



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 266 OF 2011

CONSTANT WESONGA OMBIHWAAAAAAAAAAAAAAAAAAAAAPPELLANT

V E R S U S

REPUBLICAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAAARESPONDENT

*(Appeal from the original Criminal Case No. 873 of 2010 in the Principal*

*Magistrate's Court Mumias [H. WANDERE, PM]*

**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 were that the appellant on the 25.1.2009 in Matungu district within Western Province with others not before the court, while armed with dangerous weapons namely panga, robbed **E S** of cash money KShs.10,000/=, two phones make Nokia 16000 Motorola, three suit cases, assorted clothes, a camera make Kodak a deck make J.V.C., two A.T.M. Cards for Co-operative Bank and National Bank all valued at KShs.110,000/= and at the time of such robbery used actual violence on the said **E S**. The appellant was also charged with a second charge of causing grievous harm contrary to section 234 of the Penal Code. He was convicted of both counts and sentenced to suffer death.

The grounds of appeal are that he did not plead guilty to the charge. There was no proper identification, the prosecution witnesses were not credible, the doctrine of recent possession was not proved and his alibi defence was not considered. The appellant filed written submissions which mainly expound on the above grounds. He further submitted that he was arrested after a period of one year and eight months outside a shop. The State opposed the appeal and relied on the evidence on record. Mr. Ngetich submitted that the appellant's daughter was found with the stolen clothes and that there was no mistaken identity.

Before the trial magistrate **E S** was the complainant in the main count of robbery with violence. She testified that on the 25.1.2009 at about 8.00 p.m. she was at home with her husband and children when three men entered their house and told them to lie down. The generator was on and there was electricity. The robbers took their phones and KShs.10,000/=. They assaulted them with pangas and whips. Her daughter PW2 was cut on the head and she was bleeding profusely. The robbers also took their clothes and left. They managed to untie themselves and her husband and children were later taken to Busia District Hospital for treatment. On the 8.8.2010 her daughter PW2 came from the market and informed her that they had seen a child wearing one of their stolen clothes. She also saw the child and talked to her. The child told her that it was her father who had given her that dress. She notified the police and they went to the appellant's house. The house was searched and the appellant's daughter escaped. She managed to recover a briefcase which she identified as hers. It is her evidence that the appellant's home is about 200 meters from hers. She never saw the appellant during the robbery.

**PW2 R S** was a form II student at [particulars withheld]. She was present during the robbery. Her evidence was that the robbers took phones and clothes. She was hit on the head with an iron bar and she bled profusely. She saw the appellant during the robbery as he is brownish and not tall. She was issued with a P3 form. Her sister PW3 later saw a girl wearing her stolen dress at Mwinami trading centre. She never knew the appellant before the robbery. **PW3 A S** is **PW1's** daughter. She was a Standard 7 student

at [particulars withheld] School. On the 8.8.2010 at midday she was at Mwinami market when she saw a girl wearing one of her stolen clothes. She was not present during the robbery. She notified her mother PW1 and after a search their suitcase was recovered. **PW4 W O O** is a brother in-law to PW1. On the 22.8.2010 he was at Mwinami trading centre when the appellant's wife tried to remove some household items from their house and she was prevented to do so by the crowd. He notified PW1 who went there with police officers. A search was conducted and some exhibits were recovered.

**PW5 PC EDWARD KIPKOSGEY** was based at the Koyonzo AP post. On the 22.8.2010 at about 9.00 a.m. PW1 went to report that she had seen a girl wearing her daughter's clothes that had been stolen during a robbery. They went to the appellant's house and recovered some exhibits. The appellant's wife escaped. **PW6 THOMAS NDEGE** was a clinical officer at Busia District Hospital. He produced the P3 form for PW2. He classified the injuries as grievous harm. **PW7 PC KADIR SHARAMME** was based at the Mumias Police station. A report had been made of the robbery on the 26.1.2009. On the 21.8.2010 AP officers from Koyonzo camp took the appellant to Mumias police station with some exhibits. The appellant was later charged with the offence.

The appellant was put on his defence. He gave sworn evidence and stated that he repairs bicycles, the complainant runs a clinic and his child was bitten by a snake on the 12.7.2010. He took the child to PW1's clinic and he paid 300/=leaving a balance of 500/=. He left his Identity card as security. On the 21.8.2010 he went to his place of work and he met the complainant who asked for the balance of his money. They struggled and the complainant's mobile phone got damaged. He was arrested and taken to the chief's office. He was later charged with the offence.

The main issue for determination is whether the prosecution proved its case against the appellant. The robbery occurred on 25.1.2009. PW1 could not identify any of the robbers. PW2 who identified the appellant did not know the appellant before that date. According to PW1 the appellant lives about 200 meters from her home. It is therefore clear that the parties are neighbours. It is not clear why PW2 at her age of 16 years had not met the appellant. The court in its judgment noted that the robbery took about 4 hours and the lights were own. PW1 did not see the appellant. There was only dock identification. We do find that the finding by the trial magistrate that the description of the appellant by PW2 fitted the appellant was wrong as the witness was simply describing the person she was seeing in court. There is no evidence that PW2 gave the description of the robbers to the police. The arrest of the appellant was due to alleged dress worn by the appellant's daughter. The dress was not recovered. It could be true that a briefcase that had been stolen was recovered in the appellant's house. The recovery was made after one year and eight months and therefore the doctrine of recent possession does not apply. The appellant was not also charged with the offence of being in possession of stolen items. He was only charged with robbery with violence.

There is evidence that the appellant's wife disappeared. It is not clear whether it was the appellant's wife who had in possession the stolen items or the appellant. Given the evidence on record we do find that the conviction is not safe. It took about one year and eight months for the appellant's daughter to be purportedly seen wearing a stolen dress that was never produced in court. The items were capable of being sold in the market and there is no evidence that the appellant was at the scene of the robbery. The identification by PW2 is not proper. It was simply dock identification which cannot prove the prosecution case. We do find that the case was not proved beyond reasonable doubt and the conviction is unsafe. The appeal is allowed and the appellant shall be set at liberty unless lawfully held.

**Delivered, dated and signed at Kakamega this 24<sup>th</sup> day of September 2014**

**SAID J. CHITEMBWE**

**GEORGE DULU**

**JUDGE**

**JUDGE**