



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CRIMINAL APPEAL NO. 135 OF 2012**

**KENNETH OWINO OMOLLO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*[From original conviction and sentence in the Principal Magistrate's Court at Siaya Criminal Case No. 844 (A) of 2011]*

**J U D G M E N T**

1). The appellant and two others were charged with the offence of Robbery with Violence contrary to section 296 (2) of the Penal Code.

The particulars were that on the 22nd day of October 2011 at Karapul Sub Location in Siaya District within Nyanza Province jointly with others not before court being armed with dangerous weapons namely panga robbed Dorcas Anyango Ochieng, a mobile phone make Nokia 1616 Serial number 3577605083238 valued at Kshs. 2000/= and cash Kshs. 7000 and immediately before or immediately after the time of such robbery threatened to use actual violence against the said Dorcas Anyango Ochieng.

2). The prosecution called 4 witnesses to establish their case. **PW1 Dorcas Anyango Ochieng**, told the court that she was asleep on the material night in her house when at around 3 am her husband decided to go out for a short call. Suddenly somebody entered her house armed with a panga and a strong torch which blinded her. He demanded money from her or else he was going to harm her. She obliged and gave him Kshs. 7000/=. He also took her phone. After leaving she raised alarm and people came but the robbers had already left. She later reported at Siaya Police Station.

3). **PW2 John Ochieng Okwiri**, PW1 husband gave the same version only that when the robbers struck he was outside. He raised alarm after they had left. Significantly, both PW1 and PW2 did not identify the robbers as it was dark and there was no light outside the house.

4). **PW3 Joshua Kimulwa**, a police officer were on patrol on 22-10-2011 when at around 10 am they heard people shouting "thieves, thieves". They went to the direction where the shouts came from and when they arrived they found that the members of the public had killed one person and were in the process of killing the second. They rescued the two who included the appellant. They recovered a mobile phone from the appellant which they handed over to the police as well as the two suspects. He identified the mobile phone.

5). **PW4 Cpl. Anthony Mugo**, based at Siaya Police station told the court that on 23-10-2011 at

around midnight he was on a patrol together with his colleagues. He said that he received a call from the OCS to proceed to Kanyawagwer village where there were suspects who were being beaten by the members of public. On arrival they found that two of them had been killed and the other two were rescued by AP officers. They were handed over the two who included the appellant as well as a mobile phone which was recovered from the appellant. The following day he learned that PW1 had identified the mobile phone.

**6).** The appellant when put on his defence denied the charge. In his sworn evidence he told the court that he was coming from work on 22-10-2011 at around 8.30 pm. He met Administration Police officers who accused him of loitering. They then bundled him into a police vehicle and was placed in the cells. He was brought to court the following day. He said that the only item recovered from him was Kshs. 70/=.

**7).** We have perused the entire evidence on record as well as heard the submissions from the parties. Our duty as expected is to reevaluate the evidence afresh and come up with an independent finding. There are two sets of petitions of appeal, one filed by the appellant and that by his counsel M/S Nyawiri & Co. Advocates. The substance of the two petitions is that the evidence adduced by the prosecution was not sufficient enough to have warranted the appellant's conviction.

**8).** For such an offence which was committed at night, that is 3 am to be sustained the question of identification was paramount. PW1 and PW2 confirmed in their evidence that they were not able to recognise or identify the assailants because there was no sufficient light. This then leaves the burden of proof to PW3 and PW4. PW3 told the court that he rescued the duo at 10 am on 22-10-2011 from the members of the public. If this was so then being daytime we do not hesitate to conclude that he was able to identify them clearly.

**9).** If this was so, then PW3's evidence ought to be contrasted with that of PW1 and PW2 who confirmed that the incident occurred at 3 am on 22-10-2011. It means that the robbery at PW1 took place earlier before the appellant was apprehended.

**10).** But again this timing ought to be contrasted with that by PW4 who said that the appellant was arrested on 23-10-2011 at midnight. Does it mean that the incident took place again at around midnight, yet according to PW1 it was at 3 am and PW3 at 10 am. Even on cross examination the PW4 still maintained that he received the appellant from the AP officers at midnight on 23-10-2011.

**11).** The other issue which we must analyse is the recovery of the phone and its identification. The complainant did explain to the court that his phone was Nokia 1616 and gave the said number. However, we do not find this very adequate. Whereas it is true that the mobile phone could be hers, there was no other description to suggest that the phone may not have belonged to any other person. She did not have any identification mark and neither did she produce any receipt to suggest that she purchased. It is always necessary and more so in recent times where almost every person owns a mobile phone to properly identify the same to the court.

**12).** The other issue which we agree with the appellant in his submission is that apart from PW3 no other person including the owners of the house in which the appellant and his accomplices were found came to testify. We believe that it could have been prudent for the prosecution to have called any other civilian witness to explain how the appellant found himself in the alleged house.

**13).** We find that there are several material contradictions which ought to work in favour of the appellant. We are not satisfied as outlined above on the time when the appellant was arrested and handed over to PW4. The same materially contradicts that of PW4. Significantly, PW1 and PW2 did not recognise the assailants. Since PW3 and PW4, evidence was really material the same was not watertight enough to sustain a conviction.

**14).** For the foregoing reasons we think this appeal ought to succeed. We are not satisfied that the prosecution did sufficient investigation in this matter. The appellant's defence was reasonable enough not to have been put in his defence. The appeal is allowed. The appellant set free unless lawfully held.

**Dated, signed and delivered at Kisumu this 10th day of February, 2015.**

**H.K. CHEMITEI**

**E.N. MAINA**

**JUDGE**

**JUDGE**