



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KWACH, LAKHA & O'KUBASU, JJ.A.

CRIMINAL APPEAL NO. 86 OF 2002

BETWEEN

MORRIS CHIEDO WOGA.....APPELLANT

AND

REPUBLICRESPONDENT

JUDGMENT OF THE COURT

This is an appeal by Morris Chiedo Woga who was tried and convicted by the Chief Magistrate's Court at Kisumu of robbery with violence contrary to section 296(2) of the Penal Code particulars of the offence being that:

"On the 27th day of April 1991 along Rwambwa - Port victoria road near Nambengele trading centre in Busia District of the Western province jointly with others not before court while armed with a dangerous weapon namely rifle of unknown calibre robbed CHRISPINE ODUOR OPONDO of cash Kshs.90,500/= and at or immediately before or immediately after the time of such robbery used personal violence to the said CHRISPINE ODUOR OPONDO".

During the trial the prosecution called five witnesses to testify against the appellant. Prosecution case was based on evidence of identification by two witnesses and the appellant's own cautionary statement which he (appellant) however retracted but the statement was admitted in evidence after a trial within a trial.

The evidence of the complainant one Chrisphine Oduor Opondo (PW 1) was to the effect that he was the purchasing officer with Victoria Nile Company and that on 27th April 1991 at about 1.30 p.m. he was a passenger in the company vehicle registration number KAA 916 being driven by Paul Kiprotich (PW 2). As the two employees of Victoria Nile Company drove towards Port Victoria they were stopped by a Toyota pick-up. Suddenly people came from the Toyota pick-up. One of them had a gun and two had pangas while the fourth person had a rungu. The two armed people started beating Opondo and Kiprotich saying that they wanted money. Opondo who was carrying Shs.90,000/= surrendered the same to the assailants. During this incident Opondo was able to recognize the appellant as he had known him (appellant) for about five years. Opondo was able to recognise the appellant as the one who had a panga during the incident. Kiprotich was also able to identify the appellant. Opondo and his colleagues escaped into the bush and then reported the matter to the Police whom he told that he had known the appellant (PW 3) accompanied the Officer Commanding Station (OCS) of Yala Police Station to a certain village where some suspects were arrested. The appellant was one of the arrested suspects. An identification parade was then conducted in which the appellant appeared

and was identified by Kiprotich (PW 2).

While the appellant was in police custody his charge and cautionary statement was recorded by Inspector David Wafula (PW 4). The statement was admitted after trial within a trial. In that statement the appellant gave a detailed account of how he and others planned and executed the crime.

When put to his defence the appellant said that he knew nothing about the charge as he was asleep in his house on 17th April 1991 when he was arrested.

The learned trial Magistrate having considered the evidence before him came to the conclusion that the appellant committed the offence on which he had been arraigned before court. In concluding his judgment the learned trial magistrate stated:-

"Accused made lengthy confession which was admitted into evidence after trial within trial. In the statement he gave graphic description on how the robbery was planned and executed and how the money was shared between them. I am satisfied it was given voluntarily and that the police officer did not write it himself as accused claimed.

The burden is on the prosecution to prove accused's guilt beyond a reasonable doubt. The two prosecution witnesses had time and opportunity to see the accused properly. He was very close to them as he demanded money and beat them. OPONDO (PW 1) also knew him before. I am satisfied the two witnesses did see and identify the accused person. This evidence amply corroborates the confession of the accused. The evidence satisfies me beyond a reasonable doubt that he was one of the robbers that did rob the complainant, with respect I have not believed his defence. I find the accused person guilty of the charge of robbery with violence as charged and convict him accordingly".

Being aggrieved by that determination by the learned trial Magistrate the appellant filed an appeal to the High Court where his appeal was heard and determined by Owuor J. (as she then was) and Oguk J.

The two learned Judges in the High Court reevaluated the evidence and came to the same conclusion as did the learned trial magistrate that the appellant was properly identified as one of the robbers. In their view the appeal revolved on two main issues, namely identification and alleged confession. In their Judgment the learned Judges said; inter alia:-

"We having assessed the evidence on our own see no reason why we would not come to the same conclusion or find otherwise. We find as the learned Trial Magistrate did, the appellant was properly identified".

As regards the statement made by the appellant the learned Judges said:-

"The statement in issue was very lengthy. It gave all details as to where the vehicle that was used for robbery was stolen from. It gave also the details where the gang was sleeping and exactly what happened during the robbery and after the robbery. The confession according to the Learned Trial Magistrate although retracted it gave a true account of what exactly happened".

In this appeal there are concurrent findings by both the trial court and the first appellate court to the effect that the appellant was properly identified during the robbery. The complainant Chrisphine Oduor Opondo (PW 1) testified to the effect that he recognised the appellant as he had known him for about five years. The witness, therefore, knew the appellant and was able to recognize him in broad daylight as the incident took place at about 1.30 p.m. This was therefore evidence of recognition not identification as far as the evidence of Opondo was concerned. In Anjononi and Others v. R [1980] Kenya L.R. this Court said:

"This was however a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other".

On our part we are satisfied that the appellant was properly identified as having been a member of the gang that robbed the complainant.

As regards the statement by the appellant which statement was taken as a confession the legal position still remains as stated by the Court of Appeal for East Africa in Tuwamoi v. Uganda [1967] E.A. 84 at page 91:-

"We would summarize the position thus - a trial Court should accept any confession which had been retracted or repudiated or both retracted and repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstance of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true".

The two courts below were satisfied that there was corroboration of material fact, from the evidence of Opondo (PW 1) and Kiprotich (PW 2).

In his submissions before us Mr. Mugo for the appellant appeared to argue that as there was no evidence of injuries to the victims then the offence disclosed was simple robbery and not robbery with violence. We think it is appropriate to say something 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.

Analysing the first set of circumstances the essential ingredient apart from the ingredient including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in section 295 of the Penal Code, the offender was armed in the manner aforesaid then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him."

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 in the company of other people and that they were armed with offensive weapons to wit, a rifle, pangas and rungas when they pounced on the complainant (PW 1). In our view 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.

For the foregoing reasons we are satisfied that the appellant's conviction was inevitable and his appeal to the High Court was rightly rejected. Consequently his appeal to this Court is accordingly

dismissed in its entirety.

Dated and delivered at Nairobi this 8th day of November, 2002.

R.O. KWACH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR