REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL 77 OF 2010

(Appeal from Senior Resident Magistrate Hon. R. O. Oigara in Kimilili court in cr. case no.1424 of 2009)

ISAAC WEKESA WASIKE.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was convicted of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. The particulars were that on the night of 28th/29th day of September 2009 at Chesamis market in Makhonge sub-location in Bungoma North District of the Western Province he jointly with another not before the court robbed Fredrick Nyongesa Cherwa (PW1) of one T.V., Motor cycle registration number KMCE 587 E, two radio cassettes Sony and JVC, car battery, Nokia telephone, one crate of beer and cash Ksh.5600/= all valued at Ksh.127,890/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence on PW1. He was not satisfied with the conviction and sentence and preferred this appeal. Mrs. Leting for the State conceded the appeal.

The prosecution evidence was that PW1 was outside his bar at Chesamis Centre when at about midnight he was attacked by two people, one being in A. P. uniform, who ordered him back into the bar. He was handcuffed on both hands by the attackers who made away with the items named in the charge. The attack took about 15 minutes. Next day he went to report at Sikhendu Police Post. He had recognized one of the attackers, the Appellant, who also went by the name of *"Complainant Pandia alias Isaac Wasike."* When he reported to the police they knew his house. They went to Wehoni Centre where he was found in his house. He was arrested and later charged. Nothing was recovered. PW2 John Lusweti was a watchman at Chesamis market that night and testified that he witnessed the attackers struggling with PW1 before they took his items and left on a motorcycle whose passenger he recognized as the Appellant. The robbery was reported to Corporal Festus Chepkuto (PW6) of Sikhendu A. P. Post and he is the one who arrested the Appellant whom PW1 said was in the attack. PW6 did not know the Appellant before.

The Appellant gave an unsworn statement to say he was arrested and charged for an offence he had not committed.

The Appellant was not found with PW1's property and was therefore convicted on the evidence of PW1 and PW2 who testified that they had recognized him in the attack. The attack was at night and it took 15 minutes. PW1 was found outside the bar where there was no light and taken into the bar. Was there any light in the bar? The only evidence by PW1 regarding light was in the following sentence:

"But one said that I lie down as one put light to lamp."

In the judgment, the trial court observed that PW1 recognized the Appellant using light from a lantern lamp. The court stated:

"He did recognize him using lantern light in the premises."

The record does not show that there was a lantern lamp that was on. We have not been able to make sense of *"one put light to lamp."*

We must find that the record does not show that the prosecution proved beyond doubt that the bar had any form of light.

The record further shows that PW1 stated as follows:

"They ordered me to go where I had come from that is rear side of the bar. The face was covered – one. At my rear door one handcuffed one hand as the other held the other."

Whose face was covered? Was the face of one of the attackers covered? It that was so, PW1 did not say that the attacker whose face was not covered was the Appellant.

PW2 was out here and said he witnessed the attack and recognized the Appellant as one of attackers. There was no light out here, but PW2 said he had a spotlight. The person he recognized was a pillion passenger on the motorbike. The motor cycle passed very fast about 50 metres from where PW2 was. Asked how he recognized the Appellant his response was that:

" I did see you when you looked at me."

PW2 was not led to say that the spotlight was on at any time, or that it was the light from it that enabled him to see and recognize the Appellant. PW2 went on to say:

"I did see and recognize the accused when he turned and looked at me."

It should be remembered that the Appellant was said to have been a pillion passenger on a motor cycle that was being driven very fast about 50 metres away. We are unable to find that the circumstances were favourable for any positive recognition.

PW1 testified that when he went to report to police and mentioned the Appellant as one of his attackers, the police knew the Appellant and even his house. They went to the house and found the Appellant and arrested him. Two officers testified. They were PW6 and PW5 P.C. Edward Murunga of Kimilili Police Station. PW5 is the one to whom the Appellant was handed over by A. P. Officers following arrest. PW6 was one of the officers who arrested the Appellant. His evidence was that it was to him that the report was made. PW1 told him that he had recognized a neighbour as one of his attackers. He (PW1) then led the officer to the house of the Appellant at Wenani Centre where he was arrested. PW6 did not know the Appellant before.

Lastly, we are concerned that the court did not caution itself about the danger of convicting solely on the evidence of recognition and making sure that such evidence was water-tight and sufficient to justify a conviction. In the Court of Appeal case of **Dzombo Chai v. Republic, Criminal Appeal no.256 of 2006 at Mombasa** it was observed as follows:

"This court has said on many occasions that the evidence of identification and recognition of an accused should be tested with the greatest care and should be water-tight to justify a conviction. It is also recognized that there is a possibility for a witness to be honest but mistaken and for a number of witnesses to be mistaken (see Kiarie v. Republic [1984] KLR 739). Further, although evidence of recognition is more satisfactory, more assuring and more reliable than the identification of a stranger

(see Anjononi v. Republic [1980] KLR 59), such evidence should not only be credible but also should be free from any possibility of error before it can be relied on to implicate an accused person."

In conclusion, we find that the trial court did not carefully consider all the circumstances under which the robbery was committed. Had that been done it would have been found that the evidence of PW1 and PW2 was neither credible nor free from error. It is for these reasons that we allow the appeal, quash the conviction and set aside the sentence. The Appellant is set at liberty immediately unless he is otherwise being legally detained.

Dated and delivered at Bungoma this 28th day of March, 2012.

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A. O. MUCHELULE **F. N. MUCHEMI**

JUDGE **JUDGE**