



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL NO. 77 OF 2014
(FORMERLY KISII HCCRA NO. 75 OF 2013

BETWEEN

DAVID OUMA WANYARA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 479 of 2012 at the Senior Principal Magistrate's Court at Migori, Hon. D.K.Kemei, SPM dated on 5th December 2012)

JUDGMENT

1. The appellant, **DAVID OUMA WANYARA**, was charged jointly with others not before the court 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 charge were that on 27th August 2012 at Ora Estate in Migori County while armed with dangerous and crude weapons namely pangas and metal bar robbed **SULEIMAN ISMAIL ADAN** of a mobile phone make NOKIA X2 valued at Kshs. 8,000/- and at or immediately before or immediately after the time of such robbery used actual violence on the said **SULEIMAN ISMAIL ADAN**.
2. The appellant was tried, convicted and sentenced to death. He now appeals against the conviction and sentence on the grounds set out in his petition of appeal filed on 30th July 2013. In summary the grounds of appeal are that the evidence of visual identification did not establish his complicity in committing the offence, that the prosecution did not call essential witnesses, that the complainant did not give any description of the appellant for purposes of conducting an identification parade. During the hearing the appellant filed further grounds of appeal in which he stated that he was never served with witness statements hence he did not have adequate opportunity to prepare for his defence. He argued that he was a victim of mistaken identity and that his rights under **Article 50** of the Constitution were violated. Learned Counsel for the State, Mr Kimando, supported the conviction and sentence and submitted that there was sufficient evidence to uphold the conviction.
3. As this is the first appeal, we are 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*).
4. The prosecution evidence was that Suleiman Ismail Adan (PW 1) recalled that on 27th August

2012 at about 7.30 pm he was walking from Takwa Mosque, Migori when he met two young men pretending to urinate beside the road. As he passed them he was suddenly hit with a panga on the shoulder and a metal bar on the leg. His mobile phone was taken away whereupon he raised alarm. At that time a police officer who was nearby gave chase and apprehended the suspect. The suspect turned out to be the appellant herein. The complainant's mobile phone was recovered from the appellant. He reported to the police station and was issued a P3 form which was filled by Andrew Were (PW 4), a clinical officer at Migori District Hospital who examined him on 29th August 2012 and confirmed that he sustained injuries on the head and the right shoulder which had a swelling. He classified the injury as harm.

5. PC Gabriel Ndana (PW 2), a police officer, testified that on the material day he was on patrol near Migori Show ground with PC Daniel Kimuyu (PW 3) when he heard people shouting, "thieves, thieves.." They rushed where the screams were coming from and saw someone running towards them. They ordered him to stop but he changed course and continued to run so they pursued the suspect. They apprehended the suspect and recovered a Nokia X2 phone and a metal bar tucked inside his trouser. PW 2 recalled that PW 1 was present when they apprehended the appellant. PW 2 and PW 3 escorted the appellant to Migori Police Station where he was charged with the offence of robbery with violence.
6. PC Kennedy Mwachi (PW 5), the investigating officer, was deputed to investigate the matter on 28th August 2012 by which time the appellant had been arrested and the witnesses had recorded statements. He received the exhibits which were the Nokia X2 mobile phone, the purchase receipt, the carton for the mobile phone and the metal pipe.
7. When put on his defence, the appellant elected to make an unsworn statement denying involvement in the incident. He stated that on the material day he was at the bus stage when police officers arrested him while he was standing there.
8. The ingredients of the offence of robbery with violence under **section 296(2)** of the **Penal Code** were clearly set out by the Court of Appeal in the case of **Oluoch v Republic [1985] KLR** where it was held that;

Robbery with violence is committed in any of the following circumstances:

- a. *The offender is armed with any dangerous and offensive weapon or instrument; or*
- b. *The offender is in company with one or more 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"[our own emphasis].*

The use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code.

9. In the instant case, we are satisfied that the prosecution proved the ingredients of the offence of robbery with violence. PW 1 was attacked by a person who had a weapon and the fact that he sustained injuries was confirmed by PW 4. In the course of the violence, PW 1's mobile phone was stolen. The main issue in this appeal is whether the appellant was the person who committed the act of robbery with violence.
10. Although the incident occurred at about 7.30pm in circumstances that were not favourable for positive identification, the prosecution evidence dispelled any doubt as to the appellant's identity. The appellant was arrested so soon after PW 1 raised alarm which attracted PW 2 and PW 3 who gave chase and apprehended him with a weapon and the a Nokia X2 phone which the PW 1 positively identified and proved was his. The appellant did not lay claim to the phone or provide any reasonable explanation as to why he had in his possession the phone so recently stolen from

PW 1. As the appellant was apprehended so soon after committing the offence and in possession of recently stolen property, there was no need for an identity parade to be conducted.

11. We are therefore satisfied that prosecution proved that the appellant committed the offence of robbery with violence. His defence taken in light of the overwhelming prosecution evidence was a sham.

12. In his further grounds of appeal the appellant argued that his rights to a fair trial were violated in that he was not given witness statements prior to the hearing of the case. We have perused the record and we note that the learned magistrate did not make an order directing the prosecution to supply witness statements but we do not think that the appellant was prejudiced in the circumstances.

13. We affirm the conviction and sentence. The appeal is dismissed.

DATED and DELIVERED at MIGORI this 1st day of *September* 2015.

D.S. MAJANJA

W. A. OKWANY

JUDGE

JUDGE

Appellant in person.

Mr Kimando, Prosecuting Counsel, instructed by the Director of Public Prosecutions for the respondent.