



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CRIMINAL APPEAL NO. 87 OF 2014

BETWEEN

ALFRED ODIPO NDERAM.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kakamega Chemetei & Muchelule, JJ.) dated 21st January 2014)

in

H. C. Cr. A. No.106 of 2013)

JUDGMENT OF THE COURT

The appellant, Alfred Odipo Nderam, was charged before the Chief Magistrate's Court at Maseno with the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code**.

The particulars were that on the 23rd of March 2013 at Kalkada Uradi sub-location in Siaya County within the former Nyanza Province, jointly with another not before the court, while armed with crude weapons robbed Lukas Oginga Omondi of three cows and one mattress all valued at Kshs. 64,000/- and immediately before or immediately after the time of such robbery used actual violence on the complainant, **Lukas Oginga Omondi, PW1**.

He was also charged with stealing stock contrary to **section 278** of the **Penal Code**, the particulars of which were that on the same day he stole three cows valued at Kshs. 60,000/- the property of the complainant.

The appellant denied committing the offence.

The learned trial magistrate found that the charges were proved to the required standard, convicted and sentenced him to death as by law prescribed. On appeal to the High Court his conviction and sentence was upheld.

Further aggrieved by the High Court's decision the appellant lodged this appeal setting out six grounds of appeal which are that, the High Court failed to appreciate that his right to a fair hearing on account of illness during the trial was breached; that the High Court in failing to analyse the evidence failed to appreciate that the agreement was not derived through coercion; that the prosecution failed to prove that the appellant committed the offence beyond reasonable doubt; and that the sentence was harsh and unjust.

Ms. Aron, learned counsel for the appellant, begun by submitting that the appellant was not subjected to a fair trial as required by **Article 50 (c)** of the **Constitution** as, on the date of the hearing despite having requested for the proceedings to be adjourned for reasons that he was unwell, the trial court declined to grant the adjournment; and that despite the issue having been raised, the High Court failed to consider the issue in its judgment.

Counsel further submitted that the first appellate court did not properly evaluate the evidence when it disregarded the sale agreement between the appellant and the complainant. Counsel argued that the courts below fell into error by finding that the agreement was entered into through coercion, when there was no evidence to support this conclusion. Counsel further faulted the trial court for finding that the agreement was "doctored" and amounted to a forgery, without any basis whatsoever.

Counsel complained that the courts below further failed to take into account that the complainant's evidence was contradictory, as he had stated on the one hand that, the appellant locked him up in his house upto 11 pm, but also stated that he went to the police station at 7 pm; that though PW 3 and PW 4 stated that they witnessed the incident, PW2 said she saw the appellant cut Lukas with a panga, while PW3 said he used a slasher.

Ms. Khaemba, learned Senior Prosecution Counsel, conceded the appeal. It was counsel's submission that the charge sheet and the evidence were at variance as, the appellant was charged with the offence of robbery with violence, yet the evidence did not support the offence. Counsel argued that the events commenced in the morning when the appellant accused Lukas' son of having stolen his motor cycle, and culminated at 3.30pm when Lukas' cattle were driven away after he (the appellant) returned to Lukas' farm. It was counsel's case that, since Lukas admitted that the cattle were driven away by another person, and not by the appellant, the evidence did not point to a robbery having taken place.

Counsel further submitted that the trial court wrongly concluded that the signatures and the agreement were a forgery, as there was nothing to show that a handwriting expert, or document examiner examined Lukas' signature.

We have considered these submissions and carefully read the record of appeal. This being a second appeal and by dint of **Section 361(2)** of the **Criminal Procedure Code**, this Court can only address a point or points of law only. In the case of **Karigo vs Republic (1982) KLR 213** this Court stated,

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari C/O Karanja vs R (1956)17 EACA 146."

Guided by the foregoing, it is apparent that the issues for our consideration are whether, the appellant's right to a fair trial were violated; whether the High Court failed to evaluate the evidence; and whether the offence was proved beyond reasonable doubt.

Beginning with whether the appellant's right to a fair hearing was violated, the record shows that on the date the trial commenced, the appellant informed the court that he was unwell and applied for an adjournment. The prosecution opposed the application for reasons that the appellant had also sought an adjournment on the previous hearing date.

The trial magistrate ruled that this was a delaying tactic on the part of the appellant, and ordered that the hearing proceed, whereupon, Lukas was called to testify as the first witness.

It is true that the appellant indicated that he was unwell, however, during Lukas' examination in chief, the prosecution sought to step him down, and applied for an adjournment to obtain an exhibit from the investigating officer who was not present in court. When the trial next proceeded on 8th July 2013, the complainant was recalled, and continued with his examination in chief. Thereafter, the appellant thoroughly cross examined him. We find that though the hearing initially proceeded despite his alleged illness, we see that no prejudice was occasioned to the appellant. He did not conduct any cross examination on that day, and when he did, he participated fully by cross examining Lukas which demonstrated that his illness had not incapacitated him in any way. On this account, this ground fails.

We turn next to the question of whether the offence was proved beyond reasonable doubt. To do so, we consider that a brief outline of the facts would be efficacious.

The events of 23rd March 2013 began at about 9.00 am while Lukas was cultivating his farm, when the appellant and a group of people confronted him alleging that Lukas' son, one George Otieno, had stolen his (the appellant's) motor cycle. Lukas claimed that the appellant hit him on the shoulder with a panga, and in the ensuing melee, he lost one tooth. He stated that he was dragged from the farm and forced to board a motor cycle to Nthonya, and then to Unguja trading centres. At around 3.30pm, he was returned to his homestead, whereupon the appellant took his three cows and a mattress, and informed him that it would be reimbursement for the stolen motor cycle. The cows were led away by a member of the appellant's group.

According to Lukas, the appellant locked him up in his home at Uranya trading center until 11 pm, and then released him to go home. He later sought treatment at Rabul Health Centre and at the Siaya District Hospital, and reported the matter to the police.

Wilfrida Awino Oduor (PW2) and **Teresia Akinyi (PW3)** were also in their respective farms that morning. They saw the appellant together with a group of people enter Lukas' farm where they slapped him with a panga, as the appellant demanded a motor cycle which he claimed was stolen by one of Lukas' sons. Shortly thereafter, they took Lukas away on a motor cycle and returned with him at 3.00 pm. Teresia added that when they returned they took Lukas' three cows and a mattress.

In his defence, the appellant testified that on 23rd March 2013 he had given his motor cycle to one Jacob to drive when Lukas' son requested to be driven to Nyaderero. Soon thereafter, he received a call that his driver had been robbed of the motor cycle by Lukas' son. When he confronted him, Lukas agreed to reimburse him for the stolen motor cycle. Lukas was to take the money to his shop. At about 6.00pm Lukas brought Kshs. 42,000/- whereupon, they drew up an agreement. Following Lukas' insistence it was agreed that the agreement be witnessed by the police.

Lukas, the appellant and DW 3 arrived at Rwambwa police post at 7.30 pm but, as it was dark, they were advised to return the following morning, which they did. The agreement was given to the police officer who was present, to sign and it was placed in the Occurrence Book. Both Lukas and the appellant retained a copy of the agreement, which was produced in court as D. Exh No. 1. The appellant stated that he was subsequently charged with the offence of robbery with violence because, he said, Lukas refused to pay him his money.

His evidence was corroborated by his wife, **Beatrice Auma Odinga, (DW 3)** and **Elvis Ouma Otieno, (DW 4)** who also testified as to the existence of the agreement for the sale of Lukas' cows.

There was also the evidence of **PC Christopher Kimutai Ngeno (DW 2)** from Siaya Police station, attached to Nyandorera Police post who stated that at around 11 am on the morning of 23rd March 2013, he received a report involving a stolen motor cycle Reg No. KMCY 480M. On the same day at 7 pm, the appellant, the owner of the motor cycle, his wife and Lukas went to the police post. DW 2 advised them to return the following day as it was late. They returned the next morning and informed him that Lukas had sold some cows to pay for the stolen motor cycle. The buyer, one John Ochieng Obweo, showed him a sale agreement for the sale of three cows, made with Lukas of which he retained a copy, and produced as D. Exh .3.

The trial court found that the offence of robbery with violence was proved as, the appellant, while armed with a panga and in the company of more than 2 people having beaten and wounded Lukas, robbed him of his cows. The High Court likewise, arrived at the same conclusion.

Section 296(2) of the Penal Code stipulates the ingredients necessary to prove the offence of robbery with violence thus;

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other personal violence to any person, he shall be sentenced to death.”

When we consider the events as they unfolded in their totality, we are not convinced that the offence of robbery with violence was established. Contrary to the finding of the courts below, Lukas was not robbed of the cows that morning moments after the appellant confronted him. It is also not disputed that, it was at 3.00 pm on returning to Lukas’ home, that the cows were driven away by a third party.

In his defence, two agreements D. Ex 1 and D. Exh 3 were produced to show that Lukas had agreed to sell the cows to pay for the alleged stolen motorcycle, and that the cows were sold to one John Ochieng Obweo for a sum of Kshs. 42,000/-.

In considering the agreements, the trial court found them to have been doctored and obtained through coercion when it stated thus;

“The complainant testified that he was taken to the accused’s house and something was written down and I believe that this is when the agreements were written and I doubt whether the complainant signed them and if he did I doubt whether they were signed voluntarily. If you look at the agreement for sale of the cows (DExh No. 3) and the agreement for payment of money (DExh. No.1) you will note that the signature of the complainant Lukas Oginga is different on both documents and my take is that he did not sign any of these agreements.”

The court went on to conclude;

“The agreement for the sale of cows (DExh 3) appears not genuine further by the fact that the date stamped on the rubber stamp of Nyadorera police base is 24th March 2012 and yet the incident is said to have been reported in March 2013. I find the evidence of defence witness No. 2 the police officer not of any value to the defence, as the agreement he produced bears a stamp for the year 2012 when it was prepared, the author of the agreement was not called to testify he only received documents that may have been doctored.”

The High Court, on its part evaluated the agreements and likewise found that they were contrived through coercion when it observed thus;

“In respect to the agreement signed we do agree with the trial court that the same was obtained through coercion. Infact the only departure is when the court deviated to the issues of whether there was a variation in the signature which essentially is the preserve of the experts and not the court although it is entitled to its opinion. The variation of the dates that is 24-3-2012 and March 2013 is at variance which DW2 the police officer failed to explain.”

The finding that Lukas was coerced into signing the agreements led both the trial court and the High Court to dismiss them, together with the appellant’s explanation as to why the cattle were driven away that afternoon.

We can find no basis upon which, the lower courts arrived at this conclusion. Though Lukas did not testify as to their existence, there was nothing to show that he was coerced into signing the agreements produced by defence. DW 2 testified that Lukas, the appellant, and DW 3 went to the police station and

informed him that they had entered into an agreement where Lukas had agreed to sell some cows to pay for the stolen motor cycle. Nothing pointed to Lukas having signed the sale agreement under duress, and the prosecution did not in any way discredit DW 3's evidence.

Furthermore, since neither the agreements nor the signatures were dislodged or invalidated by virtue of having been examined by a handwriting expert or document examiner, their cogency remained uncontroverted.

We agree with counsel for the appellant that, without evidence to show that the agreements were rendered invalid, it lent credence to the appellant's defence that Lukas sold his cows to reimburse the appellant for the stolen motor cycle. By unjustifiably disregarding this evidence, the trial court and the High Court failed to evaluate the appellant's defence, together with all the evidence.

It therefore follows that, had the courts below considered the fact that no robbery occurred immediately following the confrontation and assault of Lukas by the appellant, in conjunction with the appellant's defence that, Lukas had agreed to sell his cows as reimbursement for the stolen motor cycle, (evidenced by the sale agreement), they would have found that, the appellant sufficiently explained why the cows were driven away on the material day, which facts effectively displaced the offence of robbery with violence.

As rightly conceded by Ms. Khaemba, in the face of these findings, the only conclusion we can reach is that, the prosecution failed to prove the offence, which thereby renders the conviction unsafe.

In sum, we must allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED and delivered at Kisumu this 23rd day of September, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR