



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CRIMINAL APPEAL NO. 27 OF 2012

BETWEEN

JAMES OMONDI ONYANGO APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Kisumu, (Abida Aroni & Chemitei, JJ) dated 13th March, 2012

in

HCCRA NO. 102 & 103 OF 2007)

JUDGEMENT OF THE COURT

The appellant, **James Omondi Onyango** was charged jointly with another before the Principal Magistrates' Court, Siaya, with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code particulars being that on the 31st day of July, 2006 at Karapul sub-location in Siaya District within Nyanza Province, jointly with others not before the court while armed with dangerous weapons namely rungun and iron bars robbed **Joseph Augoh Otieno** of his money Kshs. 3,500/= and that at or immediately after or immediately before the time of such robbery they wounded the said complainant. In a judgement delivered on 10th July, 2007 by the learned Principal Magistrate (G. K. Mwaura) the appellant was convicted and was sentenced to death. The first appeal to the High Court of Kenya at Kisumu was heard by Ali-Aroni and H. K. Chemitei, JJ, who in a judgement delivered on 13th March 2012 dismissed the appeal but reviewed the sentence ordering that the appellant serves fourteen (14) years custodial sentence from the date of the High Court judgement.

The appellant was still dissatisfied with these findings and filed this appeal premised on four grounds of appeal which were drawn by the appellants counsel, Mochere and Company Advocates. In the first ground of appeal the appellant complains that the first appellate court failed to evaluate the evidence or selectively evaluated the same failing to notice that the appellant was not mentioned in the first report. In the second ground it is alleged that the first appellate court erred in law and fact because the charge did not comply with Sections 89 (1) and 134 of the Criminal Procedure Code. The complaint in the

third ground is that the first appellate court erred in law and fact in upholding conviction when there was no cogent evidence to sustain conviction while in the last ground which is not materially different from the third ground it is alleged that the first appellate court erred in law and fact in upholding conviction based on contradictory and un-corroborated evidence.

This is a second appeal and we are concerned with points of law. We are bound by the concurrent findings of fact made by the lower courts unless those findings are shown not to be based on evidence – See **Njoroge v R [1982] KLR 388** and **Thiongo v R [2004] IEA 333**

The case for the prosecution was through the evidence of four witnesses and it was that on 31st July, 2006 at 6.30 p.m or 8.30 p.m Joseph Otieno Oungo (this last name is given as “Augoh” in the charge sheet) (PW1) (Otieno) who had been visited at his home by his friend called Martin decided to see off this friend who lived in Rabango. They followed a short-cut route which was bushy. Before they reached a hotel called Sussy they saw six men who were dressed in black long coats not dissimilar to those worn by the police. These men ordered them to stop and to kneel down. One of them who Otieno identified as Oduor who he knew before flashed a torch on Otieno and hit him with a metal bar. Meanwhile the person being escorted by Otieno – who the evidence reveals to be **Samson Odongo Oloo (PW3) (Odongo)** – managed to escape, ran to Sussy hotel or bar, alerted watchmen who were there and they all proceeded to the scene but found the assailants gone and Otieno injured. Otieno stated that the assailants had surrounded him, lit torches by which he was able to recognize the man called Oduor and the appellant and they frisked him removing money from his pocket before escaping. Otieno gave the names of Oduor and of the appellant to the watchmen and to the police the following day and was treated at Siaya District Hospital.

Odongo stated in his evidence that:

“.....On 31.7.06 at around 8.00p.m I was with Joseph Otieno. At 8.30 p.m I began to escort him towards his home....”

And that they met the assailants as per Otienos' testimony. Like Otieno he recognized Oduor and the appellant who were people he knew before as they came from the same village.

Peter Amoth, a registered Clinical Officer at Kadenge Ratuoro Health Centre attended to Otieno and certified the injuries he had suffered as bodily harm. He produced a P3 Form as part of the evidence in the case before the trial court. In cross – examination this witness insisted that he attended to Otieno on 31st April, 2006 and in re-examination stated that he completed P3 Form on 22nd August, 2006. This date – 31st April, 2006 – was also given by Odongo who in cross – examination stated:

“..... He went for treatment on the same night. He went to hospital on 31.4.06....”

No. 81362 PC Zakayo Chepkeum of Crime Branch, Siaya Police Station, received a report on the incident from Otieno on 1st August, 2006 who further told him that he knew two of the attackers as “Erick Ngonga and James Omondi”. This witness also testified that on 16th August, 2006 he was taken by Otieno to the homes of the two persons named and he arrested them. He also stated that:

“..... The complainant came to the police station later and said it was then also (sic) knew the two suspects before over other matters and knew it was people who were referred to by the complainant.....”

In cross examination by the appellant this witness stated:

“....I wrote the complainant's statement on 27.8.06. I knew you before due to other investigation Samson Odongo recorded his statement on 28.8.06.”

That was the evidence that the prosecution laid before the trial court which found that the appellant had a

case to answer. The appellant in an unsworn statement testified that he was at a funeral on 16th August 2006 when, on getting home he was confronted by ten police officers one of who he knew by name. His inquiry on why he was being arrested met a response that it was over an old case of a generator which generator he still refused to return to its owner because he was owed a lot of money presumably by the person from whom he had taken the generator. He denied being involved in any way with the charge then before the court.

