



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT SIAYA

HCCRA NO. 35 OF 2016

(CORAM: J. A. MAKAU – J)

SAMSON OMONDI ODUOR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal against both the conviction and the sentence dated 6<sup>th</sup> April, 2016 ,*

*in Criminal Case No. 66 of 2014 in Siaya Law Court before Hon. Hazel Wandere – P.M.)*

**JUDGMENT**

1. The Appellant **Samson Omondi Odour** was charged with **Robbery with Violence contrary to Section 296 (2) of the Penal Code**. The particulars of the offence are that on the 23<sup>rd</sup> day of August, 2014 at around 0900 hours at Komolo sub-location in Siaya District within Siaya Court with another not before court while armed with dangerous weapons namely a rungu and a dagger robbed **Erick Odhiambo Sewe** before the time of such robbery used actual violence to the said **Erick Odhiambo Sewe**.
2. That after full trial the appellant was found guilty, convicted and sentenced to suffer death.
3. The conviction and sentence provoked this appeal. The appellant in his petition of appeal set out several grounds of appeal which can be summarized as follows:-
  - i. The prosecution was riddled with contradictions and the prosecution failed to prove the case of robbery beyond any reasonable doubt.*
  - ii. The appellant did not have fair trial before the trial Court.*
  - iii. The investigating officer did not testify and exhibits were not produced before the trial court.*
  - iv. The trial court erred in failing to consider the appellant's defence.*
4. At the hearing the Appellant appeared in person whereas M/s. M. Odumba learned State Counsel appeared for the State.
5. The Appellant in support of the appeal urged that the prosecution witnesses contradicted one another as

regard the time and on how the robbery took place, specially PW1, PW2 and PW3, and the way the report was made, the weapon used during robbery stating PW1 stated the weapon used was a panga whereas other talked of a rungu, he further submitted the conditions were not favourable for positive identification from a distance of 10 metres, that investigating officer statement indicted he issued warrant of arrest whereas the appellant was arrested without a warrant of arrest. That the exhibits were released without court's order, that the arresting officer was not called as a witness, that the appellant was arrested on 24<sup>th</sup> August 2015 but taken to court after 2 days, that treatment notes of the complainant were not produced by the clinical officer, nor did the complainant produce the same, that clinical officer treated bruises but not cuts and that nothing was recovered from the appellant's house. The appellant prayed that the court do order a retrial as he did not understand the court process.

6. M/s. M. Odumba learned State Counsel opposed the appeal and submitted that the ingredients of robbery with violence were proved, in that the appellant was in company of another or others, was also armed with offensive weapon, that immediate before or after the robbery violence was used against the complainant who sustained some injurious, that the appellant was properly identified as the offence was committed during broad daytime, that the complainant was robbed some money, that the trial was fair and there is no justification for ordering a retrial, that the appellant's defence was considered and reasons for rejecting the same given and lastly the issue of delay in being taken to court in time was not raised before the trial court and if at all the appellant is aggrieved by the detention for more than 24 hours he can file a claim for appropriate reliefs a Constitutional Court. M/s. M. Odumba learned State Counsel prayed that the appeal be dismissed.

7. I have very carefully considered the Appellant's appeal, his grounds of appeal and his submissions before the court as well as submissions by the learned State Counsel.

8. I am a first appellate court and as such 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 **Court of Appeal case of Okeno V. R. (1972) E.A. 32** where the Court set out the duties of a first appellate court thus:-

***“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. only then can it decide whether the magistrate's findings 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, See Peters V. Sunday Post, (1958) E.A. 434)”***

9. The facts of the prosecution case form part of the record of appeal herein and I need not reproduce the same as the same is easily accessible from the record of appeal attached herein, I shall however briefly summarize the prosecution case and the defence.

