



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
HCCRA NO. 183 OF 2012

FRANCIS AMEYO ASUMWA alias DOCTOR APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence of E. S. Olwande. PM, at Butere PM's Court, Criminal Case No. 487 of 2011)

JUDGEMENT

The appellant herein Francis Ameyo Asumwa alias Doctor was charged with the offence of robbery contrary to Section 295 as read with Section 296(2) of Penal Code. Particulars of the offence are that on the night of 29th November 2011 at Eburinde village Marama West Location in Butere District within Kakamega County, jointly with others not before court while armed with dangerous weapons namely; pangas and runqus robbed Amos Oduya Najendo of two mobile phones make Nokia 1616 serial no. 354304049433996, Motorola WX 161, one jacket, one panga and one pair of black shoes all valued at Ksh 6,100/= and at the time of such robbery used actual violence against the said Amos Oduya Najendo.

On count 2, the appellant was charged with robbery with violence contrary to Section 296 as read with Section 296(2) of the Penal Code.

Particulars of the offence are that on the night of 29th November 2011 at Eburinde village Marama West Location in Butere District within Kakamega County, jointly with others not before court while armed with dangerous weapons namely; pangas and runqus robbed John Nasengo Oduya of cash Ksh 300, national identity card, elector's voting card and a wallet all valued at Ksh 550/= and at the time of such robbery, threatened to use actual violence against the said John Nasengo Oduya.

The prosecution called 7 witnesses where evidence was that on the 29th day of November 2011, the complainant was in his house when he heard a knock on his door. The people knocking identified themselves as police officers. Before he could open, they hit the door and it flew open. About 10 men entered the house armed with pangas, axes and canes. They ordered the complainant to lie face down and demanded for money and all he had. They beat him up injuring him on his arm and eye. They took his phones, jacket and shoes and left. The 1st complainant did not see or identify any of the robbers.

As the attackers left the 1st complainant's house, they proceeded to the house of his second son the second complainant. They broke down the door and also beat him up and also robbed him. The 2nd complainant stated that when the robbers entered his house his tin lamp was on and he was hiding behind a curtain. The robbers cut the strings of his curtain and it fell down. He was able to see and identify the appellant whom he knew as Doctor. That is when the tin lamp was hit and went off. The 2nd complainant then ran to his father's house and found the door locked from outside. He open the door and told his father about the robbery. The second complainant had not heard his father being robbed as it was raining heavily and the house had iron sheet roofing. At that time, PW4 the brother to 1st complainant came and the complainants told him about the robbery and showed him the direction the robbers took as they were fleeing.

PW4 called a community policing member of the area where the robbers had fled to by the name of Shadrack Atsiali. The said Shadrack Atsiali called some other community policing members amongst them PW3. They organized an ambush near a school known as Ituti Primary School. As they hid there waiting, a group of about 5 people came along with torches. PW3 sprung from his hiding place and shone his torch on them. They fled in different directions. PW3 was able to see and recognize one of them whom he knew as Doctor – the appellant. They chased the robbers and chased one whom they pursued all the way to his house. It appears that this robber was not aware that they were on his trail. PW3 and others he was with went upto appellant's house and they saw him remove his wet clothes and throw them on the roof and enter the house naked. They knocked on his door and they waited until sometimes when the door was opened. They found the appellant and another. The appellant was muddy all over. They asked him whose clothes were on the rood and he stated that they were his and he had washed them. They asked him why they were dirty and the trouser still had it's belt on. They also found his red slippers which were wet and muddy. They arrested him and the other who was also charged alongside him. They escorted them to the junction on the main road and called the police. PW6 Cpl. Mbindyo was amongst the police officers who collected the appellant and his colleague. The appellant was re-arrested and his wet clothes recovered. The police also visited the scene of the offence and collected the stone the robbers used to break the door. The complainant was also treated and issued with a P3 form which was filled by PW5. PW7 investigated the matter and interviewed witnesses and recorded their statement. He confirmed that amongst the exhibits which appellant was seen throwing on the roof was a jacket which complainant confirmed was his.

Put on his defence the appellant stated that he was at home the whole day and in the evening he went for a drink and came back home drunk. Later at midnight he was awoken by a knock at his door and arrested. They were taken to the complainant's home before being taken to Butere Police Station and were charged with this offence.

After the trial court heard this evidence, the honourable magistrate made a finding that the appellant was traced from the place of the robbery to his house. He had been seen by the PW2 who knew him well and this evidence weighed against the offence, made him convict him.

The appellant has appealed to this court on both conviction and sentence on the grounds that:-

1. **The charge sheet is defective.**
2. **The evidence of identification was insufficient and inadequate.**
3. **That he was not informed of the reasons of his arrest at the time of arrest.**
4. **Investigation done by PW7 were shoddy.**
5. **That there was no proof that the house where exhibit was found was the appellant's house.**
6. **The trial magistrate did not exhaustively examine prosecution's case against the defence.**

We shall consider these grounds individually.

As to ground one – the charge sheet as presented to court is not in any way defective. Section 295 of Penal Code defines what robbery is whereas Section 296(2) stipulates the sentence for such an offence. The charge sheet explained the way and place the offence was committed and explains and includes all the ingredients of robbery including the stealing, use of violence and the fact that the

appellant was in the company of others. We find that the charge sheet as presented was proper and there was nothing defective about it.

The appellant contends that the evidence of identification was not sufficient. We find that the PW2 told court he identified the appellant given that he previously knew him. The light from the lamp in PW2's house was on and he saw the appellant well. Other than this PW3 also saw the appellant as he pursued the robbers to the appellant's house and arrested him that same night. PW3 saw appellant arrive at his house, remove the wet and muddy clothes and throw them on the roof of his house and get in the house naked. All this evidence is corroborative on the identity of the appellant and we do not find it insufficient.

The appellant alleges that he was not informed of the charges at the time of arrest. It is worth pointing out that the appellant was initially arrested by the community policing group who handed him over to the police. He was led to complainant's house same night at the scene of the offence. He never pointed out that he didn't know why he had been arrested and the chronology of events show he was informed and was aware of why he had been arrested. His assertion is therefore not correct.

As to grounds 4, 5, and 6 they point to the investigations done. The PW7 interviewed witnesses he recorded their statements, he produced exhibits in court and also caused the complainants to be treated and his P3 form filled. The investigations were properly done. The evidence presented was carefully considered by the trial court. We make a finding that the trial magistrate directed himself properly to the evidence presented and reached a correct finding. The appeal has no merit and we dismiss it accordingly. We confirm the conviction and sentence.

DATED THIS 11TH DAY OF DECEMBER 2013

SAID J. CHITEMBWE

HELLEN S. WASILWA

JUDGE

JUDGE