



REPUBLIC OF KENYA

Court of Appeal at Kisumu

Criminal Appeal 161, 166 & 170 of 2009

SAMUEL ODHIAMBO OWINO

MICHAEL ODUOR RADODI

SAMUEL OTIENO WERE ..... APPELLANTS

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ) dated 9<sup>th</sup> June, 2009

in

H.C.C.R.A. Nos. 87, 140 & 141 OF 2008)

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JUDGMENT OF THE COURT

*SAMUEL ODHIAMBO OWINO, MICHAEL ODUOR RADODI and*

*SAMUEL OTIENO WERE* [hereinafter referred to as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants] respectively, were charged before the Principal Magistrate's Court at Siaya with the offence of robbery with violence contrary to **Section 296 (2) of the Penal Code**. The 2<sup>nd</sup> and 3<sup>rd</sup> appellants also faced a second count of handling stolen goods contrary to **Section 322 (2) of the Penal Code**. After trial, they were convicted of the main count and sentenced to death. Their appeal against the conviction and sentence before the High Court was also dismissed.

This is a second appeal and by dint of the provisions of **Section 361 (a) of the Criminal Procedure Code**, only matters of law can come up for our consideration.

We will recapitulate albeit in a summary form the evidence before the trial court so as to put this judgment into perspective. On the night of 14<sup>th</sup> July, 2007, within Karapul sub location, Siaya District, Nyanza Province, the house of **PATRICIA AUMA OTIENO** was broken into while she was sleeping. She was not able to identify the assailants, nonetheless, during the hearing, she identified the 2<sup>nd</sup> appellant as the one who was dressed in a maroon jacket and the 3<sup>rd</sup> appellant who was dressed in a black jacket. We will revisit this issue of identification later in this judgment, but for the time being this was dock identification which was, rightly, not given any consideration by the trial magistrate.

Patricia was ordered to go back to bed and the thugs covered her with a blanket after slapping her. The thugs stole several household goods which were listed in the charge sheet. Patricia reported the matter to the police and also the chief. She enlisted the help of the local vigilantes and they got some information that there were suspected goods that were being sold at Matunga area. The informer took them to a certain house where they found the 1<sup>st</sup> appellant. However, nothing was recovered from the 1<sup>st</sup> appellant, but he led them to the house of the 2<sup>nd</sup> appellant. They found the 2<sup>nd</sup> appellant sleeping and from his house they recovered about twelve [12] items that Patricia identified as her stolen items. The 1<sup>st</sup> appellant also led them to the house of the 3<sup>rd</sup> appellant, who tried to escape but was immediately arrested. Patricia was able to identify the green blanket as one of the items that were stolen from her. The 1<sup>st</sup> appellant also led the group to the house of *Jane Auma* from where the complainant identified about three [3] of her stolen items [*Jane Auma died in custody*].

The above evidence was corroborated by about four [4] witnesses as pointed out by the learned trial magistrate in his opinion as follows:

*“All the four witnesses are unanimous on this evidence. They are also clear and consistent and I find no reason to doubt him [sic]. Therefore I proceed to dismiss the denial by the accused persons as the same cannot be true at all. Accordingly, I find the first accused led the assistant chief’s search party to the home of the other two accused and the two were met with stolen goods. The first accused had been asked to produce the robbed items and offered to lead the search party to where the items were. ... Though they did not injure the complainant, they are a gang that acted jointly. They violently broke her door and forcefully covered her with a blanket to prevent identification. Due to this use of violence and the fact of joint operation, I find that the act [sic] aggravated to robbery with violence. ...”*

The appellants’ appeals before the High Court were dismissed. The learned Judges, after re-evaluating the evidence arrived at a concurrent finding that the 1<sup>st</sup> appellant knew where the items were, therefore, he was part of the joint enterprise. From this fact, the judges found that he was aware of the location of the robbed items and the other assailants. He actually told the arresting party that they had given some of the items to Auma to sell for them. From these facts, the judges therefore found that the 1<sup>st</sup> appellant was in joint possession of the items which were recovered only three [3] days from the night they were robbed. The learned Judges of the superior court concluded that the appellants were in very recent possession of the same and they did not offer any explanation for the possession thus they drew an inference the 1<sup>st</sup> appellant took part and was in constructive possession of the complaint’s stolen items while the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were found in actual possession.

The appellants have now appealed before this Court. They relied on a supplementary memorandum of appeal which sets out six grounds of appeal. Mr Onsongo represented the 1<sup>st</sup> appellant, while Mr Gichaba represented the 2<sup>nd</sup> and 3<sup>rd</sup> appellants. During the hearing, Mr Onsongo combined the arguments into two. Firstly, he faulted the quality and quantity of the evidence that was relied on to convict the 1<sup>st</sup> appellant. The evidence was inadmissible as the 1<sup>st</sup> appellant is said to have confessed that he was part of the gang; it contradicted the other evidence and fell below the threshold of circumstantial evidence. Secondly, the superior court failed to re-evaluate the evidence and arrive at their own independent conclusion. This is because the attack took place at night and Patricia testified that she did not identify the attackers. That in essence should have ruled out her further evidence when she said she identified the 2<sup>nd</sup> and 3<sup>rd</sup> appellants by the clothes they were wearing. Moreover, no items were recovered from the 1<sup>st</sup> appellant but the learned trial magistrate relied on inadmissible evidence of confession which as at the time had been repealed vide the amendment of **Section 31 of the Evidence Act**.

On the part of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants, Mr Gichaba while associating himself with the submissions of Mr Onsongo, further submitted that the fact that the police relied on information whose sources were unknown to raid the houses of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants, that evidence was against the law. He went on to argue that the search was unlawful and contrary to the provisions of **Section 118 of the Criminal Procedure Code** because the arresting party had no search warrant.

On the part of the State, Mr Gumo, learned Deputy Public Prosecutor, supported the conviction which was based on circumstantial evidence. He submitted that there were no material contradictions and even the minor discrepancies did not dent the prosecution's case. The 1<sup>st</sup> appellant is the one who led the police to arrest the 2<sup>nd</sup> and 3<sup>rd</sup> appellants who were arrested in possession of stolen items that were positively identified. The 2<sup>nd</sup> and 3<sup>rd</sup> appellants did not lay any claim on the items and the only inference that could be drawn was that the appellants were the robbers.

Having given a brief summary of the evidence before the two courts below, we will consider the issues raised in regard to the 1<sup>st</sup> appellant first. The stolen items were not recovered from the 1<sup>st</sup> appellant. The arresting team purported to rely on the information given by the 1<sup>st</sup> appellant which led to their recovery of stolen items from the 2<sup>nd</sup> and 3<sup>rd</sup> appellants. It is this information that led to the arrest, prosecution and subsequent conviction of the 1<sup>st</sup> appellant. The complainant did not identify the 1<sup>st</sup> appellant, thus it was taken that the 1<sup>st</sup> appellant incriminated himself when he led the arresting team to the 2<sup>nd</sup> and 3<sup>rd</sup> appellants. This evidence apart from being inadmissible was not safe to lead to a conviction of the appellant. The 1<sup>st</sup> appellant could very well have been in possession of information that led to the arrest and recovery of stolen items, however, having information or knowledge that is used to cause an arrest cannot be taken to mean that the person who led to the arrest was part of the thugs who stole the property. That was a wrong inference by the learned trial magistrate and if the 1<sup>st</sup> appellate court had re evaluated the matter, the conviction of the 1st appellant is not safe.

In the case of ***NGUGI VS R [1984] E KLR***, the court of appeal while dealing with the same principle of law touching on the first appellate court's duty to reconsider the evidence and especially on the issue of the quality of evidence observed at page 4 that:

*“In all these circumstances, we do not think that the appellant should be convicted mainly on Police Constable Muture's statement that it was the appellant who led the police party to Major Mutuku's house. ... Both the trial magistrate and Police Constable Muture were in error in saying that the appellant led the police to Major Mutuku's house. ....”*

We find the evidence against the 1<sup>st</sup> appellant was most unsatisfactory, we accordingly allow his appeal.

As regards the 2<sup>nd</sup> appellant, there are concurrent findings of facts by the two courts that he was found sleeping by the arresting party and from his house, several items were recovered. Those items were positively identified by the complaint as those which were stolen from her house a few days earlier. The 2<sup>nd</sup> appellant did not offer any explanation regarding these items. We see no valid ground for interfering with his conviction and sentence.

As regards the 3<sup>rd</sup> appellant, when the arresting party visited his place, he attempted to run away. The evidence shows that a green blanket was found with him. It is not clear from the evidence whether the blanket was found in the 3<sup>rd</sup> appellant's house or he was arrested while carrying it. The following are four [4] versions of the evidence as it was captured by the learned trial magistrate.

*“PW 1... The green blanket was found with the third accused.*

*PW 2... From there the 1<sup>st</sup> accused then led us to the house of the 3<sup>rd</sup> accused. The 3<sup>rd</sup> accused tried to run but we caught him there and then and the complainant identified her green blanket.*

*PW 3... the group came shortly afterwards with the 3<sup>rd</sup> accused and the green blanket...*

*PW 4... we were then led to the house of the 3<sup>rd</sup> accused where we found him with a blanket.”*

We are of the view that the first appellate court if it had properly re-evaluated the evidence should have resolved the issue of whether the evidence was sufficient to sustain the conviction. It is not clear whether

the blanket was found in the 3<sup>rd</sup> appellant's house; whether the house belonged to him or whether he was found carrying the blanket. There was no evidence of identification as the complainant said in her evidence that she could not identify the attackers; she nonetheless purported to identify the 3<sup>rd</sup> appellant on the dock which identification was of no evidential value.

In view of the above, we find the conviction of the 3<sup>rd</sup> appellant unsafe, we allow the appeal and quash the conviction in respect of the 1<sup>st</sup> and 3<sup>rd</sup> appellants. We, however, come to the conclusion that the 2<sup>nd</sup> appellant's conviction was based on sound and sufficient evidence. His appeal, therefore, fails and it is dismissed in its entirety. The 1<sup>st</sup> and 3<sup>rd</sup> appellants are to be released forthwith unless they are otherwise lawfully held.

**Dated and delivered at Kisumu this 10<sup>th</sup> day of October, 2012.**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**K. H. RAWAL**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR