Oginga v Republic

High Court, at Nairobi July

30, 1984

Abdullah & Aluoch JJ

Criminal Appeal no 1711 & 1712 of 1983

Criminal law - robbery - accused alleging fight and not robbery in defence - failure by magistrate to consider defence - whether such failure occassioned miscarriage of justice.

The appellants are convicted of the offence of robbery contrary to section 296(1) of the Penal Code. The appellants in their defence had alleged they were involved in a fight with the complainant and they were not involved in robbery. They were sentenced to serve 3 years' imprisonment with 4 strokes corporal punishment. In addition they were to be under police supervision for 5 years after their incarceration. In their defence they narrated how they were involved in a fight. The prosecution case was that the complainant alighted from a bus and was set upon by the appellants and was robbed of personal items. In the appeal the issue of the failure by the magistrate to consider and examine the defence carefully was raised.

Held:

> ***1. The criticisms made by the magistrate regarding the manner of crossexamination was misplaced as the accused persons could have been putting what according to them the truth of the matter in that way.***
>
> ***2. The defence raised when considered alongside the prosecution evidence cast doubts and the failure by the maistrate to consider the implication of the defence case, apart from saying he did not believe it was fatal.***
>
> ***3. The prosecution evidence fell short of proving the charge against the appellants.***

Appeal allowed.

Cases

No cases referred to.

Statutes

Penal Code (cap 63) section 296 Advocates

LG Mbarire (state coursel) for Respondent.

July 30, 1984, ***Abdullah & Aluoch JJ*** delivered the following Judgment. The two appellants Alfred

Oginga Ofula and Richard Otieno were convicted by the learned 1st class district magistrate Nairobi, of the offence of robbery, contrary to section 296 of the Penal Code (cap 63). The appeals were consolidated. Each appellant was sentenced to 3 years' imprisonment, and ordered to receive 4 strokes of the cane, plus 5 years mandatory police reporting order after release. Both appellants have appealed against both coviction and sentence. We have gone through the petitions of appeal filed by both appellants, and have found that both have claimed that the 2 of them together with the complainant were involved in a fight and not a robbery, and that the court did not consider that part of their defence. Because of this claim we decided to examine carefully the defence put forth by both appellants in light of the prosecution evidence on record. According to the 1st appellant in defence he was playing draft with one Patrick Owino who was the original 3rd appellant and whose appeal was finalized before us on July 23, 1984. They were joined by the 2nd appellant, who again left to go and buy cigarettes. Shortly afterwards, there was a lot of noise outside. The 2 came out and found Richard 2nd appellant on the ground, he was injure. The police came and arrested all of them as they were in the bus taking him to hospital. The 2nd appellant on the other hand stated in his statement in defence that whilst on his way to but cigarettes he met the 1st appellant and another playing drafts. He left them, walked along, crossed the road and got to the shops. On his way back he found some people standing. He did not know them. One held him. He was hit on the face." He realized it was a fight. He was beaten and he fell unconscious. He found them beating another man. These people ran away as the 1st appellant and another arrived. They took him to Kenyatta National Hospital. It was there that police went to see him. The complainant was with them and the appellant identified him as being one of those who assaulted him.

The prosecution case on the other hand was that the complainant had alighted from a bus on September 18, 1983 about 7 pm . That he was with PW 2 as he met the two appellants. That the 2 appellants together with others attacked him and robbed him of a pair of shoes, watch, coat and some cash money. The complainants and others ran and disappeared, but on October 3, 1983 the complainant pointed out the 1st appellant to the police, and he was arrested. The 2nd witness, PW 2 on the other hand testified that, that same evening, he found the complainant being beaten, Oginga v Republic

after the latter had alighted from a bus. According to him he found the 2 appellants and others having knocked down the complainant. PW 2 passed them to go and call people. When he returned all of them were gone. He later identified the 1st and 2nd appellant, when they were arrested. In the learned magistrate's judgment at page 18, beginning at line three he said,

> ***"I do not believe the defence case that it was the contrary that it was accused No 2 who was assaulted and robbed of his cigarettes. Their clever way of putting questions to PW 1, PW 2 and even PW 3 shows that they are people who could have acted in such a manner….."***

We on our own part have assessed and evaluated the entire evidence in this case and, whilst we are prepared to accept that the complainant was robbed of his property at the same time, it is our considered opinion, that the defence case considered along side the prosecution case, causes some doubt as to whether what happened in this case was a robbery as described by prosecution, or a fight, as described by appellants. We find that the learned magistrate did not fully consider the implication of defence case, apart from just saying that he did not believe it. We are also unable to find reasons to support the learned magistrate's observation of the appellants when he said,

> ***"There clever way of putting questions to PW 1, PW 2 and even PW 3 shows that they are people who could have acted in such a manner".***

What the learned magistrate describes as "clever way of putting questions..." could have just been the appellants' way of putting what according to them was truth of the matter.

The sum total of our consideration of this case is that the prosecution evidence on record fell short of proving the charge against the appellants, because the defence put up by the 2 appellants caused doubts in our minds. We have therefore decided to resolve this doubt in favour of the appellants. We allow the appeal, quash the conviction and set aside the sentence imposed on both. We order further that each

appellant be released forthwith unless otherwise lawfully held.