



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEALS NOS. 239 & 240 OF 2011

SYLVESTER OCHIENG OGODE 1ST APPELLANT

DENNIS JUMA SIEMBE 2ND APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal arising from the judgment of [E. K. MAKORI, P.M.] delivered on 28.10.2011 in Criminal Case No.1035 of 2010 in the Principal Magistrate's Court Mumias)

J U D G M E N T

The appellants were charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars of the offence were that the appellants and five others *on the 4.11.2010 in Mumias district within Kakamega County while armed with offensive weapons namely pangas and rungas robbed M O O of KShs.3,000/= and a mirror valued at KShs.600/= and at the time of such robbery threatened to use actual violence to the said M O O*. There was a second count of shop breaking and committing a felony contrary to **section 306(a)** of the **Penal Code**. The particulars of the charge were that the appellants and others *on the night of 9th and 10th October 20120 at unknown time at Bungasi trading centre in Mumias district within Kakamega County broke and entered into a building namely shop of PETER JUMA OKETCH and committed therein a felony namely theft of one carton of Toss soap, 6 cartons of Lido soap bars, five bundles of wheat flour, 2 dozen of match box, one dozen of Jik 100 ml, one dozen of Kiwi, 3 dozens exercise books, two carton Tuzo milk, a bundle of sugar, five chrisco cooking oil, one dozen pencils, one dozen bal pen, 3 dozen lovely cosmetic, one dozen handsome cosmetic all valued at KShs.40,000/= the property of the said PETER JUMA OKETCH*.

The 1st appellant was charged with a count of handling stolen goods contrary to **section 322(2)** of the **Penal Code**. The particulars of the offence were that the appellant *on the 7.11.2010 at around 5.40 a.m. at Buyondo village in Mumias district within Kakamega County other than in the course of stealing dishonestly received and retained 7 kilograms of sugar, 10 bar soaps Lido, a packet of match box rhino, 10 packets wheat flour, 5 packets hair and lovely cosmetic, one kilogram Toss soap and 2 kg of salt knowing or having reason to believe them to be stolen goods*.

The 1st appellant Sylvester Ochieng Ogode was found guilty of the alternative charge of handling stolen property and sentenced to serve 7 years imprisonment. The 2nd appellant Dennis Juma Siembe was found guilty of the charge of robbery with violence and sentenced to death. We do note that the two appeals ought to have been heard separately but it had been thought all along that both accused were sentenced to death and therefore the appeals ought to have been dealt by two judges.

The grounds of appeal for the 1st appellant are that he pleaded not guilty to the charge, he was not supplied with witness statement, the case was not proved beyond reasonable doubt, he was not found in possession of the stolen items and his alibi defence was not considered. The appellant filed written submissions and relied on the. The appellant contends in his submission that the charge sheet was defective. Other witnesses who were present during the alleged recovery were not called to testify. It is alleged that a watchman identified the appellant but was not called to testify. The prosecution case was full of contradiction and he ought not to have been convicted.

The grounds of appeal for the 2nd appellant Dennis Juma Siembe are that he pleaded not guilty to charge, he was not given witness statements contrary to the provisions of Article 50(2) of the Constitution of Kenya, no identification parade was conducted, no first report mentioning his name was produced and that the court failed to evaluate the whole prosecution evidence. The appellant filed written submissions and contends that the amount of money allegedly stolen in the charge sheet is different from the amount mentioned by the complainant. PW2 gave the name of Moses Opondo who was not charged, the prosecution did not give him the witness statements before the trial started. The court ought to have cautioned itself as it could have been a case of mistaken identity. The appellant further submitted that the complainant testified that he injured some of the robbers on the chest and fingers. He did not have those injuries. The complainant could not identify any of the robbers and there was only dock identification. The initial report shows that the robbery was done by unknown young men and he was not mentioned.

Mr. Oroni, State Counsel, opposed the appeal and relied on the evidence on record.

The prosecution called nine witnesses to prove its case. **PW1 M O O**, testified that on the 4.11.2010 at around midnight he was in his house sleeping when they were attacked by a gang of about six people who were armed with pangas and rungs. He tried to fight with them and chopped off a finger of one of the robbers. He also injured a second robber. He managed to escape and went to inform his brother. They went back to the house and found that his wife (PW2) had been injured and was unconscious. They found the piece of the chopped finger and took it to the police. He could not identify any of the robbers. During the robbery he lost his wallet which had KShs.3,500/= and his mirror was also taken. **PW2 M A** is the wife of PW1. Her evidence is that the robbers attacked her husband and asked her to remove her pant. She identified some of the robbers including the 2nd appellant. They started attacking her and she tried to protect herself using her hands. She was hit on the head and fell down. She found herself in Busia Hospital. There was a lantern lamp in the bedroom and enabled her to see the robbers. She mentioned the name of the 2nd appellant to the police.

PW3 PETER JUMA OKETCH was the victim of the breaking of his shop at Bungasi centre and his evidence related to the count of shop breaking and handling stolen property against the 1st appellant. He testified that on the 20.10.2010 he went to his shop and discovered that it had been broken into and goods worth Kshs.40,000/= had been stolen. The thieves broke the back door of his shop. On the 6.11.2011 he got a phone call from Administration Police officers that some goods had been recovered and some people arrested. He identified most of the recovered items to be his goods that had been stolen. **PW4 FREDRICK UDIMI OLUOCH** was the chief of Bungasi. On 26.11.2010 he was informed by members of his community policing that PW1 had been attacked and there were suspects. They went to the house of the 2nd appellant in the company of APs and found him in his house pretending to be drunk. The appellant had some cuts and had been plastered over his face. The appellant told them that he got the cut at Sidindi area. They arrested the appellant. They also went to the house of the 1st appellant and recovered several items including those stolen from PW3. They arrested the 1st appellant and took the goods with them. It is his evidence that the 2nd appellant was arrested because of the injuries he had and nothing was recovered from him.

PW5 PC AYUB MANYASI was based at Komele Police station. On the 12.2.2011 he got a call from the chief of Matungu by the name James informing him that somebody was being killed by members of the public. They went to the scene and rescued that person. He was the 7th accused before the trial magistrate who was acquitted. **PW6 Z O** is a brother to PW1. His evidence is that PW1 went to his house and they went together to PW1's home where they found PW2 injured. They took her to

hospital.

PC CHARLES NYARAMBA was **PW7** and investigated the case. His evidence was that on the 7.11.2010 the appellants were brought to the Mumias police station having been arrested at Bungase area by APs. He visited the shop of **PW3** and found that it had been broken. **PW3** identified his goods. He issued **P3** to **PW2** who had sustained injuries to her hands and head. **PW2** informed him that she had identified four of the robbers. It is his evidence that he was informed that one of the robbers had had his finger chopped off. The robber was killed by members of the public. **PW8 CHRISTOPHER JUMA** was based at the Bungasi Health Centre and he produced the **P3** form showing the injuries sustained by **PW2**.

PW9 was **PC KIPKEMOI KOSKEI MWARINDANY**. He was based at the Bungasi police post. On the 8.11.2010 he was on duty when **PW1** reported the robbery incident. He got information that the robbers had gone to Sidindi area and one of them was scene with a bandage over his nose. He went in the company of the assistant chief **PW4** to the house of the 2nd appellant. The appellant had a cut over the nose and they arrested him. They also arrested the 1st appellant who was found in possession of the goods stolen from **PW3**'s shop. No identification parade was conducted.

The appellants were put on their defence. The 1st appellant gave sworn evidence and testified that on the 6.11.2010 he was in his house when the assistant chief went there in the company of APs and some youth. The assistant chief wanted him to go on patrol but he refused. He was arrested and beaten up. He was later taken to Mumias police station. He denied that he had some stolen goods.

The 2nd appellant also gave sworn evidence. He stated that on the 6.11.2010 he was at his home when he was woken up by the chief and some youth. He was handcuffed and taken to Bungasi AP camp. He was hit with some rungas and he suffered injuries to the face, mouth and face. He was taken to Matungu District hospital and then to Mumias police station. When the matter was taken to court the trial magistrate ordered that he be taken to hospital first as the court noted that he had injuries. He stated that he sustained the injuries as he was beaten by the mob and denied that he got the injuries during the robbery.

The evidence against the 1st appellant is that of **PW3** whose shop was broken into and several items stolen. **PW4** was the area chief got information and went to the appellant's home on the 6.11.2010 where some of the stolen items were recovered. Evidence of **PW9** is that they recovered several items at the house of the 1st appellant. The complainant **PW3** identified the items to be his. On his part the 1st appellant testified as to how he was arrested at night. He denied having been in possession of the stolen items. From the evidence on record we do find that it is true the stolen items were found in possession of the 1st appellant. The theft occurred on the 20.10.2010 and the items were recovered on the 6.11.2010. The court did not find the appellant guilty of the count of shop breaking and committing a felony. We do agree with the findings of the trial magistrate as the items could have been taken to the 1st appellant by those who committed the offence of shop breaking. The appellant's evidence does not raise doubt on the prosecution evidence to the effect that the stolen items were found in his possession. We do find that the prosecution proved its case and the appeal lacks merit. The same is disallowed.

With regard to the 2nd appellant the evidence against him is that of **PW1**, **PW2**, **PW4** and **PW9**. It is the evidence of **PW1** that he injured two of the robbers. It is also his evidence that he did not identify any of the robbers. According to **PW2** she identified four of the robbers. It is her evidence that she gave the appellant's name to the police. The evidence of **PW4** is that he got information that the appellant had been injured and was hiding in his house. They went to his house and found him having been bandaged on his face. He had an injury on his nose. The same evidence was adduced by **PW9**. The main issue is whether the appellant is one of the robbers who was injured by **PW1**. **PW1** chopped off a finger of one of the robbers. The prosecution evidence shows that that robber was lynched by the mob and he died. According to the appellant he sustained the injuries when he was beaten by the mob. When the appellant was arraigned before the court on the 8.11.2010 the court noted that the 1st appellant had broken legs and

alleged that he was beaten up by the mob. The 2nd appellant also informed the court that he was beaten by the mob. The court ordered that before the plea was to be taken the two appellants were to be taken to hospital.

The prosecution contends that the appellant was injured by PW1. The evidence of PW2 with regard to the identification of the appellant is not of much help as there is no evidence that the police were looking for the appellant. The offence occurred on 4.11.2010 and the appellant was arrested on the 6.11.2010 which is a period of about three days. There was no identification parade conducted for PW2 to identify the appellant. This is understandable as PW2 was hospitalized and the appellant had to be charged in court. The arrest of the appellant was because he was suspected to have been nursing injuries in his house. Given the evidence on record it is not clear to us whether the appellant had injuries before he was arrested. The investigating officer ought to have ensured that the injuries the appellant had were assessed by a medical officer and a medical report in form of treatment notes produced in court. The area chief also ought to have ensured that the appellant was not assaulted by the mob. As of now it is not clear whether the appellant had injuries before he was arrested. The chief could have even gone to the Sidindi area and find out whether the appellant had been treated there. It is possible that the appellant could have been injured by PW1. However, convicting the appellant on that evidence has to be on the basis of beyond reasonable doubt. The appellant explained that he sustained the injuries due to mob justice. It is certain that the appellant was beaten up by the mob.

In the end we do find that the prosecution did not prove its case beyond reasonable doubt against the 2nd appellant. The appeal for the 2nd appellant is hereby allowed and he shall be set at liberty unless otherwise lawfully held. The 1st appellant **SYLVESTER OCHIENG OGODE**'s appeal is disallowed. The 1st appellant was sentenced to serve 7 years imprisonment and not death. The 1st appellant shall continue to serve 7 years imprisonment.

Delivered, dated and signed at Kakamega this 15th day of May 2014

SAID J. CHITEMBWE

GEORGE DULU

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