



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 59 OF 2013

GABRIEL OMONDI.....1ST APPELLANT

VINCENT ONYANGO MUSINGO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case number 568 of 2011 of the Principal Magistrate's Court at Ukwala – R.M. Oanda -Ag. PM)

J U D G M E N T

Introduction

1). The appellants were charged with several counts of robbery with violence as follows:

Robbery with Violence contrary to section 295 as read with section 296 (2) of the Penal Code.

Particulars: 1. Vincent Onyango Musingu 2. Gabriel Omondi on the 7th day of June, 2011 at Uranga market along Nyadorera Siaya road within Siaya District of Nyanza Province, jointly with others not before court and while armed with a fire arm namely G3 rifle robbed Timothy Odunga Otieno of cash Kshs. 1000/= (One Thousand shillings only) and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Timothy Odunga.

Count II: Robbery with Violence contrary to section 295 as read with section 296 of the Penal Code.

Particulars: 1. Vincent Onyango Musingu 2. Gabriel Omondi on the 7th day of June, 2011 at Uranga market along Nyadorera Siaya road within Siaya District of Nyanza Province, jointly with others not before court and while armed with a fire arm namely G3 rifle robbed Susan Tatu Otieno of cash Kshs. 460/= (Four Hundred and Sixty shillings only) and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Susan Tatu Otieno.

Count III: Robbery with Violence contrary to section 295 as read with section 296 of the Penal Code.

Particulars: 1. Vincent Onyango Musingu 2. Gabriel Omondi on the 7th day of June, 2011 at Uranga market along Nyadorera Siaya road within Siaya District of Nyanza Province, jointly with others not before court and while armed with a fire arm namely G3 rifle robbed Cecilia Taka Njomu of cash Kshs. 460/= (Four Hundred and Sixty shillings only) and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Cecilia Taka Njomu.

Count IV: Robbery with Violence contrary to section 295 as read with section 296 of the Penal Code.

Particulars: 1. Vincent Onyango Musingu 2. Gabriel Omondi on the 7th day of June, 2011 at Uranga market along Nyadorera Siaya road within Siaya District of Nyanza Province, jointly with others not before court and while armed with a fire arm namely G3 rifle robbed Caroline Apiyo Orando of cash Kshs. 460/= (Four Hundred and Sixty shillings only) and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Caroline Apiyo Orando.

Count V: Being in Possession of fire arm contrary to section 89 (1) of the Penal Code.

Particulars: Gabriel Omondi on the 7th day of June, 2011 at Uranga market along Nyadorera Siaya road within Siaya District of Nyanza Province, without reasonable excuse had in possession a fire arm namely G3 rifle serial No. 93007942 in circumstances which raised reasonable presumption that the said fire arm was intended to be used in a manner prejudicial to public order.

Count VI: Being in possession of ammunition contrary to section 89 (1) of the Penal Code.

Particulars: Gabriel Omondi on the 7th day of June, 2011 at Uranga market along Nyadorera Siaya road within Siaya District of Nyanza Province, was found in possession of 15 rounds of 7.62 mm calibre of ammunition without a fire arm certificate.

Count VII: Consorting with a person in possession of a fire arm contrary to section 89 (2) of the Penal Code.

Particulars: Vincent Onyango Musingu on the 7th day of June, 2011 at Uranga market along Nyadorera Siaya road within Siaya District of Nyanza Province, was found in the company of Gabriel Omondi a person who without reasonable excuse had in possession a fire arm namely G3 rifle serial No. 93007942 in circumstances which raised reasonable presumptions that the said fire arm was intended to be used in a manner prejudicial to public order.

2). They were both convicted on all counts hence this appeal in which they have cited 8 grounds in their petitions. The substance of the grounds are that the evidence relied on by the trial court was not sufficient enough to have sustained a conviction, that the identification was never sound and there was tampering of the exhibits.

Facts and Evidence

3). **PW1 Timothy Odhiambo Odunga**, together with **PW2 Susan Tatu Otieno**, **PW3 Cecilia Taka** and **PW4 Carolyne Apiyo Alando** were traveling from Bondo heading to Siaya at around 4 p.m on the material day. As they left Uranga market after about 300 meters they were stopped by two people who forcefully entered the vehicle and commandeered PW1 to turn back. The said person were armed with a rifle and they started assaulting PW1.

4). One of the attackers took control of the vehicle and drove back towards Uranga market. As they approached the market PW1 gathered courage and twisted the vehicle steering forcing it to veer off the road. The driver then opened the door and took off and his colleague who was holding the gun dropped it and also ran away. With the assistance of the members of the public the two were arrested.

5). The witness evidence was all categorical that the 1st appellant was the one driving the vehicle whereas the 2nd appellant had the gun. Both were arrested and taken to the DO'S office.

PW5 CPL John Mathenge, arrested the appellants and also recovered the rifle with several rounds of ammunition.

6). **PW7 Peter Ramogi**, picked the appellants from the AP's hands and interrogated them. He apparently knew the 1st appellant who had another case which he had handled. Through his investigation he discovered that the 2nd appellant was a police reservist based at Kitale and he confirmed that the gun he had had been issued to him at Kitale police station.

7). **PW8 Senior Sergeant Lucas Ogara**, OCPD Kitale testified that the 2nd appellant was indeed a police reservist who had been issued with the G3 rifle on 4-2-2011 lawfully. He said that there was no report that the said rifle had gotten lost.

8). **PW9 Harrison Maningo**, a ballistic expert produced the ballistic report in which he confirmed the authenticity of the rifle and the ammunition which had been handed to him by PC Erick Onyango for analysis. His report indicated that the rifle recovered from the appellants and the ammunitions were from the alleged recovered G3 rifle.

9). In his sworn evidence the 1st appellant defended himself by arguing that he had come from a funeral of one of his classmates and on his way back he was accosted by two people demanding to know where he had come from.

The said persons whom he later discovered were police officers took him to the cells where he was later charged with the offences herein.

10). The 2nd appellants said that he had been abducted on 6-6-2011 at 4. p.m and driven all night long by his abductors while in the booth of the car. He was later released and his gun taken away. He was shocked that he was at Alego in Siaya where with the assistance of a good samaritan he was taken to the AP camp. The Aps told him that the rifle had been recovered and some people arrested whom he could not identify whether they were his abductors. He was charged with the offences which he denied.

None of them called any witness to corroborate their sworn testimonies.

Analysis and Determination

11). From the evidence on record we find clearly that the incident took place at around 4 p.m as explained by all the prosecution witnesses. There was no doubt therefore that the witnesses were in a better position to recognise their attackers. Both the appellants were clearly seen by the witnesses who explained that it was the 1st appellant who was driving the vehicle whereas the 2nd appellant was carrying the gun. None of the appellants here denied that the incident took place during daytime.

12). We do not find that it was in any way possible for the four witnesses who were in the vehicle to concoct a lie against the appellants. The incident took a matter of minutes and within that time the vehicle had been commandeered back to Uranga where due to the courage of PW1 he was able to wrestle the steering wheel and the vehicle veered off the road.

13). The appellants were arrested by the members of the public and we do not find any evidence to suggest that they were mistaken by the mob. Infact, had the chief PW6 John Odhiambo Owuore and the other police officer from the DO's office not arrived perhaps the members of public would have harmed the appellants.

14). Infact, PW6 said in his testimony:

“We followed the thieves we managed to arrest one in a forest. On seeing one, he raised up

his hand and asked me to spare his life. He had one ammunition in the pocket. He is present in court (2nd accused) we later arrested the 1st accused person”.

15). The question of the ownership of the gun and the ammunition has not been contested by the 2nd appellant. We do not believe at all his evidence that the gun was taken away from him. We think that this is a made up story. He was all along in control of his gun having been entrusted to him by the OCPD Kitale for purposes of using it in his Kenya Police Reservist duties. No wonder then that his counterpart, 1st appellant was not found with it or any ammunition.

16). We have read the appellant's written submissions and we do not think that they in any way displace the prosecution's case. The whole robbery incident took place in broad daylight and the arrest made within a short time as explained above. We do not find their defence credible at all and we fully concur with the trial court.

17). In the premises we find that the prosecution clearly established their case especially the ingredients of robbery with violence as envisaged under section 296 (2) of the penal code. The 2nd appellant took the trust bestowed to him as a Police Reservist to use his gun to undertake a daring daylight robbery. We do therefore dismiss this appeal.

Dated, signed and delivered at Kisumu this 7th day of May, 2014.

H.K. CHEMITEI

A.O. MUCHELULE

JUDGE

JUDGE