



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CRIMINAL APPEAL 171 OF 2006

MAURICE ODHIAMBO WESONGA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from conviction and sentence in the High Court of Kenya at Kisumu (Bauni & Warsame JJ) dated 24th March, 2006

in

H.C.CR.A. NO. 204 OF 2004)

JUDGMENT OF THE COURT

The appellant was jointly charged with three other persons with one count of robbery with violence contrary to **section 296 (2)** of the Penal Code before the Senior Resident Magistrate Kisii. The appellant was the first accused while **GEORGE OTIENO OBURA, ALFONCE MARIARIA, RICHARD DICKSON NYAMBANI** were the 2nd, 3rd and 4th accused persons respectively. The 2nd and 3rd accused persons were acquitted while the 4th accused person died in prison before the conclusion of the trial.

The particulars of the charge stated that the appellant and the co – accused while armed with dangerous weapons, namely, rifle and home –made guns robbed **ABEL MORANGA ONGWACHO** of cash Shs.630,000/= and a motor vehicle Registration No. KAG 570Z Toyota valued at Kshs.450,000/= and at or immediately before or immediately after the robbery wounded **THOMAS AYOTI MASESE**.

The complainant **Abel Moranga Ongwacho** (Abel) (PW5) and his brother **Peter Ongwacho Ongwacho** (Peter) (PW1) operated Agip Petrol Station at Suneka Trading Centre at the material time. They had employed **Rose Momanyi Ngonge** (Rose) (PW6) as a cashier. On the morning of 13th May, 2002, the three counted the proceeds from sales of the previous day. There was Shs.630,000/= in various denominations including about Shs.13,000/= in silver. The money was placed in a bag and loaded into motor vehicle Reg. No. KAG 570Z belonging to Abel to be transported to Kenya Commercial Bank Kisii for banking. Rose boarded the vehicle and Abel drove it to a nearby hotel in the same petrol station premises to pick his cell phone which he had forgotten there. He parked the vehicle outside the hotel and walked to the hotel leaving Rose inside the vehicle guarding the money. Shortly thereafter, Abel went back to the car closely followed by his brother Peter. Before he reached the car three people all armed

with guns emerged from behind the car; one of the three who had a rifle (identified as the 2nd accused at the trial), ordered Abel to sit down and surrender the car keys. Abel complied. The robbers fired once, entered into the car and sped off towards Kisii Town. When the vehicle reached the junction to St. Peters Academy – about one (1) kilometer from Suneka trading centre the robbers stopped and told Rose to alight. She alighted and boarded a matatu to Kisii Police Station where she reported the robbery.

Meanwhile Abel, his brother Peter and others followed the robbers in another vehicle and caught up with the robbers near St. Peters Academy where the vehicle had stopped. The robbers fired at the vehicle and Abel and others alighted from the vehicle and ran away. Members of the public gathered and started chasing the robbers. The robbers abandoned the vehicle and run away carrying the bag containing the money with them. One of the three robbers was stoned to death near the vehicle. The two other robbers caught up with **THOMAS AYOTI MASESE** (Masese) (PW3) as they were running away and shot him at the back. The two robbers also caught up with **COSMAS NYANGAU ONGOTE** (Ongote) (PW2) and threatened to shoot him. The two robbers asked Ongote to show them the way to Gesunzu. The three went through the maize plantation for about half-hour and reached a bush. The members of public were pursuing the robbers. On reaching the bush, one of the robbers identified as the appellant took Ongote's coat and wore it. The other robber took money in form of notes from the bag that the appellant was carrying, stacked the money in his jacket and disappeared into the maize plantation. The appellant hid in a hole. The members of the public and the police arrived. The police officers including PC Alfred Arisa (PW7) rescued the appellant from the members of the public and arrested him. They recovered a bag containing Shs.11,140/50 in silver near where the appellant was arrested.

At about 10.00 a.m. Ag. IP. David Makau (PW10) and IP John Wabubwa (PW12) and other police officers went to the area where the appellant had been arrested. They searched the surrounding area and recovered a home-made gun in the bush. The complainant's motor vehicle Reg. No. KAG 570Z was found abandoned near St. Peters Academy. There was a dead body next to the vehicle, 1 – 2 metres away. The body was identified as that of one of the robbers who drove away the vehicle. He had been stoned to death by members of the public. On 17th May, 2002, the appellant led Ag. IP. Makau and other police officers to his house in Migori where police recovered 7 live short gun bullets hidden in socks inside a box.

The appellant stated at the trial that he is a businessman at Homa Bay and that on the material day he boarded a vehicle to Kisii Town to buy clothes for sale. He was injured on the finger by the door of the vehicle at Itiero. He went to Itiero Hospital for treatment after which he went to the bus stage to take a vehicle. At a bus stage a crowd of people came and questioned him. He was arrested and taken to Kisii Police Station. His cell phone, Seiko 5 watch and Shs.8,750/= was taken. He denied committing the robbery.

The trial magistrate recognized that the prosecution case was dependent on the positive identification of the accused persons and in respect of the appellant stated:

“As for the first accused person the evidence before me is that he was identified by PW1, PW2, PW3 and PW5. Those witnesses had direct contact with the first accused. PW2's evidence is even stronger. For a while he was abducted and ordered to show the way to Gesongo.

All throughout from the time of the abduction to the time first accused was arrested he did not lose sight of the first accused. The evidence of PW2 was overwhelming. In any event the first accused was arrested as it were in the act and it is him who was found in possession of the coins which were left in the bag. I have addressed myself to the defence advanced by the first accused person.

In the face of the overwhelming evidence adduced by PW2 and the evidence of the other witnesses, including the recovery of ammunitions recovered from his residence, I disbelieve his defence”.

The superior court evaluated the evidence of Peter, Ongote, Masese, Abel and Agnes and concluded that the appellant was positively identified as one of the robbers who attacked and robbed the complainant. The superior court said in part:

“Appellant was arrested in a hole where he hid when he heard policemen coming, police also received a bag with coins amount (sic) to Shs.11,140. There (sic) were part of the money stolen from the complainant. Complainant had said that there was a total of Shs.13,000/= in coins among the money they were going to bank”.

There are nine grounds of appeal which Mr. Mwamu, learned counsel for the appellant classified into two – the first ground dealing with identification of the appellant and the second dealing with the ingredients of the charge of capital robbery.

Mr. Mwamu in support of the second group which he dealt with first, contended that the superior court did not properly evaluate and analyse the ingredients relating to the charge of robbery. He contended that the charge did not disclose the weapons used or allege that the weapons were dangerous or offensive weapons. He contended that in the absence of those material ingredients the charge of robbery with violence contrary to **section 296 (2)** of the Penal Code was not warranted.

It is true that the copy of the charge sheet contained in the record of appeal does not state that the appellant was armed with a dangerous or offensive weapon or instrument or specify any. It is one of the essential components of the charge of capital robbery that the accused should be armed with a dangerous or offensive weapon or instrument. However, our perusal of the original file of the trial magistrate, shows that the copy of the charge sheet in the record of appeal is not the charge on which the appellant and others were tried. The copy of the charge sheet on the record of appeal relates to the original charge preferred against the appellant alone on 24th May, 2002 before the co-accused were arrested.

That charge sheet was replaced by another on 7th October, 2002. In the new charge, the appellant was jointly charged with three others with the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the new charge stated in the relevant part:

“... while armed with dangerous weapons namely, rifle and home-made guns”.

That charge sheet which has inadvertently been omitted from the record of appeal contained the correct ingredients of the charge. Thus, the ground of appeal relating to the defect in the charge of capital robbery has no merit. We are satisfied that that ground of appeal could not have been raised had the Deputy Registrar filed the correct charge sheet in the record of appeal.

The second ground of appeal in the memorandum of appeal correctly summaries the first category of the grounds of appeal. It states:

“The learned judges did not properly evaluate the evidence relating to identification when the circumstances were not favourable”.

Mr. Mwamu submitted that the evidence of Ongote was not free from error; that the evidence of Ongote was contradictory; that the evidence of Abel was not helpful; that the superior court misdirected itself by finding that Masese identified the appellant in an identification parade and that the evidence relating to the recovery of the coins was inconsistent.

It is true that both the trial court and the superior court heavily relied on the evidence of Ongote. This is for good reasons. This witness gave substantial evidence against the appellant. He walked in the company of the appellant and another through the maize plantation for about half an hour before they reached the bush. According to Ongote, it is the appellant who was carrying the bag containing the money which bag he identified at the trial. It is also the appellant who asked for the Ongote’s coat and wore it before he hid in a hole. Mr. Mwamu gave two reasons why the evidence of Ongote was not free from error. First he said that the evidence of Ongote that appellant hid in a hole was not supported by the evidence of PC Alfred Arisa, the arresting officer and secondly, that the evidence of PW2 that it is the appellant who was carrying the bag containing the money was inconsistent with his statement to police that it was the other person (2nd accused at the trial) who was carrying the bag.

It is true that PC Alfred Arisa did not say that he found the appellant inside the hole. There is evidence, however, that the appellant was arrested by the members of the public who beat him before the police arrived. Peter said so. According to PC Alfred Arisa he rescued the appellant from the members of the public and arrested him. That probably explains why PC Alfred Arisa did not find appellant still hiding in the hole.

Considering the entire evidence given by Ongote the contradiction in his evidence and in the police statement as to which accused was carrying the bag containing money is not material. His evidence that it was the appellant who was carrying the bag was supported by the evidence of the recovery of the bag containing some money at the place where the appellant was arrested and by the evidence of Masese.

We do not find any material inconsistency in the evidence on the recovery of the bag containing part of the stolen money. Both Ongote and Alfred Arisa were consistent that the bag was recovered near where the appellant was arrested. We agree with Mr. Mwamu that the superior court misdirected itself when it said that Masese later identified the appellant at an identification parade which was not the case. That misdirection did not, however, occasion any failure of justice in this case as there was other overwhelming evidence of identification of the appellant which the two courts below believed.

It is clear from the passage from the judgment of the trial magistrate that we have quoted above that the trial magistrate evaluated the evidence against the appellant and considered the appellant's defence. The trial magistrate came to the conclusion that there was overwhelming evidence against the appellant and rejected his defence.

It is also clear that the superior court performed its duty as a first appellate court. It re-considered and re-evaluated the evidence and arrived at the same conclusion as did the trial magistrate.

This is a case where the robbery was committed in the early hours of the morning at about 8.00 a.m. at a small trading centre. Both Peter and Abel testified that they saw the appellant at the time Abel was ordered to surrender the car keys and sit down. According to Peter the robbers were 10 metres from him and the whole episode took about 2 minutes. He, Peter, described how the robbers sat in Abel's motor vehicle before the car sped off. According to him the appellant sat at the back seat. Masese saw the appellant and Ongote was with the appellant for about 30 minutes. It was never suggested at the trial or in the superior court that Ongote was an accomplice.

The appellant does not come from the area where he was arrested. The evidence of identification at the scene of the robbery by Peter and Abel, the identification by Masese as he was escaping, the identification by Ongote as the person who was carrying the bag containing the stolen money; the removal of some money from the same bag by the appellant's co – accused and the possession by the appellant of the bag containing part of the money at the time of arrest comprise an unbroken chain which left no doubt that the appellant was one of the three robbers.

We have no doubt that the appellant was convicted on overwhelming evidence. In the result, we conclude that the appeal has no merit and we hereby dismiss it.

Dated and delivered at Kisumu this 1st day of December, 2006.

R. S. C. OMOLO

.....

JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR