REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

CRIMINAL APPEAL 10 OF 1992

PETER ONDUKO MOCHACHE …..…….….. APPELLANT

AND

REPUBLIC …….....……..… RESPONDENT

(An Appeal from a judgment of the High Court of Kenya Nakuru (Mr Justice B.K. Tanui)

dated 25th January, 1991 In H.C.CR.APP No 253 of 1991)

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JUDGMENT OF THE COURT

Before the Resident Magistrate's Court at Kericho six persons were charged on count 1 with the offence of robbery with violence contrary to Section 296(1) of the Penal Code and on count 2 with the offence of assault causing actual bodily harm. The appellant was the 5th accused. All the six were found guilty on both counts and convicted. Five of them were sentenced to various terms of prison sentences and corporal punishment. The sixth accused was placed was placed on probation for 3 years. The appellant on account of his two previous convictions for offences of similar nature was sentenced to 8 years imprisonment with corporal punishment of 5 strokes on count 1 and to 2 years imprisonment on count 2, the prison sentences to run concurrently. The appellant's appeal to the Superior Court against conviction and sentence was dismissed on both counts. None of the remaining five co-accused of the appellants appears to have appealed to the Superior Court.

This being a second appeal no appeal lies on facts to this Court under Section 361(1) of the Criminal Procedure Code. Briefly the facts are that on the night of 18th June, 1988, all the six accused gathered at the house of the first accused at about 7.00 p.m. Some other people remained outside. Also present was Jane Kesare (P.W.2) who had been living with the first accused for 6 months. She claimed that she was his wife. In her presence the six accused, all of whom she identified in court (including the appellant), hatched a plot to way-lay the complainant in the 1st count on his way home in his car and rob him. P.W.2 describing the meeting in details said that the appellant was carrying a black hand-bag and that the conspirators had named the victim as Ezekiel. She added that she had heard them say before they left the house that they were going to the road of Kipseleu. At 11.30 p.m. when they came back she woke up. In her presence they divided the loot – ten of them receiving Shs 2,000/- each and one received Shs 1,000/-. The appellant was among them and was in fact the one who was counting out the money. He also had a

torch. After the group left the first accused counted his money, Shs 1,750/-, and put it under the tin for water from where the Police later recovered the sum after the police were taken by her to the house.

The appellant's grounds of appeal to the High Court were based on simple allegations of facts which were all dealt with at length by the learned Judge. By the time he filed his appeal to this court the appellant appears to have suddenly picked up some sort of legal vocabulary and legal phrases an indiscriminate use of which rendered comprehension of his grounds of appeal a somewhat difficult task. However, to our understanding his grounds of appeal, the supplementary grounds that he handed in at the time of the hearing and his submissions, may be divided into the following three grounds:

1. His conviction on count 2 was an error because the complainant therein had identified the third accused only.

2. The complainant in count 1 had not identified him as one of the robbers.

3. Evidence of P.W.2 needed corroboration.

As regards the first of the above grounds it is true that the second complainant, that is the wife, was able to identify only the third accused because he was the one who had assaulted her after pushing her into the wall. But her evidence was clear that it was a gang of robbers carrying objects like pistols who had come in her husband's (the 1st complainant's) vehicle. She saw the husband tied in the car. The gang members were all acting in concert and it was the fact that she raised the alarm that saved her from further harm. Each member of that gang was guilty of assault. Both the lower courts found that the appellant was a member of that gang and so he is equally guilty of the act of the other members of the gang committed by them in the furtherance of the common intention to rob. There is no substance in this ground.

Coming now to the ground that no witness had seen him at the scene of robbery in count 1 the prosecution case did not rest on the appellant as having been identified at the scene. The prosecution case against him was founded on P.W.2's evidence only who was present when the plot was being hatched inside the house and later when the loot was being divided. During cross-examination by the appellant she said that on the first occasion the appellant had sat in the house for 30 minutes. P.W.2 clearly had ample opportunity of uninterrupted observation of the proceedings and also of the appellant about whom she was able to describe what he had come with on the first occasion and what part he played in the division of the loot. We reject this ground of appeal.

In support of the 3rd ground the appellant submitted that he was convicted on the sole evidence of P.W.2. Corroboration of her evidence should have been sought. It is true that the only evidence against the appellant was that as given above by P.W.2. But of the remaining five accused whom she had identified as members of that group of six, the first accused was identified by the complainant in count 1 during the highway robbery, and the third accused was identified by his wife who was the complainant in count 2 as the one who had assaulted her when, after the gang had over-powered the first complainant and gained possession of his vehicle, came to his house to continue the robbery. This fact combined with the fact that the police recovered Shs 1,750/- which the 1st accused had hidden under the tin of water as stated by her and the fact that the amount of money which she saw being divided after the robbery was the same which 1st complainant said was stolen from him viz Shs 21,000/- all lend strong support to the credibility of the witness and the veracity of her account about the hatching of the plot and the subsequent division of the loot.

Both the trial magistrate and the Judge of first appellant court had carefully considered the evidence of P.W.2 and both of them had accepted her as a witness of truth and credibility. The trial magistrate who had heard and observed her when she was giving evidence was particularly impressed by her demeanour and assurance. We on our part, having re-evaluated the evidence in its entirety and P.W.2's evidence in particular, see no reason at all to disagree with the concurrent findings of the two lower courts together with their reasons for rejecting of the appellant's defence of alibi.

Both before the first appellant court and before us Miss Ndungu, for the State, had made submissions

conceding the appeal on the ground that P.W.2 was the wife of the first accused and as such was an incompetent witness for the prosecution and should not have been allowed to continue with her evidence after she had disclosed this fact at the beginning of her examination-in-chief. The learned Judge made no finding as to whether the evidence showed that she was the firs accused's wife or not. He thought the question immaterial because the appellant was not her husband. That leaves this question of her status in relation to the first accused for us to decide.

P.W.2's evidence was that since 1981 she had lived at Chebson with her mother. On 18th June, 1988, she was staying at Kapsuser with Seimon Kamau the 1st accused. During her examination-in-chief she had maintained that she had been seeing the accused persons at Kapsuser and that they did no work. Later she said that it was the first accused's mother who had told her to go. This part of her evidence is significant particularly in view of her first answer during cross-examination by the first accused. This is what she said:

"We stayed with you for 6 months."

So the first accused, after having listened to her evidence that she was his wife and that she had been seeing the other accused in the area, had asked her for how long she had been staying with him. One does not ask such a question of a wife to whom he has been properly and lawfully married whether under customary law or any other law. Such a question is normally asked only when one is disputing the claim of living together. P.W.2 had said that soon after the arrest of the first accused she went away with her mother who had come on the 15th. Why should she, if she was a lawfully married wife, have left her matrimonial home at all?

In our view that evidence is not enough to show that P.W.2 was the wife of the first accused. We, therefore, reject the submission by Miss Ndungu who sought to concede the appeal on behalf of the State on that ground. In the final analysis we find that there is no merit in this appeal and we dismiss it.

Dated and delivered at Nakuru this 28th day of February, 1992.

J.M. GACHUHI

JUDGE OF APPEAL

R.O. KWACH

JUDGE OF APPEAL

A.M. COCKAR

JUDGE OF APPEAL