



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 88 OF 2012

S S L APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal arising from the judgment of [M. I. G. MORANGA, P.M.] delivered on 30.3.2012 in the Chief Magistrate's Court at Kakamega in Criminal Case No. 1028 of 2011)

J U D G M E N T

The appellant was charged with the offence of Robbery with violence contrary to **section 196(2)** of the **Penal Code**. The particulars of the offence were that the appellant *on the 3.3.2011 at around 8.00 p.m. in Kakamega East district within Western Province jointly with others not before court while armed with crude weapons namely pangas and runqus robbed M A cash KShs.5,000/= and one radio make Panasonic valued at KShs.2,500/= and immediately after the time of such robbery used actual violence to the said M A.*

The appellant was convicted and sentenced to suffer death. The grounds of appeal are that he did not plead guilty to the charge, the evidence was not corroborated, the witnesses are from one family, investigations were not conclusive, he was implicated due to personal differences and the trial court did not analyze the evidence properly. The appellant filed written submissions which mainly elaborate on the above grounds.

Mr. Ngetich, State Counsel, opposed the appeal. He contends that the prosecution proved its case. PW1, PW2 and PW3 (a minor) identified the appellant. The complainant was injured and a P3 form was produced.

The trial court record shows that five witnesses testified for the prosecution. PW1 M A testified that on 3.3.2011 at 8.00 p.m. she took a child out of the house to relieve himself. She was attacked by four robbers. She had lit a tin Kerosene lamp. The robbers took KShs.5000/= from her cupboard. Her son, E (PW2) went for her rescue but was also attacked. She identified the appellant as one of the attackers. Her right hand was injured and she was treated at the Kakamega Provincial Hospital. It is her evidence that the appellant is her relative.

PW2 E A testified that on the 3.3.2011 at about 8.00 p.m. he heard screams. He went out and found his mother screaming. E entered the house and the robbers attacked him. He was hit with a rungu. It was not the appellant who hit him but the appellant was with the robbers. The appellant is his uncle.

PW3 K M is a minor who was 10 years old. He is the one who had been out to relieve himself. His evidence is that when PW1 opened the door some people entered the house. He saw the appellant and

one Asumba. The appellant had a white short sleeved shirt. The appellant started beating PW1 telling her to hand over money. They took KShs.2,000/= in a cupboard. PW4 DR. JEREMIAH KINUTHIA produced the P3 form for PW1. He classified the injuries as grievous harm.

PW5 P.C. SAMSON BOR was based at Kakamega police station. He investigated the matter. The case was reported at the station on 4.3.2011. He tried to trace the appellant who was arrested by police officers from Khayega A.P. Camp. He later charged the appellant with the offence.

The appellant was put on his defence and he gave sworn evidence. He stated that the complainant is his sister in-law. She is married to his brother P A. In several occasions the complainant has left him to guard her house while she is away. Hatred between the two started in 2010. The complainant has warned him several times. He was not aware of the robbery. He was arrested on 9.6.2011 at 4.00 a.m. by APs from Khayega. He also saw the complainant and her husband. He was later charged with the offence. He claims that the appellant was attacked on 3.3.2011. He is a neighbour to PW1.

DW2, DANSHON ITENYA IMBWAKA was the area Shirulu ward in Shinyalu constituency. His evidence is that he is a neighbour to PW1. He is normally at home at home by 7.00 p.m. The neighbourhood has arrangement of assisting each other whenever one is attacked. At one time the complainant's home was attacked and the neighbours went for her rescue. The robber was arrested. He further testified that the complainant and her husband are drunkards who normally fight. The alleged robbery is doubtful as there are neighbours in the area who would have assisted her.

From the evidence on record, we do find that PW1 was robbed on 3.3.2011. Although the evidence is from PW1 and her children, we do find that the incident occurred. The main issue for our determination is whether the appellant was one of the robbers. According to PW1, PW2 and PW3 they saw the appellant. PW1 and PW3 stated that the appellant had a white short sleeved shirt. The evidence shows that PW1 was injured on her right hand and it suffered a fracture. PW3 who was with PW1 is a minor. It is not clear where he was standing when the robbery was taking place. The witnesses also did not state how long the incident occurred. Although it is stated by PW1 that there was kerosene lamp, it is not clear where it had been placed and how bright the lamp was. There were four robbers and it is quite difficult to conclude with finality that PW1 and PW3 could see all of them that evening given the fact that the time element is not given.

We also observe that the parties are related. The incident occurred at 8.00 p.m. It is not clear why PW1 could not inform the village elder and visit the appellant's house the same evening. The parties are neighbours. There is no evidence that police looked for the appellant but he had gone into hiding. The investigating officer never visited the appellant's home.

On his part, the appellant contends that there is animosity in the family. Although the defence evidence concentrated on the character of the complainant which we find not to be an issue, it still raises doubt as to whether the appellant was one of the robbers. DW2 who is the area councilor was quite clear that neighbours normally assist each other. It is not clear to us as to why the complainant did not give the appellant's name to the neighbours for him to be arrested.

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

Delivered, dated and signed at Kakamega this 24th day of September 2014

SAID J. CHITEMBWE

GEORGE DULU

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