



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**CRIMINAL APPEAL NO. 183 OF 2011.**

**SHADRACK OMWAKA :::::::::::::::::::: APPELLANT.**

**VERSUS**

**REPUBLIC :::::::::::::::::::: RESPONDENT.**

*(An appeal from the conviction and sentence of Hon. E.K. Makori – PM in Mumias Principal Magistrate’s Court Criminal Case No. 1119 of 2010 delivered on 5<sup>th</sup> August, 2011.)*

**J U D G M E N T.**

1. Motor cycle taxi operators otherwise commonly known as boda boda operators or boda boda riders carry out brisk business in Kakamega County. This seems to be the most common means of transport for members of the public as they discharge their day to day business. PW1, Naftali Wesonga, a bodaboda operator was conducting the said business on the night of 2/12/2010 when he picked two pillion passengers at Safi Guest House who were to be dropped at Lureko Primary School. His would be benefactors however turned against him, viciously attacked him and robbed him of his motor cycle.
2. Investigations led to the arrest of the appellant Shadrack Shuatani Omwaka who was charged with the offence of Robbery with violence contrary to section 296 (2) of the penal Code. The particulars were that on the 2<sup>nd</sup> day of December, 2010 at about 9.00 a.m. at Lureko village Nabongo location in Mumias District within Kakamega County jointly with another not before the court while armed with dangerous weapons namely a panga and a club robbed Naftali Wesonga Namamba off (sic) a motor cycle Reg. No. KMCK 586 M make TVS Star Black purple (sic) in Colour Engine No. AF5CA 1925700 Chassis No. MD 625KF 5941CO9138, one mobile phone make Nokia 1110 and cash Ksh. 750 all valued at Ksh. 87,150/= and at the time of such robbery used actual violence to (sic) the said Naftali Wesonga Namamba.

The appellant was found guilty and sentenced to death as by law prescribed.

**Petition of Appeal**

3. The appellant being dissatisfied with the conviction and sentence, filed a petition of appeal on 11th August, 2011, raising the following grounds of appeal:-
  - i. *That he did not plead guilty to the appended charge (sic) ;*
  - ii. *That the trial magistrate erred both in law and facts in convicting (sic) him on defective charge sheet;*
  - iii. *That the court erred in law and facts by uploading (sic) the conviction on the prosecution*

- purported aspect of recognition in the absence of the appellants' names and description;*
- iv. *That the court erred in law and facts by uploading (sic) the conviction on the prosecution purported aspect of electricity lights without considering the length of time the witnesses had the accused under observation. At what distance, to rule out the possibility of mistake (sic) ;*
  - v. *That the trial magistrate erred in law and facts in convicting him on the evidence of one witness;*
  - vi. *That the trial magistrate erred in law and facts in convicting him when it (sic) failed to notice that the evidence of PW1, PW2, PW5 and PW6 was not uncorroborated (sic) but lacked probative values (sic) to sustain a conviction;*
  - vii. *That the trial court did not stop to ask why the prosecution did not produce essential witnesses that were necessary for this case to have valid grounds i.e. caller of the mobile phone to PW2 (sic); and*
  - viii. *That he was not found with any exhibit.*

### **The appellant's submissions**

4. At the hearing of the appeal, the appellant relied on his written submissions which highlighted the following:-
  - i. *There was variance in the evidence of PW1, PW4 and PW12 (sic) as to the number of days that PW1 was admitted in hospital;*
  - ii. *No evidence was adduced to show that PW1 owned any mobile phone;*
  - iii. *PW1 did not know the appellant before and the distance of where the electric light was positioned to where the robbery occurred was not given;*
  - iv. *PW1 did not give a description of his assailants to the police;*
  - v. *The lady who assisted PW1 after he was attacked was not called as a witness. Other witnesses were not called;*
  - vi. *PW2's evidence was doubtful;*
  - vii. *PW1 testified that there were thirteen (13) people at the parade whereas the officer who conducted the parade said that they were eight (8) members. PW2 stated that the witnesses were accommodated at the police canteen whereas the parade forms show that the witnesses were accommodated in the office of the Deputy OCS and the parade conducted in the police cells.*
5. In addition, he orally submitted that according to the charge sheet, it was alleged that the offence was committed during the day but at the hearing before the trial magistrate, it was alleged that the offence was committed at night. He was therefore confused. He further submitted that he did not see the Occurrence Book (OB), although he did not ask for the same.

### **The respondent's submissions**

6. Mr. Omwenga, learned counsel for the State supported the conviction and sentence. He submitted that:-
  - i. *The identification at the lower court was proper. PW1 identified his assailant and that there was sufficient electricity lighting at Safi Guest House and Burudika bar;*
  - ii. *The complainant positively identified the appellant at an identification parade by pointing him out;*
  - iii. *PW2 identified the appellant as the client who had been ferried by PW1 at Burudika Bar;*
  - iv. *PW5 testified that he conducted an identification parade after being instructed to do so by the Mumias police station OCS on 15/12/2010. The parade consisted of eight (8) persons and the appellant was positively identified by PW1. PW5 who is an Inspector of Police informed the court that the parade was properly conducted;*
  - v. *PW2 participated in the identification parade and identified the appellant;*
  - vi. *PW3, PW4 and PW5 corroborated the testimony of PW1 to the effect that PW1 had been robbed, injured and admitted at St. Mary's Hospital Mumias.*

### **Analysis and re-evaluation of the evidence**

7. In the case of **David Njuguna Wairimu vs. Republic [2010] eKLR**, the court while relying on the holding of the court in **Okeno vs. Republic [1972] EA 32**, held that:-

*“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”*

8. We now proceed to analyze and reassess the evidence on record and to consider the grounds of appeal presented before us for determination by the appellant as well as the arguments presented by both the appellant and the State. In doing so, we bear in mind that the most critical aspect in this appeal rests with the identification of the appellant. In this aspect, we are guided by the decision in **Wamunga Vs. Republic (1989) KLR 424**, where the Court of Appeal held at page 426:-

*“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of conviction.”*

#### **The Prosecution’s case**

9. In the instant case, Naftali Wesonga PW1, testified that he was carrying out boda boda business along the Shibale Mumias road on the night of 2/12/2010. At around 9.00 p.m., while at Safi Guest house, he was approached by two passengers who requested to be ferried at a fee of Ksh. 180. PW1 acceded to their request. They passed by Burudika bar and proceeded to Lureko Primary School where one of them made as if to remove money from his pocket. Instead, he removed a jembe pin which he used to hit PW1 from behind. PW1 fell down. As PW1 tried to raise his hand, one of the assailants removed a panga and hit PW1 across the head. As a result, PW1 sustained injuries on his head. He was also hit on his eyes using the jembe pin.
10. PW1 testified that there was sufficient electric light at Safi Guest house where he picked his passengers and at Burudika bar where they stopped briefly before proceeding to Lureko primary School, which also had electric light. PW1 testified that he saw the appellant well.
11. PW1 was assisted by a lady whom he gave his colleague’s cell phone number to call. His friend, PW2 went to the scene with the police. PW1 testified that he was robbed of his motor cycle and was admitted in hospital from 3<sup>rd</sup> to 9<sup>th</sup> December, 2010 as a result of the serious injuries he sustained during the robbery. PW1 testified that after discharge from hospital, he attended an identification parade and identified the appellant from a group of thirteen (13) people.
12. On cross examination, PW1 maintained that he saw his attackers quite well. He was attacked by a tall and short person. In the report he made to the police he did not describe the appellant as he was badly injured. He indicated that it was the appellant who removed a panga from his coat. He reiterated that he saw the appellant quite well having ferried him and another on his motor cycle. He saw the appellant’s height, the mark (sic) and the dressing.
13. The evidence of PW2, Michael Safari Olweya, was to the effect that he was at Burudika area at 9.00 p.m., on 2/12/2010. PW1 was operating boda boda business in that area. PW2 was called on phone and told that PW1 had been attacked. He found PW1 at Lureko having sustained injuries on the head and near the eyes. He was in a pool of blood. PW2 took him to St. Mary’s hospital and stayed overnight with him.
14. PW1 regained consciousness at 7.00 p.m., the following day and told PW2 that the persons who

- attacked him were the ones he had carried on his motor cycle.
15. PW2 identified the appellant in an identification parade. PW2 testified that he had seen the appellant outside Burudika bar as they passed where he was and said that they were in a hurry and needed to be ferried away.
  16. On cross examination, PW2 maintained that he was with the complainant waiting for customers. PW2 informed the court that his motor cycle was in a state of disrepair and was assisting PW1 on the material night.
  17. PW3, Lucy Walialo, adduced evidence that she had bought her brother, PW1, the motor cycle he was robbed of. She showed the court the receipts for the motor cycle which were marked as MFI 1.
  18. PW4, Wycliffe Wesechere, a clinical officer at Mumias filled a P3 form in respect PW1 who was treated at St. Mary's hospital where he was admitted from 3<sup>rd</sup> to 6<sup>th</sup> December, 2010. PW1 had a swollen right thigh, he had a deep cut wound about 7 cm long on the scalp which was bleeding profusely. He had mild tenderness in the left lumbar region. The injuries were caused by sharp and blunt objects. The degree of injury was assessed as harm. He produced the P3 form as exhibit 4 and the treatment notes as exhibit III (a) (b).
  19. PW5, Inspector Joel Kibet, conducted two identification parades on 15/12/2010. The members of the parade were eight (8). The 1<sup>st</sup> witness, Naftali Wesonga, PW1, identified the appellant as the one who had attacked him. PW2 identified the appellant in the second identification parade. PW5 testified that PW1 and PW2 were accommodated in the office of the Deputy OCS whereas the identification parade was conducted in the police cells. PW5 produced the identification parade forms as exhibits IV (a) and (b).
  20. PW6, Corporal Maurice Otieno, was the Investigating officer in this case. He received a report of the robbery on 2/12/2010 at 9.30 p.m. from PW1 who reported that he was violently attacked by two passengers who had boarded his motor cycle. He reported that he was robbed of his motor cycle in an area which was well lit with electric light. He said that he could possibly identify two people who were familiar. PW6 issued PW1 with a P3 form.
  21. PW6 further testified that the appellant was arrested on 8/12/2010 by members of the public who wanted to lynch him. The appellant ran to an Administration police (AP) camp to take refuge. After his arrest, the appellant was identified by PW1 and PW2 in an identification parade.
  22. On being cross examined, PW6 conceded to the fact that the charge sheet shows that the offence was committed at 9.00 a.m. He further stated that PW1 said he could identify the attacker if he sees him and that ***"it's a fellow dark (sic) he could see and identify if shown."*** PW6 reiterated that PW1 said the ***"attackers were people he could see if shown. He never knew the appellant by name."*** The clothes the appellant wore were not described to PW6 by PW1. PW6 did not ask about the appellant's clothing.
  23. On re-examination, PW6 informed the court that the appellant's dressing was never described but the physical appearance was.
  24. PW7, Stephen Mwamba, an Administration Police Corporal attached to Mumias Matawa gave evidence of how on 4/12/2010, several motor cycles were moving in a convoy heading towards Musango. The motor cyclists were baying for the appellant's blood. The appellant ran to the AP camp with people following him in hot pursuit. PW7 locked the appellant in and called for reinforcement. The appellant was rescued.

## **Defence Case**

25. In his defence, the appellant informed the court that on 8<sup>th</sup> December, 2010, he met people whom he knew quite well who told him that he was needed somewhere. He joined them and on reaching the AP camp he jumped from a motor cycle and rushed to the AP camp. The Administration Police took him to Mumias police station.
26. On 10<sup>th</sup> December, 2010, he was removed from the cells to some office where he saw a lady with PW1 and PW2 and he was interrogated. He denied having any knowledge of the robbery. On cross-examination, the appellant informed the court that the members of the public had pangas and rungas. They wanted to kill him. He saw an AP camp and jumped from the motor cycle when he saw danger. He informed the court that the parade was thoroughly done on (sic) him.

### **The Lower Court's finding**

27. The learned trial magistrate in his judgment analyzed the facts and warned himself of the dangers of convicting particularly when circumstances as to identification were difficult. The magistrate reached the conclusion that the appellant was positively identified by PW1. He found that there was sufficient electric light at Safi guest where PW1 picked the appellant and another passenger and that PW1 stopped at Burudika bar where there were electric lights from the bar. PW1 thereafter dropped the appellant and the other passenger at Lureko where there was electric light from a nearby school.

### **Determination of the appeal**

28. In the case of **Maitanyi vs. Republic (1986) KLR 198**, the Court of Appeal held that:-

*“The strange fact is that many witnesses do not properly identify another person even in daylight ..... it is at least essential to ascertain the nature of light available. What sort of light, the size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were not inquired into .....”*

The Court of Appeal continued to state:-

*“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants to those, who came to the complainant's aid, or to the police. In this case, no inquiry of any sort was made ..... if a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description if on the other hand, the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect unless explained.”*

29. The record herein as regards the evidence of PW1 was that he saw the appellant at the spot where they stood at Safi Guest house, at Burudika bar where he stopped to talk to PW2 and at Lureko Primary School. We have perused the original proceedings of the trial court which clearly state as follows with regard to PW1's evidence.

*“I saw the people quite well when I picked them. I never saw them carry a weapon. I went to police. The fellows who attacked me, there was short (sic) and tall person who attacked me. Many people are tall ..... in April report to police I never described you because I was badly injured.”*

30. On cross examination, PW6 indicated that the complainant (PW1) said he could identify him (assailant) if he sees him and that he said it was a fellow dark (sic) he could see and identify if shown. On re-examination, PW6 stated that:-

*“The dressing in which the suspect wore was never described to me. It was physical*

***appearance .....***”

31. We are in concurrence with the learned trial magistrate’s finding that PW1 saw the appellant and his fellow passenger with the aid of electric light at the position where he picked them as pillion passengers at Safi Guest house, they rode on to Burudika bar where they stopped, albeit briefly, the said bar was lit by electric light. There was also electric light at Lureko Primary School where PW1 was attacked. The evidence of PW2 corroborated that of PW1 with regard to the presence of electric light at Burudika bar where he saw PW1 with the appellant and another passenger.

32. In the case of **Amani Kitsao Mweni vs. Republic [2015] eKLR**, the Court of Appeal at Malindi upheld a conviction in an appeal whose facts were almost similar to the instant case. The Court of Appeal observed that:-

***“Unlike in the Maitanyi case in which the identifying witness saw the appellant in stressful conditions with the aid of a safari lamp, the complainant herein saw the appellant under a very relaxed and friendly atmosphere with the aid of a street electric light which must have been reasonably bright as the motor cycle taxis were parked there waiting for prospective passengers. The complainant and the appellant had the opportunity to talk as they negotiated over the distance and the fare. The learned judges reasonably inquired into the nature of light and the time the complainant took with the appellant.”***

33. The Court of Appeal in **Amani Kitsao Mweni** (supra) held that:-

***“Although the complainant did not give a clear description of his assailant to the people to whom he initially reported the robbery, he was sure that he could identify his assailant if he saw him. We are satisfied that the complainant saw and talked to the appellant and was able to identify him as his assailant .....***”

34. Guided by the foregoing decision and the evidence in this case, we are satisfied that the appellant was properly identified by PW1 and PW2. The record is clear that PW1 had indicated to PW6 that he would be able to identify his assailants if he saw them again. As indicated earlier in this judgment, the circumstances were conducive for positive identification due to the presence of electric light at various locations. The issue of mistaken identity does not arise.

35. The identification of the appellant was confirmed in two identification parades conducted by PW5, Inspector Joel Kibet, in which PW1 and PW2 identified the appellant. In his written submissions, the appellant indicated that although PW1 said that there were 13 members in the identification parade, PW5 testified that there were 8 members in the parade. Another discrepancy was on whether PW1 and PW2 were accommodated at the police canteen or at the office of the Deputy OCS before the identification parade was conducted.

36. We have considered the discrepancies that were highlighted by the appellant in his written submissions and we find that they did not occasion him any prejudice. We are satisfied that the two identification parades were properly conducted. Furthermore, the appellant had no objection to the manner in which the parade was conducted. The appellant signed the identification parade forms to confirm that he was satisfied with the manner in which the identification parades were conducted.

37. Another discrepancy pointed out by the appellant was with regard to the duration that PW1 was hospitalized. There is no doubt that PW1 was admitted in hospital for a number of days. The discrepancy as to the number of days cannot go to the benefit of the appellant.

38. In the case of **Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993** the Court of Appeal held:-

***“In any trial there are bound to be discrepancies. An appellate court in considering***

***those discrepancies must be guided by the wording of section 382 of the CPC viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.”***

39. In his written submissions, the appellant indicated that some witnesses were not called to testify in court. It has been said time and again by the High Court and the Court of Appeal that the duty of the prosecution is to present before the trial court such witnesses as it thinks will establish its case beyond reasonable doubt. A case in point is that of **Cliff Bikeri Mokua & Another vs. Republic [2014] eKLR**.
40. In the instant case, we cannot infer that the prosecution failed to call some witnesses because the evidence they would have given would have been prejudicial to its case. We are satisfied that the prosecution called those witnesses that were deemed material in support of its case.
41. The defence put forth by the appellant addresses the issue of his arrest. We are of the finding that it casts no doubt whatsoever on the evidence by the prosecution.
42. Whereas the charge reads that the offence occurred at 9.00 a.m, the evidence adduced by PW1, 2 and 4 & 6 shows that it occurred at 9.00 p.m. on 2/12/2010. There is therefore a variance between the charge and the evidence as to the time when the offence occurred. In this regard, we invoke the provisions of section 382 of the Criminal Procedure Code to cure this defect.
43. We are satisfied that the appellant was properly convicted for the offence of robbery of PW1’s motor cycle on the night of 2/12/2010. The appellant was in the company of another person, they were armed with dangerous weapons which they used to viciously attack PW1 as evidenced by the P3 form produced in court.
44. We therefore uphold the death sentence meted by the trial court. We find that the appeal herein is without merit and hereby dismiss it.

It is so ordered.

**DELIVERED, DATED and SIGNED** in open court at **KAKAMEGA** on this **28<sup>TH</sup>** day of **JANUARY, 2016**.

**RUTH N. SITATI**

**NJOKI MWANGI.**

**JUDGE**

**JUDGE.**

**In the presence of**

..... Appellant.

..... for Respondent.

.....Court Assistant.