



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL APPEALS NOS. 204 AND 205 OF 2012

SAMSON MWANGE 1ST APPELLANT

YASSIN CHOGO JUMA 2ND APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal against conviction and judgment from the original Criminal Case NO. 510 of 2010 in the Principal Magistrate's Court Vihiga arising from the Judgment of [G. MMASI, PM] delivered on 15.8.2012)

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 the **Penal Code**. The particulars of the offence were that the appellants *on the 14.5.2010 at Chango sub-location in Maragoli Location in Vihiga District within Western Province jointly with others not before court while armed with offensive weapons namely pangas (Matchet) rungus (club) Iron bars huge stone and sharp torches robbed **RONALD MUGOYA BUSAKA** of woofers with two speakers one car exide battery, two mobile phones make Motorola V3, Nokia 2680 DVD make Sony, one bed sheet blue and yellow in colour and cash KShs.15,000/= (Fifteen Thousand Shillings Only), all these were valued at KShs.35,000/= (Thirty Five Thousand Shillings Only). The property of **Ronald Mugoyia Busaka** and immediately after such robbery assaulted the said **RONALD MUGOYIA BUSAKA**.*

The appellants were convicted and preferred this appeal. The grounds of appeal for the 1st appellant are that the complainants were not aware that the appellants had been arrested, the prosecution evidence was contradictory and inconclusive, the appellant was not given witness statements, no names were given in the first report and that the evidence was from one family. The appellant filed written submissions. He contends that his alibi defence was ignored. The source and intensity of the light was not clear. Further, that it was alleged that there was a panga that had blood stains but it was not produced or verified to confirm that the blood stains were those of the complainant. PW1 did not book his report with his names and that there were serious errors in the prosecution case.

The grounds of appeal for the 2nd appellant are that he was not given written witness statements, the prosecution evidence was inconclusive and the case was not proved beyond reasonable doubt and that the names of the assailants were not given to the police. The appellant filed written submissions. He contends that the evidence was from the same family members although neighbours and the area chief are said to have gone to the scene. Although the evidence is that of recognition, the names of the robbers

were not given to the police. The name of the appellant was given at the scene yet a report had already been made to the police with no names given. Appellant submits that PW4 who allegedly held one of the robbers did not identify the robber while PW1 claimed to have identified the appellant. According to the appellant there were contradictions in the prosecution evidence regarding the time of the attack and the time when the complainant was treated at the hospital. Finally he submits that his defence to the effect that he was arrested in his house was ignored yet it was in line with the prosecution evidence.

The State Counsel, Mr. Oroni, entirely relied on the evidence on record.

The record of the trial court shows that five witnesses testified. **PW1, RONALD MUGOYIA BUSAKA** was the complainant. He is a teacher at Demesi Secondary School. On the 14.5.2010 at 1.30 a.m. he was asleep in his bedroom when the house was broken into and three robbers entered. He was with his wife (PW2) and his brother's son (PW4). The robbers had torches and pangas. PW4 was sleeping upstairs and when he came down he was taken to PW1's bedroom. They were told to lie facing downwards. The robbers took KShs.13,000/= from the purse of PW2 and KShs.2,000/= from PW1's clothes. While the robbery was continuing one of the robbers was with them in the bedroom. PW1 rose and held the robber by the neck and struggled with him. PW4 went to assist him and they struggled and took the panga from him. The robber told his colleagues who were in the sitting room "lete bunduki ingine" bring another gun. Those who were outside the bedroom managed to push the bedroom door open and managed to cut PW1 with a panga. PW1 identified the two appellants as they are people whom he knows. He identified the 2nd appellant as the person he was struggling with. He did not identify the 3rd robber. The robbers left and they discovered that they had stolen two mobile phones, a car battery and a computer speaker. PW1 was taken to Vihiga hospital. The robbers left a panga and a Marvin cap that were collected by the police. PW1 informed the police that he had identified the appellants and gave them their names as **RWIMBURI** and **CHOGO**. None of the stolen items were recovered.

PW2, WILKISTER MUGOYIA is the wife of PW1. She is the Deputy Principal at Womulalu Secondary School. Her evidence is similar to that of PW1. She further testified that when they were made to sleep facing downwards she did not do so as she was pregnant. She slept by her side. The robbers had torches which had bright light and were flashing in the house. Her husband held one of the robbers and she started screaming for help. She was able to identify the 1st appellant as the one who opened her purse and took the money. She also identified the 2nd appellant as he used to assist people to carry their luggage at the stage and at one time he carried some windows for her. She identified the 2nd appellant as the one who was struggling with her husband. She escaped when PW1 was cut with a panga. The house had electricity but the lights were off. When the robbers left they switched on the lights and recovered a panga, a Marvin and a green re-chargeable torch. The 1st appellant was the one wearing the Marvin during the robbery. The police went to the scene and they were given the names of the appellants.

PW3, JOHN SHIGALI is a clinical officer who was based at the Vihiga District hospital. He attended to the injuries sustained by PW1. According to him PW1 sustained two superficial cuts on the back and a cut on the right shoulder. He also had superficial cuts on the right and left elbow. The injuries were graded as harm. **PW4, FELIX AYOLI** was in PW1's house but was sleeping upstairs. He was a Form Four student at Gisamabi Secondary School. He was a day scholar and was staying with his uncle, PW1. On the material night he heard commotion downstairs and he switched on the light. He realized there was a problem and switched off the lights. He went downstairs and saw two people standing in the corridor. He was harassed and told to go to his auntie's bedroom. He found his auntie there together with his uncle. The robbers started ransacking the pockets of his uncle's clothes. He went to assist his uncle when he was struggling with one of the robbers. The other robbers pushed the door open and cut his uncle. The robbers were flashing their torches and he was able to identify one of the robbers by physical appearance but did not know his name. According to him, it was the 1st appellant whom he saw that night.

PW5 CI PAUL KIMETO was based at the vihiga police station and investigated the matter. He was notified of the robbery on the 14.5.2010 at about 5.00 a.m. and he went to the scene. He conducted a

search in the neighbourhood with assistance of members of the public and arrested three suspects. The complainant informed him that he had identified two people who were the appellants. They went to the 1st appellant's house and recovered a panga which had blood stains. The 2nd appellant was arrested in another house where the police did not recover anything. The raid was conducted at about 6.00 a.m. and the appellants were found in their houses.

The appellants were put on their defence and both gave unsworn testimonies. The 1st appellant stated that he quarreled with a colleague with whom they had washed a motor vehicle and started fighting. Police officers went and arrested him while the other person ran away. He was later charged in court with the current offence. The 2nd appellant stated that he sells chang'aa. On the 17.5.2012 at about 8.00 a.m. police officers went to his house to search for chang'aa but they found none. He was beaten up and arrested and taken to Vihiga police station. He was later charged with this offence.

The prosecution evidence shows that the complainant was violently robbed of his property on the 14.5.2010 at about 1.30 a.m. The main issue for determination is whether it is the appellants who robbed the complainant and whether the appellants were positively identified. It is the evidence of PW1, PW2 and PW4 that they were asleep when they were attacked by three robbers. The robbers had torches and were flashing them. The three witnesses were put in one room where they were with one robber who had a torch and a panga. The appellants contend that the circumstances were not conducive for positive identification as the source of light was not clear. It is clear from the evidence on record that the robbers had torches and that was the only source of light during the robbery. The victims switched on their light after the robbery. It is the evidence of PW1 that when he was in the room with one of the robbers he decided to attack him and he struggled with him. PW4 went to assist him and they managed to overpower him. At that juncture the robber called his colleagues who were outside asking them to give him a gun. PW1 managed to identify that robber who was in the room as the 2nd appellant. He informed the police that he had identified the 2nd appellant.

It is also the evidence of PW1 that when the robber he had overpowered called for assistance his colleagues pushed the bedroom door and managed to open it. One of them cut PW1 with a panga. PW1 managed to identify the robber as the 1st appellant. He knew him by the name RUIMBURI. With regard to the evidence of PW2 she testified that she saw the 2nd appellant struggling with her husband (PW1). She knew the appellant and there was bright light from the torches. It is her evidence that she was able to clearly identify the 2nd appellant as he was struggling with PW1. The torch of the 2nd appellant was on and she identified him. It is also her evidence that it is the 2nd appellant who opened her purse and took out some money. She had known the appellant before. She was near her husband when the 2nd appellant was struggling with him. She gave the names of the two appellants when the police went to the scene. PW2 also testified that she also identified the 1st appellant whom she knew as SAMSON RUIMBURI. She knew the two appellants as they come from the neighbouring village. She knew the 2nd appellant as he used to assist people to carry their luggage at the local bus stage. It is the prosecution evidence that the robbers were flashing their torches and the victims could see their faces.

The defence evidence dwelt on the manner in which the appellants were arrested. The appellants maintain that their alibi defences were not considered. According to PW5 they conducted a raid at about 6.00 a.m. The robbery occurred at about 1.30 a.m. It is therefore clear that the appellants could have had the time to commit the robbery and go back to their respective homes. The arrest was made immediately and PW1 was taken to hospital. The contention that there was no first report with the appellants' names cannot hold. It is the evidence of PW5 that the victims of the robbery informed him that they had identified the two appellants. The items stolen were moveable items which could have been hidden elsewhere. From the evidence on record we do find that the circumstances were conducive for positive identification. The 2nd appellant was alone with the victims in the bedroom. The victims blocked the door to the bedroom and the torch light enabled the victims to identify the 2nd appellant. The 1st appellant went to rescue the 2nd appellant and in the process he was recognized. We do find that the torch light was sufficient for positive identification. PW1 and PW2 knew the two appellants very well and this was a case of recognition.

In the end it is our finding that the prosecution proved its case beyond reasonable doubt and the trial court arrived at the correct decision. The appeals lack merit and the same are disallowed.

Delivered, dated and signed at Kakamega this 28th day of May 2014

SAID J. CHITEMBWE

GEORGE DULU

J U D G E

J U D G E