



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CRIMINAL 357 OF 2006

JOSEPH TETE OKILA 1ST APPELLANT

SHADRACK TETE OGINGA ALIAS KADI.....2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya

Kisumu (Mwera & Warsame, JJ) dated 21st September, 2006

in

H.C.C.R.A. NO. 132 OF 2003)

JUDGMENT OF THE COURT

JOSEPH OKILA, the 1st appellant and *SHADRACK TETE OGINGA*, the 2nd appellant, whose appeal has abated under *Rule 68 (1) (a)* of the Rules of this Court on account of his death, were both convicted on two counts of robbery with violence contrary to *section 296 (2)* of the Penal Code and sentenced to death. Their first appeals to the High Court of Kenya at Kisumu (Mwera and Warsame, JJ) were dismissed on 21st September, 2006 and hence this second appeal.

As the appeal of the 2nd appellant has abated, this judgment will of necessity concern itself solely with the 1st appellant.

The case for the prosecution rested on the following facts. *Margaret Opwole* (PW1) and her husband were asleep on the night of 7th and 8th February, 2002, in their house at Emuli, Emalaha sub-location of Vihiga District when she heard a bang on the window. A group of people were asking for the house of Odanga saying that they were police officers from Nairobi looking for his son who had allegedly stolen in Nairobi and had ran to his rural home. Since their son was not present, PW1 got suspicious and refused to open the door for the group. Nevertheless, the group forcefully gained entry by breaking the door to the house. When it gained entry, the husband to PW1 ran through the back door while the robbers entered with her two daughter's – in – law, who were already stripped naked.

PW1 testified that the four people who entered the house pointed a spear in her mouth ordering her to put off the tin lamp which she had lit in the house. The robbers had torches which they used to search the house from which they stole Shs.15,000/= which was under the mattress. PW1 made an attempt to escape but as she was running away, she fell down and one of the robbers who was following her also fell. She said she saw him well when the other robbers flashed their torches on her to thwart her escape bid. The robber who was pursuing her tripped and fell on her. He then started removing her pants while looking for money. PW1 testified that because the torches of the robbers who had surrounded the house were directed at her, she was able to identify the person who fell on her as the 1st appellant. The 1st and the 2nd appellants held her breasts and made her to stand. They then carried her back to the house before they ran away. PW1 testified further that the two appellants were known to her since childhood and she even knew their parents.

Alfayo Odanga (PW2) is the husband of PW1. He substantially corroborated her testimony. He testified that on the material night he heard a knock on his door and when he inquired who the visitors were, they replied that they were police officers from Nairobi and had followed his son Odanga who stole a lot of money from Nairobi. He told them to come with the Assistant Chief but they immediately broke the door using an axe and they gained entry. He flashed his torch and he saw the two wives to his son being pushed into the house. They were naked. He also saw the 1st appellant who was among the robbers coming into the house. He said that the 1st appellant was wearing a black cap and shirt. As a result of what he saw, he ran through the back door and stayed away till the robbers had completed their mission of robbery at his house. When he went back he found that his wife and one of his daughters – in – law had been beaten by the robbers and various items stolen from his house and that of his son.

A search by the police resulted in a recovery of one mattress and sewing machine spare parts from the house of the 1st appellant. These were positively identified by **Caren Odanga** (PW3) as her property. PW3 is one of the two daughters – in – law of PW2. The local Clinical Officer, **John Shigali** (PW6) examined PW1 and PW3 and filled their P3 forms.

The defence of the 1st appellant was that on 15th February, 2003, while sleeping in his house he heard a knock on his door and when he opened he was handcuffed and the house searched. The police took away his bedding and from his mother's house a bicycle and a radio were taken. He said that the arresting officers did not mention that he had been found with sewing machine spare parts. In short he denied having been found with any property allegedly stolen from the complainants. He contended that he was implicated because PW3 differed with his late father.

Mr. Odeny for the 1st appellant in a forceful submission contended that the identification of the 1st appellant was not free from error in that the incident occurred at night and that although PW1 had lit a tin lamp it would be difficult for anyone, when there is a forcible intrusion by a gang of robbers, to positively and immediately identify any of them. Mr. Odeny also took issue with PW1 who despite having said in Court that she had recognized the 1st appellant informed the police officer who filled the P3 form that she "*had been beaten by unknown people during a robbery in their home*", thus giving the impression that she had not actually recognized any of the robbers.

The conviction of the 1st appellant is mainly based on two sets of facts:

1. ***First, that the complainants recognized the 1st appellant at the time of the robbery;***

and

2. ***Secondly, that he was arrested in possession of stolen property, which property was identified as belonging to the complainants.***

As this is a second appeal, this Court cannot interfere with the concurrent findings of fact of the two courts below unless they are shown to have been based on no evidence. See ***Karingo vs. Republic*** [1982] KLR 213. In this case, the attackers took considerable time with the complainants. Moreover, according

to PW1, the 1st appellant was a person known to her since childhood and when he tried to remove her pants she protested to him about what he “*was doing to me when he was like a child to me*”. Thus, this close contact between the two enabled PW1 to recognize the 1st appellant. It is significant that PW1 first recognized the 1st appellant when he forced himself into the house through her own tin lamp and by means of the torches which were being shone in the house by the robbers. It is worthy of note that the faces of the robbers were not covered or disguised in any manner so as to hide their identity. In this regard the 1st appellate court held:

“According to PW1, she first recognized the first appellant when he came in through her own lamp and through their own torches. The faces of the robbers or assailants were not covered or disguised any way to hide their identity and although this incident happened during the night there was ample light coming from the torches carried by the robbers. According to the evidence of PW3, the torch lights made the compound and the whole area bright like a day. It means the situation and circumstances were ideal for correct identification in the premises. We are satisfied that there was sufficient evidence to show that the house and its compound was lit by the bright torches which were flashed throughout the period of the attack by the intruders and, which made PW1 and PW3 recognize the appellants. There was close contact between the attackers and the complainants during the time of robbery. That close contact of the robbers with the complainants made their identification or recognition easy and beyond doubt. We think the circumstances prevailing at the time of the attack were conducive for correct recognition or identification”.

With due respect to Mr. Odeny there were concurrent findings of fact by the two courts below that the house of PW1 and the compound were lit by a tin lamp and bright torches, respectively, which were flashed throughout the period of attack by the robbers which made PW1 recognize the 1st appellant; and, in the absence any evidence to the contrary we cannot interfere with that finding.

Again, there is indisputable evidence that the 1st appellant was found with the property of the complainant. These were the sewing machine heads and the mattress. The onus was upon him to show he came by them lawfully, but, he did not do so. As he was found in recent possession of the property stolen during the robbery, that possession has bolstered the prosecution’s case against the 1st appellant.

The Medical Examination Report – P3 forms were obtained from O.C.S. Luanda. PW1 and PW3 told the O.C.S. that the people who attacked them were unknown. Mr. Odeny has argued vigorously that the witnesses had in fact not recognized the 1st appellant because if they had done so, they would have told the O.C.S. that they were attacked by persons known to them. With respect, we do not agree. Though this submission was not made before the two courts below, we have no hesitation in rejecting it in view of the co – existing cogent evidence of recognition and recent possession.

Upon our consideration of the entire evidence on record, we are satisfied that the 1st appellant was properly convicted and we uphold the conviction and sentence. We reject the grounds of appeal.

In the result, the appeal is hereby ordered dismissed. We so order.

Dated and delivered at Kisumu this 22nd day of June, 2007.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR