



**REPUBLIC OF KENYA**

**HIGH COURT AT KAKAMEGA**

**CRIMINAL APPEAL NO. 218 OF 2011**

**TIMOTHY KHAYUMBI ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

***(Appeal arising from conviction and sentence OF (MRS. M.I.G. MORANGA, SRM) in the Chief Magistrate's Court Kakamega in Criminal Case no. 8 of 2010)***

**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 17<sup>th</sup> day of December 2009 at Maraba village, Sichirayi sub-location, Shieywe location in Kakamega Central district within Western Province jointly with others not before court, while armed with dangerous weapons namely axes and rungus robbed JOSECK OKUMU BARSA of one mobile phone make Dorado all valued at KShs.6,000/= and immediately after the time of such robbery used actual violence to the said Joseck Okumu Barasa.*

The appellant was not found guilty of robbery with violence but was found guilty with attempted robbery with violence contrary to **section 297(2)** of the **Penal Code** and was sentenced to serve 8 years imprisonment. His grounds of appeal are that:-

- 1. He pleaded not guilty to the charge*
- 2. His constitutional rights were violated as he overstayed at the police station after the arrest.*
- 3. There was no fair trial as guaranteed under Article 50(2) of the constitution.*
- 4. The prosecution case was not proved, was un-corroborative and lacked probative values*
- 5. His alibi defence was rejected*

Before the hearing of the appellant was warned that the court would be at liberty to impose the death sentence in the event that the appeal is dismissed and the appellant appreciated that advice but opted to proceed with his appeal. He submitted that he faced three counts. The two counts of assault were dismissed and also the count for robbery with violence was dismissed but became attempted robbery. The appellant further submitted that the complainant alleged to have known him yet he did not inform the other witnesses that it was the appellant who had robbed him. The complainant did not send police officers to go and arrest him and did not know how he was arrested.

Mr. Orinda, state counsel, opposed the appeal and submitted that the law allows the court after hearing evidence to convict on a similar offence. Counsel submitted that the prosecution evidence proved robbery with violence and the appellant ought to have been sentenced to death. The identification was proper and the charge was proved.

Eight witnesses testified for the prosecution. **PW1, MARY OKUMU LUSILA**, testified that she is a teacher at Matende Secondary School on the 17<sup>th</sup> of December 2009 she was in her house with her husband and brother **KANUTI** together with three workers who had gone to paint their house at about 8.30 p.m. She told Kanuti to take some bathing water outside and when he came back some people entered the house and Kanuti disappeared into the garage. They were four people and one had an axe and the first one to enter had a long plank of firewood and a torch. They were ordered to lie down. There was a gas lamp that was on and her husband managed to escape through the door. The man who had an axe started cutting one of the painters. She screamed and the one who had a plank of firewood hit her on the head. She managed to identify the one who had the plank of firewood as the appellant who was wearing a cap with the front facing the back. His face was not covered and was able to see him clearly. The gas lamp was still on. PW1 managed to escape but saw neighbours outside the get who had been called by her husband. The robbers escaped. PW1 knew the appellant and later identified him at a parade. She used to see the appellant on her way to school at Maraba area in Kakamega. PW1's further evidence is that the fundis were from Mumias and had decided to sleep as it was late for them to travel to Mumias. PW1 knew the appellant by appearance.

**PW2, WAPUKHE MKEMBI KANUTI**, testified that on the 17<sup>th</sup> of December 2009 he was at his sister's house at Maraba in Kakamega. He was a form four student and was reading. At about 8.30 p.m. his sister PW1 told him to put bathing water for her. The bathroom is located outside the house. He took the water outside and saw some people who flashed him with a torch. PW2 returned to the house and escaped to the garage. He was not able to identify any of the people who were outside. He later heard his sister screaming. The neighbours came and the robbers escaped.

**PW3, REMICHO ODONGO**, testified that he was in the house of PW1 on the 17<sup>th</sup> of December 2009 at about 8.30 p.m. when about five people entered the house. They asked for a generator that had been taken to the house earlier as well as the owner of the house. The owner of the house escaped. PW3 saw the appellant as the first person who entered the house and had a torch. One of the robbers had an axe and attacked one of the fundis on the head. PW3 struggled with the person who had an axe and the appellant went to assist his colleague. PW3 struggled with the appellant and he could see him clearly as there sufficient light from a gas lamp. The appellant gave up and he left with his colleague. PW3 was later called in identification parade and he identified the appellant. According to PW3 the appellant had a torch and a piece of firewood.

**AKWALA MALOBA**, testified as PW4. He was a clinical officer based at the Kakamega General Hospital. He produced P3 forms for **JOHN OBIKHWA** and **DICKSON NYAPOLO**. These were the fundis who were in PW1's house who sustained injuries. **PW5 JOSECK OKUMU BARASA** is the husband to PW1 and a Secondary school teacher. On the 17<sup>th</sup> of December 2009 at about 8.00 p.m. he was in his house with his wife and three painters when they were attacked. He heard voices of someone ordering and demanding to know where the boy who had just entered the house was (PW2), where the generator was and who the owner of the house. PW5 escaped through the front door and went inform his neighbours. After about 15 minutes they went back to his house and found that the robbers had escaped. He saw two of the painters had sustained injuries and he took them to Kakamega Provincial Hospital. PW5 lost his phone that was on the seat. He could not identify any of the attackers.

**PW6**, was **DICKSON NYAPOLO** who was one of the painters and was at PW1's house on the material night. He was cut on his left side of the head and lost consciousness. He regained consciousness after 30 minutes and was taken to hospital. The attackers came through the back door. **PW7, JOHN OMBIKHWA MALALA**, is one of the painters who were in PW1's house. His evidence is that the leader of the gang went into the house asking where the boy who had just entered house was, the owner of the house and the generator. They were ordered to come out of their seats and sit on the floor. The owner of the house (PW5) escaped through the front door. PW7 was hit with a rungu on his left thigh. He

pushed the attackers outside the house but he was overpowered. Police officers came to their rescue but the attackers had left. He was not able to identify any of the attackers.

**PW8, SGT GEORGE ONGEI** was based at the Kakamega police station. On the 31<sup>st</sup> of December 2009 at about 8.30 a.m. he was in the office when he received three suspects who had been arrested in connection with a robbery. **PW5, JOSECK OKUMU** had reported the robbery at the station. PW8 investigated the matter and established that PW5 was robbed of his mobile phone valued at KShs.6,000/=. He organized for an identification parade and the appellant was identified by two witnesses as one of the robbers. The other suspects were released. According to PW8, PW1 had informed the police that she was able to identify one of the robbers by his appearance.

The appellant was put on his defence. In his sworn testimony he stated that on the 31<sup>st</sup> of December 2009 he was in his house when police officers informed him that the OCS wanted to see him. He went to the Kakamega police station where he was arrested. Three days later he was made to participate in an identification parade and was later charged in court.

The trial court after evaluating the evidence found the appellant not guilty of the two counts of assault causing actual bodily harm. Further, the trial court found that since the victim of the robbery escaped and there was no force used on him, the charge for robbery with violence was replaced with that of attempted robbery with violence. The trial magistrate acquitted the appellant of the charge of robbery with violence as she found that there was no conclusive proof of anything stolen from PW1's house. The court found that none of the witnesses was able to explain the loss of the mobile phone.

The prosecution evidence does establish that on the 17<sup>th</sup> of December 2009 PW1 and PW5 were in their house together with PW1's brother (PW2) and three visitors who had gone to work for PW5 when they were attacked by robbers at about 8.30 p.m. The main issue for determination is whether there was a robbery at PW5's home and whether the appellant was one of the robbers. The prosecution evidence does prove that robbers entered PW5's house that night. It appears that they were looking for a generator. A struggle ensued between the robbers and the three visitors who were in PW5's house. Sensing danger the robbers escaped but two of the visitors namely John Obikhwa and Dickson Nyapola were injured.

We do concur with the findings of the trial court that the complainant PW5 was not violently robbed as he escaped when the robbers entered the house and started enquiring about the generator. There was no evidence that the robbers had stolen the phone. The next issue is whether the appellant was one of the robbers. We do note that the parade officer was not called to testify. However, PW1 and PW3 testified that they saw the appellant at the scene and identified him at an identification parade. PW8 testified that he organized for an identification parade but did not produce the parade forms or have them marked for identification. The appellant testified that he was arrested on 31<sup>st</sup> of December 2009. This was about two weeks after the incident had taken place. It is the evidence of PW1 that there was a gas lamp in the house and it was not put off throughout the robbery. PW3 testified that he struggled with the appellant while holding an axe and he was able to see the appellant. It is PW3's evidence that there was sufficient light from a gas lamp and was able to see the appellant clearly. According to PW1 and PW3 it is the appellant who entered the house first and he had a torch and a plank of wood. Both witnesses managed to identify the appellant at a parade. The appellant in his defence admitted that the parade was conducted and some witnesses identified him but they had seen him before the parade was conducted.

Given the evidence on record, we are satisfied that the circumstances under which the incident occurred was conducive for positive identification. PW1 knew the appellant by appearance. There was a gas lamp in the room where the incident occurred and the same was not put off. PW3 physically struggled with the appellant for some time before the appellant escaped. We are satisfied that the appellant was one of the robbers who entered PW5's house that night. The appellant was positively identified. Even though the parade officer did not testify, the prosecution evidence does establish that the appellant was one of the robbers.

The proceedings of the trial court show that on the 13<sup>th</sup> of May 2010 the charge sheet was amended. The

trial court did explain to the appellant whether he wanted to proceed with the case where it had reached. We are satisfied that the requirements of section 200 of the Criminal Procedure Code were complied with.

The appellant's defence mainly dealt with the issue of arrest. It did not disprove the fact that there was a robbery attempt at PW5's house. We do find that the appellant's defence did not cast doubt on the prosecution evidence. The trial court did evaluate the defence evidence and concluded that the appellant was one of the robbers. The proceedings show that the appellant was supplied with copies of witness statements. On the date the charge sheet was amended the appellant informed the court that he had only received witness statements for the witnesses who had testified by that time. Four witnesses had testified. The issue was not raised again and we conclude that the statements for the other witnesses were also supplied. The appellant's contention that Article 50(2) of the Constitution was not complied with is not true. The appellant further contends that he was arrested on 31<sup>st</sup> December 2009 and taken to court on the 5<sup>th</sup> of January 2010. It is common knowledge that the 1<sup>st</sup> of January 2010 was a public holiday. 31<sup>st</sup> of December 2009 was a Friday. The appellant was brought before the court the following Tuesday. We do find that the appellant was arraigned before the court within reasonable time.

The trial court acquitted the appellant on the two counts of assault. P3 forms were produced for the two painters who were assaulted. We do find that the trial court was wrong in acquitting the appellant on the two counts of assault causing grievous harm. However, since the appellant was found guilty with attempted robbery with violence, even if he was found guilty of the two counts of assault, then the sentence would have been kept in abeyance as the main count of attempted robbery with violence carries a death sentence.

In the end we do find that the trial court properly found the appellant guilty of the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code. The trial court relying on the decision of the Court of Appeal of **Godfrey Ngotho vs. Republic (Criminal Case No. 55 of 2004)**, sentenced the appellant to serve eight (8) years imprisonment. We do find that the sentence is reasonable and we shall not disturb it. In the end appeal lacks merit and the same is disallowed. The appellant shall continue serving his eight (8) year jail sentence.

**Delivered, dated and signed at Kakamega this 31<sup>st</sup> day of January, 2013**

**SAID J. CHITEMBWE**

**B. THURANIRA JADEN**

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