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| Court: | High Court at Nairobi (Milimani Law Courts) |
| Case Action: | Judgment |
| Judge: | George Matatia Abaleka Dulu |
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| Advocates: | - |
| Case Summary: | . |
| Court Division: | - |
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| Representation By Advocates: | - |
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| Advocates Against: | - |
| Sum Awarded: | - |

**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 35 of 2005**

**(CORAM: LESIIT, DULU JJ)**

***(From Original Conviction and Sentence in Criminal Case No. 7609 of 2003 of the Chief Magistrate's Court at Kibera – Ms. Muchira (SRM)***

**OMONDI ODIDA ……APPELLANT**

**VERSUS**

**REPUBLIC……..RESPONDENT**

**JUDGMENT**

**OMONDI ODIDA** the appellant was charged before the subordinate court with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that –

**"On the 29th day of September 2003 at Kibera Lindi Nairobi within Nairobi Province, while armed with a dangerous weapon namely a knife robbed GRACE KIMULI NDULU of a mobile phone make Nokia worth Kshs.8,000/= and at or immediately before or immediately after such robbery used actual violence on the said GRACE KIMULI NDULU".**

After a full trial, he was found guilty of the offence, convicted and sentenced to suffer death as provided for by law. Being aggrieved by the trial magistrate's decision, he filed this appeal. The grounds of appeal can be summarized as follows:-

1. The learned trial magistrate erred in law and facts in convicting him on evidence which was inconsistent and inadequate to justify a conviction.

2. The learned trial magistrate erred by shifting the burden of proof from the prosecution to the defence.

3. The learned trial magistrate erred in engaging in speculation and conjunctures not borne by the evidence on record.

4. The whole proceedings were defective and a nullity.

5. The conviction was unsafe as crucial witnesses were not called.

6. The learned trial magistrate erred in rejecting his defence without evaluation.

The appellant also filed written submissions.

Learned State Counsel, Mrs. Gakobo opposed the appeal. She submitted that the identification of

the appellant was positive. It was her contention that PW1 (the complainant) had met the appellant before the attack. It was in broad daylight. PW1 described the appellant as a person who had a goatee and was of light skin. The witness also struggled with the appellant during the incident. In those circumstances, the identification of the appellant by PW1 was positive and could not be faulted.

She further submitted that PW2 witnessed the incident and, in fact, saw the appellant attack PW1. PW2 had known the appellant for about one year previously and knew him by the name "**OMOSH**". She contended that the evidence of PW1 was corroborated by that of PW2. In addition, the doctor who examined PW1, confirmed that PW1 suffered injuries which were classified as harm.

On the complaint by the appellant that material witnesses were not called to testify, the learned State Counsel submitted that it was true that the arresting and investigating officers were not called to testify. She submitted however, that the failure to call these witnesses was not fatal to the conviction, as there was sufficient evidence from PW1 and PW2 on how and why the appellant was arrested.

In a short reply, the appellant submitted that the prosecution did not give evidence on the duration of the incident. He further contended that the failure by the prosecution to call crucial witnesses prejudiced him.

This being a first appeal, we are duty bound to subject the evidence as a whole to a fresh and exhaustive examination and draw our own conclusions and inferences. see **OKENO – vs – REPUBLIC [1972] EA 32.**

We have evaluated the evidence on record. The prosecution called two witnesses. The facts of the case are that on 29.9.2003 at 12.00 noon, the complainant **GRACE NDULU KIMULI (PW1)** was walking from Ngumo estate towards Kibera. She had gone to Ngumo estate to pick a friend called **JOYCE NDAMU KITIWA**. The complainant had a Motorola mobile phone. When she reached near a bridge, someone passed her. Shortly thereafter, she heard a beep for a message in the phone. She produced the phone to read the message. Then somebody jumped on her and tried to grab the phone. They struggled and the assailant hit her on the neck and head. She screamed. As they struggled, the complainant saw blood on her skirt. She then let the assailant go. The assailant ran away with the mobile phone, but left his shirt behind. As the complainant was screaming, PW2 **JULIUS NJUGUNA MWANIKI,** heard the screams from his "mandazi" kiosk near the bridge at Kibera Laini Saba. He went on top of the bridge and saw the two people struggling. He saw the assailant running off and leaving his shirt behind. He advised the complainant not to follow the assailant but go for treatment instead. He also informed the complainant that he knew the assailant as "OMOSH".

The complainant went for treatment and later reported to the police. The appellant was arrested on 17. 10. 2003 at 10.00 p.m. He was later charged with the offence.

In his defence, the appellant gave an unsworn statement. He denied committing the offence. He stated that he was arrested at 10.00 p.m. while eating food in a hotel. The police took him to Kilimani police station and the complainant saw him there. Initially, the complainant said that she had lost a Nokia mobile phone, but later changed the story to a Motorola phone. He stated that he had asked for the OB to be produced in court, but that was not to be. He stated that the complainant said, in cross examination, that she did not see a knife.

The first complaint of the appellant is that he was convicted on evidence which was inconsistent and inadequate to justify a conviction. The burden is always on the prosecution to prove an accused person guilty beyond any reasonable doubt. This is a case based on evidence of visual identification. In

**REPUBLIC – vs – ERIA SEBWAYO [1960] EA 174 Lyon,** J held –

**"Where the evidence alleged to implicate an accused is entirely of identification that evidence must be absolutely watertight to justify a conviction".**

The incident clearly took place during the day time, at about 12.00 noon. The complainant PW1 testified that she identified the appellant during the struggle. However, there was no evidence that she gave a description of the appellant to anybody after the incident. In fact, the evidence on record is that it was PW2 who told the complainant that he knew the attacker. The appellant also requested for the OB to be produced in court to confirm what was first reported to the police. The OB was not produced in court nor was an explanation given for the failure to do so. The arrest of the appellant was several days later. There is no evidence that it was the complainant who pointed the appellant to the arresting officer. In addition, no identification parade was held for the eyewitness PW2 to confirm whether the appellant, who had been arrested in his absence, was indeed the person who attacked the complaint. In the circumstances of this case, it was imperative to hold an identification parade for PW2 to confirm whether the person he saw struggling with the complainant was the appellant.

We are of the view that the evidence of identification of the appellant was not watertight. It left glaring gaps. It cannot be said to be positive. Though the incident occurred in broad day light, it is highly possible that there could be mistaken identity. The identification of the appellant by PW2 was merely dock identification, which cannot be relied upon.

The second complaint of the appellant is that the learned trial magistrate shifted the burden of proof against him.

We have perused the judgment of the learned trial magistrate carefully. We find no statement in the judgment that suggests that the learned trial magistrate expected the appellant to prove anything. We find no merit in this ground of appeal. It has to fail. We also find no basis for the ground that the proceedings were defective and a nullity. We therefore dismiss that ground as well.

We now turn to the ground that the learned trial magistrate engaged in speculation and conjencture. We observe that at page J2 of the judgment the learned trial magistrate stated –

**"unlike what accused says in defence that PW1 said she was only with one woman and a child, I believe in the commotion in a crowded place like Kibera, it is possible other people including PW2 witnessed the robbery".**

In **OKETHI OKALE AND ANOTHER – vs – REPUBLIC [1965] EA 555**, Crabbe, Duffus and Spry JJ.A stated at page 557 –

**"…… in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and not on any fanciful theories or attractive reasoning. We think it is dangerous and inadvisable for a trial judge to put forward a theory of mode of death not canvassed during evidence or in counsel's speeches".**

In the present case there was no evidence that there was a crowd, or that the place was crowded. With due respect, the reasoning of the learned trial magistrate was not based on the evidence on record. It should not have been a basis for disbelieving the defence of the appellant and basing conviction on the same.

The next ground of appeal is that crucial witnesses were not called. In **BUKENYA AND OTHER – vs – UGANDA [1972] EA 549, at page 550,** Lutta JA of the Court of Appeal for East Africa stated –

**"It is well established that the Director has discretion to decide who are material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tendered to be adverse to the prosecution case".**

Several crucial witnesses were not called by the prosecution. The complainant's companion during the incident, JOYCE NDAMU KITIWA, was not called to testify. The arresting and the investigating officer were not called to testify. No reasons were given for the failure to call these important and crucial witnesses. It will also be noted that the appellant asked for the production of the OB report, and the same was also not produced in court. In our view, the witnesses who were not called to testify were important and crucial witnesses. The failure to call them leads us to the inference that, if the said witnesses were called to testify, their evidence would be or would have tended to be adverse to the prosecution case. The benefit of the adverse inference has to be given to the appellant. We do so.

The next complainant by the appellant was that the learned trial magistrate rejected his defence without evaluation. The appellant gave an unsworn defence. He denied committing the offence. He stated that he was arrested in a food hotel while taking supper. In considering the defence of the appellant at page J2 of the judgment, the learned trial magistrate stated –

**"Nevertheless, I have no doubts that the scaring of PW1 was from, as per her evidence in court and that of the eye witness, caused by accused person. I do not believe accused's defence that PW1 framed him. I do not understand what she would stand to gain".**

In our view, the dismissal of the appellant's defence by the learned trial magistrate fell short of the requirements of section 169(1) of the Criminal Procedure Code (Cap. 75 of the Laws of Kenya

was imperative on the learned trial magistrate to evaluate the defence case against the prosecution case. The learned trial magistrate only evaluated the prosecution case and, within it, dismissed the defence. That was an error. She should have evaluated the issues raised in the defence such as how, where and when the appellant was arrested. She should also have considered the issue of a change by the complainant from theft of a Nokia phone to a Motorola phone, as well as the failure of the proseution to produce the OB as requested for by the appellant. She did not do so. That was a fatal mistake.

Consequently, and for the above reasons, we allow the appeal, quash the conviction and set aside the sentence imposed by the learned trial magistrate. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 17th day of May 2007.

……

LESIIT

JUDGE

**……**

**DULU**

JUDGE

Read, delivered and signed in the presence of –

Appellant

Mrs. Gakobo for State

Tabitha/Eric – Court Clerks

**……**

**LESIIT**

**JUDGE**

**……..**

**DULU**

**JUDGE**