10. The facts of the prosecution's case are that the complainant, PW1, a motorbike rider left his home on 23.8.2014 at 9.00 a.m. for Obare Trading Centre Stage where he works, that on the way he was flagged by two men to stop, one of whom was familiar to the complainant, that upon stopping, one of the two suddenly removed panga, from their trousers demanding money from the complainant, the familiar person used a panga to slap the complainant on the face with the flat side of the panga as the other one frisked the complainant's pockets as he struggled with them till he fell down breaking motorbike's side mirror in the scuffle. He was cut on his right arm twice at wrist leading to his screaming as the other assailant continued to frisk his pockets. The complainant was slapped all over the body and the assailants took the complainant's purse, removed all the money and gave it to the familiar assailant. It was all KSh.6000/= . The familiar assailant, the complainant told the court, was the accused in the dock. The assailant upon leaving the complainant a passerby approached the complainant, informed him he was able

from a distance to recognize Omondi from Kamolo village as one of the attackers. That after Boniface Graham Opiyo, one Nicholas also came to complainant's rescue. The complainant made a report to Siaya Police Station and gave the name of Omondi and another person as his attackers. That as the complainant was bleeding from the cuts and bruises he was given a P3 form and proceeded to Siaya sub-County Referral Hospital. He also proceeded to Kisumu for treatment. He identified the P3 form dated 23.8.2014 as MFI – 1. The police issued warrant of arrest which was executed by the A.P's at Ndere. The accused was then charged with the present charge.

11. The Appellant on being put on his defence opted to give sworn defence. The Appellant denied the charge and testified that on the previous day 22.8.2014 he had attended *makumbusho* with Erick the complainant whereby he sold sweets and soda, chewing gums to the complainant amongst other assortments on credit basis and that on 23.8.2014 he went to the Boda boda stage where he awaited for Okoth and Erick. Okoth paid him KShs.40/= clearing his debit. That Erick who is also a motorbike rider came and told him a night debt is never called for from daytime. That an arguments arose and a fight ensued. That Ondeng separated them. That Erick owed the appellant KShs.600/= for beans so Ondeng decided to pay the appellant the KSh.600/= as Erick threatened him that he will see. That the following day Police Officers from Ndere arrested the appellant on the allegation that he had assaulted Erick, the complainant and escorted him to Siaya Police Station. He testified the investigating Officer Isaack Matoke informed him Erick had reported that the appellant had attacked the complainant. He was shown along sleeved shirt at Police station which was not produced before the court. He urged that evidence of Erick (PW1) and Nicholas (PW3) differed in regard of the place of incident as the complainant talked of the stage whereas Nicholas (PW3) talked of Kobare. He urged that this is a trumped up case. He denied robbing the complainant.

12. DW2, Collins Ochieng Omenyo gave evidence for the defence. He testified that on 23.8.2014 before 9.00 a.m. he was seated at the Piki Piki Trading Centre Stage at Kobare when the appellant came carrying his work tools in a paper bag used for cement, placed it down and approached Erick, then Okoth came. He heard them asking about money, that Okoth Wagumba gave Omondi KShs.400/= as the appellant was also asking Erick, the complaint for his money. That a commotion ensued then a butcher owner came to the scene and decided to pay Omondi, the appellant the money owed. That after the payment Omondi, the appellant decided to pick up his bag as the complainant told the appellant "**utajionea.**" DW2 testified that he was a witness to that threat.

13. The Appellant contends that the trial court failed to reconcile the inconsistencies in the prosecution evidence. It is the appellant's contention that the testimony of the complainant PW1, PW2 and PW3 is inconsistent, that the inconsistencies were not considered by the trial court. I have very carefully examined the testimony of the complainant PW1 and that of the other prosecution witnesses as regards the commission of the offences of robbery with violence.

14. PW1 in his evidence testified that on the way to the above Trading Centre along the road he met two men who stopped him. That they suddenly removed pangas from their trousers demanding money, that the familiar assailant, thus the appellant cut his arm twice at that instance. That he screamed as the other unfamiliar assailant frisked his pockets, that he took his purse, removed all the money and gave it to the familiar one, the appellant herein, that they took KSh.6,000/= from him, that the attackers then left and that after a while a passerby Boniface Graham Opiyo (PW2) came to his rescue, followed later by Nicholas (PW3). That it was PW2 who told him that he recognized Omondi of Kamolo village. On cross-examination PW1 told the appellant that the appellant is a mason and that at the time of his attack nobody else was at the scene.

15. PW1's evidence is materially contradicted by PW2, PW3, and PW4. PW2 in his evidence in chief testified that the incident took place at 8.30 p.m. as opposed to 9.00 a.m. as stated by PW1, that PW2 passed the complainant and the two attackers and later heard PW1 screaming, that he had seen the two with a panga and a rungu, that it was the appellant who had the rungu and not the panga as stated by PW1, that PW2 contrary to what PW1 stated insisted that on going to the scene he only looked back and saw other people consoling PW1, that he saw PW1's wallet fall down and the appellant pick it, PW2 did not mention giving the name of one of the attackers to PW1. On cross-examination PW2 contradicted

himself by stating that the incident occurred at 8.30 a.m. PW3 testified that he is an eye witness and that at 9.00 a.m. of 23.8.2014 he saw the people attack the complainant PW1, that one of them had a panga and another a rungu but when they saw him they disappeared. PW3 did not mention finding PW2 at the scene as stated by PW1. PW2 and PW3 testified of the attackers being armed with a panga and a rungu contrary to what PW1 testified, further PW2 and PW3 testified they saw the attackers from as very close range as PW2 passed them with PW1, whereas PW3 testified he saw them from a distance of 3 metres contrary to what PW1 testified that his rescuers came much later after the attackers had left.

16. I will on the same point turn to exhibit 1, the P3 form dated 23.8.2014 Ref.O.B. 8/23/8/08/2014 in respect of Erick Odhiambo Sewe issued by Siaya Police Station. PW5 testified that the complainant reported to him that he had been robbed by the appellant and another and had sustained cuts and as such he issued a P3 form which P3 form was filled by PW4. PW5 recorded on P3 form as follows:-

***“Date and time reported to police 23.08.2014 at 9.30 hours brief details of alleged offence alleges to have been assaulted by well known persons well known to him please ascertain the degree of anything for further police action.”***

17. PW4 a Clinical Officer attached to Siaya Referral Hospital testified that on 23.8.2014 he received a patient Erick Odhiambo Sewe who alleged to have been assaulted on 23.8.2014 by a known person. The P3 form on part II – Medical details states:

***“1. Plaintiff in possession of dry blood stained shirt (long sleeved), not torn, verified on examination.***

***2. Plaintiff alleged to have been assaulted on 23.08.2014 at around 0900 Hours by well known persons to him.”***

18. It is evidently clear from the evidence of PW4 that the complainant PW1, when he presented himself to PW4 he claimed of an assault but not of robbery. Similarly when PW5 issued P.3. form exhibit 1. He did not record any complaint of robbery but of assault. His evidence in chief contradicts the report that he put down in the P3 form exhibit. P. 1. That from the evidence of PW4 and PW5 and the contents of the P.3. form exhibit 1, if any offence was committed by anyone it was an offence of assault or not any other offence.

19. From the examination of the evidence of the prosecution witness, I am satisfied that there are fundamental inconsistencies that dent the prosecution case. The appellant in his submissions was able to succinctly identify the alleged inconsistencies and has been able to point out how they dent the prosecution case. I therefore hold and find that there are fundamental inconsistencies in the prosecution case which the trial court failed to consider and as such came to the wrong conclusion. I find merits on this ground of appeal.

20. Whether appellant had a fair trial? The appellant did not in this appeal specifically state to the Court what provisions of the constitution as guaranteed by Article 50 of the constitution were violated and in what manner. That where a party alleges a constitutional right as to fair hearing has been breached or violated or infringed or threatened he/she is under duty to specifically state the article breached, by who and in what manner but stating generally that he/she did not have fair trial is not enough. I have very carefully perused the court proceedings and have been unable to note any breach or violation of the appellant's rights as regards having been accorded a fair trial. The charge was read and explained to the appellant in Kiswahili language which he understands, he applied for bond and was granted the same, he did not raise the issue of not having been supplied with witnesses statements or of not having been afforded sufficient time to prepare for the trial. I therefore find no basis in support of this ground and I dismiss the same.

21. The appellant contends that the investigating officer did not testify and the exhibits were not produced before the trial court. I have perused the court record and indeed it is true the Investigation Officer did not testify and no reason was given for his failure to testify in this case. The Appellant in urging this

ground did not state what it was that would have been of great importance to his case had the Investigating Officer been called to give evidence. I find that it is always important for prosecution to call the Investigating Officer in every case as the evidence of the Investigating Officer would buttress the prosecution case, especially in a situation where there is no sufficient evidence in support of the charge. Similarly where exhibits have been received the prosecution should always produce the same. In the instant case, the panga, the complainant's wallet and money were not recovered but PW1's motor bike which the complainant claimed fell down during the scuffle and side mirrors broke down should have been produce as exhibit. The failure to call the Investigating Officer and produce the motorbike side mirrors which were purportedly broken down would make this court make a conclusion that such omission could have been the basis for any adverse inference.

22. Whether the appellant's defence was considered? The appellant in his defence denied committing an offence of robbery with violence but stated that he had a scuffle with the appellant at the Boda Boda Stage as he demanded the complainant to clear his debt with him. He called DW2 who witnessed the incident and corroborated his evidence. The trial court considered the defence and rejected the same after comparing his defence with his cross-examination. The burden of proof in criminal cases does not shift and the prosecution has always to prove their case beyond any reasonable doubt.

23. In the instant case the prosecution was required to proof all the ingredients of an offence of Robbery with Violence. The charge under section **296 (2) of the Penal Code** has three 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 was stated to be:-

*i. If the offender is armed with any dangerous or offensive weapon or instrument.*

*ii. If one is in company with one or more other person or persons and:*

*iii. If at or immediately before or immediately after the time of robbery, wounds, beats, strikes or uses any other violence to any person.*

24. I have in this judgment found that the evidence against the appellant from PW1, PW2, PW3, PW4 and PW5 to have fundamental inconsistencies which dent the prosecution case against the appellant. That though the prosecution witnesses attempted to demonstrate that all the three ingredients of the offence of robbery were satisfied, the fundamental inconsistencies in their evidence dents the prosecution's case especially when the complainant reported to PW4 that he was assaulted by person known to him. He did not state he suffered injuries while being robbed. PW4 in his evidence and in the P.3. form did not mention finding any panga cuts on PW1 as he had stated. PW5 contradicted what he had recorded in the P.3. form exhibit 1 thus the complainant had been assaulted by persons well known to him but gave a different version of what happened to the court, thus the complainant was robbed. The prosecution did not in my view and in view of their evidence proof the three ingredients for an offence of robbery with violence. Had the trial court considered the entire evidence of the prosecution witness and that of the appellant and his witnesses, it would have found the evidence of the appellant credible as the report to PW5 by the complainant and the P3 form gave credence to the appellant's defence. I therefore find that appellant's defence was not properly considered. The prosecution failure to produce the damaged motorbike side mirrors and the failure of the prosecution to call the investigating officer, makes this court make an inference that, that omission was because that evidence would have been adverse to the prosecution case, hence it was not availed to the trial court.

**25. The upshot is that I find the conviction was not safe, the conviction is quashed and the sentence meted against the appellant is set aside. I direct that the appellant hereby be set at liberty forthwith unless otherwise lawfully held.**

**DATED AND SIGNED AT SIAYA THIS 6<sup>TH</sup> DAY OF OCTOBER, 2016.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN THE OPEN COURT**

**IN THE PRESENCE OF:**

**Appellant in person present.**

**Mr. E. Ombati for Respondent**

**C.C. K. Odhiambo**

**L. Atika**

**J. A. MAKAU**

**JUDGE**