



REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

Criminal Appeal 99 of 2009

DOMINIC SHIBIA OMULUBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. This Appeal arises from the conviction and sentence of the Appellant in Butere Senior Resident Magistrate's Court Criminal Case No.292/2007 where the Appellant, Dominic Shibia Omulubi had been charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. It was alleged that on 16th January 2007 at Eshitaha Village, Shirotso Sub-Location, Butere/Mumias District within the Western Province, jointly with others not before Court, while armed with dangerous weapons namely pangas, rungas, and knives robbed Eriya Omutayi Kutswa of his mobile phone make Bird valued at Kshs.5,500/-, a wrist watch, a pair of shoes, a torch, a Somali sword, a walking stick and cash Kshs.2,000/- all valued at kshs.12,000/- and at or immediately after the time of such robbery used personal violence on the said Eriya Omutanyi Kutswa.

2. In the alternative, he was charged with the offence of handling stolen property contrary to **Section 322(2)** of the **Penal Code** and It was alleged in that regard that on 21st April 2007 at Eshitaha Village, Shirotso Sub-Location of Butere/Mumias District within the Western province otherwise than in the cause of stealing, dishonestly retained one Somali sword, and a walking stick valued at kshs.500/- the property of Eriya Omutanyi Kutswa, having reason to believe it to have been stolen or unlawfully obtained.

3. He denied both the main count and the alternative count and in evidence, the prosecution's case was that on the night of 16th January 2007, PW1, Eriya Omutanyi Kutswa was on his way home when four (4) persons accosted him and commanded him to sit down. Before he could do so, he told them that he was a Chief and focused his torch on one of the four (4) and he recognized him as one "J. J." or Joseph Omulubi Chibia. He then sat down and "J. J." cut him on the hand and another robber cut him on the face. Others attacked him viciously and he fell into unconsciousness. He came to conscious after two days and after being discharged, he made a report to the Police and later when he was asked to go and look at some items recovered after the robbery, he identified his Somali sword and a rungu.

4. It was his evidence that he recognized the Appellant from his voice and also his face as he had known him quite well prior to the incident.

5. PW2, Saidi Chubuche is the one who at 6.00 a.m. got information from his children that PW1 was lying unconscious in a thicket near his land and when he went to the scene, he was unable to identify the

person as he was covered with blood. He made a report at the local Administration Police Camp and the injured man was taken to St. Mary's Hospital, Mumias.

6. PW3, Yona Yamai Omusinde, a member of the Community Police Unit at Butere Township was present when the Appellant was arrested. According to him, when the Appellant saw them, he fled but was apprehended and after a search at his house, a Police jungle jacket was recovered as were two pairs of boots, one Somali sword and a rungu. The Appellant was then handed over to the Police. PW4, Zablun Opanda and PW5, Godfrey Omonde were with PW3 during the Appellant's arrest and gave similar evidence as the latter.

7. PW7, PC Paul Tuei was the one who conducted a search at the Appellant's house and recovered the Somali sword and a walking stick which PW1 later identified as belonging to him.

8. PW8, Mlukwe Barack, a Clinical Officer produced the P3 form indicating that PW1 had suffered serious cut injuries to the head, face, fingers and the extent of injuries was classified as grievous harm.

9. PW9, PC Rotich, investigated the case, recorded witness statements and noted that PW1 had mentioned that one of his attackers was "J. J." son of Omulubi and attempts at arresting the said person failed until 21st April 2007 when he resurfaced and was arrested and the Somali sword and walking stick were recovered. He then charged the Appellant with the offence of robbery with violence.

10. In his defence, the Appellant stated that on 21st April 2007, he was ploughing his land when he was arrested and later charged. He denied committing the offence.

11. In his judgment, the learned Trial Magistrate found the Appellant guilty, convicted him and sentenced him accordingly.

12. It is our duty to analyse the evidence tendered and reach our own conclusion and in doing so, we note that the Appellant was only arrested because of the evidence of PW1 that;

i) he was able to recognize the Appellant by his voice and face since he had known him before,

ii) that the Somali sword and walking stick or rungu recovered from the Appellant's house after the robbery belonged to him and were stolen on the night of the robbery.

13. On identification, it is now trite that when only one witness purports to identify a suspect, a Court must warn itself of the dangers of relying on that evidence alone – see Marit & 3 Others vs. Republic [1986] KLR 224. With that warning in our minds, PW1 said that he had known the Appellant prior to the incident and was able to recognize his voice and when he focused his torch on him, he recognized his face as well. We are unable to fault that evidence because it is instructive that PW1 was the area Chief and it is his business to know his subjects. With a torch focused on the Appellant, he had no reason to frame him and we are satisfied that he was able to recognize him in fair circumstances.

14. The evidence of identification was corroborated by the evidence of recovery of the Somali sword taken from PW1 during the incident. It was unclear to us whether what was recovered apart from the sword was a rungu (club) or a walking stick but there was no contradiction regarding the somali sword. The Appellant never claimed the sword to be his and in evidence, there was little doubt that the sword belonged to PW1. No explanation was given as to how it came to be in the Appellant's house and although it was recovered three (3) months after the robbery, the truth is that the Appellant had gone underground soon after the incident and once he returned, he was apprehended.

The doctrine of recent possession was properly invoked in the circumstances and we see no reason to hold otherwise – see Benson Mwangi vs. Republic [2010] eKLR.

15. We should only add that the Appellant's conduct was symptomatic of a guilty mind; **why would he go underground unless he was hiding his guilt and why would he run away when he saw the Police**

Officers and Community Police Members approaching his home soon after he returned from hiding? He was obviously aware of the reason why they were at his home and he tried to run away from his fate without success.

16. We find that the Appeal herein has no merit and is dismissed.

17. Orders accordingly.

I. LENAOLA
JUDGE

D. O. ONYANCHA
JUDGE

**DELIVERED, DATED AND COUNTER-SIGNED BY S. CHITEMBWE, JUDGE AT
KAKAMEGA THIS 19TH DAY OF JANUARY, 2012**

S. CHITEMBWE
JUDGE