REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 15 OF 2015

(CORAM: J.A. MAKAU – J.)

CHARLES OMBAKA MBILIKA …….....….. APPELLANT

VERSUS

REPUBLIC …….……. RESPONDENT

(Being an appeal against both the conviction and the sentence Dated 31.3.2015 in Criminal Case No. 416 of 2013 in Ukwala Law Court Before Hon. R.M. Oanda – (AG P.M.)

JUDGMENT

1. The Appellant **CHARLES OMBAKA MBILIKA** was the 1st accused at the Lower Court and was charged with an offence of **Robbery with Violence Contrary to Section 296 (2) of the Penal Code.** The particulars of the offence are that on the 29th day of June 2013 at Rangala area in Ugunja District within Siaya County, jointly with others not before court while armed with dangerous weapons namely firearms robbed **GEOFFREY OMONDI ONYANGO** of Kshs.63,000/=, a mobile phone make Nokia X2 S/No.352426056236970, mobile phone make Nokia 1200 and immediately at the time of such robbery used actual violence to the said **GEOFFREY OMONDI ONYANGO**.

2. The Appellant was tried, convicted and sentenced to suffer death. The Appellant being aggrieved by the conviction and sentence filed the appeal through a petition of appeal filed on 13th April 2013, setting out Nine(9) grounds of appeal which can be summed up as follows:-

(i) That the charge was defective as evidence did not support the charge.

(ii) That the trial Magistrate erred in convicting the Appellant on evidence of a single witness on identification and without warning himself and when circumstances were not conducive for proper identification and in absence of corroboration.

(iii) That the trial Magistrate even in relying on parade identification which was not properly conducted.

(iv)The learned trial Magistrate erred in relying on evidence of PW3 and Safaricom data which there was no evidence from Safari Personnel proving registration of sim card No.0711864772 that it was in use.

(v) That trial Magistrate erred in relying on contradictory and uncorroborated evidence from prosecution witness and with prosecution case had not been proved beyond reasonable doubt.

(vi) That the Appellant's defence of alibi was wrongfully dismissed without cogent reasons by shifting the burden of proof to the Appellant.

3. 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."***

4. During the hearing of the appeal the Appellant appeared in person whereas M/s. Odumba learned State Counsel appeared for the State.

5. The Appellant in support of the appeal submitted written submission in which he urged that the trial court erred in law and facts thus convicting him on the evidence of single identification witness under difficult circumstances, that the parade was conducted in contravention of Judges Rules, that the trial court erred in holding that the Safaricom data exhibit P4 showed that the appellant was using the mobile phone which was stolen from PW1 in Nakuru and Vihiga areas whereas the prosecution case was not exhaustively established beyond reasonable doubts, that the trial magistrate erroneously convicted the appellant has failed to find that the charge was defective as the evidence did not support the charge, that the evidence was inconsistent and contradictory and that the Appellant's defence of Alibi was not considered.

6. M/s. Odumba Learne State Counsel appearing for the State opposed the appeal submitting that the prosecution proved the ingredients of the offence of robbery with violence, as he was in company of another person and was identified by PW1, that though Safaricom printout was not produced by PW3 he talked about it, adding that the sim card and phone was never recovered nor the cash of KShs.60,000/=.

7. The record of appeal forms part of this appeal containing, the prosecution witnesses evidence and as such I shall briefly summarize the prosecution case and the defence.

8. The prosecution case is briefly that, PW1 George Onyango Omondi an M-pesa Operator was on 29.6.2013 sent to go and pick money from KCB, Ugunja, whereby he went and withdrew KShs.60,000/=. He then took motorbike back home along Kisumu-Busia Road however as he approached Nzoia River, a Saloon car came from behind, whose Registration number PW1 did not get, but noted it was cream in colour, it stopped next to PW1, the occupants dressed in jungle jackets, came out, grabbed PW1 and started harassing him. They snatched his phone and placed him inside the back seat of the car where he was told to kneel down inside the car. The motorcycle of PW1 was left at the scene, as the vehicle turned towards Ugunja direction and the occupants took everything that PW1 had. The occupants then damped PW1 somewhere and sped off. People around told PW1 he was at a place called Nyamninia in Yala. PW1 was taken to Yala Police Station whereby he made a report. He was later called to Ugunja Police Station and referred to DCIO Ukwala. He was asked to take the receipt of the phones and was later informed of a suspect who had been arrested. That an identification parade was organized and PW1 was able to pick one person from the parade, the 2nd accused. The appellant was subsequently charged with this offence.

9. The Appellant denied the offence, gave a sworn defence to the effect that on 3.10.2013 at 6.30 p.m. the area Assistant Chief M/s. Brenda Akwendo went to his place and alleged his numberless motorcycle had

carried thieves. On 4.10.2014 the Appellant reported at D.C's Office Emuhaya but was ushered into the office of C.I. Julius Ivan, was interrogated, ordered to surrender his phone Techno T340 serial No.86069 8004323381 with sim card 0713435105 registered under his name. The Appellant led Police officers to his home, saw his motorcycle number plate, they took Appellant's wife's phone, Nokia X2-05 serial No. 3574060 – 45218060 with sim card No. 0704237979 registered under the name of Tabitha Lungoso Apamo. The police officer's also took a phone belonging to the Appellant's nephew, John Indebe Mbilika and that of the Appellant's landlord Jane Ongato, Techno T9 30 and the number plate KMCZ441Z of the Appellant's motor cycle, Boxer 100 red in colour. The Appellant testified that nothing related to this case was recovered from him. That on 5.10.2013 the Appellant was interrogated and finger prints taken. Later an identification parade was conducted with which he was not satisfied. He concluded by testifying that he cannot tell where he was on 26.6.2013 since he does not keep a diary but stated since the beginning of 2013 he had not gone outside Vihiga County but he was within Vihiga County. He produced statement of complainant exhibit D1 and investigation diary exhibit D2.

10. The Appellant contends that the trial court erred in law and facts in convicting him on testimony of a single witness under difficult circumstances and that the identification parade was conducted in contravention of Judges Rules. In the case of **Charles O. Maitanyi V. Republic (1986) KLR 198**, the Court of Appeal held that:-

> ***"Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification."***

11. That according to PW1 though the offence was committed at day time, he described the attackers as people wearing jungle jackets. He did not give description of the attackers to the police or anyone In his first report to the Police he did not give the names or particulars of his attackers nor did he tell the police if he could see them, he could identify them. The appellant and another were arrested without the complainant having given their description and the complainant was only informed of the suspect who had been arrested and asked to go and identify the suspects in an identification parade.

12. As regards identification, in the case of **Paul Etole and Another V Republic CRA 24 of 2000 (UR)** Page 2 and 3 the Court state as follows:-

> ***"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."***

13. I have very carefully considered the evidence of identification adduced by the complainant. According to PW1 he was only able to identify his attackers by jungle jackets. He did not even state their sex, physical appearance, their size nor did he mention even seeing their faces. That when he reported to PW3 No. 67215 Cpl Benson Ndambuki based at Ugunja C.I.D. he gave description of his attackers as two people in jungle jackets. He did not give any other description of his attackers. The first Report of PW1 brings to the fore the issue of the importance of first Report when it comes to considering the ability of complainants to identify, the people who robbed them or who committed the offence. I have noted from the evidence of the complainant that the offence occurred during day time however he did not in his evidence state whether he was able to see and identify the assailants by their physical appearance or their faces. He did not give any description of the assailants to the police but said the assailants were in jungle

jacket. Jungle jacket are commonly worn by various people in this country and cannot be a basis of identification alone as the same are commonly available in common markets. PW1 did not give details of what would enable him identify his attackers including the Appellant herein.

14. In the case of **Terekali and Others U. R. (1952) EACA** the Court held:-

> ***"Evidence of first report by the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguards against late embellishment on made up case.Truth will always come out from a statement taken from a witness at the time when recollections is very fresh and there has been no time for consultation with others ….."***

15. In the instant case robbery took place during day time and the complainant was bundled into the attackers vehicle and travelled with them for undisclosed after which he made a report to PW3 a Police Officer when the facts of the case were fresh in his mind yet he did not give physical appearance of the attackers. I am therefore of the view that PW1 was unable to identify his assailants because he was so scared to observe their appearances and the offence mostly happened so swift and when he was bundled in the vehicle he had no time to observe his attackers. I therefore find and hold that PW1 did not identify the appellant as one of his attackers.

16. Whether the complainant (PW1) was able to correctly identify the Appellant in the identification parade and whether the same was conducted in accordance with the judges rules? Any meaningful and lawful identification parade is organized and conducted based on description of the assailants as given by the complainants, hence the importance of the first report. In this case PW1 never gave description of his attackers other than saying the attackers were in jungle jackets, however PW4 proceeded to organize an identification parade in which the Appellant was identified by the PW1, the complainant herein, one wonders on what basis PW4 organized an identification parade and called PW1 to identify his attackers without having given the description of his attackers. I have very carefully perused the evidence given by PW1, PW3 and PW4 and I have found nowhere where PW1 had given description of his attackers to any of them. In the identification parade form exhibit P2, it is clear the suspect was not informed of his right to have a friend or counsel at such time, the objection that were made or could have been made by the suspect concerning the arrangements or persons on the parade and what action was taken concerning the objection was ignored as that part of the form is blank. Paragraph 6 (IV) (c) and (f) with reference to page 1 of identification parade form, dealing with the witness or witnesses not seeing the accused before the parade, and care that had to be exercised that witness do not communicate with each other, is similarly blank and finally the remarks by the suspect of the identification is still blank. Indeed the Appellant stated he was not satisfied with the parade and people standing on parade were not of his caliber and also on the basis that he was first taken out for finger prints but was not taken. The identification parade therefore was in breach of paragraph 6 (IV) (c) (d) (f). PW4 who gave evidence on behalf of Ip. Masinde did not know whether Ip Masinde complied with judges Rules. In view of the aforesaid I find that the identification parade was flawed and served no purpose for which it was intended by the prosecution. I find that the identification parade was an exercise in futility and should not be allowed to stand as in allowing it would occasion miscarriage of justice and prejudice the Appellant.

17. I now turn to circumstantial evidence based on the evidence as to whether the trial Court was correct in basing its judgment on data obtained from Safaricom printout? PW3 No. 67215 Cpl Benson Ndambuki testified that PW1 was robbed KShs.63,000/=, a Nokia 1200 and Nokia X2. It is important to point out that PW1 in his evidence in chief stated that his phones were snatched but never gave the type or model of the phones however in cross-examination he said he lost Nokia X 201 and Nokia 1203 which are different from what he told Pw3. PW3 got serial numbers of phone Nokia 1200 and Nokia X 2 and send request for the data to Safaricom. The Serial Number was 352 426056236970 (Nokia X 2) and upon getting the result it indicated the said phone was used by complainant on 29.6.3013 at 09.36 hours and that it was used by Charles Ombaka of ID/No.13632733 on 1st July 2013 while at Nakuru.

18. Section 78 (1) of the Evidence Act allows photographic evidence in Criminal Cases subject to certain conditions being satisfied.

19. Section 78 (1) of the Evidence Act provides:-

> ***"78. (1) In criminal proceedings a certificate in the form in the Schedule to this Act, given under the hand of an officer appointed by order of the Attorney-General for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein."***

20. Section 106 A of Evidence Act provides:

> ***"106A. The contents of electronic records may be proved in accordance with the provisions of section 106B."***

21. Section 106 B of the Evidence Act provides:-

> ***"106B. (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.***
>
> ***(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following–***
>
> > ***(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;***
> >
> > ***(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;***
> >
> > ***(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and***
> >
> > ***(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities."***

22. In the instant case I find that the data from Safaricom for Nokia X2 not relevant in this case simply because PW1 did not claim ownership of Nokia X2 as his nor did he state that his stolen phone was Nokia X2 but Nokia X 201 and Nokia 1203. His evidence is also at variance with particulars of the purported prepared Data Phone for Nokia X2 and Nokia 1200. The Safaricom data furnished to PW3 are of different phone from the ones purportedly stolen from PW1. PW1 did not produce any documentary evidence on ownership of Nokia X 2 nor did PW3 produce evidence to satisfy conditions set out under Section 106 B (2) of **Evidence Act** being conditions under which electronic records can be admissible and more specifically being certificate by service provider. PW3 did not produce any certificate or document to show that Appellant used Nokia X2 and certificate for Registration of persons to confirm ID/No.13632733 belonged to the Appellant. Had the trial Court considered all the above it would have come to a different conclusion. I therefore find that the Safaricom data was wrongfully produced as it did meet the required standard of proof. The Appellant should therefore be given the benefit of doubt.

23. Whether charge is defective? In the present case the appellant is faced with a charge of **Robbery with Violence contrary to section 296 (2) of the Penal Code**. A charge under this Section has three essential ingredients that must be proved by the prosecution. In the case of **Johana Ndungu V R Criminal Appeal No. 116 of 1995**, the ingredients for the charge of Robbery with Violence were stated to be:-

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.

24. I have carefully perused the charge sheet in support of the charge of robbery and I note the Appellant is said to have committed the offence jointly with others not before court. PW1 testified he was robbed by two people with others. I therefore find the particulars in support of the charge satisfies the ingredients for an offence of robbery with violence, hence the charge is not defective as contended by the Appellant.

25. Whether the Appellant gave a defence of Alibi? The Appellant in his defence did not state where he was on the material date of the commission of the offence, this was on 29.6.2013. I find that the Appellant therefore did not give a defence of Alibi but gave evidence on his arrest which evidence was considered and rejected rightly.

26. The upshot is that the appeal is merited. Accordingly the appeal is allowed, conviction quashed and sentence set aside. The Appellant is set at liberty forthwith unless otherwise lawfully held.

DATED AND SIGNED THIS 6TH DAY OF OCTOBER, 2016.

J. A. MAKAU

JUDGE

DELIVERED ON THIS 6TH DAY OF OCTOBER, 2016 IN OPEN COURT

IN THED PRESENCE OF :

APPELLANT IN PERSON

M/S. ODUMBA FOR STATE

C.C. K. ODHIAMBO

L. ATIKA

J. A. MAKAU

JUDGE