



REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 60 OF 2009
BONFACE AGOLOMBA *alias* NANDWA CHENELWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant, Boniface Agolomba *alias* Nandwa Chenelwa was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and the particulars of charge were that;

“On the 25th day of January 2004 at Masigulu Village, Central Maragoli Location in Vihiga District of the Western Province, jointly with others already before the Court while armed with dangerous weapons namely pangas, axes and runqus, robbed James Kabaka Likeya of cash Kshs.2,000/- and one torch valued at Kshs.80/- all to the total value of Kshs.2,080/- and at or immediately before or immediately after the time of such robbery used personal violence to the said James Kabaka Likeya.”

2. He denied the charge and the Prosecution called a total of five (5) witnesses and their evidence can be summarized as follows;

3. That on the night of 25th January 2004, PW1, James Kabaka Likeya, the then Assistant Chief, Chango Sub-Location, Central Maragoli Location, Vihiga District, was at his home watching television at about 10.00 p.m. He decided to use the pit latrine outside his house and so he took a torch, went to the pit latrine and when he came out, he saw some people and he turned the torchlight on them and counted them as being six in number. He asked them what they were doing there and without warning, one of them cut him on the head with a panga and as he did so, another man removed Kshs.2,000/- which was in his pocket.

4. According to PW1, he recognized some of the men as people he had previously known and that the torchlight assisted in the identification. He said that the one who cut him on the head was Boniface Akolomba *alias* Nandwa; the one who cut his hand was Kevolwe and the one who removed money from his pocket was Kennedy Imbuga.

5. In any event, PW1 further stated that as he screamed, his wife came out and she was listed as PW2, Zerephaya Musimbi Kabaka. Her evidence was that when she heard her husband screaming, she came out of the house carrying a lamp and she recognized the Appellant and two other robbers whom she had previously known. As she screamed for help, she noted that the three had pangas and PW1 was bleeding.

6. She added that as the robbers approached her, she recognized three others and she ran back to the house. The robbers that she allegedly recognized were named Kevolwe, Mwambuki, Ananda, Bonface Nandwa and Imbuga. That before she retreated to the house, she threw the lamp at the approaching robbers and with the help of her children, locked the metal door and later, after the robbers had left, assisted in taking her injured husband to Mukumu Hospital.

7. During cross-examination, PW2 stated that she had known the Appellant since he was seven (7) years old and that he lived one kilometer away from her home.

8. According to PW1, when he made his initial statement to the Police (which he did while still at Mukumu Hospital), he named his attackers and Kevolwe and Mwambuki were the first to be arrested, based on that information. They were tried and sentenced to death and on 28th April 2005, the Appellant, who had been on the run, was arrested at Mbale Township.

9. PW1 identified the P3 form which he was issued with and PW4, Francis Wasike who had treated him, produced the P3 form. He noted that the injuries on PW1 were caused by a sharp object and he assessed the degree of injury as grievous harm.

10. PW3, Siddiq Mugasia Kadenge stated that on 18th January 2004, he met the Appellant who told him to go and tell the Chief (PW1) that he was going to cut him and that he had no fear of death. He proceeded to church nearby and passed the message to PW1. The following week, he received information that PW1 had been injured and on reaching PW1's house, he found the latter's children wailing and shouting that Nandwa had cut and killed their father.

11. PW5, Corporal Ezra Serem received the report of the robbery at PW1's home on 26th January 2004 at 8.00 a.m. and together with one C.I.P. Rotich, he proceeded to the scene and near a pit latrine, there was a lot of blood. He also went to Mukumu Hospital and found PW1 in a bad state with injuries to the head. PW1 stated that he was able to identify his attackers and one of them was the Appellant.

12. PW5, thereafter investigated the case, arrested two suspects who were later charged in Court. That in 2005, the Appellant was also arrested and charged.

13. When he was asked to defend himself, the Appellant stated that he was a boda boda operator and that he had differences with PW1 because of a debt owed to him when he took PW1 to Vihiga and that PW1 instigated his arrest for that reason. He denied the charge but was found guilty and sentenced to death.

14. We have taken into account the submissions by the Appellant and Mr. Orinda, learned Counsel for the Republic and our opinion on the Appeal is as follows;

15. Firstly, from the evidence of PW1, PW2 and PW4, a violent incident occurred at PW1's home on the night of 25th January 2004 and PW1 was seriously injured. We have perused the P3 form and those injuries were authenticated by PW4, a Medical officer.

16. Secondly, we note that upon PW5 and C.I.P. Rotich visiting PW1 at Mukumu Hospital, he immediately gave them the names of his attackers and with that information, PW5 set out to track the named persons but he only managed to arrest two of them; Kevolwe and Mwambuki, who were later tried and sentenced to death for the same offence as the one that the Appellant later faced. That evidence is significant because PW1 and PW2 were able to speak about the identity of the attackers a few hours after the attack and the initial report is always critical where recognition is alleged. Further, we are aware of the decision in Mungai vs. Republic [1965] E.A. 782 at page 787 where it was held inter alia that where two persons are proved to have acted in concert, then they should be found guilty, jointly and that the acquittal of one, does not affect the conviction of the other. Conversely, the conviction of Kevolwe and Mwambuki while a significant development does not affect the conviction or otherwise of the Appellant but as we shall shortly show, his case is no different from that of Kevolwe and Mwambuki and his culpability is not in doubt when looked at in the totality of the evidence presented to the trial Court.

17. Thirdly, and very importantly, the Appellant was properly recognized by both PW1 and PW2 in circumstances that were favourable to such recognition. We say so because PW1 had a torch and when he pointed it to the group of people standing near his pit latrine he immediately recognized the Appellant as one of them. Similarly, PW2 with her pressure lamp was able to recognize him, separately.

18. It is also significant that PW1 and PW2 separately gave the names of the suspects to PW5 and that was the basis for his arrest of Kevolwe and Mwambuki and later, the Appellant.

19. PW1 was the area Chief and so was aware of his subjects and it is interesting that in his defence, the Appellant admitted that he was well known to PW1. PW2 on the other had stated that she had known the Appellant since he was seven (7) years old and so her recognition of him in favourable circumstances cannot be doubted.

20. With all the circumstances set out above, it is most likely than not, that both PW1 and PW2 could not have made any mistake as to the presence of the Appellant at the scene. We say so with the following holding in mind, per the Court in Republic vs. Turnbull (1976) 3 All E.R. 549:

“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

21. We are convinced that the recognition was proper and there was no mistake on the part of PW1 and PW2 as to the fact that the Appellant was at the scene and participated in the robbery.

22. Regarding the Appellant’s defence, the alleged grudge between him and the PW1 was only raised at the point when he tendered his defence and nowhere did he put the issue to test during the testimony and evidence of PW1. It was a mere afterthought and was of no use in the circumstances.

23. In the end, our collective mind tells us that the Appeal has no merit and is dismissed on all the grounds raised.

24. Orders accordingly.

D. A. ONYANCHA

I. LENAOLA

JUDGE

JUDGE

**DELIVERED, DATED AND COUNTER-SIGNED BY S. CHITEMBWE, JUDGE AT
KAKAMEGA THIS 23RD DAY OF FEBRUARY, 2012**

**S. CHITEMBWE
JUDGE**