

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 263 OF 2010

***(APPEAL AGAINST CONVICTION AND SENTENCE ARISING FROM THE JUDGMENT OF
(E.K. MAKORI, PM) IN THE SENIOR RESIDENT MAGISTRATE'S COURT MUMIAS IN
CRIMINAL CASE NO.61 OF 2009)***

RAJAB WAMALWA HUSSEIN 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**. He was acquitted of that charge and was found guilty of the offence of assault causing grievous harm contrary to **section 234** of the **Penal Code** and was sentenced to serve 10 years' imprisonment. The grounds of appeal are that he pleaded not guilty to the charge, he pleads for leniency as he is epileptic and be referred to community service and that his alibi defence was not considered. During the hearing of the appeal the appellant relied on his written grounds of appeal which he referred to as submissions.

Mr. Oroni, State Counsel, opposed the appeal and submitted that the appellant was positively identified by PW2. He had a panga and was known to the witnesses.

The record of the trial court shows that PW1 Safarinos Shikangani Muchisu was the complainant. On the 9.1.2009 at 9.30 p.m. he was walking from Shibale market with PW2, Patrick Lumumba when three people emerged ahead of them. One removed a panga and PW2 was pushed to the ground. PW1 was cut on the right side of his head and he fell on the ground. In the process he lost his wallet which has KShs.6,000/= and other personal documents. He was taken to Bookers police post and later to St. Mary's hospital where he was admitted for 10 days. He did not know the appellant before. He was later issued with a P3 form.

PATRICK LUMUMBA was **PW2**. He works with PW1 at Mumias Sugar Company. He was walking with PW1 at around 9.30 p.m. and along the way some people emerged ahead of them. One of them pulled a panga and cut PW1. He recognized the one with a panga as the appellant as there were street lights. He made noise and the attackers ran away. The appellant was arrested by good Samaritans while running away. **PW3, MOHAMMED NYONGE** was on that evening on community policing when they heard the screams. They saw the appellant with a panga and members of the public chased him and he was arrested. He was taken to the police station. **PW4, HAJI OMULISA KEYA** was at Shibale market when he heard that somebody had been assaulted. They went to the scene and saw the appellant running with a panga. They arrested him and took him to Booker police post. The panga was recovered and given to the police. **PW5, ISAAC MUKHWANA**, was a clinical officer based at Matungu district hospital. He attended to PW1 who had a cut measuring 7 centimeters on the right side of the head. PW1 was admitted and discharged on the 19.1.2009. He produced the P3 form for **PW1**. **PW6, CPL WILBERFORCE WAMBULWA** was the investigating officer who was based at the Booker police post. On the 9.1.2009 at about 10.00 p.m. the appellant was escorted to the police post by members of the public. He took statements from the complainant and witnesses and later charged the appellant with the offence.

The appellant was put on his defence. In his sworn evidence he testified that he is a bricks maker. On

the 9.1.2009 he was heading home when he met more than six people who flashed their torch at him. They attacked him and took him round Shibale market. He was later told that he had attacked and robbed somebody and charged with the offence.

The grounds of appeal are that the appellant did not plead guilty and his alibi defence was not considered. The other grounds are mainly seeking to have the sentence reduced. It is the evidence of PW2 that he saw the appellant with a panga and the appellant was arrested by members of the public. The trial court acquitted the appellant on the main count as the court doubted whether PW1 lost any property. The defence evidence is that he was arrested by over 6 people while coming from his work. From the evidence on record I am satisfied that the appellant is the one who assaulted PW1 and he was arrested immediately after the incident. Nothing was found with the appellant and I do agree with the trial court that it is possible that nothing was stolen from the complainant. The contentions by the appellant that he was arrested and taken round Shibale market does not disprove the prosecution evidence. I do find that the prosecution proved the offence the appellant was convicted of.

On the issue of sentence, the appellant contends that he is epileptic and he is pleading for leniency. The maximum sentence for assault causing actual grievous harm is life imprisonment. The appellant was sentenced to serve 10 years. The victim was hospitalized for 10 days. I will exercise my discretion and revise the sentence to 5 years' imprisonment from the date of conviction. The appeal lacks merit and the same is dismissed. The appellant to serve 5 years' imprisonment from the date of conviction.

Delivered, dated and signed at Kakamega this 14th day of November 2013

SAID J. CHITEMBWE

J U D G E