



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO.60 OF 2012

DAVID JUMA ATELU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

**(An Appeal arising out of the conviction and the sentence of B. Maloba SRM delivered on 30th
April 2003 in Busia SRM 1450 of 2001)**

J U D G M E N T

1. David Juma Atelu (the Appellant) is aggrieved by his conviction and sentence on a charge of robbery with violence Contrary to Section 296 (2) of The Penal Code. He Appeals against both conviction and sentence.
2. It had been alleged that on the night of 20th and 21st October 2001 at Machakus village, Osurete sub location, Aremi location in Teso District jointly with others not before Court robbed DAVID ODIMA EKACHUL of cash of ksh.4250/= and at or immediately before or immediately after the time of such robbery assaulted the said DAVID ODIMA EKACHUL. The Prosecution called six (6) witnesses to prove its case.
3. DAVID ODIMA EKACHUL(PW1) is a Rice farmer and had a crop in the year 2001. That crop yielded 10 sacks which he sold. He was therefore in some money on the night of 20th to 21st October 2001. On that night while at his home at Machakus asleep with his wife Godfrida Nangila Okiaye (PW2), they got some unpleasant visitors.
4. That some people asked PW1 to open the door. That he recognized the voice of one of them to be that of the Appellant. He looked outside and saw four men. He said that he recognized three of them. He lit a lamp and opened the door. It was there that Saulo Ekiring, Ipapa and the Appellant entered the house.
5. Each of them had a “rungu” (club). They ordered PW1 to sit down and he obliged. They demanded money from him. He showed them where the money was. There was ksh.4000/= under his mattress and ksh.250/= in his long trouser. During the robbery the three hit him with a rungu and he sustained some bodily injuries.
6. PW1 was examined by Dennis Okwoyo Kerario (PW 6) on the injuries sustained. The witness found that the complainant had a swelling on his back and injury on his right hand. The degree of injuries was assessed as harm and the probable type of weapon used to inflict the injuries as blunt. The P3 Form completed by the Clinical officer was received in evidence.
7. The arrest of the Appellant was effected by John Ikokonyi (PW5). He is a Senior Chief of Aremi location. Acting on a report received from the complainant, he visited the home of Appellant. He found the Appellant there. He arrested him but three people who were in the Appellants house fled. PW5 handed over the Appellant to the Administration Police situated at Machakus who in turn handed over the suspect to P.C. Joseph Mwali (PW4).

8. In his defence, the Appellant raised an alibi. He says that at the time of the robbery he had visited his brothers home and that he remained there until the following morning. When he returned to his home, he saw the Chief with another person. He was then arrested. He denied the charges.
9. The Petition of Appeal raises 5 grounds. At the hearing the Appellant was represented by Otanga Advocate. Counsel pressed two grounds. It was his view that the Appellant had not been positively identified and secondly that the Learned Magistrate erred in failing to consider the Alibi evidence of the Defence. The Appeal was opposed.
10. This is a first Appeal and this Court is under a duty to evaluate all the evidence presented at trial and make its own conclusion of it. The Court is however minded that unlike the trial Court it did not hear and see the witnesses testify and due allowance must be given for that (see **Okeno –vs- Republic [1972]E.A 32.**)
11. It is common ground that the substantial evidence that implicates the Appellant is that of recognition. It is the submission by Counsel for the Appellant that the circumstances of the robbery made identification or recognition difficult. For the reason it needed to be tested with great care. That law is well settled.
12. PW1 and PW2 were asleep in their house when they were aroused in their sleep by voices outside. PW1 says that he recognized one of the voices as belonging to the Appellant. This is what he said in respect to the voice recognition.

“I had known you for many years prior to the Robbery and we used to talk regularly used to ((sic) meet with you in our local market prior to this incident.”

13. Counsel for the Appellant thought that the trial Court ought to have been more probing on how the Appellant made that recognition. It is nevertheless our view that there was sufficient evidence on this aspect. The witness said that he had known the Appellant for many years prior to the robbery. Secondly that they met frequently at the local market and they talked to each regularly.
14. Then the visual recognition. When the robbers entered the house, there was a lamp on. The lamp is said to have lit the room. The Appellant thought the circumstances were such that identification was difficult. PW1 and PW2 had been woken up in the dead of the night and ordered to open their door. Then entered three men armed with rungu. These would not be calm moments.
15. The Appellant submitted that the identification was erroneous and pointed out to the fact that PW1 seemed unsure of the number of attackers. This Court has looked at both the handwritten notes of the Magistrate and the typed proceedings. It seems clear to us that PW1 and PW2 were consistent on the number of the assailants. Both said that there were four people outside the house. One remained outside and the other three entered the house of the four. PW1 was able to name Godfrey Ipapa, Saulo Ekiring and the Appellant. He was unable to recognize the fourth. Although the typed proceedings seem to suggest that the names Godfrey referred to three different people, the handwritten notes of the Magistrate show that it is the name of one person to wit, Godfrey Ekabuteni Ipapa.
16. That said, we do agree with Counsel that a deeper inquiry should have been made about the intensity and quality of the light and its position vis-a-vis the faces of the assailants: And we think that the evidence of visual recognition alone would have been too tenuous to support a conviction.
17. But that evidence must be considered alongside the evidence of voice recognition and the events of the following day. PW5 visited the home of the Appellant after PW5 received the report of the robbery as that the Appellant was a suspect. That visit of PW5 was confirmed by the Appellant himself. Whilst there, 3 people ran out of the Appellants house. Luckily, PW5 was able to arrest the Appellant who was the 4th person in that house. So are the four people who were in the house of the Appellant the four people who robbed PW1 on the previous night? Or is this just a coincidence? We think not. We in fact think and hold that it gives credence to the evidence of PW1 and PW2.
18. The alibi raised by the Defence first came up in the course of the Defence. While the general rule is that an accused never assumes the burden of proving his alibi (see Criminal Appeal No 238/2008 **Benson Mugo Mwangi –vs- Republic** [2010]eKLR somewhat different considerations apply when the Alibi is put forward for the first time in the course of the defence hearing. The different considerations were discussed in the Court of Appeal decision in **Wangombe –vs- Republic** [1980] KLR 149. The Court held,

“On the other hand, however punctilious the prosecution or police, it throws upon them an unreasonable burden when the alibi is pleaded for the first time an unsworn statement at the trial, out of the blue. Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it.”

The approach to be taken is for Trial Court to weigh the evidence of the prosecution against that of the Alibi.

19.This is how the Trial Magistrate weighed the rival evidence,

“The Defence raised is that the accused was assisting his brother who had visitors. This however is incredible as this brother was not called as a witness.”

The Learned Magistrate held that the Alibi evidence of the Appellant was not corroborated. And we agree. That evidence would be pale against the recognition evidence of the victim and the event of the Appellants arrest.

20.We reach the same conclusion as the Trial Court that the Appellant was amongst the four people who robbed the Appellant of ksh.4,250/= on the night of 20th – 21st October 2001. And since the robbers were armed and inflicted bodily injuries on their victims, then an offence under Section 296(2) of The Penal Code was disclosed and proved. There collapses this appeal. It is dismissed in its entirety.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 13TH DAY OF NOVEMBER 2013.

F. TUIYOTT

S.M. KIBUNJA

J U D G E

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IN THE PRESENCE OF:

.....**COURT CLERK**

.....**FOR APPELLANT**

.....**FOR RESPONDENT**