



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)**

**CRIMINAL APPEAL NO. 46 OF 2015**

**BETWEEN**

**THOMAS ODHIAMBO AGAO .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Odero & Muya, JJ.) dated 1<sup>st</sup> August, 2014*

*in Criminal Appeal No. 15 of 2013)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

Being a second appeal, under **section 361(1)** of the Criminal Procedure Code we are only concerned in this appeal with matters of law. See also **Karingu vs.R. (1982) KLR 214**. Before we consider the legal grounds proffered, the following summarized background is relevant.

The appellant was convicted of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. It was alleged that on the material day at about 5.35 a.m. along Moi Avenue, Mombasa, in the company of another person wearing a blue T-shirt and who was not before the trial court, the appellant who was himself wearing a red T-shirt used violence on the complainant in the course of a robbery in which the latter's mobile phone and a handbag were stolen. The complainant's screams during the incident attracted people including a neighbor, PW2 to the scene. The appellant was identified by the complainant as the one who had held her by the throat while at the same time he snatched her handbag and the mobile phone; and was thereafter chased and arrested by members of the public. PW2 witnessed the chase and indeed saw the appellant running with a handbag in his hand which, at some stage, he threw away and was collected by one of the men who were pursuing him. When it was presented to the complainant it was empty. The complainant, PW2 and the investigating officer testified as to the lighting condition at the scene and maintained that it was on the road with street lights and security lights from the shops.

Although the appellant denied robbing the appellant he admitted that he was arrested on that street while waiting to board a *matatu*; that the only reason for his arrest was the red T-shirt he was wearing, in effect arguing that he was a victim of a mistaken identity.

The learned magistrate assessed the evidence presented by both parties at the trial and was satisfied from that evidence that the identification of the appellant was without error, the offence having been committed in a well-lit street and the appellant having been chased and arrested shortly after the robbery. The learned magistrate further found, relying on **Oluoch v R** (1985) KLR 549, that robbery with violence contrary to **section 296(2)** of the Penal Code was proved beyond any reasonable doubt because the appellant while in the company of another, in the course of stealing used violence on the complainant. The appellant as a result was sentenced to death.

His appeal to the High Court was dismissed with the learned Judges (**Odero** and **Muya**, JJ.) concurrently holding, as the trial court, that there was sufficient evidence of identification of the appellant. In bringing this second appeal, the appellant through **Ms. Otieno**, learned counsel relies on three grounds which may be condensed into one ground, namely, that the offence of robbery with violence contrary to **section 296(2)** of the Penal Code was not proved. According to counsel none of the three essential ingredients of the offence was proved; that there was no evidence that the appellant was in the company of any other person, or armed with a dangerous or offensive weapon or that he wounded or beat the complainant; and that to the contrary, the offence disclosed by the evidence was a simple robbery contrary to **section 295(1)** of the Penal Code.

**Mr. Kiprof** learned counsel for the respondent conceded the appeal on these very ground – that the evidence before the trial court only disclosed an offence of simple robbery and that the only role played by the second person who was said to be in a blue T-shirt was merely to give way for the appellant as he fled the scene.

We emphasize that even where an appeal is conceded, the court is not bound to accept it. Instead, the court must itself be satisfied that the grounds for concession are sound. Only two questions were raised before both courts below and indeed before us regarding identification and whether the offence committed was that provided for under **section 296 (2)** of the Penal Code. Both courts below made concurrent factual findings that there was sufficient opportunity and light that enabled both the complainant and PW2 to identify the appellant. We are unable to disagree. The High Court spent considerable time in re-evaluating the evidence of identification in the most satisfactory manner and came to the conclusion that it was shown beyond any reasonable doubt by the recorded evidence that the appellant was involved in the robbery.

On the second question, it is important to state that according to the particulars of the offence in the charge sheet, the appellant was said to have been in the company of one person who was not charged; and that in the course of the robbery they threatened to use actual violence on the complainant.

In her testimony the complainant explained that;

***“I met 2 young men walking from the opposite direction. One had a red T-shirt and the other a blue T-shirt. .... Suddenly the one in a red T-shirt turned and held me by the neck ... from behind .... He pulled my handbag handle and got it cut. He pulled the handbag and the two of them ran away. Inside the handbag I had a mobile phone, make Adios and cash Kshs.7,350/- .... Another young man came holding my bag. He handed it over to me. .... By the time I checked inside the bag I found it empty. I realized the young man who had it had disappeared from the crowd”.***(our emphasis)

In cross-examination the witness clarified that it was only the appellant who took part in the robbery stating that;

***“The one who passed by my left did not do anything to me. I do not know why the other one did not do anything to me.... I did not talk to the one who came carrying my bag. However, he is not the one who robbed me the bag”***

It is this evidence that has led to the argument and concession that the essential ingredients of the offence charged were not satisfied. We agree. But in addition, we think that from the facts of this case the

offence disclosed is that robbery occurs of robbery under **section 295** as read with **section 296 (1)**. **Section 295** provides that robbery occurs where a person steals from another and in the process uses, or threatens to use actual violence to any person or property in order to obtain or retain the stolen property.

In the result we allow the appeal, quash the conviction for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code and substitute it with a conviction for the offence of robbery contrary to **295** of the Penal Code. We also set aside the death sentence and substitute it with a sentence of prison term of seven years from the date of sentence by the trial court.

**Dated and delivered at Mombasa this 22nd day of April, 2016**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**W. OUKO**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**