



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEALS NOS. 184 AND 185 OF 2012**

**MOSES LIBAKO LITINDO .....1<sup>ST</sup> APPELLANT**

**BENSON SAKWA ALUDA ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Appeal against conviction and sentence arising from the judgment of [M.I.G. MORANGA, PM] dated 29.8.2012 in the Chief Magistrate's Court Kakamega in Criminal Case No. 1989 of 2011)***

**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 the **Penal Code**. The particulars of the offence were that the appellants *on the 26.2.2009 at about 9.40 p.m. at Igunga sub-location, Chavakali location in Vihiga District within Western Province, jointly with others already before while armed with offensive weapons namely pangas and sharp torches robbed of **PATRICK MWAVALI KAIYA** his one Television make Sanyo S/No N/A black and white, one radio cassette make Panasonic, two mobile phones make Nokia and Samsung, one panga, one torch and cash money KShs.19,000/= all valued at KShs.38,600/= and at or immediately before or after such robbery used actual violence against **PATRICK MWAVALI KAIYA**.*

The 1<sup>st</sup> appellant was also charged with an alternative count of handling stolen goods contrary to **section 322(2)** of the **Penal Code**. The appellants were convicted of the main count and sentenced to suffer death. the grounds of appeal for the 1<sup>st</sup> appellant are that the evidence of recognition was not supported with a first report to the police or those who went to the complainant's rescue, he pleaded not guilty to the charge, the circumstances were not favourable for positive identification, the prosecution evidence was full of contradictions, his sworn defence was not considered and that there was no proof of ownership of the stolen items. The appellant filed written submissions which mainly elaborate on the above grounds.

The 2<sup>nd</sup> appellant's grounds of appeal are that the conviction is based on the evidence of a single identifying witness. Identification was based on recognition and it is not supported by a first report, vital witnesses like arresting and investigating officer as well as a doctor who treated the complainant did not testify, the charge sheet was defective and his sworn defence was not considered.

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

The record of appeal shows that the case was heard by two magistrates. Mr. Onyina, SRM of Vihiga heard PW1 to PW4 before he disqualified himself and the file was brought to Kakamega. Mrs. Moranga continued with the matter and heard the evidence of PW5 to PW9. PW1, **PATRICK KAIYA**

**MWAVALI**, was the complainant. His evidence is that on the 26.2.2009 at about 9.40 p.m. he was in his house with his wife PW2 when three robbers attacked him. PW1 had gone out for a short call when the robbers entered. He identified the two appellants but could not identify the third one. He was assaulted with a panga and robbed of Kshs.18,000/=, a wallet that had KShs.1,000/=, two mobile phones, a TV, a Radio and several other items. His wife was in the bedroom heard the commotion and sneaked out using the back door. PW1 was tied and injured. The robbers ran away and shortly the police arrived.

PW1 was taken for treatment at Kilingili Health Centre. The following day he heard that his TV had been seen at the home of one NGERESA (PW4). He went there and identified the TV. Ngeresa told him that it was the 1<sup>st</sup> appellant who had taken the TV to him. They went to the house of the 1<sup>st</sup> appellant and recovered some clothes which he identified as the clothes the robbers were wearing. The wife of the 1<sup>st</sup> appellant was arrested as the appellant was not at home. The 1<sup>st</sup> appellant disappeared in Nairobi and on the 6.3.2009 he was seen in Kisumu. PW1 notified police officers at Mbale police station and the 1<sup>st</sup> appellant was arrested. The 2<sup>nd</sup> appellant was arrested on the 29.4.2009 through the assistance of PW1.

**PW2, ANNE ONGACHI**, was with PW1 when the robbery occurred. She sneaked out and went to inform the neighbours. She then went to inform the Administration Police officers. They went back with the officers at her house but by then the robbers had ran away. They found PW1 who was injured and several items had been stolen. **PW3, BENSON SHIKUNYI OMULINDI**, is a boda boda operator. On the 27.4.2009 at about 9.00 a.m. he was engaged by the 1<sup>st</sup> appellant and took a TV to Ngeresa (PW4) for repairs. The TV was covered in a lesso. He went together with the 1<sup>st</sup> appellant to the technician. **PW4, RONALD NGERESA MUHISI**, is a technician. On the 27.2.2009 he was at his workshop at about 11.00 a.m. when the 1<sup>st</sup> appellant took to him a TV on a motorcycle for repair. It was a Sanyo black and white TV. Two people went to his workshop while he was repairing the TV. The 1<sup>st</sup> appellant was present and he escaped indicating that he would collect the TV later. Shortly police officers went to his workshop in the company of PW1 who identified the TV as his. They went to the 1<sup>st</sup> appellant's home and recovered some clothes. The wife of the 1<sup>st</sup> appellant was arrested.

PW5, AGGREY NDOLO INDIMURA, is a neighbor to PW1. On the 26.2.2009 he heard PW1 screaming at about 9.50 p.m. He went to PW1's house and found him tied up. They untied him and he told them that he had been robbed. PW6, RODGERS OKWELO, is a boda boda operator. He knows the 1<sup>st</sup> appellant. On the 27.2.2009 he saw the 1<sup>st</sup> appellant carrying a Television set to the house of PW4. He was later asked by police officers whether he had the telephone number of the 1<sup>st</sup> appellant and he gave them. The 1<sup>st</sup> appellant told him on phone that he was in Nairobi.

WYCLIFFE DEMESI, was PW7. On the 27.1.2009 at about 8.00 a.m. he saw the 1<sup>st</sup> appellant being carried on a motorcycle carrying a TV set. He then heard that PW1 had been robbed at night. He went to PW1's house and was informed by PW2 that they had lost a TV. He went to PW4's workshop and saw a Sanyo black and white TV. PW7 notified the police about the incident as well as the area chief. That led to the arrest of PW4 and the TV was taken. PW8, HILLARY LWANGU ONGWESO, is a student at Igunga Primary School. On the 27.2.2009 he was heading to school when he found a mobile phone near PW1's compound in a ditch. He notified PW2 who went and picked it and identified it as one of the stolen items.

PW9, was PETER ISABWA, the Chief of Chavakali location. He got information about the incident from PW7 and went to PW4's workshop. They recovered the stolen TV and went to the 1<sup>st</sup> appellant's home. He did not know the two appellants before.

The appellants were put on their defence. The 1<sup>st</sup> appellant in his sworn testimony stated that on the 18.1.2009 he took his TV for repair. He then went to Nairobi as he does business of selling maize. He was to collect maize from Lessos. He heard from a neighbor his wife and children had been arrested. On the 6.2.2009 he left Nairobi and went to Kisumu as he heard that his wife was at Kodiaga prison. While in Kisumu on his way to Kodiaga prison he was arrested. He denied committing the offence. The 2<sup>nd</sup>

appellant gave sworn testimony. He was arrested on the 29.4.2009 at a changa'aa den. He was later charged with the offence.

We have gone through the record of the trial court and the judgment of the trial court. We do note that the investigating officers and the arresting officers together with the health officer who filled in the P3 form for the complainant did not testify. The trial magistrate noted all those facts in her judgment but was of the view that the case had been proved beyond reasonable doubt. The main issue for determination is whether the prosecution proved its case as required by the law. The evidence on record shows that indeed PW1 was robbed of his items including a black and white TV. It is also clear from the evidence that it is the 1<sup>st</sup> appellant who took the TV to PW4. The defence evidence did not controvert the evidence of the prosecution. We however, do find that the conviction is not safe as it is not clear as to whether the complainant reported at the police station that he could identify his robbers. It appears that it is the complainant who facilitated the arrest of the two appellants. Indeed other than the evidence that PW1 saw the 2<sup>nd</sup> appellant at scene there is no any other evidence whatsoever touching on the 2<sup>nd</sup> appellant. It is only the evidence of the complainant indicating that he heard that the 2<sup>nd</sup> appellant had been seen at Kilingili and he went to arrest him. The trial magistrate noted that there was no identification parade that was conducted and correctly indicated that it was not necessary as the complainant was present during the time of arrest.

Although a criminal case can be proved without the evidence of the arresting and investigating officer, we do find that this was one case whereby the investigating officer ought to have testified. Ideally all the items that were marked for identification were not produced. In essence therefore no recoveries were made. The record of the trial court shows that the case started in 2009 and the prosecution was given all the time to bring the witnesses. The officer who treated the complainant did not produce the P3 form. Although robbery with violence can be proved without the production of medical evidence such as where the victim is threatened and the robbers are more than one, it would have been advisable in this case if the medical officer had testified. The trial court adjourned the matter several times until it forced the prosecution to close its case. On the face value one can conclude that the 1<sup>st</sup> appellant was either one of the robbers or was found in possession of the stolen TV. However, as required by the law, a criminal case has to be proved beyond reasonable doubt. There was need to corroborate all the prosecution evidence by way of evidence by the investigating officer. All the items that were recovered ought to have been produced. Since the prosecution was given ample time and did not produce all the witnesses, we do find that there is no need to order for a re-trial. The evidence against the 2<sup>nd</sup> appellant is not sufficient to sustain a conviction.

In the end, we do find that the appeal is merited and the same is allowed. The appellants shall be set at liberty unless otherwise lawfully held.

**Delivered, dated and signed at Kakamega this 17<sup>th</sup> Day of February 2014**

**SAID J. CHITEMBWE**

**GEORGE DULU**

**JUDGE**

**JUDGE**