



IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 30 OF 2013

BETWEEN

GEORGE OCHIENG OWUOR APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 700 of 2011 at Principal Magistrate's Court at Homa Bay, Hon. C.A.S. Mutai, PM dated on 27th January 2011)

JUDGMENT

1. The appellant **GEORGE OCHIENG OWUOR** appeals against the conviction and sentence of death imposed after he was found guilty of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the offence as stated in the charge were as follows;

On the 11th day of August 2011 at Koderia Forest, Homa Bay District within Nyanza Province, jointly with other not before the court while armed with dangerous weapons namely pangas robbed Evans Otieno Onyango of cash Kshs. 50,000/- and at or immediately after the time of such a robbery struck the said Evans Otieno Onyango.

2. The appellant challenges the conviction and sentence principally on the ground that the conviction was based on insufficient evidence identifying him as the person involved in the robbery. In his written submissions, he attacked the charge sheet on the ground that the complainant who testified in court was **EVANS OTIENO OLOO** and not **EVANS OTIENO ONYANGO** as reflected in the charge sheet. He submitted that there was no evidence that the complainant had the Kshs 50,000/- in his possession which was sent to him by his customer. He contended that the officer who recorded the initial report at Homa Bay Police Station was not called to confirm the authenticity of the report that he was identified as the person who robbed the complainant.

3. Mr Oluoch, learned counsel for the State, submitted that the appellant was known to both PW 1 and PW 2 and that the incident occurred at day time hence the issue of mistaken identity could not arise. He further submitted that the testimonies of PW 1 and PW 2 were corroborative of each other and that the when they made the first report they named the complainant as confirmed by PW 3. He contended that the appellant had gone underground and could not be traced. Counsel submitted the issue of the two names was never put to the witness in cross-examination and in any case it was minor and curable. He submitted that the sentence was in accordance with the law.

4. The prosecution marshalled three witnesses to prove its case. Evans Otieno Oloo, PW 1, testified that on 11th August 2011, he went to Oyugis Town to purchase some hardware for a client who had sent him Kshs. 50,000/- through M-PESA which had cashed at the Co-operative Bank. Unfortunately, he did not make the purchases as the money was not enough for the items he wanted to buy. At about 1 pm he went to have a soda with David Otieno, PW 2, whereupon the appellant joined them. The appellant asked him what had brought them to town and he informed him that he had come to shop for items but the money he had was not enough.

5. At about 4 pm, PW 1 and PW 2 decided to go home using the Oyugis-Rangwe road through Kodera Forest on a motorbike. As they were riding, two motor cycles followed them and then one of them came in front of them. PW 1 testified that the appellant removed a panga from his jacket and demanded the money. PW 2, who was carrying the money, handed it over and they left. PW 1 stated that since he knew the appellant, he went and made a report to the appellant's mother. He reported the incident at Homa Bay Police Station. On 21st September 2011, the appellant's uncle told him that the appellant had been arrested in connection with another offence and that he was at Rangwe Police Station whereupon he went there and reported the offence.

6. PW2 testified that he was PW 1 on the material date at Oyugis when they were joined by the appellant while they were taking soda. He confirmed that they spoke about what had taken them to Oyugis. He stated that while they were riding, two motor bikes carrying two people blocked their way and forced them to stop. The appellant and the other rider removed pangas. The appellant demanded the money and as he was holding it in a black bag, he handed it over to the appellant. He also stated that he went with PW 1 to the appellant's mother. They later made a report to Homa Bay Police Station.

7. PW 3, the police officer from Rangwe Police Station investigating the matter, recalled that on 12th September 2011, the appellant had been arrested for stock theft when PW 1 came to lodge a complaint after hearing that the appellant had been arrested. He made a follow up at Homa Bay Police Station where he confirmed that PW 1 had made a complaint and named the appellant regarding the robbery.

8. After the close of the prosecution case, the appellant was put on his defence. He opted to give an unsworn statement. He stated that he did not know the PW1 and PW2 and that on 11th August 2011 he was at his place of work making bricks. He confirmed that on 12th September 2011 he was at Rangwe Police Station as he had been accused on leaving cattle to graze of his aunt's piece of land. It is then that PW 1 and PW 2 came to report the alleged offence.

9. As to whether there was sufficient evidence to support the conviction, this Court, as this is the first appellate court, is enjoined to consider the entire evidence, evaluate it and reach an independent conclusion bearing in mind that it neither heard nor saw the witnesses testify (see *Okeno v Republic* [1972] EA 32).

10. Before we consider the essence of the appeal before us we wish to point out the essential elements to be proved by the prosecution beyond reasonable doubt. In *John Mwikya Musyoka v Republic Mombasa CRA No.38/99 (UR)*, the Court of Appeal stated that **proof of theft is a central element in the commission of the offence under section 295 as read with 296 (2) of the Penal Code.** The other elements of the offence of robbery with violence that need to be established before a charge of robbery with violence can be sustained were elaborated by the Court of Appeal in *Ganzi & 2 Others v Republic* [2005] 1 KLR 52 as follows:-

The offence of robbery with violence under section 296(2) of the penal code is committed in any of the following circumstances namely:-

(a) The offender is armed with any dangerous or offensive weapon or instrument; or

(b) The offender is in company with one or more other 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.

11. In this case PW 1 and PW 2 both gave testimony implicating the appellant who is a person they knew. This was a case of recognition as the witnesses stated they knew the appellant. They had seen him before the incident. The circumstances surrounding the incident negated any possibility of mistaken identity as it occurred in broad daylight. Their testimony was consistent but this does not necessarily discharge the obligation of the court to be cautious particularly where the evidence of two friends is the only basis of conviction as the appellant denied that he knew PW 1 and PW 2. The other evidence is that of PW 3. Although he stated that a report had been made at Homa Bay Police Station alleging that the appellant was named, there was no evidence from the said Police Station as to the nature of report made, the date and time it was made and when PW 1 and PW 2 recorded the statements. Testimony from the appellant's mother who received the first report would have lent credibility to the prosecution case.

12. Furthermore, we find it strange that if the complaint was made at least on 11th August 2011, it took until 23rd September 2011 for the appellant to be apprehended for the offence of robbery with violence. As PW 1 and PW 2 knew the appellant and his mother, it would not have been difficult to apprehend the appellant. PW 3 did not explain why the appellant was not arrested prior to that date or why it took so long to arrest the appellant. We reject the contention by Mr Oluoch that the appellant had gone underground as there was no evidence to that effect.

13. We also find that evidence that money was stolen rather threadbare. We are aware that under **section 143** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* the prosecution is not obliged to call all or any number of witnesses to prove the offence. Other than the testimonies of PW 1 and PW 2 there was no evidence that the complainant was sent Kshs. 50,000/- by his customer through M-PESA and that he withdrew it at bank. These facts would have been easy to establish and PW 3 did not state how he confirmed this fact.

14. For the reasons we have outlined we think the appellant's conviction is not free from doubt. There are too many loose ends and it is for this reason we are not convinced that the case against the appellant was proved beyond reasonable doubt.

15. The appeal is allowed and the appellant is set free unless lawfully held.

DATED and DELIVERED at HOMA BAY this 7th day of November 2014.

D.S. MAJANJA

C. B. NAGILLAH

JUDGE

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.