to the scene and found 2 stones and proceeded to Rakwaro Health Centre where he arrested the 2nd appellant who was undergoing treatment. When he went back to the station, PW 5 had arrived there with the 1st appellant.

8. The 1st appellant elected to give sworn testimony. He denied that he robbed PW 1. He stated that on the evening of 30th August 2005, he had gone to pick up his girlfriend at Rakwaro from PW 1's hotel. He was accompanied by the 2nd appellant. He found his girlfriend with PW 2. He testified that while he was leaving PW 1 confronted him with a panga and asked him where he was the girl. Before he could answer, PW 1 assaulted him with the panga and slashed him, causing him to raise alarm. People came and also started beating him. He lost consciousness and was arrested by the area chief.

9. The 2nd appellant also gave sworn testimony. He confirmed that he was with the 1st appellant when they went to PW 1's hotel to pick the 1st appellant's girlfriend. He stated that PW 1 beat them and other people joined in beating him causing him to become unconscious. When he recovered he found himself at Kendu Bay Police Station.

10. Based on the evidence, the learned magistrate was satisfied that the appellants were guilty of the offence charged. In the ground of appeal and submissions, the appellants attack the conviction on the basis that the prosecution failed to prove the offence and that they were convicted without any exhibit or material evidence linking them to the offence. They also contended that they were not properly identified and that their respective defences were not considered by the trial court. The respondent's position is that all the evidence pointed to the fact that the appellants were involved in committing the offence.

11. In a prosecution for robbery with violence **under section 295 as read with 296 (2) of the Penal Code** the prosecution must prove theft as **a central element of the offence** (see *John Mwikya Musyoka v Republic Mombasa CRA No.38/99 (UR)*). The other elements of the offence of robbery with violence were elaborated by the Court of Appeal in *Ganzi & 2 Others v Republic* [2005] 1 KLR 52 as

follows:-

The offence of robbery with violence under section 296(2) of the Penal Code is committed in any of the following circumstances namely:-

(a) The offender is armed with any dangerous or offensive weapon or instrument; or

(b) The offender is in company with one or more other person or persons or

(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.

12. As regards the issue of theft, the testimony of PW 1 confirmed that he was counting money when he was confronted by two assailants. His testimony was clear and consistent and the circumstances that he was in his shop at the close of business supports the fact Kshs. 40,000/- was stolen. The fact that the money was not recovered does not undermine his testimony as it could have been disposed of by the 1st appellant who had run away and was arrested the following day.

13. It is also not in doubt that the assailants were more than one in number and they were armed with a weapon namely stones with which they assaulted PW 1. The assault was confirmed by PW 7 and was consistent the injuries observed by PW 2, PW 3, PW 4 and PW 8. I therefore find and hold that all the elements of robbery with violence were proved by the prosecution.

14. The central issue in this appeal is whether the appellants were the persons who perpetrated the offence. First, this was a case of recognition rather than identification of a stranger. In ***Anjononi & Others v Republic [1980] KLR 59, 60*** the Court of Appeal stated as follows concerning recognition:-

The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.

15. PW 1 and PW 2 testified that they were familiar with appellants although they did not know their names. When pressed in cross-examination, PW 1 stated that he informed the police when he recorded his statement that he knew the assailants but he did not know their names. I am also satisfied the circumstances surrounding the incident were favourable to positive identification as PW 1 recalled that there was sufficient light while he was counting money and while PW 2 recalled that she had seen both appellants get into the shop. The time taken to demand the money from PW 1 and the interaction removes any doubt to the appellants' identity. The fact that the 2nd appellant was arrested immediately thereafter and the 1st appellant arrested in the morning renders the prosecution case watertight. Moreover, in their respective defences, the appellants confirm that they were together at complainants shop on that night and that they had some form of altercation with PW 1. If indeed the appellants were going to collect the 1st appellant's girlfriend, why would they pass or ignore the PW 2 who was her sister? I therefore reject the appellants defence.

16. I affirm the appellants' conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 7th day of March 2016.

D.S. MAJANJA

JUDGE

Appellants in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.