



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 72 of 2011

RAPHAEL MUKOYA WAKA 1ST APPELLANT

FIDELIS MAKOKHA 2ND APPELLANT

MOSES SHIKUKU KWEYU 3RD APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Appeal against conviction and sentence from the judgment of [H. WANDERE, SRM] dated 18.5.2011 in the Senior Resident Magistrate's Court at Mumias in Criminal Case No. 965 of 2010)

J U D G M E N T

The three appellants were charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that *on the 21.9.2010 at about 8.00 p.m. at Eshikalame village, Eshikalame sub-location, Ingotse location, Mumias District within Western Province the appellants jointly and while armed with pangas and runqus robbed PIUS LABAN RANDARI of his bicycle make Jupiter and Motorola mobile phone all valued at KShs.10,500/= and at such time of such robbery wounded the said PIUS LABAN RANDARI*. The appellants were convicted and sentenced to death.

The 1st appellant **RAPHAEL MUKOYA WAKA** filed the following grounds of appeal. That he pleaded not guilty to the charge, the charge was defective, the investigation officer relied on rumours, the prosecution did not prove its case, the exhibit produced in court was not recorded as a stolen item on the charge sheet and that his alibi defence was rejected. During the hearing of the appeal the 1st appellant submitted that the first report to the police did not give his names. PW2 the complainant's father did not give out the names of the robbers. A jacket was produced in court yet PW1 did not mention it in his evidence. Somebody by the name Laban was mentioned but did not testify. The complainant allegedly mentioned some names after four days while at St. Mary's hospital. The 2nd appellant **FIDELIS MAKOKHA**'s grounds of appeal are similar to those of the 1st appellant. During the hearing of the appeal the 2nd appellant filed written submission which expound on all the grounds of appeal. The appellant contends that the charge sheet was defective as the amount indicated is given as 10,500/= yet the judgment indicated the amount as 10,000/=. Further that the first report did not reveal the names or description of the robbers. The prosecution evidence is inconsistent. Finally, that no exhibit was found with him. The complainant alleged that the robbers were his neighbours yet he did not inform PW2, his

father, about their names. The 3rd appellant **MOSES SHIKUKU KWEYU**'s grounds of appeal are also a replica of those of the 1st and 2nd appellant. He filed written submissions and submitted that no exhibit was found in his possession. The conviction was based on a single witness. There was no evidence from external witnesses. If the evidence was on recognition there was no first report with his name. The circumstances were that it was dark and the complainant became unconscious. He could not have identified his attackers. The complainant knew him and did not give out his name. The arresting officer testified that the complainant complained of a case of assault. The matter turned out to be a robbery and later robbery with violence.

The State opposed the appeal. Mr. Orinda submitted that all the appellants were identified by PW1 and the conditions were conducive for positive identification. PW1 had a torch and he talked to the attackers before the ambush. He used the torch to identify the appellants. He gave the names of his attackers to his relatives after three days and that explains why PW2 could not have given names to the police. The evidence was contradictory and the conviction was safe.

The record of the trial court shows that six witnesses testified for the prosecution. **PW1, PIUS LABAN RANDARI**, testified that on the 21.9.2010 at about 8.00 p.m. he was riding on his bicycle heading home. When he reached about 100 meters to his home he met a group of five people including the appellants. The 2nd appellant flashed a torch on his face and told him to stop. He took his torch and flashed at the appellants and he recognized them. They were armed with pangas. He did not recognize the other two robbers. They called each of the appellants by their names and the 2nd appellant slapped him with a panga. He was then stabbed on the lips and the head and lost consciousness. He regained his consciousness after 30 minutes. He noted that he had lost his wallet, cell phone and bicycle. He was bleeding from the nose, lips and head. He pulled himself to his home and was taken to Bukhaya Health Center for treatment. He was later transferred to St. Mary's hospital Mumias and then to Moi Teaching and Referral Hospital Eldoret. While he was at St. Mary's hospital a police officer went to record his statement and he gave the names of **JOB**, the 2nd appellant and **KWEYU** the 3rd appellant. The appellants were arrested while he was undergoing treatment at Eldoret.

PW2, BENSON KATIMBI, is the father of PW1. On the 21.9.2010 he was sleeping at 8.00 p.m. and he heard PW1 calling his wife **TABITHA**. He went to PW1's house and found him bleeding and unable to respond. He took PW1 to Bukhaya hospital. He then went to report at the Musanda police station. The police visited PW1 who had been transferred to St. Mary's hospital. After two days PW1 gave the names of **RAPHAEL MAKUNDA** and **MOSES** as the ones who had cut him. He knew them as they are his neighbour's children. **PW3, ELISHA OFUKO OMUDALO** was the area assistant chief. He testified that he got information about the robbery on the 22.9.2010 at 6.00 a.m. He visited PW1 at Bukaya Health Center. He then heard people talking of a jacket having been left at the scene. The police went to the scene and retrieved the jacket. On the 22.9.2010 he received a call from the police that the appellants had been mentioned. PW3 assisted in arresting the appellants. The 1st appellant was arrested at a chang'a den, the 2nd appellant was arrested at Itenje market where he usually sells tomatoes and was selling tomatoes.

PW4, ALBERT DOME, was a clinical officer at Bukaya Health Center. He filled in the P3 form for the complainant after seeing the treatment notes from the Health Center, St. Mary's hospital and Moi Referral hospital. PW5, APC **DISHON LOKATUKO**, was based at the Otiato AP post. On the 13.10.2010 the assistant chief of Musanda sub-location **BEATRICE KWEYU** reported that the police at Musanda police post were looking for **MOSES SHIKUKU KWEYU**. On the 15.10.2010 PW5 was at Mumias Town and Moses Shikuku Kweyu (1st appellant) told him that he had heard that the APs were looking for him. He went with him to Musanda Police post for being a suspect in an assault case that turned out to be grievous and later robbery. At the police post he found the other two appellants already arrested.

PW6, SGT. JIMMY BUKA, was based at the Musanda patrol base. He investigated the case. His evidence was that on the 22.9.2010 at about 8.00 a.m. PW2 went to report the incident at the patrol base. PW6 sent two officers to Bukaya Health Center to see PW1. He was later told that PW1 had been transferred to St. Mary's hospital. He sent the same two officers to St. Mary's hospital and PW1 gave out three names of **RAPHAEL WAKA**, **TOTI AWILO** and **MOSE KWEYU SHIKUKU** as the people who

had attacked him. He called the area assistant chief to inquire whether he knew the three people. The appellants were arrested and charged with the offence. Nothing was recovered. He talked to PW1 on phone while admitted at Moi Referral Hospital. PW1 visited the police post after his discharge from hospital. According to PW6, PW2 never mentioned any names. He was given the names of the appellants by the two officers **PC ODONGO** and **PC KIPCHUMBA**.

The appellants were put on their defence. The 1st appellant **RAPHAEL MUKAYA WAKA** was the 1st accused. In his sworn evidence he testified that on the 25.9.2010 he went to Bukaya market with two crates of tomatoes on his bicycle. He sold them and went back home to pick more tomatoes. He decided to take chang'a at a house. While there the village elder went with the Administration Police officers and he was arrested. He was taken to Mumias police with two other men and those two were charged with the offence of chang'a while he was charged with the offence of robbery with violence. He denied committing the offence. The 2nd appellant **FIDELIS MAKOKHA** gave sworn evidence. He testified that on the 4.10.2010 he was at Mumias Town selling tomatoes using a hand-cart. A motor vehicle knocked his hand-cart and the driver demanded Kshs.6,000/= as his headlight was broken. He was placed in the cells and later charged with the offence. He was charged alone and later the other appellants were enjoined. The 3rd appellant **MOSES SHIKUKU KWEYU** also gave sworn testimony. His evidence is that on the 13.9.2010 he was at Imanga Tea center when the assistant chief arrested him and he was taken to the nearby AP post. He was told the officer who had his report was at Mumias. He was escorted to Musanda police post where he was placed in the cells. He did not know the other appellants and he was enjoined with them.

The main issue for determination is whether PW1 was robbed on the 21.9.2010 and whether it is the appellants who robbed PW1. It is the evidence of PW1 that he was attacked on the material day while riding a bicycle on his way home. He lost consciousness but later pulled himself to his house. He was treated at three different medical facilities. PW4 produced the P3 form that shows that PW1 sustained injuries. PW2 saw the complainant PW1 bleeding and he took him to hospital. PW3 went to the hospital and saw the complainant having been injured. The prosecution evidence does establish that the complainant was attacked on the 21.9.2010. The evidence does prove that the complainant was robbed of his mobile phone and bicycle.

The next issue is whether it is the appellants who robbed the complainant. According to PW1 he was robbed by five people and managed to identify three of them. The other two were strangers to him. The robbers had a torch and he also had a torch. There is no other eye witness to the incident. According to PW2 the complainant could not talk when he arrived home. He gave the names of the appellants after about three days. PW6 testified that the appellants' names were given to two police officers who took the complainant's statement. Those two did not testify. All the appellants gave sworn evidence and denied committing the offence. It is the 1st appellant's evidence that he was arrested while taking chang'a after having sold his tomatoes. The 2nd appellant testified that he was involved in a traffic accident with his hand-cart and taken to Mumias police station. He was later enjoined in the case. The 3rd appellant stated that he was arrested on the 13.9.2010 and taken to an AP post. He was later charged with the offence.

PW1's evidence is that he used torch light to identify the three appellants who he knew. He gave the appellants' names to the police officers. PW3 was informed by the police officers to arrest the appellants and he did so. PW1 was alone when he was attacked. It is not clear how long the robbery took place. The incident occurred at 8.00 p.m. It appears that other than the torch light there was no any other source of light. According to PW1 the 2nd appellant flashed his torch on PW1's face. PW1 also flashed his torch and he saw the appellants. PW1 was attacked and lost consciousness. From the evidence on record, it is not established beyond reasonable doubt that PW1 positively identified his attackers. It was at night and PW1 lost his consciousness immediately he was attacked. The identification of the appellants by PW1 raises doubt. It is not clear how long PW1 talked to the robbers. The fact that PW1 flashed his torch raises doubt that he could identify three appellants at once using the torch light. The incident occurred on the 21.9.2010. Moses Shikuku Kweyu was initially charged alone with the offence and the initial charge sheet indicate that he was arrested on the 18.10.2010. The complainant gave the names of

the appellants after about four days and it is not clear why it took almost a month to arrest the appellant who are neighbours. The consolidated charge sheet shows that some of the appellants were arrested on 15.10.2010. This is also a period of about three weeks from the 21.9.2010. It is alleged that two police officers were given the appellants' names by PW1. Those officers were not called to testify and the statement of PW1 was not produced to show that indeed some names had been given to the police. We do find that the appellants are entitled to the benefit of doubt. They gave sworn evidence showing what they do in life and how they were arrested. According to PW3 the 1st appellant sells tomatoes and he was arrested after he had sold his tomatoes. There is no evidence that the appellants were hiding or they had ran away from their homes. According to PW5 the 3rd appellant inquired from him as to whether the police were looking for him. It is clear that he was not hiding from the police.

In the end, we do find that the appeals are merited and the same are allowed. The appellants shall be set at liberty unless otherwise lawfully held.

Delivered, dated at Kakamega this 27th day of February, 2013

SAID J. CHITEMBWE

J U D G E

B. THURANIRA JADEN

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