



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
CRIMINAL APPEAL 348 OF 2008

1. MOSES ODHIAMBO ODUOR

2. JOHN OTIENO PANYA

3. DANIEL OMONDI.....APPELLANTS

AND

REPUBLIC.....RESPONDENTS

(Appeal from a judgment of the High Court of Kenya at Kisumu,

(Mwera & Mugo, JJ) dated 26/9/2008

in

H.C.CR.A. NO. 20 OF 2004)

JUDGMENT OF THE COURT

At about 7.30 p.m. on 14th October, 2009 ROBERT MUGA, the complainant herein left his house at Manyatta Estate of Kisumu to go and buy paraffin at a kiosk within the estate. On reaching Love Bar, a five minutes walk, he met a group of people gathered by the road side, among them the three appellants. It is not clear as to what exactly the group was doing, but, what is known of its identity is that it was a group of young bicycle taxi operators commonly known as “*boda boda*” or “*ngwares*”. It would appear that the complainant, a school leaver then aged 18 years old, joined the youths for a while probably to discuss their day’s escapades and adventures. However, within a short time the youths turned hostile towards the complainant. They assaulted him, searched his pockets and cut him on the forehead with a panga. Daniel Omondi, the 3rd appellant, then rushed to a nearby chips kiosk and picked a pan of hot oil with which he threatened to burn the complainant and the witnesses, Barack Ojwang (PW2) and Edwin Ogola (PW3), but, the many people who had gathered to watch the incident screamed and the appellants and their group fled. The complainant who was seriously injured was rushed to the hospital where he was admitted for 4 days. He lost Shs.20/- during

the attack.

The incident was reported to the police and the appellants were arrested during the same night. A week later on 21st October, 2003 they were arraigned before the Chief Magistrate, Kisumu, on a charge of robbery with violence contrary to section 296(2) of the Penal Code. At the end of their trial the Chief Magistrate found them guilty of the offence as charged and convicted them in a judgment dated and delivered on 30th January, 2004. She accordingly sentenced them to death. Their first appeal to the High Court of Kenya at Kisumu (Mwera and Mugo, JJ) was dismissed on 26th September, 2008.

The main ground of appeal before us as argued by Musomba, the learned counsel for the appellants, is that the offence of robbery with violence could not be sustained on the facts narrated before the trial court. The learned Senior State Counsel Ms Oundo agrees with Mr. Musomba and urges us to allow the appeal but to substitute the offence of robbery with violence with that of grievous harm.

On our part having carefully considered the testimony tendered before the trial court we would agree with the two counsel that had the two courts below correctly directed themselves, they would have found the appellants guilty of the lesser but cognate offences of either assault or grievous harm rather than that preferred. The evidence on record shows that the attack upon the complainant was preceded by a disagreement or an altercation of some sort, possibly arising from a business rivalry. Again, the fight was protracted and involved other youths.

The attack upon the complainant could only be explained on the basis of some an unexplained reason and not robbery. The two courts below having failed to direct themselves on this issue, the robbery charge cannot stand. We must, accordingly, give the benefit of doubt to the appellants and quash the conviction for robbery with violence and set aside the sentences of death. In their stead we substitute therefor convictions for grievous harm contrary to section 234 of the Penal Code since the injury sustained by the complainant was classified as maim according to the P3 form – exhibit No.1.

Consequently, each appellant is sentenced to ten(10) years imprisonment to run from 6th February, 2004 when they were sentenced by the Chief Magistrate. Those shall be the Court's orders in the appeal.

Dated and delivered at Kisumu this 9th day of October, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

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