



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCCRA NO. 34 OF 2014**

***From original conviction and sentence in Criminal Case number 48 of 2012 of the Principal Magistrate`s court at Siaya – Hon. J.N Sani-SRM)***

**AGGREY MUKHOKHO MUSEVE.....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

1. The appellant was the first accused in the three counts of Robbery with violence contrary to section 295 as read with section 296(2) of the penal code:
2. In the first count, the particulars were that on 12th June, 2012 at Lela area along Busia -Kisumu road in Siaya District within Nyanza Province jointly with others not before court and while armed with a dangerous weapon namely forearm, they robbed Abdulahi Shake Sora of ksh. 529,900/- and one Nokia phone 6233 valued at ksh.15,000 and at or immediately before or immediately after the time of such robbery used actual violence to the said Abdulahi Shake Sora.
3. In count 2 the particulars were that on the said date, time and place aforementioned they robbed Paul Mbulanga Otiende of Nokia 1110 valued at 3,000/-
4. In count 3 it was alleged that on the date, time and place aforementioned they robbed Caleb Onayo Okinyi of an L.G. Phone valued at Ksh. 3000/-
5. The appellant pleaded not guilty on the three counts but upon hearing and considering the evidence of the prosecution witnesses and the appellant`s sworn testimony, the trial magistrate in a judgment delivered on 3/6/2014 acquitted him on count 1 but found him guilty and convicted him on counts 2 and 3 and sentenced him to death. Being aggrieved by the conviction and sentence he filed this appeal.
6. His petition of Appeal is premised on grounds that:

As per petition filed on 30/5/2014:-

**i) The trial court erred in law and fact in failing to consider my mitigation.**

**ii) The trial court erred in law and fact by failing to accord me a fair trial.**

**iii) The trial court did not consider the contradictions by the prosecution witnesses and therefore arriving at a sentence that is not correct.**

7. In a petition filed on 6/10/2014 he cites further grounds:-

**i) That the sentence imposed on me is manifestly harsh and excessive as to amount to a misdirection.**

**ii) That the trial magistrate erred in law and facts by observing that the prosecution did not establish their case on the strength of the identification evidence notwithstanding the fact that the parade was worthless as it contravened the parade rules as stipulated by the vice.(sic)**

**iii) That the learned trial magistrate misdirected himself by placing reliance to convict on the contradictory evidence of the prosecution witnesses.**

**iv) That the learned trial magistrate failed erred in law and facts by failing to comply with section 324 as read with section 329 of the Criminal Procedure Code.**

**v) That the trial court failed observe the facts that the investigation done in this matter was shoddy to sustain the offence in the capital offence (sic)**

**vi) That the learned trial magistrate erred in both law and facts in totally misunderstanding and or failing to appreciate my unsworn defence therefore coming to a wrong conclusion.**

8. Briefly the facts of this case were that on 12/6/2012 at about 8.30 a.m Abdulahi Shake Sora (a salesman), Paul Mbagu Otieno ( a driver) and Caleb Omayo( a turnboy) all employees of Mombasa Maize Millers Ltd at Kisumu departed Kisumu at 8.30 a.m in a motor vehicle Reg. No. KAW 517D Mitsubishi FH loaded with goods for sale. They sold goods worth **498,900/-** at Ugunja, Bumala and Matayos and were on their way back to Kisumu when they suffered a tyre burst at Lela area. When the driver slowed down five people one of who had a pistol emerged from the bushes. The one with a pistol stood in the middle of the road. They then opened the door and removed the driver, salesman and conductor and ordered them to lie on the road face down. They then roughed them up , frisked them and after taking their personal effects and mobile phones left on two motor cycles taking with them all the money the proceeds of the sale. The three witnesses raised the alarm whereupon a boda boda cyclist Peter Achala gave chase. He was soon joined by other members of the public and as he inched closer two of the attackers jumped off the motor bike and went into the thicket. He nevertheless pursued the remaining motor bike and upon realising they were being conered one person threw a mobile phone at him. He did not get distracted however and he chased them upto a place called Muhanda. It was there that he caught the 1st accused with the help of members of the public. In the meantime, the salesman, driver and conductor had reported the attack to Yala police station. Police officers led by Sergeant Omar Mohamed mounted a road block to catch them but the chase had diverted into a feeder road. When they caught up with them they found the cyclist and other members of the public had already apprehended the appellant and one other suspect. They arrested them and later handed them to the Siaya CID Office together with the mobile phone and the motor cycles that were abandoned during the chase.(these were used as exhibits at the trial). The appellant was subsequently charged with these offences.

9. The appellant when put on his defence, testified that he operated a “boda boda” business between Kisumu and Nyalenda and that on the material day after dropping a customer in town he stopped at the stage whereupon two people requested him to help them chase a motor vehicle that had gone with their luggage. He agreed and on reaching Kamas area he advised them to get another motor

cycle. They flagged down his co-accused at the trial who carried two people. They rode upto Luanda but did not find the vehicle. When they could not find it even at Yala and Ugunja they decided to go back to Kisumu. The people pleaded with them and even fueled their motor cycles and so they proceeded to Sidindi area where they found the F/H lorry beside the road. The passengers went to the vehicle and then returned and asked to be dropped off some petrol station. They were told they would be paid later but shortly afterwards a motor cyclist accused them of stealing money. When he, the appellant was searched in full view of the members of the public he was only found with his own phone and 500/-. that was in the full view of members of the public. He was then taken to Yala Police station but later at 6.30 p.m his co-accused was also taken there. He stated that he had never held a gun in his life.

10.The Appeal proceeded before us on 10./2/2015 when we heard arguments from the appellant who was unrepresented and also from Miss Wakio, Prosecution Counsel. In addition to his written submissions the appellant orally replied to the submissions made by the Prosecution counsel.

11.We have reconsidered and evaluated the evidence adduced at the trial and also considered the submissions made before us, and we are satisfied that the charge against the appellant was proved beyond reasonable doubt. To begin with this offence occurred in broad day light and apart from being identified by the three victims at the scene of the robbery the appellant was also identified by Peter Achola (PW5) an independent eye witness who happened on the robbery. It was his evidence that he chased/pursued the two motor cycles which were carrying the suspects up to a trading centre where they apprehended the appellant. In his testimony, the appellant admits that a cyclist pursued them but he contended that he too was driving a motor cycle and was only innocently plying his trade as a “boda boda”. We do not however believe him and prefer to believe the evidence of PW5 which is corroborated by the salesman (PW1), driver(pw2) and conductor (PW3) who testified that the suspects fled on two motor cycles and were pursued by PW5. The appellant was not driving the motor cycle when he was apprehended by PW5. He was a passenger. We are satisfied that the circumstances in this case favoured a positive identification of the appellant not just by the victims but by PW5 who later assisted to bring him to book. Indeed PW5 also identified him as the person who threw a phone at him so as to distract him. The evidence of identification was in our view free from error. The law is that no particular number of witnesses require to be called to prove a charge and in this case we find that the evidence of the witnesses called sufficiently proved the charges against the appellant. He has not demonstrated how his right to a fair trial was breached. Section 324 of the Criminal Procedure Code which relates to Motions in arrest of judgment was never invoked in his case and is therefore not relevant. As for section 329 the record shows that his advocate one Mr Obala was allowed to mitigate.

12.In the end we find no merit in this appeal. The same is dismissed and the sentence is upheld.

**Signed, dated and delivered this 17th day of March, 2015**

**H.K. Chemitei**

**E.N. Maina**

**JUDGE**

**JUDGE**

**In the presence of: \_**

**Miss Muiru for state**

**Appellant present in person**

**Lawrence Omollo- Court Assistant**

