



**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: OMOLO, VISRAM & NYAMU, J.J.A)

CRIMINAL APPEAL NO. 337 OF 2009

BETWEEN

GEOFREY OMONDI ODERO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ) dated 17th November, 2009

In

H. C. Cr. A. No. 78 of 2007)

JUDGMENT OF THE COURT

The appellant before us is **Godfrey Omondi Odero**. We shall hereinafter refer to him as “*the appellant*.” He was tried and convicted by the then Chief Magistrate of Kisumu, Mrs. Hedwig Ong’undi, on a charge of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of that charge were that on the 3rd day of October, 2004 at about 9.20 p.m. in East Kadiang’a location, Apok Village within Nyando District of the Nyanza Province, the Appellant, jointly with others not before the court and while armed with a dangerous weapon, to wit a home-made gun, robbed Modesai Owuor of his motor vehicle Reg. No. KAR 223 H. Nissan double-cabin valued at K.Shs.3 million and that at or immediately before or after the robbery used actual violence to wound the said Mordecai Owuor which resulted in his death. Upon conviction the Magistrate sentenced the appellant to death. The conviction and sentence was on the 7th June, 2007.

The appellant then appealed to the High Court of Kenya at Kisumu on a total of seven grounds which largely challenged the credibility of the evidence upon which he was convicted. The High Court (Mwera & Karanja, JJ) by its judgment dated and delivered at Kisumu on the 17th day of November, 2009 dismissed the appellant’s appeal against the conviction and confirmed the sentence of death. The appellant now appeals to this Court against the judgment of the High Court and since his appeal to this Court is a second one, the Court can only deal with matters of law – see **section 361** of the Criminal Procedure Code. Accordingly the Court cannot interfere with concurrent findings of facts by the two courts below unless it be shown to the Court that the findings and conclusions of those courts were not based on any evidence at all or that if they were based on some evidence such evidence was of such a nature that no reasonable court, properly directing itself as to the evidence and the Law applicable to it,

could have made such findings.

The appellants “MEMORANDUM OF APPEAL” filed on his behalf by Mr. Clifford Odhiambo Gwada, his learned counsel, contain four grounds, namely:-

“1. THAT the superior Court abdicated its statutory obligation in failing to analyze and re-evaluate the evidence on record afresh hence occasioning a miscarriage of Justice.

2. THAT the learned and noble Judges of the superior court erred in law in failing to find that the prosecution had failed to discharge the onus of proof beyond any reasonable doubt.

3. THAT both the trial court and the superior court erred in law in relying heavily on the circumstantial evidence which evidence is full of doubt/suspicion and not cogent enough to warrant the conviction of the Appellant.

4. The trial court erred in shifting the onus of proof to the Appellant hence occasioning a great miscarriage of justice.”

Arguing these grounds, Mr. Odhiambo submitted that, had the superior court discharged its duty of re-evaluating and re-analyzing the evidence it would not have confirmed the conviction of the appellant which rested entirely on circumstantial evidence. Mr. Odhiambo pointed out what he called contradictions or inconsistencies in the evidence of witnesses such as Police Constable, James Agudhu Oloo (PW7) – James); that of Lukas Owuor Okech (PW9- Lukas) and that of Inspector Joseph Karanja (PW11 – Joseph). According to Mr. Odhiambo, while James said the names of two people found dead where the vehicle of the deceased had overturned, Joseph who was with James did not mention the names of the two dead people. As to Lukas, Mr. Odhiambo submitted that this witness said he saw the appellant during the funeral service of Mordecai while the rest of the witnesses said the appellant immediately disappeared from his home area until nearly two years later when he was arrested on some Island. Mr. Gumo, the learned Assistant Director of Public Prosecution retorted that even if these were to be treated as contradictions, they were minor and did not in any way affect the prosecutions case which he (Mr. Gumo) readily admitted was wholly circumstantial. What were the findings of the two courts below on the evidence before them?

They found that Mordecai was attacked by a group of four persons as he drove his vehicle into his compound during the night of 3rd October, 2004 at about 9.20 p.m. The people who attacked Mordecai shot him on the nose and Joshua Ojwang Ogodo (PW3), a Form II student who was undergoing tuition with other students in a neighbouring home heard commotion in the home of Mordecai and thereafter saw Mordecai’s vehicle being driven out of the compound “*at a terrific speed.*” Joshua did not and could not have seen the person or persons who were in the vehicle. Joshua testified he knew the appellant who was his cousin. A day before Mordecai was shot at his home, Joshua had seen the appellant with three strange boys. He had seen them on the way to Nyamarimba Market. Then there was the evidence of Erick Otieno Walla (PW4). On 3rd October, 2004 at about 6.00 p.m., Erick had gone to buy seedlings at Nyamarimba Market. He bought the seeds at the Kiosk of Mark, who was the appellant’s brother. At the kiosk, Erick met the appellant and another person called Ken. After buying the seedlings, all of them i.e. Mark, the appellant, Ken and Erick left together and they walked upto his (Erick’s) place. They, i.e. the appellant and Ken stayed briefly at Erick’s place and then left. At about 9.00 p.m. Erick heard the commotion in the home of Mordecai and he later learnt that Mordecai had been shot dead.

Then there was the evidence of Pastor Macdonald Otieno Odero (PW8) who said he was the brother of the appellant. Pastor Macdonald said the appellant was his younger brother and he called the appellant Godwin. On 1st October, 2004, the appellant went to the business place of Macdonald at Nyamarimba Market. The appellant was with another person and they spent the night at Macdonald’s place. The appellant introduced his friend as Ken. On 3rd October, 2004, Macdonald heard of the death of Mordecai.

We go back to the evidence of Constable James (PW7). He and other police officers were manning a road-block along the Bondo-Ahero Road at Katito. They were informed of the robbery at Mordecai’s

home and were asked to be on the look out for Mordecai's vehicle. Sometime later on, they were joined by Inspector Joseph (PW11) and they drove towards Sondu. At a place called Kandaria, the police party came upon Mordecai's vehicle which was being driven in the opposite direction. The police party turned around and gave chase but Mordecai's vehicle was still being driven at a terrific speed. It disappeared from the police view but at a bridge at Stopamba, the police party came upon the vehicle. It had overturned and three persons were lying outside. Two of them were dead while the third one was still alive. Inspector Joseph interrogated the one who was alive and according to Constable James the man gave the names of the two dead people as Ken and Morris. He also mentioned Geoffrey who was missing. It is not to be forgotten that Joshua (PW3), Erick (PW4) and Pastor Macdonald (PW8) had all said that the appellant had told them the person with him was called "Ken". James said the person who was alive and gave them the names was himself called Jackton. He subsequently died from his injuries after being charged with the robbery in which Mordecai was killed.

Inspector Joseph's evidence was to the same effect as that of James. Both swore that a search in the area where the vehicle was found revealed a home-made pistol with some ammunition which was later examined by Chief Inspector Lidse Kipkemoi (PW6) who found them to be capable of being fired and causing injury. Dr. Margaret Oduor (PW1) in her evidence said Mordecai had died from hemorrhagic shock due to heavy bleeding from a gun-shot wound. Inspector Joseph said the man whom they found still alive gave his name as Jackton Arogo and he also gave the names of the two dead people but the Inspector did not mention what names (of the two dead) were given to him. The Inspector said Jackton also gave them the name of God Ochieng who had escaped from the scene. In cross-examination, Constable James said that Jackton had said the person who had escaped from the scene of the accident had been driving the vehicle and had his seat-belt on. These were the differences in the evidence of Constable James and Inspector Joseph which Mr. Odhiambo stressed before us as inconsistencies and contradictions.

Lastly, there was the evidence of Lukas (PW9) who said he was either married to the sister of the appellant or that his wife came from the appellant's home area and that he knew the appellant. He also said that early in the morning of 4th October, 2004, at about 4.00 a.m., it was raining. He heard foot steps outside his house and then he heard a knock on the door. The person knocking called out "*in-law, in-law, open for me.*" He asked that person where he was from, as he had not recognized his voice. The person insisted that the door be opened but he still refused to open. The person then mentioned a name "*James Onunga*" and the names of certain teachers. Lukas then lit a lantern and opened the door. The person knocking pushed the door and entered quickly. Lukas became afraid and almost pushed him outside again. His sight threatened Lukas. The man was full of mud and his over-all was bloody. Lukas asked him what had happened and the man said he had been involved in an accident at Stopamba. Lukas asked him where he had left the others and then he said they were too badly injured to move. Lukas again asked him why he would not wait at the scene of the accident and told him to tell the truth or else he would not be accommodated. Lukas then went out to get another person to hear the appellant's story but the appellant went out with Lukas and when Lukas returned with the other person, the appellant had disappeared. He went to the village elder and reported. The next day Lukas went to the home where the appellant's sisters were married but the sisters said they had not seen the appellant. He later learnt of the death of Mordecai and when he attended the funeral he saw the appellant there. As we have pointed out, all the other relevant prosecution witnesses said the appellant did not attend the funeral. It appears that the police were convinced that Lukas knew the appellant and when the appellant was eventually arrested nearly two years later the police did not organize an identification parade to see if Lukas could identify him. Police merely showed the appellant to Lukas and Lukas said the appellant was the person who had been to his home as stated in his evidence. In answer to the charge the appellant said he had come to his home to sell some fish at Kibuye Market in Kisumu. He came on 1st October, 2004 and he was with a friend who he named in cross-examination as Kennedy Ochieng Olala. After selling the fish he visited his grand-mother and he and his colleague slept there.

On 2nd October, 2004, he returned to Sondu Market and paid for his fish. He then said nothing about 3rd October, 2004 but jumped to January, 2005 when he was transferred to Mfangano Island. He stayed there until 2006, when he was called to Mbita Police Station where he was detained and eventually brought to Kisumu where he was charged.

That was the totality of the evidence before the trial court. Having considered that evidence the trial Magistrate agreed that the evidence was wholly circumstantial and correctly directed herself as to the principles applicable to such evidence before a court can act upon it. The Magistrate, having set out the evidence, held as follows:-

“I do appreciate that there is no eye witness who saw the robbers and what they did at the deceased’s home. What is before me is entirely circumstantial evidence. The position in law is as was held in the case of Mwita vs. Republic (2004) 2 KLR 61 is (sic) that in a case depending exclusively upon circumstantial evidence, the court must before deciding upon a conviction find that the inculpatory facts are incompatible with the innocence of the accused and incapable of any other explanation upon any other hypothesis than of guilt.”

The Magistrate then continued:-

“The circumstances surrounding accused’s brief moments at home, his company with Ken and his final disappearance from home after the incident and his resurfacing at P.W.9’s house full of mud and blood on his clothes point at the accused as having had a hand in the death of the deceased person through the robbery. He may have worked in Mfangano and Misoi but of course this was after the incident. What comes out clearly is that the accused was in the company of those who robbed and shot at (sic) the deceased. They escaped in the deceased’s vehicle and it is the accused who was driving it. After evaluating all the evidence on record I do find that the prosecution has proved its case against the accused beyond any reasonable doubt. I find him guilty and convict him as charged under section 215 of the Penal Code.”

Our understanding of the Magistrate’s conclusion is that she accepted the evidence of Joshua (PW3) that the appellant was at home on 3rd October, 2004 with one Ken, and that after Mordecai was shot and robbed of his vehicle, Joshua saw the vehicle being driven at a terrific speed from Mordecai’s home. Joshua thereafter never saw the appellant and Ken until the appellant was arrested. The Magistrate also accepted the evidence of Erick Otieno Owalla who said he saw the appellant with a visitor called Ken, that of Pastor Macdonald who also said the appellant and Ken slept in his home and that of Constable James (PW7) and Inspector Joseph (PW11) as to the circumstances leading to the chase of Mordecai’s vehicle and the vehicle overturning at Stopamba; what the two witnesses found at the scene and what Jackton told them before he died. The Magistrate also accepted the evidence of Lukas (PW9) that the appellant appeared in the house of Lukas at around 4.00 a.m. and that the appellant was covered with mud and blood and told Lukas that he had been involved in an accident at Stopamba. When Lukas became too inquisitive for the appellant’s looking, the appellant simply disappeared.

Before coming to the conclusions we have already set out, the trial Magistrate had considered all these points and concluded at page 24 of the record of appeal:-

“----- Accused in his evidence admits that while in the village he was with his friend Kennedy who must be the Ken. He says Kennedy is alive, at least he never appeared in court. The strong prosecution case is that Ken perished as they escaped in the stolen vehicle.”

As for the High Court, the learned Judges expressly stated what their duty on a first appeal as and they specifically cited the well known case of **OKENO VS. REPUBLIC [1972] EA 32**. That case is what sets out the duty of a court hearing a first appeal. That duty is not statutory as the appellant contends in ground one of his memorandum of appeal. The learned Judges then proceeded to set out the evidence of each witness who testified on behalf of the Republic. They then set out the sworn evidence of the appellant and having done so, they also set out the submissions of the appellant and those made on behalf of the Republic. The Judges then set out some of the passages from the Magistrate’s judgment and having agreed with those passages, the Judges concluded as follows:-

“----- . To us the fact that the stolen vehicle was found to have rolled and that two of its occupants were dead while one was alive with serious injuries and yet another escaped after the accident only to be mentioned as the appellant by the person who succumbed to his injuries and the

fact that one of the dead suspects was a person called Ken who had prior to the offence been seen with the appellant was more than a mere coincidence.”

This was compounded by the fact that a few hours after the offence and accident, the appellant went to his brother-in-law (PW9) in the wee hours of the morning (4.00 a.m.) while in a state of injury wearing bloodied clothes and covered in mud. He informed his brother-in-law that he was involved in a road accident at Stopamba but was rather economical with the truth regarding the circumstances of the accident and those with him at the time.

Truly, the accident occurred at Stopamba but interestingly the appellant could not wait for the appearance of a witness to hear his narration of the accident. He disappeared before the witness arrived never to be seen again in the area for almost two years. -----.”

In the face of these very clear conclusions by the High Court, we are at a loss to understand the complaint that that court failed to analyze and re-evaluate the evidence on record. The case of **OKENO V. REPUBLIC** does not set down any particular manner in which a first appellate court is to discharge its duty on a first appeal. In our view, the High Court did its duty as required by Law. They reached the same conclusions as the Magistrate did. There was overwhelming evidence to support the concurrent findings made by the two courts and there can be no basis in law upon which this Court can interfere. The other remaining grounds were relied on but not argued. In our view, they can carry the matter no further. We agree with Mr. Gumo that the contradictions highlighted by Mr. Odhiambo on behalf of the appellant were minor and cannot affect the entire evidence. Perhaps the prosecution should have shown the body of Ken to the witnesses who had seen him with the appellant to see if the witnesses could still recognize him in death but even that failure cannot affect the over-all tenor of the prosecution case. In our view the appellant was rightly convicted on evidence which proved beyond any reasonable doubt that he was among the persons who robbed Mordecai and in the process shot him dead.

We accordingly dismiss his appeal against the conviction and sentence.

Dated and delivered at Kisumu this 28th day of July 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR