



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Appeal 65 of 2012

WALTER OCHIENG BABUAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case number 875 of 2011 of the Principal Magistrate's Court at Bondo – Mr. P. W. Mutua Esq.)

JUDGMENT

The Appellant herein was charged with two (2) offences namely;-

COUNT 1: ROBBERY CONTRARY TO SECTION 296 (1) OF THE PENAL CODE.

Particulars of the offence are on the 19th day of August 2011 at Chianda market West Katwenga Sub Location in Rarieda District within Siaya County, robbed **FREDRICK AJIGO OBANGE** cash Kshs. 5,000/=, a wallet containing I D Card, two ATM cards for equity Bank and KCB Bank and at or immediately before or immediately after such robbery used actual violence to **FREDRICK AJIGO OBANGE**

Count II: ASSAULT CAUSING ACTUAL BODILY HARM CONTRARY TO SECTION 251 OF THE PENAL CODE

On the 19th day of August 2011 at Chianda Market, West Katwenga Sub Location in Rarieda District within Nyanza province unlawfully assaulted **JAMES OWUOR ADUDA** there by occasioning him actual bodily harm.

At the conclusion of the trial the appellant was sentenced to serve a custodial sentence of seven (7) years. He has appealed citing several grounds which can be summarized as follows:-

- 1) **The trial magistrate failed to analyse the evidence on record.**
- 2) **The trial magistrate based his findings on circumstantial evidence.**
- 3) **His rights to fair trial were infringed.**
- 4) **The court failed to appreciate his defence.**

The brief facts as can be deduced from the evidence on record are that PW1 **Fredrick Obage** had gone

to visit his friend one **OWUOR ADONDE** on the material day. At around 6:00 p.m. while being escorted to board a motor vehicle he was attacked from behind by an assailant.

The assailant was called by name by Mr. Adonde and he immediately left him and attacked the said Mr. Adonde. One shopkeeper by the name Ouma who was nearby came and rescued Mr. Adonde from the assailant.

He further told the court that he got to know the assailant at the time of the accident. During the process he lost the items enumerated in the charge sheet.

PW2 James Owuor Dunda was the one escorting PW1. He told the court that he saw the accused person assaulting his visitor after hearing people shouting.

As soon as he mentioned his name the appellant turned and attacked him where he lost consciousness. When he regained his consciousness he found his visitor looking for his lost items.

As a result of the assault PW2 lost his tooth among other injuries. A P3 form was filled and later produced to authenticate this.

PW3 Joseph Ouma runs a shop at Chianda Market. His shop was about 10 metres from the scene. He saw the fight and rushed to the scene with a stick where he hit the accused twice and managed to rescue PW1 and PW2. He told the court that he knew the appellant as they were village mates.

PW4 P C Sioma arrested the appellant on 14th November 2011. They had earlier on 20th August 2011 received a report concerning the incident but the appellant had gone under. He told the court that they had not recovered anything from the appellant.

PW5 Edwin Oduor produced the P3 form on behalf of one **Mr. Nyakundi**. The said form was in respect to PW2. It showed the nature of the injuries sustained by PW2 including the loss of his tooth.

The appellant when put on his defence gave unsworn testimony. He denied the offence generally.

This court is enjoined to evaluate the evidence afresh with a view of arriving at an independent finding.

What is not in dispute is that the incident took place at around 6:00 p.m. It is therefore safe to conclude that there was sufficient light for the parties to have clearly recognized or identified each other.

The complainant PW1 said that he was attacked from behind. It was clear from his testimony that were it not his host PW2 he would not have known the appellant.

PW2 clearly knew the appellant as he said that:-

“He is a child in our home and that he called him by his name”.

PW3 equally knew the appellant as they are village mates. It was him whom he hit twice causing him to run away.

The appellants assertion in his submission that an identification parade would have been conducted was really not necessary since he was well known by the two witnesses.

Against this background of identification the appellant in his defence seemed to suggest that he was not at the scene. I do not find any plausible reason why PW1 a visitor to the area would claim that he was robbed by the appellant if indeed he did not. I do not find any malice on the part of the witnesses as PW2 was escorting his visitor and PW3 came to rescue the duo from the appellant's assault.

Further PW1 was not even known to the appellant. The appellant further submitted that since his was a market area there were other independent witnesses who ought to have been called. Again this is not plausible. The prosecution had the discretion of calling such number of witnesses to support its case and if those called were sufficient then the appellant cannot cry foul.

I further do not find that the appellant's right to a fair trial was infringed. He was duly supplied with witness statements of the Criminal Procedure Code and Section 211 of the Criminal Procedure Code was well explained to him.

The appellant's defence is equally not convincing or water tight. He failed to explain his whereabouts on the material day.

In the premises I do find that there was sufficient evidence to convict the appellant. The offence took place in bright day light. PW1, PW2 and PW3 saw him committ the offence despite the fact that the stolen items were not recovered. Equally there was no malice or bad faith on the part of the complainant as suggested in the appellant's submissions.

I therefore dismiss the appellants appeal.

Dated, signed and delivered at Kisumu this 6th day of May 2013.

H.K. CHEMITEI

JUDGE

In the presence of:

.....for state

.....for the appellant.

HKC/aa0