



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OMOLO, O'KUBASU & D. K. S. AGANYANYA, JJ.A)

CRIMINAL APPEAL 154 OF 2003

TOBIAS OUMA OTIENO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret (Etyang & Tunya, JJ) dated 12th November, 2002 In H.C.CR.A. NO. 38 OF 2001)

JUDGMENT OF THE COURT

Tobias Ouma Otieno, the appellant hereinafter, together with another person who is not before us in this appeal, were tried before the Senior Principal Magistrate at Eldoret on one count of robbery with violence and a second one of assault causing actual bodily harm, both the two counts being contrary to **sections 296 (2) and 251** of the Penal Code, respectively. The charge of robbery with violence under **section 296 (2)** of the Penal Code stated in its particulars that on 13th September, 2000 at Langas Estate in Eldoret, the appellant, jointly with his co-accused and another not before the court, while armed with dangerous or offensive weapons, namely, a toy pistol, an iron bar and a sword, they robbed Jane Wamaitha Thuo of cash K.Shs.7,218/= and that at or immediately before or immediately after the time of the robbery, they wounded Jane Wamaitha Thuo. The second count stated in its particulars that on the same date, time and place, the appellant and his confederates unlawfully assaulted Ruth Wanjiku and thereby occasioned to her actual bodily harm.

At the end of the trial during in which a total of seven witnesses testified on behalf of the prosecution and the appellant, supported by his father also testified, the magistrate found the appellant guilty on the first charge of robbery with violence, convicted him on that charge and sentenced him to death. The magistrate, however, said absolutely nothing about the second charge of assault and we presume that she must have intended to acquit the appellant on the second count, particularly in view of the fact that the prosecution never led evidence to show that the assault on Ruth Wanjiku was not part of the violence aimed at robbing Jane Wamaitha Thuo. We must assume in favour of the appellant that the magistrate must have intended to acquit him on the second count of assault and we now formally record an order of acquittal on that count.

On the charge of robbery with violence, Jane Wamaitha Thuo (P.W.1), hereinafter Jane, lived and operated a butchery in Langas Estate, Eldoret. Ruth Wanjiku (P.W.2), hereinafter Ruth, was Jane's house-help. In the morning of 13th September, 2000 at around 7.00 a.m. Ruth opened the door to the

house for two men who claimed they were police officers. The two men immediately set upon Ruth and beat her up. She screamed and Jane heard her and left her room to go to the assistance of Ruth. At the door to her bed-room Jane was confronted by a man who hit her on the eye with some object and forced her back into the bed-room. In the bed-room, the man hit her twice on the back and forced her under the bed. The man demanded money from her and she told him where she had kept some Shs.7,000/=, the proceeds from her butchery business. She had not counted the money but she knew it was about Shs.7,000/=. The assailant took the money and left the room.

In the meantime, Ruth had managed to escape from the house and ran to summon help from John Mwaura Maina (P.W.3). John was their neighbour and heard the commotion in the house of Jane. He ran there and according to him, at the gate of Jane but still within her compound, John met the appellant who was armed with a sword. On seeing John, the appellant stopped and hid the sword under his clothes. John confronted the appellant and arrested him within the compound or at the gate of Jane's compound. Two other people Francis Kamako Gakuna (PW4) and Isaack Njenga Thuo (PW6) soon joined John and all of them swore that they found John holding the appellant and that the appellant was armed with a sword. When Jane came out, she identified the appellant as the person who had attacked her in her bed-room. It is to be remembered the attack on Jane occurred at 7 a.m. in the morning and the issue of lighting cannot arise. Inside the room where Ruth had been attacked, a toy pistol and a hammer were found. When searched, the appellant was found with K.Shs.7,218/=.

The appellant answered these assertions by making an unsworn statement in which he said that his father had sent him to buy some provisions and for that purpose, the father had given him Shs.2,000/=. When he was passing by the gate of Jane, he was confronted by people who arrested him, beat him up and then delivered him to the police. He knew nothing about the robbery in Jane's house. His father Charles Otieno Odede (D.W.1) supported the appellant and said he (D.W.1) had given to the appellant Shs.2,000/= to go and buy provisions for him to take to his rural home. He subsequently found his son arrested and being beaten.

Having listened to all those people the learned trial magistrate had no doubt that the truth was to be found with the prosecution witnesses and not with the appellant and his father. The magistrate concluded her judgment as follows:

“On the other hand the prosecution had called witnesses who have confirmed that accused was arrested on P.W.1's compound soon after the robbery. The time of the incident was 7.00 a.m. or thereabout. It was day time and the witnesses have said what they say [saw?]. P.W.1 and P.W.2 were injured by the attackers. This is confirmed by the P3s (EXH. 2 and 6). Produced before this court were EXB 3, 4 and 5 which were found at the scene of the robbery. They were dangerous weapons which were used by the attackers. Accused has been already identified as one of the attackers. He was armed. I am satisfied beyond doubt that the accused was one of the robbers involved in this robbery. For my part I find the prosecution case proved beyond a reasonable doubt and hence convicted him as charged”.

The appellant was dissatisfied with the trial magistrate's conclusions. He appealed to the High Court and having listened to the appellant's submissions, the High Court (Etyang and Omondi Tunya, JJ) concluded their judgment as follows:

“In the present appeal the appellant was certainly in possession of the stolen money a very short time after robbing P.W.1. He was arrested within P.W.1's compound. In the circumstances of this case P.W.1's identification of the appellant has sufficiently been corroborated and the explanation of the appellant was for rejection. Evidence against him was overwhelming”.

The appellant now comes before us by way of a second appeal. His complaints as stated in his home-made **“PETITION OF APPEAL”** are:

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR