



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL NO: 267 OF 2012

(APPEAL ARISING FROM THE JUDGMENT OF L.O. ONYINA SRM

DATED 4/9/2009 IN VIHIGA PM'S COURT VIDE CR. CASE NO. 338 OF 2006)

SAMWEL KWENDO.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellant was charged with an offence of robbery with violence contrary to section 296 (2) of the penal code. The particulars of the offence were that the appellant on the 25/12/2005 at stage Matope , Iboona sub location, Wekhoma in Vihiga District within the western province, jointly with others not before court being armed with dangerous or offensive weapons namely pangas, runigus and sticks robbed BENARD OTIENO KWENDO one quarts wrist watch valued at Ksh 300/= and at or immediately before or immediately after the time of such robbery used actual violence by maiming the said BENARD OTIENO KWENDO.

The appellant was convicted of the offence and sentenced to serve death. The grounds of appeal are that the trial court relied on the evidence of a single witness, one witness by the name DOUGLAS OMAHA was not called to testify, no weapon was recovered, the prosecution evidence was doubtful, the evidence on identification was by recognition yet there was no description given of the assailants and that the evidence was pure hearsay.

The appellant filed the written submission and entirely relied on them. It is contended that the arresting officer did not testify and nothing was recovered from the appellant. Those who were in the company of the complainant were not called to testify.

MR.ORONI, state counsel, opposed the appeal. Counsel submitted that the appellant was well known to the complainant. The incident occurred during the day and the evidence of the clinical officer reinforces the prosecution evidence. The defence was weak and the conviction was safe.

Three witnesses testified before the trial court. BERNARD OTIENO KWENDO, PW1, was the complainant. On 25/12/2005 at 9.a.m he went to Kima area for church service. He left church at 5 pm and headed home in the company of Douglas Omuha. While on their way the appellant passed them holding a panga. He scratched the panga on the ground and shortly started calling other people. Six other people joined the appellant and they held PW1. He was struck with a rungu by the appellant and he lost four lower teeth and two upper teeth. They frisked him and took his quarts wristwatch. PW 1 managed to escape. The following day he went to **Kima Health Centre** where he was treated and discharged. The

matter was reported to the police. PW1 was issued with a P3 form which was filled by PW2. He was not present when the appellant was arrested. He was not able to identify the other attackers.

PW2 SANDIFIN AYIENDA is a clinical officer who was based at the Vihiga District hospital. He filled the P3 form and produced it in court. The complainant lost 6 teeth. PW3 was Inspector DAVID APIMA. Who was based at the Vihiga police station. The incident was reported to him 28/12/2005 and PW1 informed him that he knew one of the attackers by name. The matter was reported at the Emuhaya AP camp. The suspect was the appellant and PW1 informed him that he had lost a wristwatch.

The appellant was arrested on the 26/2/2006 by AP officers from Emuhaya and taken to Vihiga police station. Nothing was recovered from the appellant.

The appellant was put on his defence. In his sworn evidence he stated that he works at Kima stage where he arranges motor vehicles at the stage. On the 27/3/2006 he was arrested at the stage for touting and taken to Emuhaya camp. He was later taken to Vihiga police station and charged with the offence.

The main issue for determination is whether the appellant violently robbed the complainant while in the company of other people. The appellant contends that nothing was recovered from him and that crucial witnesses were not called to testify. These witnesses include CALEB OMUKHA and the arresting officer. The complainant testified that he knew the appellant and gave his name to the police. The incident occurred on the 25/12/2005. The charge sheet shows that the appellant was arrested on 26/3/2006. Although the record indicates that the appellant would not be traced at his place of residence as per the evidence of PW3, it is not clear whether indeed the appellant was not at his home. PW1 was not present when the appellant was arrested. It is also not clear whether the police used to visit his house and fail to locate him. The arresting officer could have explained why they arrested the appellant.

Given the evidence on record we do find that the prosecution did not prove its case beyond reasonable doubt. Douglas Omuha could have testified so as to corroborate the complainant's evidence. Although the incident occurred at about 5 pm it is not clear why PW1 could not have led the police to the appellant's home yet he knew the appellant very well. The defence evidence raises doubt on the prosecution case. It is not proved beyond doubt that indeed the appellant was robbed of his wristwatch.

In the end ,I do find that the appeal is merited and the same is allowed.

The appellant shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Kakamega this 19th day of March 2014

SAID J. CHITEMBWE

HELLEN WASILWA

JUDGE

JUDGE