

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRA NO.85 OF 2011

(Appeal from Senior Resident Magistrate Hon. F. Kyambia in Bungoma court in Cr. Case no.1673 of 2010)

DAVIS WANYAMA WAFULA.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was convicted by the Senior Resident Magistrate at Bungoma of robbery with violence contrary to section 292 (2) of the Penal Code whose particulars were that on 21/7/2010 at Bwake village in Khachonge sub-location in Luuya location of Bungoma Central District of the Western Province he jointly with another not before the court and while armed with a knife robbed Benson Namiti Simiyu (PW2) of a motorcycle registration no. KMCH 480 M Make TVS Star valued at Ksh.85,000/= and at or immediately before or immediately after the time of such robbery threatened to use violence to the said PW2. He was sentenced to death. This is his appeal against the conviction and sentence.

The prosecution evidence was that PW2 was employed as a boda boda motor rider by Leonard Wafula Nabiswa (PW1). On 21/7/2010 at 8.00 p.m PW2 went to surrender the proceeds of the day to PW1 after which he went to Kanduyi to fuel. He then went to Sikata. While here a matatu stopped and two young men alighted from it. They came to him wanting to be taken to Bwake. It was agreed they pay Ksh.300/=. When they got to Bwake Secondary School he asked them to alight. They insisted to be dropped at home. When they reached a junction they asked him to stop. One of them held him by the neck and the other produced a knife. They took Ksh.400/=: a phone and jacket from him. They rode off the motorcycle. One attacker was thin and the other was slim. On the following day PW2 went and informed PW1 and they went to report to the Assistant Chief. PW2 said he was able to identify the man with the knife. He had wrestled PW2 to the ground in struggle. The man was wearing a white jacket. The night had moonlight. PW2 gave the description to A.P. Officers who included PW4 (APC Julius Kimathi). On hearing the description the Chief said he knew the attacker. He sent PW4 to arrest the Appellant. PW2 was called to identify him following which he was taken to Bungoma Police Station where he was charged. He was found with a white jacket (exhibit 1). PW2's property was un-recovered.

The Appellant made unsworn statement saying that he was arrested and taken to Luuya A.P. Camp and later to Bungoma Police Station where he was charged with this offence which he had not committed.

It is clear from the record that the Appellant was convicted on the evidence of a single identifying witness, PW2. The attack was at night. The trial court did not caution itself that there was need to test with the greatest care the evidence of this witness, and neither did it look for any corroboration (**Roria v. Republic [1967] EA 583**). It is not in dispute that the Appellant was not found with any of the stolen property. We also agree with Mrs. Leting for the State that the evidence of PW2 was itself not safe. He testified that there was moonlight and that he identified one of the attackers who had a knife and that he was wearing a white jacket. He did not say he identified the attacker's face. According to PW4, PW2 said that he was able to identify the attacker from the clothes he was wearing; that he was wearing a grey jacket. Of course, a white jacket is different from a grey jacket. PW4 further stated that when PW2 talked of a grey jacket the Chief was present. The Chief immediately concluded that the attacker was the Appellant and sent PW4 to go and arrest him. There was insufficient basis for the conclusion that the Appellant was the attacker.

Further, it was necessary to subject the Appellant to an identification parade after his arrest to see whether PW2 was going to pick him out.

In short, the Appellant was convicted on insufficient evidence. The appeal is allowed, the conviction quashed and the sentence set aside. The Appellant is set at liberty forthwith unless he is otherwise being lawfully held.

Dated and delivered at Bungoma this 27th day of March, 2012.

A. O. MUCHELULE

F. N. MUCHEMI

JUDGE

JUDGE