



**REPUBLIC KENYA**

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

**CRIMINAL APPEAL NO. 165 OF 2012**

**MOSES MAKONGO ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

*(Appeal against conviction and sentence from the original Criminal Case No. 1 of 2011 in the Senior Resident Magistrate's Court Mumias – [H. WANDERE, P.M.]*

**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 29.12.2010 at Masinjira sub-location, Itenje location in Mumias district within Kakamega County, jointly with others not before court while armed with pangas robbed KENNEDY ANANGWE KEYA of cash KShs.1250/=, one pair of open shoes all valued at KShs.3050/= and at the time of such robbery used actual violence to the said KENNEDY ANANGWE KEYA. The appellant was also charged with an alternative charge of handling stolen goods contrary to section 322 (2) of the Penal Code.*

The appellant was found guilty of the main count of robbery with violence and sentenced to death. The grounds of appeal are that he pleaded not guilty to the charge, the prosecution evidence was inconsistent and not corroborative, the circumstances were not conducive for positive identification, there was no proof of ownership of the alleged stolen items, the charge sheet was defective, he was injured by the police when he was arrested and did not sustain injuries during the alleged robbery, the first report did not bear the names of the appellant and his sworn defence was not considered.

The appellant filed written submissions which expound on the above grounds. He contends that the recognition was by voice yet there are many people with similar voices. The specific time of the incident was not clearly stated, there was malice on the part of the prosecution witnesses as he was branded as a bad person. No proof of ownership of the alleged stolen phone and pair of sandals was given. The alleged recovered blood stained panga was not taken for laboratory test and that the trial court was influenced by the allegations that he is of bad character.

Miss Omondi, State Counsel, opposed the appeal. Counsel contended that the appellant was identified using his voice as well as torch light. PW2 came out of his house with a torch and he identified the appellant. PW2 also was attacked by the appellant. A blood stained panga and the stolen shoes were recovered from the appellant's house.

The record of the trial court shows that several witnesses testified. **PW1 KENNEDY ANAGWE KEYA** was the complainant. On the 21.7.2011 at about 11.00 p.m. he was heading to Inanga market to watch football when he was attacked when he reached at the Otiato junction. The attacker had a panga

and he cut him twice on the face. The attacker told him to run very fast and he recognized the voice to that of the appellant as he knew him. He decided to run towards the home of Mayabi (PW2). He felt weak and fell near the house of PW2. He was screaming loudly. The appellant ran after him and held him. The appellant had a torch which he flashed and PW1 was able to see him. He was cut again on his right three fingers. He saw the appellant's burnt scars as he knew that at one time the appellant was burnt by members of the public. He recognized the appellant. A neighbor opened his house and flashed a torch. PW1 was able to once again see the appellant. The appellant flashed his torch and the neighbor saw the appellant and shouted his name MAKONGO. This was Mzee Muya (PW3). PW1 managed to escape and Mzee Muya took him to INanga police post. He informed the police that he had been attacked and robbed by the appellant. He was robbed of a pair of sandals, a mobile phone and KShs.1,250/=. He was later taken to hospital where he was treated. He was issued with a P3 form. His sandals were later recovered.

**PW2 JACOB MAYABI** testified that on the 29.12.2010 at about 11.00 p.m. he was in his house when he heard a distress call. He opened his door and saw PW1 bleeding on the head. He lit his torch and saw someone coming. He recognized him to be the appellant. The appellant hit him with a panga on his back and PW2 went back into his house and shut the door. He opened his door again and saw the appellant assaulting PW1. He shouted to the appellant not to kill someone in his compound. The appellant ran away. PW2 went back to his house to sleep. The same night the police went to his house and he saw them with the appellant having been arrested. He told the police that it was the appellant who had assaulted PW1. He knew the appellant as he is his relative. His father is his cousin. **PW3 EDWARD MUYAWAKHOBE** testified that on the 29.12.2010 at about 11.00 p.m. he heard the distress call from PW1. He heard PW2 telling the appellant not to kill someone in his compound. His house is about 90 meters from PW2's house. He went out and saw PW1 bleeding. PW1 told him that he had been attacked by the appellant. He took PW1 to the police. PW1 was later taken to hospital. He knew the appellant since birth.

**PW4 PC PETER MULI** was at the Inanga police patrol base. At about 11.30 p.m. PW1 and PW3 went to the base while PW1 was bleeding. He told them that he had been attacked by MAKONGO. He knew Makongo, the appellant. PW1 told them that he had been robbed of his mobile phone, sandals and money. He organized for PW1 to be taken to Bukaya Health centre. He went to the appellant's home with two other officers. They also visited the scene and went to the home of PW2. When they went to the appellant's home they found him with his wife. They recovered a panga that had blood stains and sandals which also had blood stains. They arrested the appellant and took him to INanga police patrol base. The appellant was later taken to Mumias police station. When PW1 went to report at the police patrol base he had no shoes.

**PW5 PC JAMES LEKAKENYI** was also based at the Inanga patrol base. The report was made that night and they visited the scene where they saw blood on the ground. PW1 gave them the name of the appellant whom he knew. They went to the appellant's house and his wife opened the door. The appellant had a fresh wound on his lip. They recovered open shoes sandals that were blood stained and a panga that was also blood stained. They arrested the appellant and took the shoes and panga. PW5 knew the appellant as at one time he had tried to rob a rider of his motorbike and he was set on fire by members of the public. He was rescued by the police while ablaze. The appellant suffered burns on his left arm. **PW6 ALBERT DOME** was a clinical officer based at Bukaya Health center. He attended to PW1 and filled in the P3 form. He classified the injuries as maim.

**PW7 PC PAUL BUNGEI** was based at the Mumias police station. On the 30.12.2010 he was notified about the robbery by police officers from Inanga police post. They went there and saw that the appellant had already been arrested. He visited PW1 in hospital. PW1 told him that he had been robbed of his mobile phone, sandals and KShs.1,250/=. He was shown the sandals and a panga that had been recovered. The appellant was in the cells and he had a cut wound on the left side of his chin. They took the appellant to Matungu district hospital for treatment. The appellant was not sober that night. He took blood samples from PW1 and the appellant plus the panga but the storage was poor and the samples could not have been taken for laboratory tests.

The appellant was put on his defence and in his sworn evidence stated that on the 29.12.2010 he was at home farming at night police officers went and arrested him. He was taken to Inanga AP camp and was told that he had injured someone. He was later charged in court.

The main issue for determination is whether the appellant robbed PW1 of his mobile phone, shoes and KShs.1,250/=. The evidence on record shows that PW1 was attacked on the night of 29.12.2010. It is his evidence that he recognized the appellant by his voice and he also struggled with him when he ran towards PW2's house. It is the evidence of the complainant that the appellant had a torch and he was able to identify the appellant using torch light. PW2 also had a torch and was able to identify the appellant. It is the evidence of PW2 that when he opened his door he saw someone coming and when he flashed his torch he identified the person to be the appellant whom he knew. PW2 was also assaulted by the appellant and he shouted his name asking him not to kill someone in his compound. It is the evidence of PW1 and PW2 that they gave the name of the appellant to the police.

The evidence of PW4 and PW5 is that they were at the Inanga police patrol base when the report was made. PW1 gave them the name of the appellant whom they knew. They went to the appellant's house and they recovered a panga and sandals shoes. PW1 later identified the shoes to be his. It is the evidence of PW1 that when the appellant attacked him for the second time the panga hit the appellant on his chin and he sustained a cut. It is the evidence of PW5 and PW7 that the appellant had a fresh cut on his chin and he was taken to Matungu district hospital for treatment.

In his defence the appellant denied committing the offence and explained how he was arrested. The defence evidence did not raise doubt on the prosecution case. It is clear that PW1 was attacked that night and he was able to identify his attacker. The appellant contends that PW1 was seen with his phone by PW2. He also contends that there was no proof of ownership of the alleged items. We do find that the complainant was robbed of his shoes, cash and his phone. The shoes were recovered the same night in the house of the appellant. There is no evidence that the police planted the shoes in the appellant's house. Other than the recovery of the shoes the evidence of PW1 and PW2 put the appellant at the scene of the crime. We do find that it is the appellant who violently robbed PW1.

In the end we do find that the appeal lacks merit and is disallowed. We have looked at the circumstances of the case and do find that the death sentence is not appropriate in the circumstances. We shall substitute the death sentence with a period of ten (10) years imprisonment from the date of conviction.

Delivered, dated and signed at Kakamega this 14<sup>th</sup> day of October 2014

**SAID J. CHITEMBWE**

**GEORGE DULU**

**J U D G E**

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