



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL 133 OF 2010

(Appeal against conviction and sentence against the judgment of [MR. B. O. OCHIENG, SRM] dated 18th June 2010 in Criminal Case No.801 of 2009 in the Senior Resident Magistrate's Court at Butere)

BONFACE TOM INYANGALA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was charged with two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. In the 1st count the particulars of the offence were that the appellant on the 4th day of October 2009 at Namasoli, Mundeku sub-location, Mundeku location in Khwisero District within Western Province jointly with others not before court while armed with dangerous weapons namely pangas, robbed Nahason Omurunji one pair of football boots, one K.L.B. history book, one C.R.E. pamphlet book all valued at KShs.3,500/= and at the time of such robbery used personal violence against the said Nahason Omurungi. In the 2nd count the particulars of the offence were that on the 4th of October 2009 at Namasoli, Mundeku sub-location, Mundeku location in Khwisero District within Western Province jointly with others not before court while armed with dangerous weapons namely pangas, robbed Bonface Abukoo football boots, one K.L.B. Agriculture text book, one Kenya Literature Bureau Chemistry book all property valued at KShs.3,200/= and at the time of such robbery used personal violence against the said Bonface Abuko.

The appellant was convicted of the two counts and sentenced to death and preferred this appeal. The grounds of appeal are that the charge sheet was defective, the conditions prevailing at the scene were not positive for identification, the prosecution evidence is full of contradictions and inconsistencies, vital witnesses were not called and the burden of proof was shifted. The appellant further filed written submissions which elaborated on each ground of appeal. He submitted that the charge sheet did not mention any weapon which the appellant had on the day of the robbery. According to the prosecution evidence the appellant was arrested immediately after the robbery but nothing was recovered from him. The appellant further contend that some witnesses alleged that the incident occurred at night while others testified that it was during the day. The village elder who was called to the scene was not called to testify.

Mr. Orinda, state counsel, opposed the appeal and submitted that the appellant was caught in the act

within the school compound. Medical evidence was produced that proved violence had been used. The appellant's two accomplices managed to escape while the appellant was arrested while trying to jump over a fence.

Seven witnesses testified before the trial court. **PW1, BONFACE ABUKO** was a Form three student at Namasoli Secondary School. On the 4th of October 2009 at about 9.00 p.m. together with fellow students were coming from preps crossing over the road heading towards their dormitory. They saw three people who were armed with pangas and torches. There was also moonlight. The three armed people flashed their torches. PW1 was carrying water, chemistry and agriculture books and had his football boots. He was slapped with a panga using its back side and his colleagues started running. PW1 was robbed of his boots and books. Fellow students from the dormitory went to the scene and chased the robbers. The appellant was arrested while scaling the fence. He was taken to an AP Camp and later to Khwisero police station. According to PW1 nothing was recovered. He was treated at a clinic and later at Khwisero District Hospital. It is PW1's evidence that the incident occurred at the school compound.

PW2, NAHASON OMURUNJI was also a Form three student at Namasoli Secondary School. On the 4th of October 2009 he was with fellow students going to sleep when three people followed them. They held PW1 and slapped him with a panga. PW2 was hit on the face. They raised alarm and fellow students went to their rescue. PW2 was robbed of his boots and books. According to PW2 the appellant's accomplices took the stolen items and ran away with them. They chased the robbers and the appellant was arrested. The village elder also went to the scene as well as a teacher of the school. It is the evidence of PW2 that the school classrooms are located on one side of the road while the dormitory is on the other side and they had to cross the road to enter the dormitory compound. PW2 was also treated of the injuries he sustained.

PW3, MOYALE PHILIP was a Form four student at Namasoli Secondary School by the time he was testifying on 18th November 2010. He testified that on the 4th of October 2009 at about 9.30 p.m. he was from preps heading to sleep and five youths armed with pangas attacked them. PW3 ran away and later other students went to the scene. The appellant was arrested. According to PW3 both PW1 and 2 were injured by the robbers. **PW4, VICTOR KARIUKI** was a teacher at Namasoli Secondary School. He testified that on the 4th of October 2009 at 10.00 p.m. he was at his house when he heard noise. He saw students had arrested the appellant and they were assaulting him. He pleaded with the students and assisted in taking the appellant to a chief's camp. Nothing was recovered. The injured students were taken to Namasoli clinic.

PW5, APC MUYATI BETT was based at Mundeku Administration police post. On the 4th of October 2009 he was at the camp when students took to him the appellant with the allegation that he had robbed the students. PW5 re-arrested the appellant and later took him to Khwisero police station. **PW6, PC NJAGI** was attached to Khwisero police station. On the 5th of October 2009 he was at the police station when the appellant was taken to him by students from Namasoli Secondary School and two Administration Police officers having been arrested on the 4th of October 2009. PW6 investigated the matter and later charged the appellant with the offence. He issued P3 forms to PW1 and 2. **PW7, OLIVER MAHASO** is a doctor based at Butere District Hospital and filled the P3 forms of PW1 and PW2.

The appellant was put on his defence and gave sworn testimony. His evidence is that on the 4th of October 2009 he was going to look for food when he was attacked by a group of people whom he did not know. He lost consciousness and was taken to an AP Camp. Police from Khwisero police station were called and they took him to hospital. He further testified that the prosecution witnesses lied to the court and that he was arrested at 6.30 p.m. He denied committing the offence.

The main issue for determination is whether the complainants were robbed of their items as particularized in the two counts and whether it was the appellant who was one of the robbers. It is the evidence of PW1, PW2 and PW3 that there was moonlight during the date of the robbery. Further that there is a public road cutting across the school compound. It is also their evidence that there are four watchmen at the

school. According to PW2 the village elder went to the scene. It is also the evidence of the three witnesses that the appellant was armed with a panga and used it to hit PW1 using its flat side.

Given the circumstances of the case we do not find that what transpired on the 4th of October 2009 was a robbery. It is likely that there was a scuffle between students of Namasoli Secondary School and members of the public who included the appellant. The appellant was arrested immediately after the incident and nothing was recovered from him. Although PW1, 2 and 3 testified that the appellant was armed with a panga, the said panga was not recovered. It is their evidence that two accomplices of the appellant ran away with the stolen items but there is no evidence that they took the panga from the appellant and ran away with it. None of the four watchmen of Namasoli Secondary School testified. Similarly the area village elder who is alleged to have gone to the scene was not called to testify. Their evidence could have given more weight as to the nature of the incident that occurred on the 4th of October 2009. It is also not clear as to whether the incident occurred within the school compound or along the road. According to PW1 the incident occurred in the school compound. If that was the case the school watchmen could have testified as to how the appellant could have gained access to the school without their notice and also testifying on how the appellant was arrested.

As indicated herein it is doubtful that the appellant was involved in a robbery with violence as charged. He was arrested immediately and the panga he allegedly used to assault PW1 was not recovered. We find the appeal is merited and the conviction is not safe. The appeal is allowed and the appellant shall be set at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 28th day of June 2012

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SAID J. CHITEMBWE

J U D G E

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B. THURANIRA JADEN

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