



IN THE COURT OF APPEAL
AT KISUMU

(CORAM: O’KUBASU, WAKI & ONYANGO OTIENO, J.J.A.)

CRIMINAL APPEAL NO. 209 OF 2006

BETWEEN

HESBON OKOTH AGAI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Karanja, JJ.) dated 7th October, 2008

in

H.C.CR.A. NO. 124 OF 2001)

JUDGMENT OF THE COURT

The appellant, **HESBON OKOTH AGAI**, was arraigned before the Chief Magistrate’s Court at Kisumu in *Criminal Case No. 228 of 2000* and charged with robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the offence were as follows:-

“HESBON OKOTH AGAI: *On the night of 16th/17th June, 2000, within Kisumu Township in Kisumu District, Nyanza Province, jointly with others not before court while armed with dangerous weapon namely an Iron Metal Bar, robbed No. 54887 PC.Patrick Otieno Odol one revolver S/No. 47220, 6 rounds of 38 ammunition, a Seiko 5 wrist watch, a pair of shoes, a wallet and cash K.Shs.200/=, all valued at K.Shs.10,700/= and at or immediately before or immediately after the time of such robbery used actual violence on the said No. 54887 PC. PATRICK OTIENO ODOL.*”

The appellant denied the charge and his trial commenced before the learned Senior Resident Magistrate (F.M. Kinyanjui, Esq.,) on 19th October, 2000. The prosecution called a total of nine witnesses.

The learned trial magistrate considered the evidence tendered by the prosecution and the defence by the appellant and in the end came to the conclusion that the prosecution had proved its case against the appellant as charged. The appellant was accordingly convicted and sentenced to death as by the law provided.

The complainant in this case was **Pc Patrick Otieno** (PW2) who testified that he went to Fanana Hotel to rescue a colleague who was being attacked by about six people. PW2 decided to chase one of the attackers into a poorly lit park. He was set upon by the attackers who twisted his neck and as a result he

lost consciousness. The attack was shortly after 7:00 p.m. on 16th June, 2000 but PW2 regained consciousness at about 3:00 a.m. when he crawled to the hotel entrance from where a taxi driver took him to Russian Hospital for treatment. PW2 discovered that the firearm, the wallet and other items had been stolen from him during the attack. A report was made to Kisumu Police Station. He did not identify any of his attackers. The appellant was arrested a week later (23rd June, 2000) as he ran from a changaa den in a bid to avoid arrest but as he ran away, he is said to have dropped something which turned out to be the firearm that the complainant had lost when he was robbed of his property. In the course of his judgment delivered on 21st June, 2001, the learned trial magistrate said:-

“This court must therefore look into the circumstantial evidence adduced very carefully. P.W.5., Inspector John Otieno the D.C.I.O., Nyando told the court that he received information that one of the long sought men in a series of robberies had been spotted in a den of changaa enjoying himself. Following the tip off he drove to the said den in the company of P.C. Pamela Osia, P.W.4. When the accused saw the police vehicle the accused took to his heels and the two officers gave chase on foot. Just before the accused person could be caught up with, the accused dropped an item from his pocket. P.W.5. pursued him leaving P.C. Pamela behind to collect the abandoned item. The accused was arrested by P.W.5. P.W.4 joined them with the gun that the accused had dropped. He was taken to Nyando Police Station. A circulation of the lost gun had been done to the police stations surrounding Kisumu and the accused was escorted to Kisumu Police Station later. It turned out that the gun that the accused dropped was the gun that was stolen from the complainant. Taking those circumstances the doctrine of recent possession would lead to the conclusion that the accused either robbed the complainant of the gun or was in the group that robbed the complainant.”

The appellant was, of course, aggrieved by his conviction and sentence and hence he filed an appeal in the High Court. The learned Judges of the High Court (Mwera & Karanja, JJ.) considered the appellant’s appeal and in a judgment delivered on 7th October, 2008 dismissed the appeal by stating inter alia:-

“The evidence of the recovery of the revolver was provided by P.C. Pamela Osia (PW4) and Ip. John Otieno (5).

Ip Otieno (PW5 stated that he was at the material time the District Criminal Investigations Officer (D.C.I.O.) at Nyando and on the 23rd June, 2000 at 9:00 a.m. received information that a suspect was somewhere a kilometer away taking chan’gaa. He set for the place accompanied by fellow officers including P.C. Pamela (P.W.4.). As they approached the place they spotted the appellant who saw their vehicle and took off. They pursued him. He in the process threw an item on the ground. They continued pursuing and eventually arrested him.

Meanwhile, P.C. Pamela (PW4) collected the thrown item which was found to be the material revolver (PW2) loaded with two live ammunitions.

The foregoing evidence clearly and corroboratively shows that contrary to what the appellant implied in his defence, the revolver was in his possession and that he threw it on the ground while escaping or attempting to escape the long arm of the law. He was arrested on 23rd June, 2000, while the revolver was stolen from the complainant on the night of 16th/17th June, 2000. He was thus found in possession of a stolen revolver eight days after the fact. The evidence against him by P.C. Pamela (PW4) and Ip. Otieno (PW5) was cogent and credible.”

Still dissatisfied with the foregoing, the appellant comes to this Court by way of second appeal. This is the appeal that came up for hearing before us on 13th June, 2011 when Mr. Pascal Odhiambo, appeared for the appellant while Mr. P.M. Gumo (Assistant DPP), appeared for the State. Mr. Odhiambo relied on the Memorandum of Appeal which comprised the following three grounds:-

“1. The 1st Appellate Court abdicated its statutory duty of examining and reanalyzing the evidence on record a fresh and thus wrongly upheld the appellant’s conviction.

2. ***The 1st Appellate Court wrongly upheld the conviction of the Appellant since the evidence tendered regarding identification was suspicious, weak and extremely circumspect.***

3. ***The Appellate Court gravely erred in upholding the Appellant's conviction since the essential ingredients of the offence of robbery was never proved and the reliance on the Doctrine of recent possession was misapplied and wrongly upheld thus occasioning a grave miscarriage of justice.***

Mr. Odhiambo dealt with the second ground first and he submitted that the first appellate Court wrongly upheld the conviction when the evidence was suspicious and weak. He pointed out that the two courts below were of the view that the evidence of identification was weak and yet they proceeded to base the conviction of the appellant on that weak evidence.

Mr. Odhiambo combined **grounds 1 and 3** and argued them together. He faulted the first appellate Court by submitting that the court had abdicated its duty of re-evaluating the evidence. He went on to argue that the appellant's conviction was based on the doctrine of recent possession and yet the evidence of **PW4** and **PW5** was contradictory. Finally, Mr. Odhiambo submitted that the prosecution case was not proved to the required standard. He therefore asked us to allow the appeal, quash the conviction and set aside the death sentence.

Mr. Gumo supported both the conviction and the sentence. He submitted that prosecution relied on circumstantial evidence in that the complainant was robbed of the firearm which was recovered from the appellant who was in actual possession of the firearm. Mr. Gumo reminded us that the two courts below made concurrent findings as to the recovery of the firearm.

We have considered the factual background to this appeal and the submissions made by counsel appearing. This was a case in which the complainant, **Otieno** (PW2) testified that he was attacked as he tried to rescue his colleague. The complainant was seriously injured that he fell unconscious and only recovered consciousness the following morning. The attack was on 16th June, 2000. Then a week later, the appellant was arrested in possession of the same firearm that the complainant lost when he was attacked. It is to be observed that the complainant or any other prosecution witness did not identify the appellant during the attack, the subject of the charge against the appellant. Hence the appellant's conviction was not based on identification but recent possession of the property stolen during the robbery. The evidence of possession was provided by **PW4** and **PW5**. In defending himself, the appellant gave a sworn evidence in which he stated inter alia:-

“On 23rd June, 2000, I went home to look after my goats leaving my place of work. I diverted to another home where they sell changaa and took changaa worth 20/=-. I met other people drinking the same. We saw a police land rover coming and we all ran in a different direction with police hot on our heels. The police arrested me with other 2 men. The other 2 gave 50/= each and did not have 50/= on me, so I was taken to the police station. They told me at the police station that a gun was brought and that I was the one who threw it away. I was not present during the robbery. I did not participate in the robbery. That is all to state.”

Having considered the record before us and the submissions by Counsel, we are of the view that while the complainant was attacked in the manner described in his evidence, we are not satisfied that the case was proved to the required standard that the appellant was one of the robbers. The appellant cannot, however, escape the fact that he was arrested while in possession of a firearm for which he had no licence to possess.

In view of the foregoing, this appeal is allowed to the extent that the conviction for robbery with violence is quashed and the sentence of death set aside and the appellant's conviction is substituted with a conviction for being in possession of a firearm without a licence contrary to **section 4(1)** of the **Firearms Act (Cap 114 Laws of Kenya)**. We note that the appellant has been in prison since his conviction on **21st June, 2001**; which means he has been in custody for slightly over ten years. Hence, we impose a sentence

which will result in the appellant being released from prison today. It is so ordered.

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

E.O. O’KUBASU

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JUDGE OF APPEAL

P.N. WAKI

.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR