



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 14 OF 2007

JOSEPH OTIENO OTIENO

PAUL OMONDI ABUOR APPELLANTS

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera & Mugo, JJ.) dated 13th March, 2007

in

H.C.C.R.A. NOS. 190 & 191 OF 2004

JUDGMENT OF THE COURT

Joseph Otieno Otieno (Otieno) and *Paul Omondi Abuor (Omondi)* were the 2nd and 1st accused respectively before Kisumu Chief Magistrates Court where they jointly faced a charge of attempted robbery with violence contrary to **section 297(2)** of the Penal Code. It was alleged in the charge sheet that on the 13th day of April, 2004 at Kisumu City Centre, jointly, while armed with a toy pistol and a knife, they attempted to rob **Kamal Shah** of his Motor Vehicle Reg. No. KAK 641X Saloon Nissan blue in colour and at or immediately before or immediately after, threatened to use actual violence. They were both convicted for the offence after trial and were sentenced to death. Their appeal to the superior court was dismissed, hence this second and final appeal now before us.

Before the appeal could be heard, Otieno fell ill and eventually died in prison custody. His appeal thus abated under **rule 68(1)** of the Court's rules and an order was recorded accordingly on 24th June, 2008. It is thus Omondi's appeal which proceeded before us. Ms. Edna Arati, appeared for him and raised three issues of law which she urged us to consider and allow the appeal. She argued firstly that the language used at the trial was not stated and therefore the trial was a nullity; secondly, that there was no analysis of the recorded evidence which was full of contradictions; and finally, that the burden of proof was not discharged. We shall examine these grounds presently.

The concurrent findings of fact made by the two courts below are fairly straightforward. **Kamal Shah (PW1)** is a businessman in Kisumu. As he religiously did every morning before going to work, Shah headed for the *Senathan Hindu Temple* in town for prayers. He placed a basket of flowers on the passenger seat of his Toyota Land Cruiser Reg. KAK 641, and drove to the temple where he arrived at

7:15 a.m. He parked the vehicle, picked up the flower basket, and tried to alight from the vehicle. Just then he saw two strangers approach him from behind. He tried to close the door but one of them, identified as Omondi, held the door and grabbed his shirt shouting “**Toa, Toa**”, Swahili for urging him to remove the ignition keys and hand them over. Otieno, who was standing behind Omondi threatened Shah with a knife and pistol and Shah started shouting for help. The flower basket he held fell down and the two strangers were distracted. That is when Shah had the opportunity to push Omondi who fell on Otieno and they both lost balance. Shah ran out of the car heading to the Temple. As the struggle in the car was going on, the watchman at the temple, **Tom Oketch Omoro (PW3)** noticed. He ran into the temple and came out holding a rungu to rescue Shah. The Temple cleaner, **Joseph Seda Aluoch (PW2)** had also heard the noise and commotion and came out. He grabbed a chair which he threw at the two strangers. Other members of the public who were in the vicinity of the temple joined in and the two strangers took off.

Omondi had a natural deformity in his right leg and could not run fast. **PW2** and other members of public got hold of him as he tripped and fell less than 100 meters from the scene. He had a toy pistol with him. Otieno ran a little further and when he found himself cornered by other members of the public he turned round and pretended to be an onlooker. He was nevertheless apprehended by members of the public who recognized him. He had the knife. The two were set upon and beaten up by members of the public before they were rescued by police officers on patrol in the area at the time. They were handed over to **PC Peter Osia (PW4)** together with the recovered weapons and were later charged with the offence stated earlier.

In his defence, Omondi said he was a shoe shiner and cobbler at Nyamasaria bus park and was going to his place of work at 9:15 a.m. on the day in question. As he was crossing the road, some people came running towards him. He panicked and started running away. At the city clock they caught up with him, grabbed him and carried him to a certain tree shade. Shortly after, some 5 other people came and forced him to walk to Nyalenda. They were plainclothes policemen. They conducted a search in a changaa den and arrested some people. Those arrested were all taken to the police station where the OCS asked them for money. Omondi did not give any and so he remained in custody. Later he was charged with an offence he knew nothing about and was joined in the case with someone he had never met.

The trial court found the appellant’s story as a “**mere excuse and fabrication**” and believed the three prosecution witnesses who saw the appellant committing the crime and participated in their arrest at the scene. The superior court re-evaluated the evidence at some length and made its own conclusions as follows:-

“The appellants attacked PW1 in the temple compound. They were close to him and the complainant saw them. They demanded car keys. To him appellant 2 (accused 1) had both the toy pistol and the knife. Other witnesses (PW2, 3) who ran to PW1’s rescue testified that while appellant 2 (accused 1) had the toy, appellant 1 (accused 2) had the knife. In the fear terror and commotion that prevailed, the confusion of who had what could occur. But the players remain the two appellants. When PW1 pushed his car’s door against the appellants, throwing them off balance, he at the same time screamed out for help. PW2 and 3 ran there. They saw these attackers, whom they attacked and chased. Members of the public who normally sat at the temple (mainly the poor waiting for alms) and others joined in the chase. They did not go far. PW2 and 3 are clear on the chase. Appellant 2 with a limp was first to be caught as he fell. Then appellant 1 would have successfully escaped had more people not confronted him from the front and the corridor where he was running to. He too was apprehended. Evidence has it that the two never ran out of sight of the pursuers/witness and they did not go far. When caught they were beaten, held and handed over to the police with their weapons.”

The issue of the language used at the trial was never raised before the two courts below. But it was the main ground relied upon in this appeal to impeach the trial. Ms. Arati submitted that the language used in taking the plea was *Kiswahili* which the appellant understood. But the record shows that subsequently **PW1** and **PW4** testified in English while **PW2** and **PW3** testified in Dholuo. While the appellant may have understood Dholuo, he does not understand English and therefore there was a fundamental breach of **Sections 77** of the Constitution and **Section 198** of the *Criminal Procedure Code*.

There is no doubt that this Court, as indeed every court should, jealously guard the rights of accused persons and has underscored that duty in many previous decisions. We have carefully examined the specific breach complained about but do not find any merit in it. It is clear from the record that there was an Interpreter throughout the trial who was competent in all three languages – *Kiswahili, English and Dholuo*. That is how the appellant, who was not represented by Counsel, managed to participate fully in the trial through cross-examination of all witnesses and in making his own defence. The entire record was then reduced into the language of the Court. There is nothing in the record to persuade us that there was a breach of the appellant’s Constitutional rights and we must reject that ground of appeal.

The second ground attacks the re-evaluation of the evidence on record and Ms. Arati contended that there was none. In her view, if there was, it would have been discovered that there were contradictions relating to the motor vehicle owned by the complainant as stated in the charge sheet and as stated by him in his evidence. With respect, that complaint is also misguided. The same issue was not only raised before the superior court but was resolved as follows:-

“On our own assessment of the lower court record, we came to the conclusion that the appellants were the people at the Hindu temple who attempted to rob PW1 with violence of his car. That car’s make may be a Nissan in the charge sheet or a Toyota Land Cruiser from the evidence of PW1, but we are satisfied that it was PW1’s motor vehicle registration No. KAK 641X. That remains constant all through and nothing much turned on the make or colour.”

We agree with that view and reject the ground of appeal.

The final ground is that the burden of proof was not discharged by the prosecution. That is because, in Ms. Arati’s view, the arresting officer was not called to testify and also because the appellant’s evidence was not analysed.

There is no justification for these complainants. The evidence is clear that the appellant was apprehended at the scene of the crime by **PW2**, amongst others. He had a toy pistol. The appellant was then handed over to some police officers on patrol before being re-arrested by **PC Osia, PW4**, still at the scene of crime. The arresting officer testified. The appellant’s evidence was also examined and found wanting in view of the overwhelming prosecution evidence which was fully believed by the two courts below. We have no cause to interfere.

As correctly observed by Mr. Musau, Senior Principal State Counsel, the appeal is largely on matters of fact and evidence which we find no reason to interfere with. The upshot is that the appeal has no merit and is dismissed in its entirety.

Dated and delivered at Kisumu this 28th day of November, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR