



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HCCRA NO. 105 OF 2012

JOSEPH WAKHUNGU KISAKA }
}

CATHERINE ASHIKA }
}

JOHN WESONGA MAKOKHA }
APPELLANTS }

VERSUS

REPUBLIC
RESPONDENT

(From the original conviction and sentence of H. Wandere SRM, at Mumias SPM's Court, Criminal Case No. 934 of 2010)

JUDGEMENT

The appellants herein Joseph Wakhungu Kisaka, Catherine Ashika and John Wesonga Makokha filed different appeals Nos. 41/12, 42/12 and 105/12. These appeals were consolidated and heard as appeal No. 105/2012.

The 3 appellants were charged with the offence of robbery with violence contrary to Section 296(2) of Penal Code. Particulars of the offence were that on the 28th day of September 2010 at Lutasio village in Musambaa Sub-Location in Matungu District, within Kakamega County, jointly with another not before court while armed with dangerous weapon namely; pangas and rungus robbed Dismas Wesonga of one motor cycle make Boxer, registration no KMCK 132H valued at Ksh 70,000, one mobile phone make Samsung valued at Ksh 12,000/=, one wrist watch make Unitex valued at Ksh 600/= and cash Ksh 6,500/= all valued at Ksh 89,000/= and at the time of such robbery used actual violence to the said Dismas Wesonga by injuring him.

The prosecution called 5 witnesses. It was the prosecution's case that one the 28.9.2010 at 12.45, the complainant was hired by the 1st and 2nd appellant to take them to a place called Litasio on complainant's motor bike belonging to a youth group he was a member of. As they proceeded on this journey, the 1st appellant who is husband to 2nd appellant was next to complainant and 2nd appellant followed. All of a sudden, the 2nd appellant asked complainant to stop as her slippers had fallen off. Just as complainant was about to stop, 1st appellant drew a knife and stabbed the complainant on the back. Immediately John the 3rd appellant also approached them with a panga. John was also known to complainant who was a former classmate. John used the panga to cut the complainant on his wrist ordering him to stop. The complainant had been cut on his right shoulder by 1st appellant and twice on mouth and wrist by 3rd appellant. They then robbed him of his motor cycle and other property listed in the charge sheet. He was treated at Bungoma District Hospital where he was admitted for 7 days. PW2 confirmed he was the one

who handed over the motor bike to the complainant as he was unwell and had been approached by 1st and 2nd appellants to take them to Lutasio.

He told court that he knew them well as 1st appellant was a neighbour and 2nd was the wife of 1st appellant. They left with the motor bike but after 10 minutes a fellow motor cycle operator called Saakai called him to tell him that complainant had been violently robbed of the motor bike and also injured.

PW3 corroborated PW2's evidence. PW4 is the doctor who examined complainant and also filled his P3 form. He produced the P3 form as exhibit. PW5 investigated this case and charged the appellants accordingly.

In their defence 1st appellant said he was arrested because of a customer's welding jerk and he didn't commit this offence. The 2nd and 3rd appellants denied the offence. The trial court upon hearing this case, found all the three appellants guilty and sentenced them to suffer death. It was the trial court's finding that the offence of robbery with violence had been established based on **John Ndungu VS R – Criminal Appeal No. 116/1995** where the three ingredients of robbery were proved i.e the offenders were armed with dangerous or offensive weapons, the offender was in the company of more than one person. The complainant was wounded during the commission of the offence. The trial magistrate found that in the current case, all the three ingredients were present and the appellants were known to the complainants and there was positive recognition.

The appellants have now appealed on both conviction and sentence on the following consolidated grounds:-

1. **There was no proper identification.**
2. **There was no evidence connecting them to the offence.**
3. **That the trial court relied on evidence of a single witness.**
4. **There were no exhibits produced in court.**
5. **The trial court rejected their defence.**
6. **They were given a degrading and inhumane sentence.**
7. **That the prosecution evidence was contradictory.**

We will consider these grounds individually. On ground one, the issue of identification does not arise as the 1st and 2nd appellants were hired by the complainant and were previously known to him and attacked him as they progressed with the journey. This was a pure case of proper recognition and PW2 and PW3 gave evidence that the 1st and 2nd appellants hired the complainant for this journey. The 3rd appellant was also seen by the complainant who knew him before and motor bike head lights were on and so he saw and recognized the 3rd appellant vividly.

The evidence of the complainant PW2, PW3 and PW4 all point to the commission of this offence. Indeed the appellants were more than one, they were dangerously armed and the complainant was injured. The evidence therefore connects the appellants to the commission of this offence. The trial court did not rely on evidence of a single witness. The evidence of PW1 was corroborated with PW2 on issue of the appellants hiring the motor bike and so the evidence was enough and corroborated to warrant the conviction. The trial court took into consideration the evidence of the appellants and found it lacked any strength.

As a whole, we find that the prosecution evidence was water tight and the conviction was therefore proper. On the issue of sentence, the Court of Appeal at Nairobi in Criminal Appeal No. 5/2008 – **JOSEPH NJUGUNA MWAURA, PETER NJOROGE KAMAU & PATRICK MIRUGI KIBIA VS R** by JJA Mwera, Warsame, Kiage, Gatembu, J. Mohammed has confirmed that this is the proper sentence for this offence. We find the appeal has no merit and we dismiss it, and confirm the conviction and sentence accordingly.

DATED THIS 11TH DAY OF DECEMBER 2013

SAID J. CHITEMBWE

JUDGE

HELLEN S. WASILWA

JUDGE