



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

APPELLATE SIDE

CRIMINAL APPEAL CASE NO. 208 OF 2013

(From the original conviction and sentence in Criminal case no. 1538 of 2011 of the Chief Magistrate's Court at Kakamega before Hon. S. Shitubi – CM)

BONIFACE ATONDOLA YABATSA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant was charged with two counts of Robbery with Violence contrary to Section 296 (2) of the Penal Code. He was also charged with two alternative counts of handling stolen properties. The particulars of the main counts of robbery with violence were that the Appellant on the night between 27th July, 2011 and 28th July, 2011 at 2.40hours at Ikhonyero village, Lubao sublocation, Kakamega Municipality in Kakamega Central District within Western province, jointly with others not before court robbed Douglas Arkhama Matasio of TV make Sony 14 inches, Cell phone make Nokia 6233, Wallet porch, assorted clothes, 4 pairs of shoes, Nakiva radio, Sonnetec radio and cash money kshs. 15,000/- all valued at Kshs. 70,800/= and at the time of such robbery used personal violence to the said Douglas Arikhama Matasio.

The particulars of the second count of robbery with violence were that the Appellant in the night between 27th July, 2011 and 28th July, 2011 at 02.40 Hours at Ikhonyelo village, Lubao sublocation, Kakamega Municipality in Kakamega Central District within Western province, jointly with others not before court robbed Hesborn Shihembekho Mademba one pair of shoes, cell phone Samsung, Cell phone Nokia C117, electrical torch, an axe and one panga also cash money Kshs. 500/- all valued at Kshs. 11,600/- and at the time of such robbery used personal violence to the said Hesborn Shihembekho Mademba.

The Appellant was convicted of the main counts of robbery with violence and sentenced to death. The grounds of appeal are that the prevailing circumstances were not conducive for positive identification, that there was no direct evidence linking the Appellant to the offence, that the prosecution did not prove its case beyond reasonable doubt, the trial court erred by rejecting the Appellant's defence which raised doubt on the prosecution case, that the prosecution evidence was contradictory and that no identification parade was done.

Miss Andia, Counsel for the Appellant submitted that the Complainant testified that he did not know the Appellant. The source of light was moonlight and torches. The intensity of that light was not indicated. No identification parade was done. Counsel contends that the trial court relied on the doctrine of recent possession – Counsel cited the case of **ERIC OTIENO ARUM -V- REPUBLIC Kisumu Criminal**

Appeal No. 85 of 2005 (C.A) and that of **KIARIE -V- REPUBLIC 1984 KLR 739.**

It was further submitted for the Appellant that the recovered items were not positively identified. PW1 alleged to have lost two radios Akai and Sony make what was produced was Aviva and Sony. No inventory of the recovered items was produced. All the witnesses did not know the Appellant and that the medical evidence did not give the injuries suffered by the Complainant.

Miss Opiyo, Counsel for the State, opposed the appeal. Counsel submitted that there was enough time and light that enabled PW1 to identify the Appellant. The stolen items were found in possession of the Appellant who could not account for them. The evidence points at the Appellant.

The record of the trial court shows that seven witnesses testified for the prosecution. **PW1, DOUGLAS ARIKHAMA MATAISO**, was the Complainant in Count I. He testified that on 28th July, 2011 at 1.30am he was sleeping in his house when robbers broke and entered the home. He woke up and found many people inside his home. There was light but the robbers had torches and were armed with pangas. He was ordered to sleep on the ground facing down. He was alone in the home. The robbers took his Nokia mobile phone, wallet, Motorola phone, identity card, ATM cards for Equity and Kenya Commercial Banks, a Sony TV, One Nakiva radio and one Sonnytek radio. It is his evidence that he identified the Appellant by the use of light from the torches. The robbers fled. He further noted that other items including a power cable, safari boot shoes and clothes had been stolen.

It is PW1's evidence that at about 6.00am the assistant chief told him that a suspect had been arrested at Lubao. He went to the scene and identified his stolen clothes, the extension called and two radios. He did not know the Appellant.

PW2, HESBORN SHIHEMBEKHO MADEMBA was the Complainant in Count II. On 28th July, 2011 he was asleep at about 1.30am. A boy he lives with Wycliffe (PW4) called him and told him that it appeared there were robbers. The robbers went to his house and broke the rear door. He flashed his torch and saw about eight robbers armed with pangas, rungu and torches. He was told to kneel and face aside. He was hit with the flat side of a panga. He was with his wife who was hiding in the ceiling. The robbers took his Kshs. 500/-, his torch, panga, Nokia phone for his wife and his boots. PW2 later heard that a suspect had been arrested. He went to the Kakamega Police station and identified his boots and panga.

PW3, MARY SUPER CHUMA is the wife of PW2. She was with her husband when the robbers entered their house. They heard PW1 telling PW2 to open the door as there were police officers. PW4 had warned them that there were robbers. PW3 closed the bedroom door and hid in the roof. Neighbours started screaming. Administration police officers later went to their home. She was taken to hospital with her husband. While in hospital they got information that one suspect had been arrested. Her husband identified his boots and panga. She did not see the robbers.

PW4, WYCLIFFE MUDAVADI was living with PW2. He was asleep on 28th July, 2011 at about 1.00am. He heard movement of cattle. He later saw torches being flashed outside. He saw five people. He moved out slowly and went to call PW2. He told PW2 and PW3 that they had been invaded by robbers. PW4 then went to hide himself. In the morning he saw PW2 who had been injured.

PW5, PC. MOSES MUNGAI was based at the Kakamega Police station and investigated the case on 27th July, 2011 at about 2.40am a report was made through a phone call about the robbery. He went to the scene and assisted the victims to Kakamega Provincial hospital. In the morning of 28th July, 2011 at about 10.00am he got a report that someone had been arrested at Lubao with some stolen goods. He went to Lubao and found the Appellant had been arrested. PW1 and PW2 identified some of the goods found with the Appellant. According to PW5, the Appellant was arrested carrying a bag. The bag had pangas, a navy blue jacket, two pairs of jeans, two vests, six t-shirts, two radios, electrical extension cable and a pair of boots. It is his evidence that the Complainants could not identify the robbers. He caused the Appellant to be charged with the offence. The two radios that were recovered were Sonatec and Nakiva make.

DUNCAN MININGWA was PW6. He is a clinical officer who was based at the Kakamega Provincial General Hospital. He examined PW2 on 28th July, 2011 at about 4.00am. PW2 had tenderness on the chest, swollen thumb and multiple bruises on the right forearm. The thumb was fractured. He classified the injuries as harm.

PW7: APC ERIC OKINDA was based at the Shinyalu headquarters. On 27th July, 2011 he was on night duties. A report was made by the area assistant chief camp that thugs were terrorizing members of the public. He went to the scene with other officers. He went PW1 and PW2. He noted that what had been stolen from the two complainants. They went back to the camp. At about 5.30am they met a suspect waiting to board a vehicle while carrying a bag. They searched the bag and found two pangas, an electric extension cable, two small radios, one pair of black boots, two pairs of long trousers, two white boots one navy blue raincoat and some t-shirts. They went back to the camp and called the Complainants. PW1 and PW2 identified some of the items as theirs. PW2 was at the hospital when the Appellant was arrested about 200 meters from the scene on the Kakamega Webuye road. The scene is about 500 metres to Lubao town. PW7 further testified that Thursdays were market days at Lubao market.

The Appellant gave sworn testimony. He stated that he is an electrician. He comes from Musoli. On 26th July, 2011 he left for Musoli market. He then went to Kakamega and took a vehicle to Lubao market to buy a cow. He saw someone coming with a cow. Two police officers were ahead. A third police officer was behind. The third officer enquired why the Appellant was standing there and he told him that he was waiting to buy a cow. The police took his money Kshs. 23,070, his phone and identity card. The Appellant was taken to the cells. He was given back his identity card and phone but not the money. After one hour, a police officer opened the cells and he was with four people including PW1. He was taken to Kakamega police station where he was charged. He saw the bag for the first time in court. He produced a receipt showing he boarded a motor vehicle from Musoli to Kakamega.

The main issue for our determination is whether the Appellant was positively identified, whether the Appellant was found in possession of the stolen items, and whether the prosecution proved its case as required by the law. The trial magistrate was in doubt as to whether the Appellant was identified. We have gone through the evidence of PW1 and PW2 and find that the two witnesses did not positively identify the Appellant. The witnesses did not know the Appellant. The investigating officer testified that the victims could not identify the robbers. This is the same information given to the clinical officer PW6 by PW2. Further, no description of the Appellant was given to the police. We find that the alleged identification of the Appellant by PW1 and PW2 does not meet the standard for positive identification.

The next issue is whether the Appellant was arrested with the stolen items. According to PW7 they found the Appellant waiting to board a vehicle. They arrested him and after searching they recovered some of the stolen items. In his defence, the Appellant stated that he was arrested at Lubao market while waiting to buy a cow. The Appellant produced a ticket for "Okambo Express" indicating it was fare from Musoli to Kakamega for 28th July, 2011. the fare was kshs. 80. the ticket does not give the name or time of the travel.

The prosecution evidence does establish that PW1 and PW2 were robbed of their items on the night of 27th July, 2011. It is also established that some of the items were recovered. PW7 went to the scene and later went back to the AP camp. They arrested the Appellant and according to him some stolen items were recovered. Although no recovery inventory was made, we do find that the stolen items were found in possession of the appellant. It is clear that the Appellant was arrested near the scene. It is the evidence of PW7 that the scene was about 200 metres to the place where the Appellant was arrested and about 500 metres to Lubao market. The robbery had taken place at night and the Appellant was arrested at about 5.30am. The contention by the Appellant's counsel that the defence evidence raised some doubt on the prosecution case is not true. We find that the defence case does not raise any doubt. The place of arrest is Lubao just near the scene of crime. There is no suspicion that the stolen items were recovered from another persons and planted on the Appellant.

PW1 testified that he lost two radios. Its the same radios which he identified to be his when the Appellant was arrested. Other than the radios there was also the extension electric cable and the clothes that PW1

identified to be his. We find that the identification of the stolen items that were recovered was proper. PW2 identified his panga and boots. He properly explained how he identified his boots. We have no doubt that the two witnesses, PW1 and PW2 identified their stolen items. The Appellant testified that he saw the bag in court for the first time. PW1 was present when he went to the AP camp and saw the bag containing the stolen items. The Appellant was at the AP camp having been arrested.

We do find that the prosecution proved its case beyond reasonable doubt. The recovery of the stolen items was made a few hours after the robbery. The doctrine of recent possession does apply. The Appellant's evidence is that he was not arrested with the stolen items. We are satisfied that the Appellant was found with the items a few hours after the robbery. It is not a requirement that a victim of robbery with violence must suffer injuries. However, PW6 testified that he examined PW2 and classified his injuries as harm.

In the end, we do find that the appeal lacks merit and is hereby disallowed.

Dated signed this **11th** day of **February, 2015**

Said J. Chitembwe

George Dulu

JUDGE

JUDG

Dated, delivered and countersigned this **12th** day of **March, 2015**

Ruth Sitati

JUDGE