



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 152 of 2010

(Appeal arising from the judgment of [MRS. H. I. ONG'UDI, C.M.] dated 27.7.10 in the Chief Magistrate's Court at Kakamega, in Criminal Case No.1961 of 2009)

MINIFACE MALUBI MUKWEORI APPELLANT

V E R S U S

REPUBLIC RESPONDENT

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 19th day of October 2009 at Lutonyi village, Sichilayi sub-location, Sheywe location in Kakamega Central district within Western Province jointly with others not before court while armed with dangerous weapons namely – a rope and a metal bar robbed **EVANS NGASE SESI** of KShs.400/=, a mobile make Nokia N88, a motorbike registration number KMCE 282C Bajaj blue in colour all valued at KShs.95,400/= and immediately before the time of such robbery used actual violence to the said **EVANS NGASE SESI**.

The appellant was convicted of the offence and sentenced to death. The grounds listed in the petition of appeal are that:-

- 1. The evidence on identification or recognition was worthless.*
- 2. The conviction is contrary to the weight of evidence.*
- 3. The evidence by the complainant was contradictory*
- 4. The alibi defence was casually dismissed*
- 5. The evidence on record did not support the charge*
- 6. The sentence was passed before the appellant was allowed to mitigate.*

The record of the trial court shows that **PW1 FRANCIS ETYANA** was a clinical officer based at Kakamega general hospital filled the P3 form for the complainant on 12th October 2009. The complainant had an injury on the eyelid and cheek, bruises on the neck and swollen left lower thorax region. **PW2 is EVANS NGASESESI** who was the complainant. He is a prison warder based at Kakamega main prison. His evidence is that on the 9th of October 2009 at between 11.00 p.m. and midnight he was undertaking boda boda business near Mama Watoto Supermarket when a customer approached him

asking to be dropped at Lutonyi. He took the customer and when he reached Lutonyi area along Mumias road the customer showed him a gate. Before he could alight PW1 was tied with a rope across his neck and suddenly other people came and tied him. He was beaten and robbed of the motorbike, Nokia phone, a cap and KShs.400/=. He later tried to untie himself and managed to stop another boda boda motorbike. Other boda boda operators went to the scene and he told them that he could remember the person who robbed him as a bike repairer based in Shianda. They went to Shianda and laid ambush and the appellant did not appear until morning. In the morning they went to the appellant's workshop and his worker told them that he had gone to Kisumu. They went to the appellant's house and his wife told them that he had gone to Kisumu. Later they received information that the appellant had been arrested by the Shianda Administration Police officers. He went to Shianda to look for the appellant with **DAVID, ABDALLA** and **ALLAN MAGOMERE**.

DAVIES ONDIALA testified as **PW3**. His evidence is that on the 9th of October 2009 at about 11.00 p.m. he was at Headquarters Bar in Kakamega Town. He saw the complainant taking a customer whom was the appellant. PW3 knew the appellant as a bike repairer who lived at Murram area. Later that night a Good Samaritan went to tell them that he had seen somebody tied with a rope. They went to the scene and rescued the complainant. They went to Shianda to look for the appellant but they did not see him. The appellant was arrested the following day by APs at Shianda. **PW4 ALLAN MAGOMERE** is also a motorbike operator in Kakamega. He testified that on the 9th of October 2009 at about 11.00 p.m. the complainant carried the appellant. PW4 had a customer whom he took towards Mumias road. When he was coming back somebody who appeared to be dirty waved him to stop. It was dark and he didn't stop. He later informed his colleagues and he went back to the scene, where they rescued the complainant. They went to Shianda that night but they did not recover the motorbike. The appellant was arrested the following morning.

PW5, LINET SHIDOGO MUSA, is the wife of the complainant (PW2). Her evidence is that her husband called her on the material night and informed her about the theft of the motorbike. The motorbike was under her name. **PW6, IP PAULINE MWANGI** was based at the Kakamega police station and investigated the case. She later preferred the charges against the appellant.

The appellant was put on his defence. In his sworn testimony stated that he lives in Shianda and he is motor vehicle mechanic. On the 9th of October 2009 he slept at his house in Shianda and on 10th of October he went to his place of work. He left his worker and went to look for spares at Mumias. When he returned he was informed that AP officers from Shianda had gone to the workshop looking for him. He immediately went to the Shianda AP Camp where he was arrested. He was later charged with the offence. He denied that he was a motorbike repairer or that he knew the witnesses who testified.

Mr. Samba, counsel for the appellant in his submissions expounded on the grounds of appeal. Mr. Orinda, state counsel conceded the appeal and submitted that the witnesses' statements were produced as evidence. The prosecution evidence on identification was weak. It appears that the complainant did not know the appellant and was only informed by the other boda boda cyclists that the passenger he had carried seemed to have been the appellant.

From the prosecution evidence it is clear that the incident occurred at night. The statement of the complainant was produced and I have gone through the statement and note that PW1 started by mentioning somebody who stopped him without giving the name or description and then indicated that that person who had stopped him repairs motorbikes at Shianda. PW2's evidence shows that they went to Shianda that night and laid ambush. It is not stated that they entered the appellant's house that night and failed to find the appellant. When they went the following morning the appellant's wife told them that he had already left. The defence evidence does raise doubt as to whether it was the appellant who committed the offence. The appellant went to the Shianda AP Camp when he heard that the AP officers were looking for him. PW2 testified that they went to the appellant's workshop with the AP officers.

The totality of the prosecution evidence with regard to the identification of the appellant raises doubt. It appears that the complainant was only informed by the other boda boda operators that the customer he had carried appeared to be the appellant. We find the appeal to be merited and the same is allowed. The

conviction and sentence is hereby set aside. The appellant shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 31st day of January, 2013.

SAID J. CHITEMBWE

B. JADEN THURANIRA

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