



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(Coram: Omolo, Tunoi & Bosire, JJ.A.)
CRIMINAL APPEAL NO. 43 OF 2000
BETWEEN**

**CHARLES ODUOR MAGERO.....APPELLANT
AND
REPUBLIC.....RESPOND ENT**

**(Appeal from a conviction and sentence of the High Court
of Kenya at Kisumu (Birech, CA) dated 23/7/99
in
H.C.CR.A. NO. 84 OF 1998)**

JUDGMENT OF THE COURT:

Charles Owuor Magero, the appellant herein, was together with eleven other persons who are not before us, charged, and tried on a total of six counts, four of them being robbery with violence under section 296(2) and two being those of assault causing actual bodily harm contrary to section 251, all under the Penal Code. The appellant was among those who were convicted on count 2 and count 3 of the charges but for some unexplained reason(s) the trial magistrate reduced the charges to be that of simple robbery under section 296(1) of the Penal Code. We warned the appellant before the hearing of this appeal commenced before us, if the appeal fails, we will be obliged by law to convict him under section 296(2) of the Penal Code. The occurrence of the robberies was wholly unchallenged and the appellant, if he participated in the robberies was, in the company of at least eleven other persons and they were armed with pangas, rungus and such like objects which were obviously offensive weapons. These are some of the elements of a charge of robbery under section 296(2) of the Penal Code and they were clearly proved. That being so, the trial magistrate would have no jurisdiction to reduce the charge to one of simple robbery under section 296(1) of the Penal Code, merely because the offence under section 296(2) carries with it a mandatory sentence, of death.

This being a second appeal, we can only deal with matters of law and the only point of law raised before us by the appellant is, to put it generally, that on the evidence presented before the magistrate, the charges on which he was convicted were not proved beyond reasonable doubt. The particulars of the charge in count two were that on 16th August, 1996 at Sihai Market in Siaya District of the Nyanza Province, the appellant, jointly with others not before the court and while armed with offensive weapons, namely pangas, rungus and spears, robbed Boniface Oduor of an aviation travelling bag, a spot-light, one coat and two dresses all valued at Shs. 500/- and that at, or immediately before or immediately after such robbery they wounded Boniface Oduor. Count three alleged a similar robbery against Lucy Owino. Boniface Oduor testified as P.W.1. while Lucy Owino testified as P.W.3.

The robberies took place at night, actually sometime after 11 p.m. P.W.1 said he identified the appellant as one of the robbers, in fact if P.W.1's evidence on this point was correct the appellant was the gang leader. On his identification or recognition of the appellant, P.W.1. testified as follows:-

"I was able to recognise four (4) of the people throwing stones. These are Peter Oduor (A.2), Odula Ochieng (.A.3), Owuor (A.9) also Rapando (A.6). They removed one from the house and took me to the front of the house. At that time I was already injured.

I was told to sit down and their corporal demanded money from me. I told them I had no money. Corporal was Owuor (A.9). He was being so called by the others. They then took my wife and she went to open the shop.....

The incident took about 1 hour and I knew the people very well. After the people left I went to the hospital. I later went to the Police Station and recorded a statement. I was in the hospital for about 1 hour. I have known the people I recognised as my neighbours for a long time. My wife also recognised them."

When cross-examined by the then counsel for the appellant, P.W.1 said:-

"I have known Accused 9 since child-hood. He is my in-law. I knew later that he had lost his father. This was not in July or August. He does not have a shop at Sihai. I knew him as a charcoal dealer. I do not know if he is a mason or he sells rice."

The burden of P.W.1's evidence was, as the appellant correctly pointed out to us, was that he (P.W.1) knew the appellant well and that the appellant was in fact his in-law.

That being so, one would immediately give his name to the police, particularly in view of the allegation by P.W.1 that the appellant was the gang leader. Yet the appellant was not arrested until 28th August, 1996 which was more than ten days after the robbery. There was no evidence at all that the police visited the home of the appellant and that he was not found there. Indeed there was no evidence by the police investigators, particularly P.W.11, that any attempts were made by the police to arrest him. The appellant contended before us, we think with justification, that if he was among the robbers and played the prominent role assigned to him by P.W.1., he (appellant) would have been arrested almost immediately as was the case with Accused 2 and Accused 7.

And what was the nature of the evidence of P.W.3 against the appellant? P.W.3 was the wife of P.W.1 and she was the one taken to the shop of P.W.1 from where some money and other things were stolen. On her identification of the appellant, she said:-

"I then heard noise outside and woke up. I just sat in the house. I heard a watchman one John Ahenda screaming from outside. I got frightened when I heard the scream. Later I heard people talking at the door, asking me to open for them. The door was not locked so I just opened for them. When I flashed the torch I saw people standing. I was only able to identify Magero Were (Accused 9)."

When cross-examined by counsel for the appellant, P.W.3 said:-

"I know Accused 9 as Magero Owuor. He is also known as Charles....I told police that the names were Charles Magero Our. I knew one person and I saw him when I flashed."

The "Ahenda" referred to by P.W.3. was Ahenda Ochieng and he gave evidence as P.W.7. He did not say anything in respect of the appellant. So the evidence of recognition of the appellant was that of P.W.1 and his wife P.W.3. The same objection regarding the evidence of P.W.1 must apply with equal force to the evidence of P.W.3 and it would appear that in the case of P.W.3, the police were doctoring her statement to them to show that she made the statement on 16th August, 1996 and that she mentioned the name of the appellant. The attempt by the prosecution to prove that she made a statement on 16th August, 1996, in fact, failed. Neither the trial magistrate who heard the case nor the Commissioner of Assize who heard the appellant's first appeal, attempted to deal with this point as we think they ought to have done. Had they done so, they might well have come to the conclusion that the evidence of P.W.1 and P.W.3 as regards the participation of the appellant in the robberies was doubtful. In those circumstances, we agree with the appellant that the charges against him were not proved beyond any reasonable doubt. We accordingly allow the appeal, quash the two convictions recorded against the appellant and set aside all the sentences

and orders imposed upon him. Unless held for some other lawful cause, the appellant is to be set at liberty forthwith.

Dated and delivered at Kisumu ths 22nd day of June, 2000.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL