



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 269 OF 2011

(Appeal arising from the judgment of (E.S. OLWANDE, P.M.) dated 2nd December 2011 in the Principal Magistrate's Court at Butere in Criminal Case No. 241 of 2011

ISACK SHIRANDE DAVID 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 are that, the appellant:- ***“On the 4th of May 2011 at Butswae village, Wambulushu Sub-location, Kisa Central Location in Khwisero District within Kakamega County jointly with another not before court robbed CASTROL MWENDWA of his Mobile Phone make TECKNO, and valued at KShs.5,000/=, shoes valued at KShs.700/= and wallet all valued at KShs.5,700/= and at the time of such robbery threatening to use violence to the said CASTROL MWENDWA”***

The appellant was convicted of the offence and sentenced to death. He preferred this appeal with the following grounds:-

1. **“That he pleaded not guilty**
2. **His constitutional rights were violated as he was not given a copy of the charge sheet and a copy of witness statements.**
3. **The prosecution failed to prove concrete evidence against him**
4. **The nature of light used by the robbers was not disclosed and it is not clear whether the light could be used to warrant positive identification**
5. **The offence occurred on April 5th 2011 yet he was arrested on 26th June 2011 and there was no explanation for that long period yet it is alleged he comes from the same neighbourhood.**
6. **That the appellant was not under any obligation to prove his innocence.**
7. **That his alibi defence was rejected**
8. **That his constitutional rights under Article 49 of the constitution was violated as he was arrested on the 23rd of June 2011 and taken to court on 27th of June 2011.”**

The appellant filed written submissions which gives explanation on four grounds of his appeal. On ground one (1) the appellant contends that the charge sheet was defective as it does not indicate the time the incident occurred, the type of weapon used by the robbers and there is no signature of the charging officer. On ground two (2) the appellant argues that the evidence on identification was by a single witness and there were no eye witnesses to corroborate his evidence. Further, PW1 did not given any

physical features of complexion, height, body fitness and mode of clothing. On ground three (3) the appellant submits that the evidence of the five witnesses who testified did not implicate him and that the occurrence book was not produced. On ground four (4) it is the appellant's contention that the trial court failed to evaluate the entire evidence on record which evidence was insufficient, inconsistent and contradictory on various aspects including that of identification.

Mr. Orinda, State Counsel, opposed the appeal and submitted that the identification was not in difficult circumstances. There was no issue of frame up and the conviction is safe.

Being the first appellate court we are duty bound to evaluate the evidence of the trial court. The record shows that five witnesses testified. **PW1, CASTRO MWENDWA** was the complainant. He was a young man aged about 20 years old. His evidence was that on the 3rd of May 2011, he stayed overnight at funeral ceremony. The following morning at about 6.00 a.m. he decided to go home and there was already day light. As he reached about 200 meters from his home he saw two people following him from behind and he recognized them as ISACK (the appellant), and one SHEM. He assumed that they were also coming from the funeral and he kept on walking. Shortly they reached him and he was held by the neck. One of them tripped him and he fell, he screamed and called their names and Shem covered his mouth. The appellant hit him using fists and kicks. The appellant took his mobile phone make TECKNO 330 and a wallet containing his National Identity Card. He was dragged into a ditch and they also took his shoes. PW1's further evidence is that he was injured on the right eye which was swollen and the two robbers took off. PW1 went to the nearby house belonging to PW2 who called his mother. PW1 was later treated at Khwisero Health Centre and he was later issued with a P3 Form. The matter was reported to the police and the appellant was later arrested.

PW2, NIFER ALUSO, was at her home on the 4th of May 2011 at about 6.00 a.m. preparing her children to go to school. The complainant PW1 went to her house and he looked disheveled and was wearing only socks with no shoes. PW1 informed her that he had been robbed by two people whom he knew. PW2 called PW1's mother who went and picked her son. **PW3, PATRICK KATAKA**, is a cousin to PW1, the complainant. His evidence is that on 23rd of June 2011 at about 7.00 p.m. he was coming from the shops when he saw the appellant, he arrested him and he took him to Khwisero Police Station. He was with the complainant who pointed out at the appellant stating that he was the one who had robbed him.

PW4, PC. CHARLES LIMBITU, was based at the Khwisero Police Station. On the 4th of May 2011 he was on duty at the station at about 7.00 a.m. when the complainant and his mother went to report the robbery. The complainant had bruises on the neck and he gave him the names of Isack Shirande and Shem. The police started looking for the two named persons but could not get them. On the 23rd of June 2011 the appellant was seen at Khwisero market and he was arrested and taken to the station. The appellant was later charged with the offence. **PW5, DOUGLAS MAOGA ONGAO** is a clinical officer who was based at Khwisero Health Centre. He treated the complainant on the 4th of May 2011. The complainant had pain all over the body and a swollen right eye. He filled in the P3 Form and classified the injury as harm.

The appellant was put on his defence. In his sworn testimony the appellant stated that on the 23rd of June 2011 he at the Khwisero shopping center when three people arrested him. They told him that he was wanted at the police station. He was taken to the police station where he was kept for five days and was arraigned in court on the fifth day.

The prosecution evidence does establish that the complainant was robbed off his mobile phone on the 4th of May 2011 at about 6.00 a.m. The main issue for determination is whether the appellant who robbed the complainant. The appellant contends that the charge sheet was defective as it does not give the time of the robbery and the weapons used by the robbers. **Section 296(2) of the Penal Code** states as follows:-

“296(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or

immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

The charge sheet indicates that the offence was committed on the 4th of May 2011 and the place is described as Butswae village Wambulushu sub-location, Kisa Central Location in Khwisero District. The charge sheet also indicate that at the time of the robbery there was threat to use violence. We do find that the charge sheet is satisfactory. According to the complainant the incident occurred at about 6.00 a.m. and there was daylight. He knew the appellant and the other person who attacked him by the name Shem. During the robbery his mouth was covered by Shem but his eyes were not covered. He was able to see the appellant put his hands in his pockets and remove his phone and wallet. It is the appellant’s contention that the nature of the light was not given. From the prosecution evidence it is clear that the robbery occurred in the morning and there was daylight.

The appellant submitted that although the crime occurred the 5th of April 2011 it was not explained why it took long time before he was arrested on the 23rd of June 2011. From the evidence of **PW4, PC. CHARLES LIMBITU**, it is stated that the police started looking for Isaac and Shem but they had gone underground. That explains why it took over one month to have the appellant arrested. The other ground of appeal is that the appellant’s constitutional rights were violated. He was not given a copy of the charge sheet and prosecution witness statements. He was also arrested on the 23rd June 2011 but taken to court on 27th of June 2011. With regard to the first complaint, we have gone through the record of the trial court and it is not stated that the appellant requested for copies of witness statements from the prosecution. We therefore find that there was no violation of the complainant’s rights. With regard to the date of arraignment in court we note that although the charge sheet indicates that the appellant was arrested on the 26th of June 2011, the evidence on record shows that he was arrested on 23rd June 2011 which was a Thursday at about 7.00 p.m. Under the provisions of the Constitution under **Article 49** of the **Constitution** the appellant was supposed to be arraigned in court within 24 hours. **Article 49F (ii)** states as follows:-

“If the 24 hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.”

The appellant was arrested on the 23rd of June 2011 at about 7.00 p.m. This was a Thursday and the 24 hours ended on Friday at about 7.00 p.m. The following day was a Saturday whereby the appellant could not have been taken to court. He was taken to court on the 27th of June 2011 which was a Monday. We do find that the appellant was arraigned before the court without unreasonable delay.

As indicated hereinabove PW1 knew his assailants. When he went to the homestead of PW2 he informed her that he had been attacked by two people whom he knew. He went to the police station and gave **PW4, PC CHARLES LIMBITU**, the names of Isaac Shirande (the appellant) and Shem. The robbery occurred at about 6.00 a.m. during the day. PW1 was injured in the process of the robbery. We do find that, although the robbers were not armed with any weapons, the ingredients of robbery with violence as stipulated in **Section 296(2)** of the **Penal Code** were proved. We also find that the appellant was positively identified by the complainant. It is our finding that the prosecution proved its case beyond reasonable doubt. We find the appeal lacks merit and the same is disallowed.

Delivered, dated and signed at Kakamega this 17th day of October 2012

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SAID J. CHITEMBWE

JUDGE

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B. THURANIRA JADEN

JUDGE