



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

Criminal Appeal 368 of 2006

LAWRENCE OMONDI OTIENOAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya

sii (Bauni & Warsame, JJ) dated 24th March, 2006

in

H.C.CR.A. NO. 160 OF 2004)

JUDGMENT OF THE COURT

On 7th July, 2003 *LAWRENCE OMONDI OTIENO*, the appellant herein, was arraigned before the Senior Resident Magistrate's Court at Migori in *Criminal Case No. 713 of 2003* on a charge of robbery with violence contrary to *section 296 (2)* of the Penal Code and he pleaded "Not Guilty" to the charge. The particulars of the offence stated as follows:

"LAWRENCE OMONDI OTIENO

On the 30th day of June 2003 at Uriri trading centre in Migori District within Nyanza Province jointly with others not before Court, robbed MILLICENT AUMA OGOLLA of Ksh.17,000/= and at or immediately before or immediately after the time of such robbery wounded the said MILLICENT AUMA OGOLLA".

Although the appellant's plea was taken on 7th July, 2003 his trial did not commence until 8th March, 2004 before the learned Senior Resident Magistrate Mr. S. O. Atonga, and the complainant Millicent Auma Ogolla (PW1) testified. After Millicent's testimony, the trial was adjourned to 22nd March, 2004 when the prosecution called two more witnesses, Peter Onyango (PW2) and Elisha O. Otieno (PW3). After those witnesses, the prosecution closed its case. The learned trial magistrate then recorded as follows:

“FINDINGS:

The accused has a case to answer and section 211 of Criminal Procedure Code have (sic) been complied with”.

Having so found the learned trial magistrate adjourned the trial to 14th April, 2004 but on that date the trial was adjourned once again to 5th May, 2004 when the record shows that the appellant said:

“I shall give unsworn statement and have no witness to call”.

The appellant then made a brief unsworn statement in which he stated that he could recall that on the 30th June, 2003 he had been drunk and only became conscious at Uriri Police Post. He concluded his unsworn statement by saying that he was charged with an offence he did not know or commit.

In a reserved judgment which was delivered on 18th June, 2004 the learned trial magistrate convicted the appellant and sentenced him to death. In convicting the appellant, the learned trial magistrate stated, *inter alia*:

“In conclusion after carefully listening to both the 2 sides and considering the evidence adduced, this court observed that there were (sic) sufficient evidence to prove the guilty (sic) of the accused beyond reasonable doubt because of the below (sic) given reasons:

- (1) PW 1 the complainant stated that on the material day at about 8.30 a.m. she was with her children when the accused came in company of 2 other suspects at large and robbed her cash Kshs.17,000/= after the accused have (sic) cut her with a panga on the forehead. The other suspects knocked her down causing her to loose 2 lower teeth before taking off with the alleged cash.***
- (2) PW 4 the investigating officer in the present case stated in his admissible (sic) evidence that on 30.6.2006 he was at Migori police station when he re-arrested the accused and took possession of the recovered cash of Kshs.3,000/ which he later produced in court as exhibit. Here this Court observed that there was a possibility that the accused and other suspects robbed PW 1 the alleged cash and distributed the same. Therefore the fact that some cash was recovered from the accused immediately after alleged offence became relevant to the fact in issue.***
- (3) PW 3 the husband of PW 1 also supported the evidence of PW 1 that he had removed (sic) some cash totaling to Kshs.72,000/= from the Bank and kept some after distributing the same to 7 people including the accused. Here this Court observed that the fact PW 3 removed some money from the Bank and kept some with PW 1 his wife became relevant to fact in issue since the accused got his share and knew about the same.***
- (4) Although there was no panga produced in court by PW 4 as exhibit, PW 2 who examined PW 1 on 3.7.2003 stated that the complainant had cut wound on the forehead and 2 missing lower teeth and suggested the probable weapon used as sharp and blunt object. He also classified the injuries sustained as maim. Here this Court observed that the evidence of PW 2 became relevant to fact in issue in respect to the probable weapons used in causing the injuries sustained by PW 1.***
- (5) Lastly, the claim by the accused in his defence that on the material day he was drunk and regained consciousness at Uriri police post could not be admitted since as he alleges, this court believes in the status he was in, he could not have had any strength to commit the alleged (sic) but is just a mere defence without any basis. Therefore, from the reasons given above, this Court observed that there were (sic) sufficient evidence to prove the guilt of the accused”.***

The appellant being aggrieved by the decision of the trial magistrate preferred an appeal to the High Court at Kisii (Bauni and Warsame, JJ) who after re-evaluating the evidence dismissed the appeal by stating:

“In his petition of appeal the appellant admits that he was at the complainant’s house where he had gone to look for changaa. He gives a totally different story for his defence in court. He talks of the complaint pulling his penis. He did not tell the trial court that. Clearly his grounds in the petition are an afterthought.

We find the appellant was properly convicted. The appeal is therefore dismissed”.

The appellant now comes before us by way of second and last appeal. Mr. Ragot, the learned counsel for the appellant filed a memorandum of appeal setting out six grounds of appeal. In his submissions, Mr. Ragot contended that although the learned trial magistrate recorded that **section 211** of the Criminal Procedure Code had been complied with, it was not clear whether the elaborate procedure set out under that section was explained to the appellant. It was further contended that the record shows that it took two months before the appellant’s evidence in his defence was recorded. In the interim period the appellant was placed in remand custody for periods in excess of 15 days contrary to **section 205 (1)** of the Criminal Procedure Code. It was also submitted that there was an element of intimidation in such lengthy incarceration and further intimidation in that whenever the appellant appeared for the trial, he was asked to plead to the charge.

As regards grounds 1, 2 and 3 of the memorandum of appeal, Mr. Ragot submitted that the entire case was based on a complaint of aggravated assault and that there was no mention of money being stolen or a robbery having been committed. Mr. Ragot reminded us that the appellant had been in custody since 30th June, 2003 and that this period ought to be taken into account, and in his view, the appellant ought to be set free.

Mr. Musau, the learned Senior Principal State Counsel did not support the conviction of the appellant on capital robbery, but urged us to substitute the conviction with one of grievous harm contrary to **section 234** of the Penal Code.

We have considered the history of this matter and the submissions by both learned counsel, Mr. Ragot and Mr. Musau. As regards the complaint about the provisions of **section 211** of the Criminal Procedure Code, we find no merit in Mr. Ragot’s submissions. Our perusal of the trial magistrate’s record shows that the trial court expressly stated that it complied with the provisions of **section 211** of the Criminal Procedure Code and we have no reason to doubt the record. That is why the appellant elected to defend himself by way of an unsworn statement which is an option available under the section. As regards the alleged intimidation arising from the numerous times the appellant was asked to plead, all we can say is that, even assuming that there was some intimidation, the appellant appears to have resisted the same up to the end and maintained his denial. We might have had a different view if the appellant had finally changed his plea and pleaded guilty to the charge. Hence we find no merit in that submission.

What has caused us some anxiety is the fact that the superior court failed in its duty as a first appellate court. As was pointed out by Mr. Ragot in his submissions, this case was indeed based on a report of aggravated assault. The evidence of Otieno (PW3) the complainant’s husband was that his wife had been assaulted. The assault was serious as the complainant sustained a cut on her forehead and lost two lower teeth in the process. The clinical officer Peter Onyango (PW2) who examined and treated the complainant classified the injuries sustained by the complainant as maim. Taking into consideration the evidence of the three prosecution witnesses (PW1, PW2 and PW3) can it be said that what was proved was a case of robbery with violence or grievous harm? Did the first appellate court reconsider the evidence, re-evaluate the same and draw its own conclusions? In **ACHIRA V REPUBLIC** [2003] KLR 707 at page 710 this Court stated:

“This is a first appeal. This Court as the first appellate court is required to reconsider the evidence, re-evaluate the same and drawn its own conclusions and in doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (see Okeno v. Republic [1972] EA 32 and Ngui v Republic [1984] KLR 729)”.

It is our view that had the superior court proceeded as stated in the foregoing passage it would certainly

have detected the fact that this was a case of aggravated assault and not robbery with violence. Only the complainant talked about being robbed of Shs.17,000/= but she does not appear to have reported that matter even to her husband who was the actual owner of the money.

In view of the foregoing, we are satisfied that the appellant ought to have been convicted for the minor and cognate offence of causing grievous harm contrary to **section 234** of the Penal Code and not robbery with violence contrary to **section 296 (2)** of the Penal Code. We therefore allow this appeal, set aside the conviction for robbery with violence and the sentence of death and substitute therefor a conviction for causing grievous harm contrary to **section 234** of the Penal Code. We sentence the appellant to five years imprisonment. The sentence of imprisonment is to run from the date the appellant was convicted by the trial court i.e. 18th June, 2004. These shall be the orders of the Court.

Dated and delivered at Kisumu this 15th day of June, 2007.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR