



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEAL NO. 144 OF 2012

JACOB PRINCE MWANIKI APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal against conviction and sentence arising from the judgment of [S. M. SHITUBI, CM] dated 9.5.2012 in the Chief Magistrate's Court at Kakamega in Criminal Case No. 2489 of 2011)

J U D G M E N T

The appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence are that the appellant *on the 29.10.2011 at Emulundu village, Emukaya Sub-location, Kakamega Central District jointly with others not before court while armed with crude weapons namely rungus robbed SAMWEL SHITOTE of motorcycle make Boxer Registration No. KMCN 300 S black in colour valued at KShs.80,000/= and immediately before the time of such robbery threatened to use actual violence to the said SAMWEL SHITOTE.*

The appellant was convicted of the charge and sentenced to death. The grounds of appeal are that the appellant pleaded not guilty to charge, the charge sheet was defective, the prosecution evidence was speculative and not corroborated, the appellant's defence was not considered, the appellant was also a victim in the alleged crime as his motorbike was also robbed and that the identification was by a single witness. The appellant filed written submissions and relied on them. The appellant contends that PW1 referred to motorcycle registration number KMCN 300 S which was reflected on the charge sheet but PW2 referred to KMCC 300 S. The witnesses gave different time of the incident and it is not clear whether the incident occurred at 8.00 or 10.00 p.m. Further that there was no light at the scene of robbery. The identification parade was based on the colour of the appellant and not his physical complexion. The first report gave the name of **PRINCE MWANIKI** and not **JACOB PRINCE MWANIKI**.

The State Counsel, Mr. Oroni opposed the appeal and relied on the evidence on record.

Seven witnesses testified before the trial court. **SAMUEL SHITOTE, PW1**, was the complainant. He testified that he is a boda boda operator having been employed by JENIPHER MMBONE (PW2). On the 29.10.2011 at 10.00 p.m. he got a passenger who informed him that he was the owner of a motorcycle and the person who was operating the motorcycle was having problems as the motorcycle had developed mechanical problems at Emulundu. He carried the passenger whom he did not know up to Emulundu where they saw a young man with a motorcycle. The passenger stopped PW1 indicating that he had seen his motorcycle. The person who was with the motorcycle asked PW1 whether he had spanners. PW1 stopped the motorcycle and shortly another person went to the scene screaming kill him, kill him. About four other people armed with rungus appeared from the bushes. PW1 ran away and left the motorbike

while its lamps were on.

PW1 further testified that he met **JACOB IMBUNDU (PW3)** a colleague in the boda boda business and he explained his predicament. They went to the direction taken by the robbers and reached Shibuli area where they saw the appellant had packed motorcycle number KMCN 259 S outside Lucky Bar. PW1 identified the motorcycle as the one he had seen at Emulundu and also identified the appellant as the one who was with the motorcycle. PW1 and his colleague confronted the appellant who managed to escape. They towed the motorcycle to Bukura police patrol base. It is his evidence that he was not beaten but was threatened. The stolen motorcycle was not traced. When he went to the police he gave the description of the appellant as a brown young man.

PW2, JENIPHER MMBONE, was the employer of PW1. She was informed of the incident on the same date at about 1.00 a.m. while she was sleeping by PW1. PW1 informed her that they had managed to take another motorcycle to the police station and could identify his attackers. **PW3, JACOB IMBUNDU**, testified that he met PW1 on the 29.10.2011 at about 9.00 p.m. who informed him that the motorcycle he was riding had been stolen. PW1 told her that he had noted the motorcycle KMCN 259 S as the one that was claimed to have had mechanical problems. They went up to Shibuli and saw the appellant pushing his motorcycle and PW1 identified it as the one he had met at Emulundu. They confronted the appellant and asked him to show them the stolen motorcycle or he will be taken to Bukura police station. The appellant managed to escape and they took the motorcycle to Bukura police station.

PW4, HEZEKIA ASEGA MUGAVALE, is a teacher by profession and the owner of motorcycle KMCN 259 S. His evidence is that he had employed the appellant to operate the motorcycle. On the 28.10.2011 the appellant dropped him at home at Lubao at 5.00 p.m. He expected the appellant to pick him up on Monday but he did not turn up. PW4 went to work and by 10.00 a.m. the appellant had not appeared. He made inquiries and got information that his motorcycle was at Bukura police station and had been used in a theft. He went there with his ownership documents and was told to look for the appellant. He saw the appellant on 24.11.2011 and notified the police who went to arrest him.

PW5, APC WILLY CHESONOK GIBELIO, was attached at the Lurambi AP post. On the 24.11.2011 he was instructed to go and arrest the appellant and went with PW4 who pointed out the appellant and they arrested him. PW6, CPL ODERO JULIUS was based at the Bukura patrol post as the officer in charge. The incident was reported at the station on the 29.10.2011 and he saw the report on the following day. He investigated the matter and on 24.11.2011 he heard that the appellant had been arrested. An identification parade was conducted by Inspector Kasyula (PW7). He decided to charge the appellant with the offence. **PW7 IP KASYULA** conducted the parade at the Kakamega police station. The appellant was identified by PW1 during the parade.

The appellant was put on his defence and he gave sworn testimony. His evidence is that he is a motorcycle rider and on 28.10.2011 he worked up to evening. That was a Friday. On Saturday morning the owner of the motorcycle collected it for service and he was to return it on Monday but did not. The appellant decided to do other casual jobs and stayed at home. After about 25 days he was arrested and taken to Lurambi AP camp. He was later taken to Kakamega Police station and charged with the offence.

The prosecution evidence shows that the complainant PW1 was robbed of motorcycle registration number KMCN 300 S on the 29.10.2011 at 10.00 p.m. The main issue for determination is whether the appellant was one of the robbers. It is the appellant's submission that he was one of the victims of the robbery. However, the evidence on record shows that when the complainant and PW3 saw him at Lucky Bar, the appellant still had his motorcycle. It is clear that the appellant's motorcycle was not stolen and it is the one that was taken to Bukura police patrol base. According to the complainant he was able to identify the appellant as the one who had motorcycle number KMCN 259 S at Emulundu. He saw the motorcycle which had its plugs had been removed. It is the same motorcycle that was taken to Bukura police patrol base. The appellant's evidence was that his employer had taken the motorcycle for repair on Saturday morning and he was to return it on Monday but he did not. According to the owner of the motorcycle, PW4, the motorcycle was with the appellant and he was expecting the appellant to pick him on Monday morning and drop him at his place of work. According to PW4 he made inquiries when the appellant

failed to turn up and got information that the motorcycle was being held at Bukura police base. The evidence of PW4 does corroborate that of PW1 and PW3. It is also in line with evidence of PW6 to the effect that the incident was reported at the Bukura Police patrol base on the 29.10.2011. PW6 was able to get information from the Occurrence Book on 30.10.2011. PW4 went to enquire about the loss of his motorcycle at Kakamega Police Station and he was referred to Bukura police patrol base.

The appellant was arrested on the 24.11.2011. He contends that he was at home doing his casual jobs. It is clear that from the date of the robbery, that is 29.10.2011, to 24.11.2011 the appellant had not conducted his employer PW4 and report that the motorcycle had been stolen from him. The appellant's explanation that the motorcycle was with the employer cannot be true as it was at Bukura police patrol base.

According to the complainant, the passenger he carried informed him to stop after he saw the appellant with the motorcycle. The evidence shows that indeed the passenger carried by PW1 was not the owner of the motorcycle that was with the appellant. The question is whether it was mere coincidence that the robbery occurred at the same place where the appellant had stopped the motorcycle he was using. PW1 testified that four other people appeared and started screaming. PW1 ran away and he was not injured. It is clear to us that the appellant was part of the scheme to steal the motorcycle. It was not pure coincidence that the appellant had stopped his motorcycle and there were four people in the bush at the same place but they did not rob the appellant only to appear after the complainant had stopped his motorcycle. The appellant was not assaulted and was seen shortly at Lucky Bar by the complainant with his motorcycle intact. We do find that the appellant was part and parcel of the gang that robbed the complainant.

Although, the complainant was not injured during the incident, we do find that the ingredients of robbery with violence were proved as there were more than four people who threatened to injure the complainant. The robbers were armed with rungun and threatened the complainant. We are satisfied that the trial magistrate came to correct conclusion and that the offence was proved. The defence evidence did not disprove the prosecution evidence. This is not a case of identification by a single witness. The sequence of events as per the prosecution evidence does show that the appellant participated in the robbery.

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

Delivered, dated and signed at Kakamega this 17th day of February 2014

SAID J. CHITEMBWE

HELLEN WASILWA

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