



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 169 OF 2010

BENSON SIMIYU BUSAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 105 of 2010 Republic vs Benson Simiyu in the Resident Magistrate's Court at Eldoret by A. Ong'injo, Senior Principal Magistrate on 11th November 2010)

JUDGMENT

1. The appellant was convicted on a count of robbery with violence contrary to section 296(2) of the Penal Code. He was sentenced to death. The appellant has appealed against his conviction.
2. The particulars of the charge were as follows: That on the night of 22nd and 23rd November 2009, at Mosoriot Centre within Nandi North District, the appellant, jointly with others not before the court, and while armed with dangerous or offensive weapons, namely bolt cutter and iron bars, robbed Noah Busienei Kiprotich of one Sony video camera and one Samsung mobile phone all valued at Kshs 290,000 and at or immediately before or immediately after the time of the robbery threatened to use actual violence against him.
3. The petition of appeal was filed on 18th November 2010. It raises six grounds of appeal. The principal grounds urged can be summarized into four. First, that the ingredients of the offence were not established; secondly, that the trial court erred by relying on circumstantial or uncorroborated evidence of the complainant; thirdly, that there was no evidence connecting the appellant with the recovered items; and finally, that the court disregarded the defence set up by the appellant. In a synopsis, the appellant's case is that the capital offence was not proved beyond reasonable doubt. The appellant filed detailed handwritten submissions. When he appeared before us, he said he wished to rely wholly on those submissions and had nothing to add.
4. The State has contested the appeal. The case for the state is that the evidence called established the appellant's guilt to the required standard of proof. At about 2.00a.m and immediately after the robbery, PW1 called PW3, an administration police officer. They gave chase to the appellant who was escaping on a motorcycle. The appellant was in the company of another person. They caught up with them after about 6 to 7 minutes. The appellant and his pillion passenger refused to stop. PW3, who was armed, shot into the air. The appellant did not stop the bike. PW3 then shot at the motorcycle. The bullet hit the appellant's leg. The motorcycle fell on top of the appellant. The other person escaped. The appellant was arrested. A black bag was recovered containing the Sony camera belonging to the complainant. The metal cutter used to gain entry into the complainant's house was also recovered. Granted those circumstances, it was submitted that the defence put forth by the appellant was untenable. In a nutshell, the case for the State is that all the key ingredients of the charge were proved beyond reasonable doubt.

5. This is a first appeal to the High Court. We are required to re-evaluate all the evidence on record and to draw our own conclusions. In doing so, we have been careful because we have neither seen nor heard the witnesses. See *Njoroge v Republic* [1987] KLR 99, *Okeno v Republic* [1972] EA 32, *KariukiKaranja v Republic* [1986] KLR 190, *Felix Kanda v Republic* Eldoret, High Court Criminal Appeal 177 of 2011 (unreported).
6. The complainant was an employee of the Department of Defence, residing at Mosoriot. On the material night, at about 2.00a.m, he was asleep in his house. He was there with his wife Rita and their child. There were also two house girls sleeping in a different part of the house. He was woken up by some noise or commotion. Suddenly, some stranger entered their bedroom. The complainant hid behind a wall curtain. The stranger had a torch and demanded that the complainant's wife "produce everything". She switched on the lights. PW1 testified the stranger who was wearing blue trousers and a face mask. His wife shouted to the complainant to shoot the attacker. When the stranger saw the appellant, he rushed out of the room and escaped on a motorbike. The complainant telephoned PW3. They got into the complainant's vehicle and pursued the attackers in the complainant's motor vehicle. They caught up with them leading to the shooting and arrest of the appellant that we mentioned earlier.
7. The defence of the appellant on the other hand was as follows. That he is employed in the business of a motor cycle taxi. He was employee of DW2. On the material night, he was transporting a customer and a bale of old clothes to Mosoriot. He was paid Kshs 500. On his way back, he gave a new customer a ride. He was to be paid Kshs 100. The customer had a black bag. It is then that they were ordered to stop by PW1 and PW3 who were in the complainant's vehicle. They were shot at; he fell down. He testified that his pillion passenger escaped. The pith of his defence was that the stolen goods that were recovered belonged to the passenger who escaped. He also called his employer, DW2. She testified that she had employed the appellant as a motorcycle cyclist. She said she bought the recovered motorcycle from Igo Holdings in Eldoret. It had not been registered in her name. At the hearing of this appeal, the appellant's counsel invited us to examine the registration documents of the cycle produced at the trial. He said there were inconsistencies in the registration particulars and that there was no clear evidence the motor cycle belonged to the appellant.
8. We have re-evaluated the evidence. To start with, the appellant was *not* charged with theft of the motorbike. PW1 had stated that the robbers took off on a motor bike. We have studied closely the original handwritten *transcript* of the trial court and the *typed* record. The original notes refer to *M/bike*. The typist recorded that as *My bike*. That is why the typed record erroneously gives the impression that the appellant was riding the *complainant's* bike. But PW2, the police officer at the scene of crime testified that he did not know if ownership of the bike was in issue. He nevertheless produced a copy of records showing it belonged to Igo Holdings. Although DW2 said she owned it she did not produce a log book because she said she used it to secure release of a patient at Moi Hospital. She led no evidence on the patient. Either way, there was no evidence that the complainant's motorbike was stolen or that he owned one.
9. The complainant stated at page 19 of the record that he found his *Samsung* phone in the house after he returned. That is consistent because no *Samsung* phone was recovered in the black bag found with the appellant. There is thus no evidence of theft of the complainant's mobile phone. The phone that the police recovered, as per the evidence of PW1, was in fact a *Nokia 2100*.
10. The scenes of crime officer confirmed that the metallic grilles to the complainant's house had been cut and a window pane removed. He could not dust the pane for fingerprints because the surface was not smooth. Some of the items recovered at the scene included a bolt cutter, pliers and two screws. We find that is consistent with the evidence of a forced entry. Fundamentally, the appellant was charged with theft of the video camera. From the evidence of PW1 and PW3, the camera was recovered in a black bag that the appellant had strapped onto his neck. PW1 was emphatic on that point even in cross-examination. PW3 testified that-

"the appellant had a black bag on his neck. When he fell from the motor bike, I removed him [sic] and the bag from under the bike."

11. There is a minor inconsistency in that PW1 said the bag *fell* from the appellant's neck after he was shot at. PW3 was clear that the bike fell on top of the appellant and that the black bag was still

strapped on his neck. We have considered that this was at night, after 2.00am. We thus agree with the learned trial Magistrate when he observed-

“ However PW1 and PW3 with a lot of emphasis said accused had strapped a black bag on his neck and it is PW3 who removed motorbike from him [sic] and also removed the bag and on searching it recovered a camera which PW1 identified as his having bought it in Osaka Japan...”

12. It is instructive that the appellant was arrested a few minutes after the robbery. The appellant raised a defence that the recovered goods belonged to his pillion passenger. That defence had serious loopholes. First, the time lines provided by the appellant did not add up. The appellant said that he left Eldoret at 5.00 a.m with his first customer headed to Mosoriot. On his way back at about 6.30 a.m he gave a ride to a new customer for Eldoret. At Langas, he encountered PW1 and PW3, leading to the shooting and arrest. Secondly, the evidence of PW1, PW2 and PW3 was very consistent that the robbery took place at about 2.00a.m on the material night. The robbers could not be identified by PW1. Although his wife switched on the lights, the robber inside the bedroom was wearing a mask. The complainant and PW3 gave chase in their motorcar and caught up with the appellant and his pillion passenger barely seven *minutes* later. They recovered the camera stored in the black bag in possession of the appellant. They also recovered the bolt cutter used to gain entry into PW1's house, two screws and the pliers. Thirdly, the appellant does not deny he was riding the motor cycle, was shot at by PW3 and that those items were recovered. His defence that the goods belonged to the person who escaped was thus unbelievable with regard to possession of the stolen items and particularly as to the time the robbery took place and his arrest. The timing and evidence pointed strongly to the fact that he and his passenger were involved in the robbery.
13. Even assuming for a moment that the appellant was not the robber, he was caught minutes after the robbery with the stolen goods. The motorbike fell on him. He was removed from under it with the black bag containing the camera. Under the doctrine of recent possession, he was unable to explain how he came to possess them. His defence that they belonged to his pillion passenger does not lie because of inconsistencies in his evidence and time lines. We remain alive that the burden of proof, subject to section 111 of the Evidence Act, rested with the prosecution throughout. In our view, the burden never shifted to the appellant.
14. The key ingredients for a robbery with violence charge are found in section 296(2) of the Penal Code. It provides as follows-

“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”.

15. The appellant was in the company of another person or persons when they broke into the complainant's house. That was the evidence of PW1. He saw persons holding *torches*. The robber in the bedroom asked PW1's wife to “produce everything”. PW1 testified there were thugs who took off in a motorbike. When cross-examined, he said he heard 2 or 3 people running. The appellant did not lay a claim to the recovered camera. The complainant confirmed he owned it and had purchased it in Osaka, Japan. The forced entry, the robbery by two or more persons and the link to the appellant were thus well established at the trial. The stolen items and bolt cutter were all recovered from the appellant minutes after the robbery. As we have stated, we agree with the learned trial Magistrate that in all the circumstances of this case and the prosecution's evidence, the defence put up by the appellant could not stand.
16. In the end, we agree with the learned trial Magistrate that all the elements of the charge of robbery with violence, pertaining to the Sony video camera, were proved beyond reasonable doubt. Section 296 (2) of the Penal code provides for a mandatory death sentence. We are thus unable to disturb the findings of the trial court. We uphold the conviction and sentence. The entire appeal is hereby dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 29th day
of November 2013

FRED A. OCHIENG

G.K. KIMONDO

JUDGE

JUDGE

Judgment read in open court in the presence of

Mr.....for the appellant.

Mr.....for the State.

Mr..... Court Clerk.