



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 29 OF 2012

KEVIN ODHIAMBO OMBOGO.....1ST APPELLANT

MOSES OUMA OBORE.....2ND APPELLANT

NICHOLAS OUMA OBURE.....3RD APPELLANT

TYRUS ODHIAMBO JUMA.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case number 1769 of 2010 of the Principal Magistrate's Court at Bondo – P.W. Mutua-PM)

J U D G M E N T

Introduction

1). The appellants were charged with the following offences:

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

Particulars: 1. Tyrus Odhiambo Juma, 2. Moses Ouma Obure alias Musa, 3. Kevin Odhiambo Ombogo alisa Leo, 4. Nicholas Ouma Owele Ngol alias Bongo, on the 25th day of December at Ndori sub location in Siaya county Nyanza Province, jointly with others still at large, being armed with a dangerous or offensive weapons namely pangas, rungas, torched robbed Charles Nyanganga Omino of his one mobile phone make Nokia 2300 S/No. 35431600/689099/2 values at Kshs. 4000/=.

2). **Alternative Charge for Accused 1:**

Handling Stolen Property Contrary to Section 322 (2) of the Penal Code.

Particulars: Tyrus Odhiambo Juma, on the 25th day of December, 2010 at Ndori sub location in Siaya County of Nyanza Province otherwise than in the course of stealing dishonestly retained one mobile make Nokia 2300 S/No. 3543/600/689099/2 valued at Kshs. 4000/= the property of Charles Nyanganga Omingo knowing or having reasons to believe it to be stolen property or unlawfully obtained.

3). **Count II:** Robbery with Violence contrary to section 296 (2) of the Penal Code. **Particulars:** 1. Tyrus Odhiambo, 2. Moses Ouma Obure alias Musa, 3. Kevin Odhiambo Ombogo alias Leo, 4. Nicholas Ouma Owele Ngol alias Bongo, on the 25th day of December at Ndori sub location in Siaya county

Nyanza Province, jointly with others still at large, being armed with pangas, rungas, hammers, torches robbed Erick Omondi Ngor of his one mobile phone make Nokia 2600, one G. Tide mobile Nokia N8 mobile phone, ID Card, Cash Kshs. 300 all valued at Kshs. 22,300/=.

4). Count III: Robbery with Violence contrary to section 296 (2) of the Penal Code.

Particulars: 1. Tyrus Odhiambo, 2. Moses Ouma Obure alias Musa, 3. Kevin Odhiambo Ombogo alias Leo, 4. Nicholas Ouma Owele Ngol alias Bongo, on the 25th day of December at Ndori sub location in Siaya county Nyanza Province, jointly with others still at large, being armed with a dangerous or offensive weapons namely rungas, hammers, pangas, torches robbed Kennedy Okoth Ouma of his cash money Kshs. 3000/=, a wallet one mobile phone Nokia 1202 all valued at Kshs. 5,050/=.

5). Alternative Charge for Accused 2:

Handling Stolen Property Contrary to Section 322 (2) of the Penal Code.

Particulars: Moses Ouma Obure on the 26th day of December, 2010 at Ndori sub location in Siaya County of Nyanza Province otherwise than in the course of stealing dishonestly retained one mobile make Nokia 1202 S/No. IMEI 353383/04/137552/1 valued at Kshs. 2000/= the property of Kennedy Okoth Ouma knowing or having reasons to believe it to be stolen property or unlawfully obtained.

6). Count IV: Robbery with Violence contrary to section 296 (2) of the Penal Code.

Particulars: 1. Tyrus Odhiambo, 2. Moses Ouma Obure alias Musa, 3. Kevin Odhiambo Ombogo alias Leo, 4. Nicholas Ouma Owele Ngol alias Bongo, on the 25th day of December at Ndori sub location in Siaya county Nyanza Province, jointly with others still at large, being armed with a dangerous or offensive weapons namely hammers, pangas, whips, walking stick, torches robbed Micah Onyango Ochieng of one Nokia 1100 S/No. EMEI 35667100/899391/5, identity card, one wallet all valued at Kshs. 3050/=.

7). Alternative Charge for Accused 1:

Handling Stolen Property Contrary to Section 322 (2) of the Penal Code.

Particulars: Tyrus Odhiambo Juma on the 25th day of December, 2010 at Ndori sub location in Siaya County of Nyanza Province otherwise than in the course of stealing dishonestly retained one mobile make Nokia 1100 S/No. IMEI 35667100/899391/5 valued at Kshs. 3000/= the property of Micah Onyango Ochieng knowing or having reasons to believe it to be stolen property or unlawfully obtained.

All the four appellants were convicted and sentenced to death. They have filed this appeal citing 11 grounds in the consolidated petition dated 19-11-2012.

Facts and Evidence

Prosecution Case

8). The prosecution called 9 witnesses in establishing their case. The same can be summarised as follows:

PW1 Charles Omino, was going home on 25-12-2010 at around 7.30 p.m when he met five people on the way. Together with his brother they were ordered to sit down. The assailants who were armed with a panga and hammer ransacked him and took away his mobile phone, Nokia 2300 and left. The following day he went to Riat police station but he was unable to register his complain as there were no police officers. He was informed the following day that there were recoveries made by the police and that people were required to go to Akala police station to identify the recovered items. He went and identified his phone. During the attack he managed to identify the 4th appellant using a torch which the assailants had.

9). **PW2 Kennedy Ochieng Owiti**, at around 8.30 p.m on the material day was heading home with his brother Boniface Owiti. At Kambare junction he came into contact with two people. One of them took off and they managed to arrest the other. When they searched him they recovered a Nokia phone which he was unable to put it on after being put off. They handed him over to the police.

10). **PW3 Kennedy Okoth Ouma**, was heading home at around 7 p.m when he met a group of people who threatened to harm him if he did not release to them all that he had. He was able to identify them as there was a passing vehicle and further that he knew them as they came from the same village. He said that the 2nd appellant had a hammer and a panga. They took from him a phone – Nokia 1202 and Kshs. 3000/= . He went further to tell the court that the 2nd appellant took the phone to his mother. The phone belonged to **PW4 Florence Adhiambo Ouma**, who corroborated what PW3 had said. The phone was purchased by **PW6 John Omondi Ochieng**, her son-in-law.

PW5 Caleb Juma Owango, was in the company of PW1 when they were attacked on the same day. He confirmed that the assailants took away PW1's mobile phone.

11). **PW7 PC John Turunya**, told the court that he was at Akala police station when the 1st appellant was brought by PC Kerong and others having been arrested by members of the public. He said that the complainant in this case managed to identify their phones and named the suspects who were the appellants. He also helped in the apprehension of the appellants on diverse days.

12). **PW9 CPL Abdi Kanyare**, conducted an identification parade where the 4th appellant was successfully identified by the witnesses PW1 and PW8.

13). **PW8 Eric Omondi**, told the court that he had been sent to Akala to charge several assorted mobile phones. While in the company of his brother he was accosted by 6 people. He was able to identify the 3rd appellant as there was some light. The assailants took the phones as well as his identity card and Kshs. 300/= . He also recognised the 4th appellant as he used to work at Akala and the clothings he wore.

Appellants' Defence

14). The appellants gave sworn testimonies denying the charges. The 1st appellant said that on 25-12-2010 while on his way home he met some three people who accosted him using pangas and clubs. They then stopped and beat him up. A police vehicle came and he was taken to Akala police station and locked up and later the charges were preferred against him.

15). The 2nd appellant equally denied the charges. He was arrested on 24-1-2011 and taken to his house. A search was conducted and nothing recovered. At the police station his wallet and the sum of Kshs. 2100/= was taken. He further defended himself by telling the court that he had a land problem with the 4th witness hence the hostility and the grudge.

16). The 3rd appellant simply denied the charges and explained how he was arrested on 18-1-2011. The 4th appellant equally denied the charges and explained how he was arrested on 28-2-2011 while herding cows beside the road.

Analysis and Determination

17). The consolidated petition of appeal has raised 11 grounds which we shall deal with them jointly and severally. The first ground raised by the appellant is that the trial court failed to appreciate the provisions of Articles 26 (1) , 50 (2) P and 50 (2) (h) of the Constitution. Their arguments were that the appellants ought to have been entitled to legal representation considering the fact that the charges facing them were grave and serious. They further argued that the death sentence passed against the appellant was unconstitutional.

18). Article 50 (2) (h) provides that in ensuring that an accused person is accorded a fair hearing, the state shall provide an advocate at the state's expense. Whereas we agree with this argument there is no

evidence to show that the appellant demanded for such services and they were denied, they cannot therefore at this juncture plead the same. Further the said article provides that such request would be granted so as to avoid “**substantial injustice**”. From the perusal of the record and the entire proceedings we are satisfied that no substantial injustice was occasioned by virtue of the fact that the appellants were unrepresented.

19). In regard to the nature of the sentence provided herein, as far as the law is concerned death penalty is still available in the statutes and to that extent the courts have no option but to pronounce it so. The same shall only change once parliament decides otherwise our hands are therefore tied.

20). The second element of the petition is the argument that the suits ought not to be consolidated. We have gone through the records and do not find any merit in this argument. No prejudice was occasioned upon the appellants. The robbery took place the same day and the reports made to the same police station almost simultaneously. The proceedings shows clearly that it was convenient for the suits to be tried at once as the accused persons were almost together during the commission of the offences. We do not find this argument meritorious.

21). The other substantive issue raised by the appellant was the question of identification. PW1 said that he was robbed at around 7.30 and the assailants had torches. He managed to identify the 4th appellant who was “**black, stout and had dreadlocks**”.

He further on cross examination by the 4th appellant said that:

“Your colleague is the one who had a torch and when he flashed it I saw you”.

Further, PW1 managed to identify the 4th appellant at an identification parade.

22). The 1st appellant was confronted by PW2 at Kambare junction. His colleague ran away and he was arrested with two phones. PW2 said that the 1st appellant was unable to turn on the phones after being switched off. Apparently it is these phones which were stolen from other witnesses.

The incident took place at around 8.30 p.m. Apparently the 1st appellant does not deny the circumstances in which he was arrested. We also note that PW1 had been robbed at around 7.30 p.m which was about an hour before PW1 was arrested.

23). PW3's evidence led to the charging of the 2nd appellant. He told the court that he was able to identify the attackers using the light of a passing motor vehicle. He told the court:

“There was a vehicle coming and using the light from the vehicle I was able to identify them. I knew them before we came from the same village and they are my friends. Otis had a hammer and a panga. I cannot tell what the others had. Otis used the hammer to hit me on my right hand. Then bongo told me to raise up my hands and not to play with my life”.

24). Equally, PW3 testified that the 2nd appellant took his phone back to PW3's mother who handed it over to the police. PW4 testified that it was the 2nd appellant who took the phone to her. PW3 also implicated the 4th appellant here. He told the court that it was him who took the phone from his pocket.

25). From the evidence of PW1, PW2, PW3 and PW4 we do not find any difficulty in concluding that the 1, 2, and 4th appellants were clearly identified by the said witnesses. We do not find that there was insufficient light to enable PW1 and PW3 identify the said appellants. Further, the 1st appellant was arrested a short while after the incident by persons who were infact not conscious of the robbery that had taken place. The 1st appellant did not deny the fact that he was found with the phones and was unable to operate them if indeed they were his.

26). The 1st appellant has not denied the nature and circumstances of his arrest. We also find the evidence of PW3 credible. He knew the 2nd and 4th appellants very well. They were from the same

village. His description of the attack was graphic and clear. Further the 2nd appellant has not denied that he returned PW3's phone to her mother PW4.

27). The 4th appellant was equally recognised by PW8 Eric Omondi who implicated the 3rd appellant. He told the court that he recognised the 4th appellant for he was wearing a vest and jeans which he had the previous day.

28). In respect to the 3rd appellant we do not find any credible evidence from the witnesses that positively identified him at the scene. PW8 who would have clearly nailed him proved inconsistent. He told the court that the incident took place at around 7. p.m. The intensity of the light at this hour is clearly subjective. It would have been helpful had the prosecution called PW8's brother one Odhiambo to corroborate his evidence. We find that it was clearly unsafe for the trial court to have convicted the 3rd appellant as there were doubt on the question of identity which is cardinal in such offences.

29). We do find therefore that appellants 1, 2 and 4 were clearly and positively identified by the witnesses and we do not find any fault at all as claimed by the appellants.

30). The next issue raised by the appellant is the question of possession of the stolen items. The evidence of PW2 clearly showed how the Mobile phones were found with the 1st appellant. He was in possession and control of the same. He was unable to operate those phones. If indeed they belonged to him nothing was difficult for him to prove to the police and those who arrested him especially PW2 and his brother Boniface Owiti.

31). Equally, the 2nd appellant was in possession and actual control of the PW3 phone. He returned it to PW3 who was able to identify it. PW6 who had bought the phone for PW3 his mother-in-law was able to produce the receipt and the relevant documentation showing ownership. PW5 equally when called by the police was able to identify the mobile phone which were found with the suspects. The phone belonged to his brother Charles Omindo whom they were robbed together.

32). From the above analysis we find that the appellants were in direct possession and control of the mobile phones which had recently been stolen. The court held in **Charles Lamamba -VS- Republic (Civil Appeal No. 8 of 1984)** that:

“The doctrine of possession of recently stolen property could not apply until possession by the appellant was satisfactorily proved”.

33). Neither do we find any malice on the part of the prosecution witnesses as argued by the appellants. The question of a grudge between the 2nd appellant and PW4 does not come out clearly. The said appellant did not lead any evidence during his defence to that effect.

34). None of the appellants had any credible evidence in their defence and none except the 1st appellant explained clearly where they were on the material day. Even the explanation by the 1st appellant does not sway the evidence of PW2. Was the offence proved by the prosecution? For the offence of robbery with violence to be established the following ingredient have to be proved:

- a. **stealing and**
- b. **use or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing and**
- c. **the offender is armed with any dangerous or offensive weapon or instrument or**
- d. **the offender is in company of one or more other person or persons or**
- e. **the offender at or immediately after the time of the robbery, he wounds, beats, strike or uses any other violence to any person.**

See **Johana Ndungu -VS- Republic Criminal Appeal No. 116 of 1995 (unreported)**.

The critical ingredients that must be proved is (a) and (b) while only one of ingredients (c), (d) and (e)

need to be proved.

35). We find the respondent having proved all the above ingredients. There was sufficient evidence that the appellants caused actual force and threats to achieve their end. They stole money though not recovered as well as the phones. The doctrine of recent possession clearly applied in this matter. They were found in actual possession and control of the mobile phones.

In the premises we dismiss the appeal by the **Tyrus Odhiambo Juma 1st appellant, Musa Ouma Obure 2nd appellant,** and **Nicholas Ouma Owele the 4th appellant.**

We find the appeal by **Kevin Odhiambo Ombogo** meritorious and allow the same. He be set free unless lawfully held.

Orders accordingly.

Dated, signed and delivered at Kisumu this 14th day of July, 2014.

H.K. CHEMITEI

A.O. MUCHELULE

JUDGE

JUDGE