REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.2 OF 2011

CHRISPINE OUMA OMONDI ….....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

(Being an appeal from Original Conviction and Sentence from Senior Resident Magistrate's at Ukwala by E. K. MWAITA

in Criminal Case No.. 197 of 2010.)

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J U D G M E N T

The appellant was convicted by the Senior Resident Magistrate at Ukwala of robbery with violence c/s 296(2) of the Penal Code whose particulars were that on the night of 13/8/08 at Mungao sub-location in Ugenya District within Nyanza Province jointly with others not before the court being armed with dangerous weapons namely pangas and whips robbed John Okwii Sewe (PW1) of his Seiko 5 automatic watch, trouser, shirt, pair of leather shoes and cash Kshs.300/= all valued at Kshs.5180/= and at or immediately before or immediately after the time of such robbery used actual violence to the said PW1. He was sentenced to death. He was aggrieved by the conviction and sentence and filed this appeal which he prosecuted in person. It was opposed by Mr. Mongare for the State.

The record shows that the prosecution called the complainant (PW1) and three other witnesses. They were Joseph Ochieng Adongo (PW2), assistant chief Wilfred Anyiko (PW3) and P.C. Ayub Manyeti (PW4) of Sigomere Police post of Ukwala Police Station. The prosecution evidence was that at 8 p.m. on 12/8/08 PW1 was going home alone when he met the appellant and three other people. They were carrying somali swords and whips. He knew the appellant as they come from the same area. He was helped by moonlight to see the attackers and recognise the appellant among them. They told him that they were civil servants who were going to arrest him. They took him for a short distance and then asked him to give them their “food.” He did not understand what they meant and asked them. They, beginning with the appellant, attacked him by cutting him on the shoulders, forehead, left hand and left knee,. They took his Seiko 5 wrist watch, black leather shoes and cash Kshs.300/=. The incident took about 5 minutes. PW1 screamed but no assistance came. The attackers left him on the ground, unconscious. It was not until the following morning that PW2 found him here and helped take him to Sigomere Hospital from where he as transferred to Busia Hospital The appellant was not arrested until 12/6/09. he was arrested by PW3 who testified that all this time he had disappeared from

his home. He was taken to Sigomere police post where he was charged. There was no recovery.

The appellant gave unsworn defence and did not call any witness. He denied having been in the attack or having disappeared from home at any time.

The trial court considered this evidence and concluded that the guilt of the appellant had been proved beyond doubt. It is our duty to consider and evaluate the evidence afresh to be able to determine whether the conviction was properly grounded (OKENO .V. REPUBLIC [1972] EA 32). it is borne in mind that the trial court had the advantage of seeing and hearing the witnesses.

The complaint by the appellant was that he was convicted on insufficient evidence of recognition. The response by Mr. Mongare was that the appellant was known to PW1 and that there was moonlight which assisted PW1 to recognise him.

It is critical to point out that the appellant was convicted on the evidence of a single witness. In the case of ANJONONI AND OTHERS .V. R. [1976-1980] 1KLR 59 the Court of Appeal had this to say:

"The proper identification of robbers is always important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. 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 if depends upon the personal knowledge of the assailant in some form or other..."

Nonetheless, even in the case of recognition at night the court must subject the circumstances under which this was done to scrupulous scrutiny to satisfy itself that they were favourable and that there was no error or mistake.

The record shows that the attack took five minutes. This was a short time. PW1 stated that he used moonlight to recognise the appellant. He did not identify the other three attackers. However, when he recorded his police statement he did not mention that the night had moonlight or that he used that to recognise the appellant. That was a grave omission. Infact, he did not name any of the attackers in his police statement. If he knew the appellant and saw him in the attack, there was no reasons why he did not give his name to the police. That is the only way the police were going to track down and arrest the appellant. In short, the appellant's contention that PW1's evidence that he was in the attack was an afterthought cannot be easily dismissed. We find that the evidence of recognition on which the appellant was convicted was insufficient.

We also noticed that the charge read that PW1 was assaulted in the attack and he infact gave evidence of the assault. He was issued with a P3 which was filled and was marked for identification but not produced in evidence. The case was adjourned severally to allow for the calling of a clinical officer who did not at the end of the day turn up. The failure to have the clinical officer testify and produce the medical evidence did not help to prove the charge.

In conclusion, we allow th appeal. The conviction is quashed and the sentence set aside. The appellant is hereby set at liberty forthwith unless there are other lawful reasons why he is being held.

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

A. O. MUCHELULE

JUDGE

H. K. CHEMITEI

JUDGE