



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CRIMINAL APPEAL 47 OF 2006

NICHOLAS OUMA OBONYOAPPELLANT

AND

REPUBLICRESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kisumu (Tanui & Gacheche, JJ.) dated 6th February, 2003

in

H.C.CR.A. NO. 11 OF 2001)

JUDGMENT OF THE COURT

This is an appeal by *Nicholas Ouma Obonyo* (the appellant) against the decision of the superior court (B.K. Tanui and J.W. Gacheche JJ) in which it upheld the conviction and sentence of the appellant of one count of robbery with violence contrary to *section 296 (2)* of the *Penal Code* by the Senior resident Magistrate Siaya. The appellant was sentenced to death being the mandatory sentence for an offence under *section 296(2)*.

The particulars of offence in the Charge Sheet stated: -

“Nicholas Ouma Obonyo: On the 15th day of June 2000 at Siaya Township in the Siaya District of the Nyanza Province, jointly with another not before the court being armed with a dangerous or offensive weapon namely a knife robbed Everlyne Odhiambo Kizito of her cash money Kshs.376,600/= and at or immediately before or immediately after the time of such robbery beat the said Everlyne Odhiambo Kizito.”

Section 296 of the *Penal Code Cap 63* provides as follows: -

296 (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

The essential features of the evidence of the events which took place as recounted by the complainant PW1, her husband **Bernard Kizito Otieno Onyango** (PW2), and **Churchill Oyiye Okubu** (PW3) can be briefly summarized as follows: -

The complainant was sent by her husband, a business man in Siaya town, to bank Shs.376,600/= in cash at the local branch of Kenya Commercial Bank. The money was in 3 paper bags. While the complainant was on her way walking a person suddenly pulled the paper bag from behind. As she turned she saw the appellant who she did not know. She, still holding the bag of money, hit him but he did not fall. The complainant screamed but the appellant held her by her throat and showed her a knife which he had removed from his jacket. He told her to keep quiet. The complainant and the appellant were still both holding the bag of money. The appellant put his knife back in his jacket. The bag tore and the money fell to the ground. The complainant was still holding on to the appellant who then punched the complainant on the head and then bent to collect the cash which was on the ground. The complainant held on to the appellant's jacket – The appellant then ran off with the cash he had picked up from the ground, leaving his coat with the knife in it still in the hands of the complainant. The complainant screamed and **wananchi** took up the screaming. The complainant saw the appellant throw some money to someone who the complainant said was apparently with the appellant and who was later identified as being called **Owira**.

The appellant was chased and arrested by the people who started beating him until the police arrived and rescued him from further punishment. He was arrested, taken to the police station and subsequently charged.

Mr. Abuta learned counsel for the appellant challenged the conviction of the appellant for the offence charged under **section 296(2)** of the **Penal Code**. He contended that there was no evidence that **Owira**, the man who picked up the money allegedly thrown away by the appellant, was an accomplice of the appellant. Mr. Abuta contended that, **Owira** was not an accomplice but was an opportunist who picked up and made off with the money thrown down by the appellant when running away, and in his view therefore, the appellant should not have been charged under **subsection (2)** of **section 296** but instead could only have been properly convicted, if at all, for the offence under **section 296(1)** which does not carry the death penalty.

It has been stressed on many occasions by this Court that the key requirements for the application of **section 296(2)** are disjunctive so that if any of the requirements exist - i.e being armed with an offensive weapon, or being in company with one or more persons, or if, at or immediately after the time of the robbery, he wounds, beats or strikes or uses any other personal violence to any person. then **subsection (2)** applies.

In the present case the facts established on the evidence show that the application of **subsection (2)** did not depend only upon the issue as to whether the appellant was acting in company with one or more persons. Even if he were not so acting there was ample evidence that the appellant was armed with an offensive weapon namely the knife and that the appellant used personal violence against the complainant by punching her on the head.

We think it would be appropriate to say a little bit more about the charge of robbery with violence contrary to **section 296(2)** of the **Penal Code**. We can do no better than cite what this Court has already said in its decision in **JOHANA NDUNGU v. REPUBLIC – Criminal appeal No. 116 of 1995** (unreported) in which it was stated, inter alia:

“In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the sub-section in conjunction with section 295 of the Penal code. The essential ingredients of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or after to further in any manner the act of stealing. Thereafter the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296(2) which we give below and any one of which if proved will constitute that offence under the sub-section.

- (1) **If the offender is armed with any dangerous or offensive weapon or instrument, or**
- (2) **If he is in company with one or more other person or persons, or**
- (3) **If at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person.”**

The above is relevant to the present appeal since the evidence accepted by both the trial court and the first appellate court was to the effect that the appellant was armed with an offensive weapon to wit a knife and that he struck the complainant. As we have already observed earlier there was evidence that the appellant used personal violence against the complainant by punching her on the head.

Mr. Abuta further submitted that the High Court did not re-evaluate the evidence so as to come to its own independent finding. We have considered this submission by Mr. Abuta but we find no merit in the same, especially in view of what the learned Judges of the superior court stated in their judgment where they expressed themselves thus: -

“At the outset of this judgment we remind ourselves of the functions and duties of a first appellate court in respect to the need for a thorough and exhaustive re-examination of evidence before arriving at its own decision. We also note that we have to give allowance to the fact that we did not observe the witnesses when they testified.”

The above clearly shows that the first appellate court was aware of its duty to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld as it was stated in **Okeno v. R [1972] E.A 32.**

We have looked at the judgment of the superior court and we are satisfied that it was not only aware of its duty as a first appellate court but it discharged that duty by reconsidering the evidence, evaluating the same and drawing its own conclusions.

There was a complaint by Mr. Abuta that the two courts below did not consider the appellant’s defence. In his judgment the trial magistrate stated:-

“Accused has deliberately fabricated the love issue or aids issue to dissuade this court from the truth and I shall not accept the defence as it is a fabrication and I shall dismiss it as such.”

The learned Judges of the High Court in their judgment stated inter alia:

“The appellant’s claim that he was assaulted by companions of his girlfriend was fully rebutted by evidence of PW3 and PW4.”

From the foregoing it cannot be argued that the appellant’s defence was not considered. Both courts below considered his defence and rejected it.

For the foregoing reasons we are satisfied that the essential ingredients of the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** were clearly established and proved beyond any doubt. The appellant’s conviction was, indeed, inevitable and his appeal to the High Court was rightly dismissed. Consequently, his appeal to this Court is dismissed in its entirety.

Dated and delivered at Kisumu this 23rd day of June, 2006.

S.E.O BOSIRE

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR