REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 14 & 16 OF 2012

(Appeal from the original conviction and sentence by Hon. R. K. Ondiek-PM in Criminal Case No. 296 of 2010 at Kilifi)

1. PETER ODHIAMBO MAGAWI.....1ST APPELLANT

2. GEORGE OUMA.....2ND APPELANT

=VERSUS=

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The two Appellants were charged with the offence of Robbery with violence contrary to section 296 (2) of the Penal Code. The 2nd Appellant was charged with an alternative count of handling stolen goods contrary to section 322(1) and (2) of the Penal Code.
2. The 2nd Appellant was also charged with being in possession of narcotic drugs contrary to Section 3(1) as read with Section 3(2) (b) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994 and having suspected stolen goods contrary to section 323 of the Penal Code.
3. When the appeal came up for hearing, the prosecutor conceded to the appeal on the conviction and sentence for the offence of Robbery with violence and agreed to have the Appellants convicted and sentenced for the offence of simple Robbery under section 295 and 296(1) of the Penal Code.
4. The reason for the concession by the prosecution was that nobody was injured during the robbery and the motor vehicle which was stolen was recovered on the 2nd Appellant.
5. The prosecution also conceded to the appeal in respect to the offence of possession of narcotic drugs because there was no chain of evidence in respect to the drugs that were allegedly recovered on the 2nd Appellant. The state counsel informed the court that there was no memo which accompanied the drugs to the Government Chemist for analysis.
6. The Prosecution further conceded the appeal in respect to the charge of handling stolen property in view of the fact that the first count, that is Robbery, carries a more severe sentence. The 2nd Appellant agreed to the said concessions and, through his advocate, proceeded to mitigate on the issue of the sentence in respect to offence of simple Robbery.
7. On the other hand, the 1st Appellant, who was charged and convicted for the offence of Robbery with violence contrary to Section 296(2) of the Penal Code, declined to accept the concessions by the prosecutor and proceeded to argue his appeal.
8. The particulars in respect to the charge of Robbery with violence are that the 1st Appellant being armed with dangerous weapons names knives robbed Juma Kazungu of his motorcycle

registration number KMCF 519R, one mobile phone, Kshs.500 and his national identity card all valued at Kshs.73,000/-.

9. As the first appellate court, we are required to re-evaluate the evidence that was tendered in the lower court, assess it and make our own conclusion. **(Okeno Vs R (1972) EA 322).**
10. The facts of this case are that on 24th March 2010, at about 1 am, the Appellants requested PW2 to ferry them to "MOPK" using motorcycle registration number KMCF519R that he was riding, which he agreed. Along the way, the Appellants pulled out knives and ordered PW2 to hand to them the motorcycle, the money that he had together with the mobile phone, which he did. PW2 stated that he did not know the people who robbed him except that one of them did not have fingers. The witness could also not recall who between the two pillion passengers took the motorcycle.
11. PW2 informed the trial court that after the Appellants left with the motorcycle, he followed the tyre marks which led him to a certain house whose owners he did not know. He reported the matter to the police who went to the said house and found the 2nd Appellant in. They also found the stolen motorcycle together with rolls of bhangi in large quantities in the house which turned out was the 2nd Appellant's house. PW2 stated that the 2nd Appellant is the one who led them to the 1st Appellant's house. PW 2 identified the 1st Appellant as one of the people who had robbed him when the police held the 2nd Appellant's hand and showed it to him.
12. According to the police Inspector Mjomba, PW4, PW 2 made a report at the police station about the robbery at 3.00 am. Accompanied by PW 2, they followed the tyre marks of the motorcycle to the 2nd Appellant's house. The motorcycle was recovered from the 2nd Appellant's house who in turn took them to the 1st Appellant's residence who allegedly used the 2nd Appellant's house as a store.
13. While making the report at the police station, the complainant did not mention the 1st Appellant's name but gave a description of his lame fingers on the left hand. However, nothing was recovered from the 1st Appellant's house when it was searched.
14. In his defence, the 1st Appellant stated that on 24th March 2010, he was arrested by PW4 at around 6 am in his house. PW4 searched his house but did not recover any stolen items. The 1st Appellant admitted that his left hand is deformed and that PW4 knew him well even before the day of the arrest. He had been arrested on previous occasions by PW4 for selling drugs.
15. The 1st Appellant denied ever knowing the 2nd Appellant and denied having been involved in robbing PW2 on 24th March 2010. The 2nd Appellant also denied having been involved in the robbery. However, as we have stated above, the 2nd Appellant has conceded to the charge of simple Robbery.
16. In his home-made submissions, the 1st Appellant submitted that there was no evidence whatsoever to link him to the offence of Robbery. The 1st Appellant submitted that PW4 showed to the complainant the 1st Appellant's deformed hand without conducting an identification parade pursuant to the Force Standing Orders. The 1st Appellant submitted that nothing was recovered from his house on the morning of the robbery and the prosecution failed to discharge its burden of prove.
17. On the other hand, the state counsel submitted that it is the 2nd Appellant who took PW4 to the 1st Appellant's house. The 1st Appellant was arrested and charged with the offence of robbery with violence because the complainant, PW2, had given the police the description of the person who had robbed him as one with a deformed hand.
18. In her Judgment, the learned Magistrate stated as follows:

"According to him (PW2), one of the customers had a lame hand. It is on record in evidence that upon recovery of the motorcycle, the 2nd accused led the police and the complainant to the 1st Accused's house and indeed the complainant confirmed that the same man was one of the robbers. To this end, it is no doubt that the complainant was robbed by two people including the 1st accused person. Sergent Charles Murage told the court that the complainant was able to identify the 1st accused's lame hand with the assistance of electric

light".

19. According to the evidence of the complainant, at around 1 am, PW2, the Appellants emerged and requested him to take them to MOPK. The Appellants asked him to use a shortcut and in the midway, they told him to stop and then pulled out knives. It was his evidence that he neither knew their names nor the person who took the motorcycle.
20. The complainant did not inform the court where the Appellants emerged from when they requested him to ferry them to MOPK with his motorcycle. It is not clear form the evidence whether there was any light at the place the Appellants are said to have boarded the motorcycle to have enabled the complainant to see the 1st Appellant's deformed hand. In view of the fact that the complainant did not recognise the Appellants at the time of the robbery, and having given the police some description of one of the persons who attacked him, it was imperative for police to conduct a parade in accordance with the Force's Standing Orders.
21. In the case of **Abdullah bin Wendo & Another V R (1953) 20 EA CA 166,** it was held as follows:

"**Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need of testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."**

22. In view of the fact that conditions favouring a correct identification of the 1st Appellant by the complainant at 1 am were not proved, what was needed was some other evidence, whether circumstantial or direct putting the 1st Appellant at the scene of crime.
23. The identification of the 1st Appellant on the day he was arrested by the complainant by his deformed hand without conducting a parade cannot be safely accepted as free from the possibility of error, especially when there is no evidence that there was enough light to have enabled the complainant see the 1st appellant's deformed hand. An identification parade becomes even more imperative where a suspect has a visible deformed organ like the hand. In the case of **Oluoch Vs R (1985) KLR 549**, it was held that "**a parade is irregular if the accused person is disfigured and was not afforded facilities to ensure that the disfigurement was not especially apparent during the parade."**
24. For the above reasons, we have come to the conclusion that the identification of the 1st Appellant by the PW 2 in his house was not reliable and the 1st Appellant should be given the benefit of doubt.
25. In the result, we allow the appeal, quash the conviction and set aside the sentence in respect to the 1st Appellant. The 1st Appellant shall be set at liberty unless otherwise lawfully held.
26. The 2nd Appellant withdrew his appeal and conceded to the reduction of the charge of Robbery with violence to that of simple Robbery. With regard to count 2 we agree with the reasoning of the state counsel and will quash the convictions accordingly. The only issue before us in respect to the 2nd Appellant is the sentence that we should impose for the offence of simple Robbery, and on the 3rd count.
27. We have considered the 2nd Appellant's mitigation. We have considered the evidence on record and in particular that the motorcycle which was stolen from the complainant was found in the 2nd Appellant's house.
28. In view of the prevalence of the offence of Robbery in this country and in particular the stealing of motorcycles, we are of view that we should impose the maximum sentence provided for under the law for the offence of Robbery contrary to Section 295 as read together with Section 296(1).
29. In the circumstances of this case, we quash the conviction and sentence of the trial court in respect to the 2nd Appellant on the 1st count and substitute it with a conviction of Robbery contrary to section 295 as read together with Section 296(1).

30. Regarding count 1, the sentence imposed on the 2nd Appellant is set aside and substituted with a sentence of fourteen (14) years imprisonment from the date of sentence in the lower court. In the light of the foregoing we order that in respect of count 3 for which no sentence was imposed the sentence will be equivalent to the period already served.

Dated and Delivered in Malindi this **7th** day of **March,** 2014

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C.W.MEOLI

JUDGE

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O.A.ANGOTE

JUDGE