REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.46 OF 2013

VICTOR OCHIENG OWOUR ….....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

[Appeal from Original Conviction and Sentence from Ukwala Principal Magistrate's Court by R. M. OANDA Ag. P.M.

in Criminal Case No.90 of 2011].

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J U D G M E N T

The appellant was convicted by the Acting Principal Magistrate at Ukwala of robbery with violence c/s 296(2) of the Penal Code and sentenced to death. The particulars of the charge were that on 21/11/10 at Yiro East Sub-location in Ugunja District of the Nyanza Province, he jointly with others not before court and while armed with iron bars robbed Moses Owino Oswego (PW1) of cash Kshs.20,000/= and one mobile phone make Sigmatel worth Kshs.12,000/= both valued at Kshs.32,000/= and at or immediately before or immediately after the time of such robbery wounded the said PW1. He was not satisfied with the conviction and sentenced and filed this appeal which he personally prosecuted. Mr. Mongare for the State opposed the appeal and supported the conviction and sentence.

In the petition of appeal the appellant relied on several grounds. They were that he was convicted on insufficient evidence of identification by recognition; the trial court failed to warn itself of the danger by relying on the uncorroborated evidence of a single witness; the prosecution failed to call material witnesses; and that the court failed to comply with section 200(3) of the Criminal Procedure Code.

The prosecution evidence was that on 21/11/10 between 8.30 p.m. and 9 p.m. PW1 was going home when he met with two people one of whom he recognised, by use of light from full moon, to be the appellant. The appellant was his nephew. He did not identify the other attacker but came to know him as Voke. The appellant held him and blocked his mouth so that he could not make noise. Voke had metal bar which he used to hit him all over the body. He was taken to a certain bush where he managed to scream. One Ray came to his rescue. Voke searched him (PW1) and took his cash Kshs.20,000/=

and a Sigmatel cellphone. The attackers were saying they would kill him. He was taken to the appellant's grandmother's house. She asked what was happening. That is when the attackers ran away. PW1 was left with Voke's coat (Exhibit 2). He went home and slept. Next day the incident was reported to police and he was eventually treated at Ambira Hospital whose clinical officer Howard Okeyo (PW2) completed a P3 form (Exhibit 1) which showed that he had swollen and painful upper limbs, the left face was swollen around the left eye and had molar pain on both sides. He suffered “harm”. P. C. CHRISPINUS LUMWACH (PW3) investigated the case. His evidence was that on 22/11/10 PW1 came to Ugunja Police Station with his mother to report the incident and stated that he was attacked by three people who included the appellant whom he knew well. The second attacker was Voke.

The appellant gave unsworn statement in defence and did not call witnesses. He denied that he was in the attack and stated that PW1 was his uncle with whom he had disagreed over a bicyle; that he had given PW1 a bicycle which he had lost and had refused to pay for until the matter was heard by area chief as a result of which PW1 paid him 4000/=. Thereafter PW1 begun threatening him of unspecified consequences.

This is the evidence that the trial court considered before finding that the prosecution had established the charge against the appellant beyond all reasonable doubt. This being the first appeal, it is the duty of this court to subject the entire evidence as recorded to fresh consideration and evaluation to be able to determine whether the conviction was safety reached (OKENO .V. REPUBLIC [1972] EA 32). In so doing, it will be appreciated that the trial court had the advantage of seeing and hearing the witnesses as they testified.

The trial court appreciated that this was a case of recognition and cited the decision in ANJONONI AND OTHERS .V. REPUBLIC [1980] KLR 59 where it was observed that such evidence was more satisfactory, more assuring and more reliable than a case of identification by a stranger. However, it was not appreciated that this was a case of a single recognising witness at night where there was no other incriminating evidence as there was, for instance, no recovery on the appellant of the robbed items (RORIA .V. REPUBLIC [1969] EA 583). The danger of convicting on such evidence needed to be appreciated, and the circumstances under which recognition was done critically analysed.

PW1 testified that he was attacked by the appellant and another whom he did not know. Later in his evidence he stated that he heard the other attacker being called Voke. He did not say from whom he heard the name. But the more important aspect was that he told PW3 that he had been attacked by the appellant, Voke and another person who was a stranger. That was a material contradiction: he was either attacked by two people or three people. The trial court did not consider this contradiction and rule on it. The contradiction certainly affected the value of PW1's evidence as to recognition.

Thirdly, PW1 testified that while being attacked he made noise until one Ray came to find the incident. He further stated that he was taken to the appellant's grandmother's house. The grandmother inquired what was happening. That was when the attackers ran away. Both Ray and the grandmother consequently became material witnesses. They were not called to testify. There was no explanation for the failure to call them as witnesses. The usual presumption is that had the witnesses been called they would have given evidence adverse to the prosecution.

It is for these reasons that we find that the conviction was not safely grounded. But there is another reason why we cannot confirm the conviction. The record shows that the trial was conducted by E. K. Mwaita (SRM) up to conclusion of the prosecution case and the determination that the appellant had a case to answer. R. M. Oanda (SRM and later Ag. PM) took over the conduct of the matter. It is recorded that on 17/4/12 the appellant stated that:

“I prefer that the matter to proceed from

where it had reached. I will give unsworn

statement with no witnesses.”

The requirement of section 200(3) of the Criminal Procedure Code is that:

“where a succeeding magistrate commences

the hearing of proceedings and part of the evidence

has been recorded by his predecessor, the accused

person may demand that any witness be re-summoned

and reheard and the succeeding magistrate shall inform

the accused person of that right.”

The record shows that trial magistrate may have asked the appellant whether he wanted the case to proceed from where it had reached. The appellant elected to proceed with the matter from where it was. The record does not show that the appellant was informed that he had the right, even now that he had elected that the case proceeds from where it had reached, to seek that the witnesses who had testified be re-summoned and reheard. The appellant now complains that he was denied his right under the law. This was a mandatory requirement from which no derogation could be allowed. It follows that the subsequent trial became a nullity.

We allow the appeal, quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless there are

other reasons why he should be held in custody.

Dated, signed and delivered this 10th day of December, 2013.

A. O. MUCHELULE **H. K. CHEMITEI**

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