



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Criminal Appeal 208 of 2006

MICHAEL OCHIENG' ODONGOAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu

(Mwera & Warsame, JJ) dated 29th June, 2006

in

H.C.C.Cr. A. No. 489 of 2003)

JUDGMENT OF THE COURT

MICHAEL OCHIENG ODONGO, the appellant, was convicted by the Senior Resident Magistrate at Bondo of robbery with violence contrary to *section 296(2)* of the Penal Code and sentenced to death. His first appeal to the High Court of Kenya at Kisumu against both conviction and sentence was dismissed by Mwera and Warsame, JJ. on 29th June, 2006, and hence this second and final appeal.

The complainant, **Butrum Owiti** (PW1) is a businessman at Ndere village in West Uyoma Location within Nyanza Province. On the material night at about 10.00 p.m. he and his wife Cecilia (PW2) were in their bedroom when some people loudly banged his outer door. Before he could respond a gang of robbers he estimated to be about five in number was already in the bedroom. The gang ordered him to give them money and when he hesitated the gang violently attacked him. PW1 testified that one of the members of the gang whom he recognized as a fellow trader next door and now the appellant, appeared to be the leader of the gang. PW1 told the trial court that the appellant had a shop and a hotel not far from his (PW1's shop). PW1 said that he was able to recognize him by means of a torch light which was in possession of the appellant.

The complainant sustained serious injuries and was taken to hospital while unconscious wherein he was admitted for about ten days. The robbers took shs.29,700/= which PW2 gave them after she was thoroughly beaten. PW1 contended that the appellant was arrested after he gave or disclosed his name to the police.

Cecilia also related to the trial court the details of the robbery. She testified that she was able to identify the appellant through the torch which the robbers lit while ransacking the house. She said that the appellant was a person known to her and who carried on business within that area. She was also assaulted during the incident. She testified that she was able to identify the appellant's voice during the episode, since the appellant has an unusually small and shrill voice. It was her evidence that the person who had the torch was the appellant and that he was wearing a red T-Shirt.

George Otieno (PW3) a fisherman, testified that on 23.1.2003 at around 3.00 p.m. the appellant gave him Kshs.2,000 and told him not to tell anyone about it. PW3 later heard that the appellant had stolen money.

During the investigation carried out by the police, a metal bar which resembled a gun was recovered from the appellant's shop. It is significant that PW1 and PW2 had testified that the appellant was armed with a metal bar which looked like a gun.

In his defence, the appellant gave unsworn testimony and stated that on 21.1.2003, he was at Osindo Beach doing his business. On 28th January 2003, police came from Bondo Police Station and arrested him for nothing. As a result of that arrest he was later charged with the offence of robbery with violence. He knew nothing about the charge preferred against him.

The trial magistrate made findings of fact that PW1 and PW2 knew the appellant very well before the incident and that the appellant was among the people who attacked the house of the complainant on the material night and committed the acts complained of. The trial court held:

“The evidence against the accused person in this case is quite overwhelming. As regards the evidence of identification PW1’ evidence is properly corroborated by PW2 who was present at the scene of the robbery. Both of these witnesses consistently proved that they had known the accused person for about 1 year when he opened a shop next to theirs at Osindo Beach. They said that they were able to identify him because of the light from the torches which were lit by the robbers and the complainant.”

On appeal from that court, the superior court held:

“Having addressed our mind to all the issues, we are satisfied that in all the circumstances of the matter the complainant and his wife (PW2) did properly identify the appellant. It follows that there were no mis-directions amounting to an error of law requiring our intervention. We think the conviction is proper and that the appellant was convicted on sound and credible evidence.”

Mr. Ong'ele for the appellant attacked the findings of the two courts below on identification. He submitted that the circumstances and the conditions prevailing at the time of the attack did not favour a positive identification. Again, he contended that it was an error on the part of the two courts below not to consider and find that there was an unexplained lapse of time between the date of the crime and its report to the police.

The robbery was staged during the night of 20th January, 2003. It is significant that it was only reported to the police at 3.25 p.m. on 23rd January, 2003 - after three days. No explanation was given to the two courts below by the complainant for not reporting the robbery immediately or within a reasonable time to the police or to any other lawful authority. Even though the complainant was injured, he had two wives, relatives and fellow traders who could do so on his behalf. In his submission before us Mr. Ong'ele has asked us to consider the likelihood of the existence of a business rivalry between the complainant and the appellant and that it was possible that the appellant was framed up.

PW1 and PW2 testified that the gang had one torch and by its light they were able to identify the appellant who was carrying it. It has not been narrated that the appellant was seen in the direct beams of the torch light. As there is no evidence of the size of the torch nor the intensity of the light, it cannot under the circumstances prevailing then, be said that the appellant had been positively identified as a member of the five man gang. We note that the first appellate court did re-evaluate the evidence of PW1

and PW2 and concluded that their evidence on the identification of the appellant was reliable and acceptable. With respect, we disagree. We have narrated the circumstances under which the attack was mounted and we have doubt about the correctness of those findings and such doubt must, of course be resolved in favour of the appellant.

Though PW2 stated that she also recognized the appellant by his unique voice, she gave no explanation why she failed to report this serious matter to the police and yet she knew that her husband (PW1) was hospitalized from the injuries received during the robbery. Her alleged recognition of the appellant is therefore suspect and we hold that her evidence is neither credible nor worthy of belief.

This is a second appeal and in normal circumstances we would be reluctant to interfere with the concurrent findings of fact by the two lower courts. But, in this case, we are compelled to do so being satisfied, as we are, that the evidence of identification on which those courts relied is completely incredible and cannot sustain the appellant's conviction.

Accordingly we allow this appeal, quash the conviction, set aside the sentence and order that the appellant be released forthwith unless he is otherwise lawfully held.

Dated and delivered at KISUMU this 20th day of June, 2008

P.K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR