



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEALS NOS. 258, 259 AND 260 OF 2012

WYCLIFFE SITATI WERE 1ST APPELLANT

RODGERS SOITA WERE 2ND APPELLANT

JAVAN KHAEMBA NYONGESA 3RD APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal arising from the conviction and sentence in Kakamega Chief Magistrate's Court in Criminal 1938 of 2011, the judgment of [M.I.G. MORANGA, P.M] dated 19.10.2012)

J U D G M E N T

The appellants were charged with the offence of robbery with violence contrary to **section 296(2) of Penal Code**. The particulars of the offence were that the appellants *on the 29.9.2011 at around 7.30 p.m. at TairiMoja along Navakholo-Namirama road in Navakholo District within Western Province, jointly with others not before court while being armed with dangerous weapons namely panga and clubs robbed WYCLIFFE KHACHONGWA SIKWAI off a motorcycle Registration No. KMCC 177F TVS Star valued at Kshs.84,500/= and at the time of such robbery wounded him.*

The appellant were convicted and sentenced to death. The 1st appellant **WYCLIFFE SITATI WERE's** grounds of appeal are that the identification was by a single witness without warning itself of the dangers of a single eye witness, there was contradiction in the description of the stolen motorcycle, the prosecution evidence was contradictory, the defence counsel handed over written submissions that were not explained to them, that the trial court did not evaluate the evidence exhaustively, that the first report did not mention his name, the incident took place on a road used by many people and that his alibi defence was not considered. During the hearing of the appeal the appellant relied on his written submissions which expounds on the above grounds. The appellant contends that the name SITATI is used by many people and the other name OWARE is not his name.

The 1st appellant further contends that the complainant lost consciousness and therefore the identification could have been mistaken. Some people went to see the complainant after the incident but he did not mention the appellant's name. The complainant gave the names of the appellants after a period of four days and this raises some doubt. He gave a sworn alibi testimony that was not exhaustively examined by the trial court. His defence shifted the burden of proof to the prosecution.

The 2nd appellant **ROGERS SOITA WERE** filed his grounds of appeal which are that he pleaded not guilty to the charge. The grounds are a replica of those of the 1st appellant. The 2nd appellant filed

supplementary grounds of appeal which are that the identification was by a single witness, when he was arrested he was not told of his charges in a language that he understands, vital witnesses were not called, his sworn defence was not considered. The appellant filed written submissions and he contends that the identification by the complainant could have been mistaken since there were four people at the scene. The appellant further contends that the complainant's evidence is that the appellant was standing on the sides of the motorcycle while its headlights were on. If that was the case then the complainant could not have seen the appellant. The first report did not give his name. The complainant had a phone which was not stolen by the robbers and that shows that there was no robbery as the robbers could not have left their victim with a communication gadget that could have been used against them. The piece of paper that the complainant wrote the appellants' names on was not produced.

The appellant further submits that the complainant is his cousin and when the first report was brought by the arresting officer it did not mention his name. The court ignored the first report. The complainant lost consciousness yet the evidence shows that he called PW4 to assist him.

The 3rd appellant **JAVAN KHAEMBA NYONGESA** filed his petition of appeal on 24.10.2012. The grounds are that he did not plead guilty to the charge, the identification was by a single eye witness, prosecution evidence was not corroborated, the initial report did not mention his name, the case was not investigated to the required standard as there was no investigating officer, the incident occurred along a road which is used by many people, his alibi defence was not considered. The appellant further filed supplementary grounds of appeal which are similar to the above grounds. The written submissions by the appellant raises the same issues as those raised by the other two appellants. The appellant contends that the intensity of light at the scene was not explained. The identification could have been mistaken as the complainant lost consciousness. The investigating officer did not mention the names of the attackers in his statement. During the hearing of the appeal the appellant submitted that the investigating officer got the information from PW5. PW5 himself got the information from the complainant's mother and brother who did not testify. The first report indicated that the complainant was attacked by unknown people.

Mr. Oroni, State Counsel, opposed the appeal and submitted that the complainant identified all the appellants. The 1st and 3rd appellants are his neighbours while the 2nd appellant is his cousin. There was no mistaken identity, the complainant was hit with an object and lost consciousness and he gave the names of the appellants when he regained consciousness.

The prosecution case was that the complainant was flagged down while riding a motorcycle. He was able to identify those who stopped him as the appellants and another person by the name NEWTON who was not arrested. The complainant talked to the appellants before he was attacked. The complainant lost consciousness and was admitted at the Moi Referral Hospital in Eldoret. He gave the names of the appellants while in hospital.

WYCLIFFE KHACHONGA SIKWAYI was the complainant who testified as **PW1**. His evidence is that on the 29.9.2011 at about 7.30 p.m. he carried a lady passenger nicknamed (Drogba PW6) in his motorcycle. On his way back after dropping the passenger he saw four people on the road. He noticed the 2nd appellant who is his cousin and he decided to stop as they had stopped him. He saw the 1st appellant who is his neighbor as well as the 3rd appellant. There was one NEWTON who wanted to be taken home. They discussed and agreed a fare of KShs.30/= . He was suddenly hit with an object and lost consciousness. He later found himself at Moi Referral Hospital. He lost some of his teeth and sustained serious injuries on his face and head. The motorcycle was stolen and was never recovered. He had seen the 1st and 2nd accused during the day on that material day. He gave the description of the clothes the appellants were wearing. The police visited him at Moi Referral Hospital and he gave the names of the appellants by writing them on a piece of paper as he could not talk properly. The appellants were arrested while PW3 was still hospitalized.

PW2, VINCENT BOSIRE was a clinical officer based at Navakholo District Hospital who produced the P3 form which indicated the injuries sustained by PW1. According to PW2 the complainant sustained several injuries including loss of two upper teeth, a broken tooth and multiple fractures of the

jaw bone. The complainant was first seen at Navakholo District Hospital before he was referred to Kakamega Provincial Hospital and later Moi Referral Hospital. **PW3, SGT. AGUSTINE MWAKIO** was based at the Navakholo Police station when the owner of the motorcycle (PW5) went to report the incident on 30.9.2011 at about 12.00 p.m. PW3 visited the complainant on 2.10.2011 at Moi Referral Hospital and the complainant described to him his attackers. He was given the names of the attackers and the appellants were arrested on 4.10.2011 and later charged with the offence.

PW4, MOSES WETUNGA NASUMBA is a bodaboda cyclist. On 29.9.2011 at about 7.30 p.m. he was heading home when he heard someone calling for help while on the side of the road. He saw the complainant PW1 who asked him to be taken to hospital as he had been injured. PW1 did not give him the names of those who had injured him. PW4 assisted in taking the complainant to Navakholo hospital. PW1's phone was in his jacket and it rang. PW4 managed to notify the caller that PW1 had been injured. The complainant was conscious at the hospital but was unable to talk. **PW5, ERNEST MUSUMBA WANYONYI** is a Primary school headmaster and the owner of the stolen motorcycle. He had employed PW1. He got the information on the 29.9.2011 at 7.40 p.m. from PW1's brother. The following day he went to report the matter at the Navakholo police station and later visited PW1 at Moi Referral Hospital. PW1 was mentioning the names of the people who attacked and they were arrested. It is his evidence that the passenger who had been carried by PW1 that night also informed him about the incident.

PW6, PETRONILA TIMINA KENYA was the passenger carried by PW1 nicknamed DROGBA. She is a vegetable vendor and testified that she was carried by PW1 to Navakholo at about 7.30 p.m. She later heard that PW1 had been attacked and informed the owner of the motorcycle.

The appellants were put on their defence and they all gave sworn evidence. The 1st appellant testified that on 29.9.2011 he was at home with his wife and children at about 7.00 p.m. They took supper and slept. The following day he did his normal duties in his farm as well as took his cattle for feeding. On the 2.10.2011 at about 8.00 p.m. police went to his house and arrested him. It is his evidence that he inherited the mother to the 2nd appellant and that is why he was implicated in this offence. The 2nd appellant testified that the complainant is his cousin and they are neighbours at home. He testified that on the 29.9.2011 he was at home at about 7.00 p.m. and he slept with his wife. The following morning he heard that the complainant had been attacked and went to see him at Navakholo hospital but was informed by PW1's mother that the complainant had been transferred to Kakamega hospital. The appellant went back home only to be arrested on the 2.10.2011 at 8.00 p.m. while having supper with his wife.

It is the evidence of the 2nd appellant that the complainant's father tried to inherit his mother after the death of his father. There was also a boundary dispute that was caused by the complainant's father. His mother was inherited by the 1st appellant who took care of the 2nd appellant and his sister. The appellant used to operate a motorcycle but it was later stolen. The complainant's father offered to lease the appellant's land so as to repay the owner of the motorcycle that had been stolen. However, the motorcycle was later recovered.

The 3rd appellant testified that he sells oil at Kharanda market. On 30.9.2011 he heard from his customers that the complainant had been attacked. He went to see him but PW1's mother informed him that the complainant had been taken to Kakamega Hospital. On 2.10.2011 he was arrested at about 9.00 p.m. by police officers and taken to Navakholo police station. He was later charged with the offence.

The main issue for determination is whether it is the appellants who attacked the complainant and robbed of the motorcycle registration number KMCC 177 F on the 29.9.2011. The evidence on record shows that apart from the complainant there was no any other person who witnessed the incident. The appellants contend that the identification was by a single witness and the first report did not give their names. The evidence of PW1 is that the incident occurred at about 7.30 p.m. when he was stopped by four people as he was coming from Navakholo. He knew the people as they are his neighbours and the 2nd appellant is his cousin. It is his further evidence that one of the four people by the name NEWTON wanted to be taken home but PW1 was reluctant as it was late. The 2nd appellant offered to escort them.

By that time the motorcycle had stopped and the head lights were on. According to PW1 NEWTON was at the back the 1st and 2nd appellants were on the side of the motorcycle while the 3rd appellant was at the front. While at the scene PW1 was suddenly hit by an object and he fell unconscious. It is his evidence that there was no other person at the scene.

On their part the appellants gave alibi defences to the effect that they were all in their homes on the 29.9.2011 at 7.00 p.m. with their families. They never went out that night only to be arrested on the 2.10.2011. The appellants contend that there was no mentioning of their names in the first report. Further PW4 went to the rescue of the complainant. At that time the complainant could talk but did not give the names of the attackers to PW4. From the evidence on record it is established that the complainant sustained very serious injuries and he was unconscious. It is also established that the complainant managed to talk to the four people who stopped him before he was attacked. The complainant engaged in a discussion with the attackers and it was about 7.30 p.m. He knew his attackers and when he gained consciousness he was able to give out their names. Although the appellants contend that the complainant could have been mistaken and took time to give out their names, I am satisfied that the circumstances of the case are that the complainant could not have given the appellants names to PW4 at the time of rescue as according to the evidence on record the complainant was in great pain and could not talk. I do note that the complainant called PW4 and asked to be taken to hospital. Taking the nature of the injuries sustained by the complainant, it is clear that the complainant was gaining and losing consciousness.

According to the investigating officer PW3 he visited the complainant at Moi Referral Hospital on 2.10.2011. The complainant gave him the names of his attackers and informed him that he could identify them as they were people from his neighbourhood. The complainant could even describe the clothes the attackers were wearing. The appellants were arrested at their respective homes and nothing was recovered from them. The item stolen was a motorcycle that could have been taken to another place. The arrest occurred after a period of three days and it was possible to hide the motorcycle. It is clear from the evidence that the 2nd appellant was able to drive a motorcycle.

The appellants contend that their counsel filed written submissions that were not explained to them. The record shows that Mr. Kundu appeared for all the appellants. The matter was listed for mention for 27.7.2012 and it was fixed for judgment on 17.10.2012 as the presiding was proceeding on leave. The judgment was read on 19.10.2012. Mr. Kundu was absent when the matter was fixed for judgment and it is not clear whether he filed submissions or not although he had indicated that he was going to file written submissions through Mr. Wekesa who held his brief. The fact that the submissions were not explained to them cannot be a ground of appeal. Whether the defence counsel filed the submissions or not cannot be an issue. There is no mandatory requirement that submissions must be filed or heard before a judgment is delivered. The appellants did not inquire whether their counsel had filed submissions. I have gone through the record of the lower court and I have seen the submissions filed by the defence counsel dated 31.7.2012 and filed on the same date. On the issue of the allegation that the appellants were not explained the reason of their arrest by the police officers, I do hold that that cannot be a reason for acquittal as the appellants were arraigned in court on the 4.10.2011 which was two days after the arrest. I am certain that the police explained to the appellants why they were being taken to court.

The judgment of the trial court shows that the trial magistrate took into account the fact that the identification was by a single witness. The court noted that the witness appeared before a court and was not driven by malice. We are in agreement with the findings of the trial court that although the identification was by a single witness, the evidence not doubtful and the case was proved beyond reasonable doubt. The identification was proper and it was not a case of mistaken identity.

In the end, we are satisfied that the case was proved against the appellants as required by the law. The appeals lack merit and the same are disallowed.

Delivered, dated and signed at Kakamega this 18th day of February 2014

SAID J. CHITEMBWE

GEORGE DULU

JUDGE

JUDGE