The trial magistrate was satisfied that the prosecution had proved the case against the appellant beyond reasonable doubt and convicted him accordingly.

When the appeal came for hearing before us on 19th March, 2014 Mr. James Mochere, the learned counsel for the appellant, abandoned grounds 2 and 3 of the Memorandum of Appeal and proceeded only on grounds 1 and 4. Counsel argued that the first appellate court failed in its duty of re-evaluating the evidence because, had it done so, urged counsel, it would have noted inconsistencies in the evidence such as in the evidence of Otieno who stated that he was escorting "Martin" while the person who stated to have been in Otienos' company was Samson Odongo Oloo. The other matters noted by learned counsel were Otienos' reference to a "hotel" while Odongo talked of a "bar." Counsel also referred to the evidence of the Clinical Officer who stated that he attended to the complainant on 31st April, 2006 while the offence was committed on 31st July, 2006.

Mr. C. A. Abele, the learned Assistant Director of Public Prosecutions in supporting conviction submitted that the first appellate court had properly carried out its mandate of re-evaluating the evidence and reaching an independent decision but disagreed with that court for reducing sentence to a term of imprisonment of fourteen (14) years instead of the death sentence imposed by the trial court. Counsel while conceding that there were inconsistencies submitted that such inconsistencies as in the name "Martin" or who between Otieno and Odongo was escorting the other were not material to the overall evidence offered by the prosecution.

We have considered the whole record, the submissions by learned counsel and the law.

On the issue of identification learned counsel for the Republic submits that Otieno and Odongo correctly identified the appellant who was not only a village mate but that they had all attended the same school. In that event identification would be by recognition which is more reliable. Otieno in evidence testified that:

"... one of them flashed a torch at me. The men then began to move towards me I saw them by the beam (beam) of the torch (torch)."

And in cross-examination:

"...I did not have a torch. I saw the 6 men when they were 6 metres away..."

So the evidence before the trial court was that the only source of light to illuminate the scene was one torch shone by the attackers against Otieno and Odongo.

The first appellate court in re-evaluating this piece of evidence noted that:

"... the nature of the intensity of the lights from the torches is not very clear. But one thing that it seemed certain is that as a consequence of the meeting between the appellants and PW1, PW3, the complainant and his colleague managed to recognize the appellant. The complainant called the 1st appellant and went further to report to the police the full names..."

Is that so?

In the report recorded in the Occurrence Book which was tendered in evidence and which was

reproduced in the judgement of the first appellate court the complainant reported inter alia that he was attacked at 8.20 p.m by 6 men and that he recognized one of them as Ngonga Oduor. Who “Ngonga Oduor” is did not come out in the evidence.

If, indeed, Otieno and Odongo had recognized the appellant at the scene as they alleged in their evidence why was the name not given to the police when Otieno reported the matter the next morning?

Also of concern to us is what emerges from the evidence of Police Constable Zakayo Chepkkeum who received Otienos' report on 1st August, 2006. He testified that Otieno informed him that he had recognized two of the attackers as the appellant and Erick Ngonga. He did not however explain the reason why it took him up to 16th August, 2006 to go to the home of the appellant to arrest him when he already knew the appellant through other cases he was handling. Neither is there an explanation as to why Otienos' statement was not recorded until 27th August, 2006 and that of Odongo on 28th August, 2006 when these witnesses were readily available.

It was the evidence of Otieno and Odongo that when Odongo managed to flee from the scene he reported the matter to watchmen who were at Sussy bar or hotel and that Odongo and the watchmen went to the scene. No explanation was offered why the prosecution did not call any of these watchmen to testify in the case.

On the other ground of appeal learned counsel for the appellant submitted that the first appellate court failed in its duty because it did not re-evaluate the evidence which counsel thought was riddled with inconsistencies. That submission is not idle at all as is evidenced by the following instances.

Otieno stated that on 31st July, 2006 he was escorting Martin, his friend who had visited him at his home.

Odongo stated that on that day:

“...I was with Joseph Otieno. At 8.30 p.m I began to escort him to his home...”

The trial court and the first appellate court did not establish who “Martin” was. He certainly was not Odongo as Odongo gave his full names to court and would have said he was also called “Martin” if this was his name.

The Clinical Officer testified that he attended Otieno on 31st April, 2006. Yet the offence was committed on 31st July, 2006.

The first appellate court should also have been concerned by the charge sheet itself. The charge sheet indicates that the appellant was arrested on 27th August, 2006. And yet the evidence of the complainant and that of the police officer was to the effect that the appellant was arrested on 16th August, 2006.

We think we have said enough to show that the trial court convicted the appellant on evidence which was not safe and the first appellate court with respect failed in its duty of re-evaluating and analysing the evidence to reach its own independent decision. In the event the appeal succeeds and we allow it accordingly by quashing the conviction of the appellant and setting aside the sentence imposed. The appellant to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered at Kisumu this 9th day of May, 2014.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR