



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 291 OF 2007

BETWEEN

PETER ODHIAMBO OWINO..... APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lessit & Makhadia, JJ.) dated 29th July, 2005

in

H.C.CR.A. NO. 245 OF 2003)

JUDGMENT OF THE COURT

Following his conviction and sentence upon trial for the offence of attempted robbery with violence contrary to **section 297 (2)** of the Penal Code, **Peter Odhiambo Owino**, the appellant, appealed against the conviction and sentence to the superior court. That court, after it heard his appeal, dismissed it on the basis that the appellant was arrested in the vicinity of the alleged crime, that he was chased by eye witnesses who caught him without losing sight of him, and there was ample light which facilitated his identification as having been a member of the gang which broke into a certain store with a view to stealing various assorted items which were stored therein. The appellant was dissatisfied and hence this appeal.

Several grounds of appeal have been proffered, but when the appeal came up for hearing, before us, the appellant’s counsel Mr. Swaka, confined his submissions to these:

- (1) Particulars of the charge were at variance with the evidence.
- (2) That the language which was used at the trial is not shown, and that failure breaches the provisions of **section 77(2) (b)** of the Procedure Code.
- (3) Evidence on identification of the appellant does not justify a finding that the appellant was one of the people who committed the act complained of.

- (4) Essential witnesses were not called especially the person who arrested the appellant.
- (5) That the judgment of the trial court does not state under what section the appellant was found guilty and convicted.

The particulars of the offence alleged as follows:-

Peter Odhiambo Owino, on the night of 22nd and 23rd September 2002 at Unga Grounds in Nairobi within Nairobi area Province jointly with others not before court and being armed with an offensive weapon namely a panga attempted to rob Sammy Madeke of Five Trophies, Ten medals, Thirty sets of Football, Uniforms, Twenty Footballs, 4 water cooler, a water pump and eight soccer nets all valued at Kshs.105,000/= and at or immediately before or immediately after the time of such attempted robbery wounded the said Sammy Madeke.”

Sammy Mandeka, (PW1) a resident of Kawangware, testified that on 22nd September, 2002, he was employed, as a guard and was then assigned by his employer to guard premises belonging to Chris Omondi Owino (PW2). In the middle of the night of 22nd /23rd September, 2002, a group of six men invaded the place, caught hold of him and tied him up before they broke the door into a store in which some items were stored. As they were breaking the door PW1 managed to untie himself and raised an alarm. A colleague pressed the alarm button. Officers from EARS back up team responded to the alarm and screams by PW1. Apart from officers from EARS, a security firm, Musembi Mulinge (PW4) a guard who was guarding neighbouring premises, responded to the screams. He went to where PW1 was. As he approached he saw someone running away. He had a panga in his hand. When the person realized the people following him were close he threw away the panga. The person was caught near the gate to the compound he was guarding. The person caught was this appellant. PW1's evidence was to the same effect. Nothing was taken from the store which was broken into.

Another guard of the compound where the store was situated was Samson Otieno. It was his evidence that there was clear moonlight on the night of 22nd and 23rd September 2002, when thieves struck. He is the one who pressed the alarm button. He testified that the appellant was arrested near Impala Club which is off Ngong road. It was his evidence that due to the clear moonlight he was able to see a person being chased. He saw a person being arrested but he did not identify him.

The appellant in his defence stated that he was an innocent pedestrian and that as he walked along railway line he was arrested by people dressed as policemen, after which security guards came claiming that some thieves had broken into a store they were guarding and stole tools. They accused him as being one of the people responsible. He denied the offence.

The trial magistrate as also the superior court on first appeal, found as fact that the appellant was so to speak caught red handed. He was chased from the *locus in quo*, and those who chased him did not lose sight of him until he was arrested. Circumstances favouring a correct identification of him were ideal. The superior court however, expressed dismay that the judgment of the trial Magistrate was casual, careless and too short. The trial magistrate did not evaluate the evidence tendered, before coming to the conclusion that the appellant was guilty as charged. That court was, however, satisfied that the decision reached by the trial court was supported by ample evidence.

We earlier set out the appellant's complaints. Regarding the first ground, we say, indeed the evidence is silent on what was contained in the store that was broken into. Chris Omondi Amino, was the owner of the store. He testified that he was a businessman and learnt on 23rd September 2002, that his store had been broken into. He did not testify concerning what was kept in that store.

PW1, who is named in the charge sheet as complainant, did not testify on what was kept in the store, either. The both witnesses were however, categorical that the store door was forced open but nothing was stolen.

PW1 was a special owner of any property which he was guarding. **Section 268 (2)** of the Penal Code defines who a special owner of property is within the context of the Criminal Law. A special owner includes:

“any person who has any charge or lien upon the thing in question or any right arising from or dependent upon holding possession of the thing in question.”

But what is the thing in question on the facts and circumstances of this case? The things are enumerated in the charge sheet, but there is no evidence to indicate that those things were actually there and constituted items capable of being stolen or robbed. Robbery, whether simple or violent is an aggravated form of stealing in view of the definition of robbery under **section 295** of the Penal Code. That being our view of the matter it is doubtful the offence of attempted robbery with violence was proved as required by law.

As regards language, the record of appeal is clear that when the appellant was first taken to court the trial court noted his language of choice. The appellant was first presented to the court on 27th September 2002, and the coram for that day reads as follows:

“Mrs C. Mwangi (PM)

CP – Wangari

CC- Odhiambo

Interpretation in English/Swahili

Accused – present.”

The above note clearly shows that the court addressed its mind to the issue of language. The record thereafter states, in pertinent part, as follows:-

“The substance of the charge and every element thereof has been stated by the court to the accused person, in the language that he understands who being asked whether he admits or denies the truth of the charge replies:- Not guilty”

There is no indication on record that the position changed. The appellant thereafter participated in the proceedings. He cross-examined witnesses and himself gave evidence in his defence. It is clear he understood the charge and the evidence which was adduced against him. The complaint regarding language is without merit.

As regards the issue of identification, the appellant was caught red-handed. He was not arrested near a railway line, but near Impala Club, which we take judicial notice is far from a railway line. He was arrested in the middle of the night contrary to what he said that he was arrested at about 10.30 p.m. Witnesses were clear that he was chased and arrested before he could escape. They never lost sight of him as he was running away. This complaint, too, has no merit.

As regards the complaint that certain essential witnesses were not called, the appellant was arrested by among other people, PW1. He testified. An officer from EARS a security firm who participated in the arrest was not called. Had PW1 not testified then there would have been justification in the complaint as the position regarding the appellant’s arrest would have been unclear. But, PW1 testified that he was one of the people who arrested the appellant. Both the trial and first appellate courts believed him. In view of that we can only interfere where the courts below have either erred in principle, i.e. by taking into account extraneous matters in coming to a decision, or it has failed to take into account a relevant factor, in coming to a decision, or that on the material before it, no reasonable tribunal properly directing its mind would have reached such a decision. That is to say, a decision is plainly wrong. We do not think that can be said of the decision of both courts below on issues of identification and arrest. The conclusions

reached by both courts below on the two matters are supported by evidence which was tendered and we therefore, have no basis for interfering.

The last complaint raised is that the judgments of both the trial and first appellate courts failed to note under which section the appellant was found guilty for the offence charged. Mr. Swaka, for the appellant expressed the view that the trial magistrate was obliged to state in her judgment that the appellant had been found guilty pursuant to the provisions of **sections 215** of the Criminal Procedure Code. In his view failure to state that section renders a judgment fatally defective. **Section 215** CPC provides as follows:-

“215 The Court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him.”

The section is directory. It guides a subordinate court on how it should proceed after concluding a trial. It is not essential to state that provision. Once it is clear that what the section directs should be done has been done, it suffices. We are satisfied that the trial court complied with the requirements of that section and the mere failure to state that section does not vitiate the judgment. The superior court did not need to specifically deal with failure by the trial court to specially refer to that section.

In view of what we have state above the superior court indeed re-evaluated the evidence as urged by Mrs. Ouya for the state. However, that court did not fully analyze the evidence, for if it had so done, it would have come to the conclusion we came to earlier, that there is variance between the particulars of the charge and the evidence. As stated earlier we are not satisfied the evidence discloses the offence of attempted robbery with violence contrary to **section 297(2)** of the Penal Code. Accordingly we quash the appellant’s conviction for that offence and set aside the sentence of death passed against him.

The issue that follows is whether as a result the appellant should be set at liberty. **Section 179(2)** CPC provides thus:

“179(2) when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

Sub-section (1) of the section deals with conviction for minor and less cognate offences. We have considered the appellant’s case. The facts proved in this case disclose two minor offences. There is the offence of store breaking contrary to **section 306** of the Penal Code, and there is the offence of assault causing actual bodily harm contrary to **section 251** of the Penal Code. The former provides for a maximum sentence of 7 years imprisonment, while the latter provides for a maximum sentence of 5 years imprisonment.

The appellant was convicted and sentenced by the trial court on 11th March 2003. Since his conviction he has been in custody. There has been a lapse of about seven years. He has more or less served the imprisonment term provided for both offences. In the circumstances, we order that the appellant be and is hereby sentenced to concurrent terms of imprisonment of 7 years and 5 years respectively for store breaking contrary to **section 306** and assault causing actual bodily harm contrary to **section 251** of the Penal Code, respectively. Considering what we stated earlier about the period of incarceration it follows that the appellant has in effect served both of his imprisonment terms, and must be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

Dated and delivered at Nairobi this 7th day of May 2010.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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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