



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 48 OF 2009

JAMES ONYANGO OWIYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in the Chief Magistrate's Court at Kisumu Criminal Case No. 18 of 2008]

J U D G M E N T

1). The appellant was charged with two counts of Robbery with Violence contrary to section 296 (2) of the penal code.

The first count was that on the 10th January, 2008 at Posta Flats estate in Kisumu East District within Nyanza Province, jointly with others not before court being armed with dangerous weapons namely toy pistol and pangas robbed Victor Humphrey Meme of his money cash Kshs. 2000/= and at the same time of robbery threatened to use actual violence to the said Victor Humphrey Meme.

2). The 2nd count was that on the 10th January 2008 at Posta Flats estate in Kisumu East District within Nyanza Province jointly with others not before court, being armed with dangerous weapon namely toy pistol and pangas robbed Jackline Achieng of her mobile phone make Samsung Kshs. 800 valued at Kshs. 7000/= and at the time of such robbery threatened to use actual violence to the said Jackline Achieng.

3). The appellant was convicted on the two counts and sentenced to death in the 1st count and the 2nd count was held in abeyance. He has filed this appeal citing several grounds.

4). The brief facts of this case are that the complainants at around 8.45 p.m were walking home. Suddenly three men armed with pangas and a pistol accosted them. They were threatened to be harmed if they raised any alarm. PW1 told the court that it was the appellant who had a pistol and his accomplices had pangas. They then took away from him Kshs. 2000/= and they took from PW3 a mobile phone. Within a short time after they left PW2 arrived at the scene and they gave chase. The rest of the robbers disappeared but the appellant was arrested as he was unable to climb a fence which was ahead. The pistol which he had was also recovered by the members of the public. He was then handed over to PW5, police officer who were at Police Bus Park.

5). The evidence of PW1 and PW3 seemed to agree on the nature of the attack. PW2 confirmed the evidence of PW1 that there was a fence ahead which the appellant was unable to cross.

6). In his defence the appellant denied the charge. In his sworn evidence he says that he was in the

house of one Dr. Omenge who was with his family PW3 who was his erstwhile girlfriend came and asked for Kshs. 1500/= to enable her go to the salon. He refused and told her to pick it from Victor as he was no longer his friend. After 10 minutes people came shouting ODM slogans and demanded that he gives up Dr. Omenge who was a Kisii. Someone called the police who around and who came and took them to Central Police Station. By that time PW1 had already stabbed him on the head. He was taken to hospital and a P3 form filled. He informed PW5 but he did not take any action as he was a relative to PW1. He therefore denied the charge.

7). We have perused the entire proceedings and heard the parties submission. Infact the appellant's submission raised more issues that were not raised during the trial and in particular that he was harbouring Dr. Omenge who was a Kisii and that this was the highlight of post election violence. The state however supported the conviction and agreed entirely with the finding of the trial court. The appellant's petition is composed of 5 grounds which basically can be summarised as follows:

- 1) **That there was a love triangle between him and the 3rd witness.**
- 2) **He was assaulted for harbouring Dr. Omenge and his family who were Kisiiis.**
- 3) **The prosecution failed to call essential witnesses.**

In **Okeno -VS- Republic [1973] E.A 32** it was stated that the duty of this court is to reevaluate the evidence afresh with a view of arriving at an independent finding and always aware that we did not have the benefits of conducting the trial and therefore seeing the witnesses. What the appellant told the court in his defence is completely at variance with the complainants and their witnesses.

8). The appellant did not associate himself with the robbery at all and that he was arrested at the instigation of the complainant who was his previous lover after failing to give her Kshs. 1500/= to use at the saloon. Apparently on critically reading the evidence of the prosecution witnesses we find that the witnesses point towards a robbery that took place that evening.

9). **PW1 Victor Meme** and **PW3 Jackline Obara's** evidence all agree on how the robbery took place and what the weapons each of the assailants possessed. The pistol was clearly traced to the appellant. PW1 told the court that:

“.....we raised more alarms and gave a chase. We went through Rotary and Nyalenda Railway, that is where they spotted the man towards estate. We ran towards Kibuye Mixed but there was a fence and he got stuck. He then dropped the pistol. We also discovered it was a toy pistol (MFI 1)”.

10). PW2 said concerning the same pistol:

“The other two ran in a different direction when the crowd came near he found me towards Kibuye Mixed. There was a fence ahead. We could not go through. He dropped the pistol in the grass we approached him and recoved the pistol. It was a toy pistol (MFI 1)”.

12). We therefore easily conclude that it was the appellant who had a pistol. We do not find any basis to connect the appellant defence and what the prosecution witnesses said. We further do not find any relationship between the love triangle issue and how he was arrested.

13). But was he identified? PW3 told the court that there was sufficient security lights and that it was not very dark. We do find this believable as the appellant did not counteract the same. Further between the robbery and the arrest, we find that the same was within a span of minutes and it becomes difficult not to believe the prosecution witness.

14). As to the contention that this was part of post election skirmishes, we do not think that there was sufficient evidence by the appellant. Even though the family of Dr. Omenge no longer stayed in Kisumu,

we do not find any evidence to suggest that the appellant attempted to call them to buttress his defence. We think this is simply a red erring.

15). Consequently, we do not find any sufficient reasons to sustain this appeal. There was reasonable evidence to hold that it was the appellant and his two colleagues who robbed the complainants. He was arrested within a short distance from the scene. All the ingredients of robbery with violence were established by the prosecution. The appellant's defence was too weak to displace the prosecution case. The appeal is otherwise dismissed.

Dated, signed and delivered at Kisumu this 3rd day of February, 2015.

H.K. CHEMITEI

E.N. MAINA

JUDGE

JUDGE