



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 19 OF 2005

(An Appeal against both conviction and sentence from the

Chief Magistrate's Court at Kakamega in Criminal

Case No. 1161 of 2004 [S. M. KIBUNJA, PM])

JOHN AMARERE SWATI

APPELLANT

VERSUS

REPUBLIC

RESPONDENT

JUDGMENT

The appellant, **JOHN AMARERE SWATI**, was charged and convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code in one count and on two counts of assault causing actual bodily harm contrary to Section 251 of the Penal Code.

The particulars of the offence in the count of robbery with violence were that on the night of 2nd May 2003, at Ebutenje village, Esumeya sub-location, North Butso Location in Kakamega District, within Western Province, jointly with others not before court, being armed with offensive weapons namely torches, pangas, axes, rungas and iron bars robbed GEOFREY MACHACHU cash 18,000/=, one radio make Panasonic, two mobile phones make Siems A-35 and a Motorola V-2288, all valued at Kshs.37,000/= and at or immediately before or immediately after the time of such robbery wounded the said GEOFFREY MACHACHU.

In the two counts of assault causing actual bodily harm, the particulars of the offences are that on the night of 2nd May, 2003 at Ebutenje village, Esumeya sub-location, North Butso Location in Kakamega District, within Western Province, jointly with others not before court, unlawfully assaulted JOASH LICHENI MUSIOMI and JOSHUA MUSIAYI LILECHI thereby occasioning each one of them actual bodily harm.

When the appellant was arraigned before the lower court, he pleaded not guilty to the charge. After a full hearing, the appellant was found guilty and convicted and sentenced to death in the robbery count and a sentence of one year imprisonment was meted over for each of the counts of assault.

The appellant was aggrieved by the conviction and sentence hence this appeal.

The grounds of appeal and the supplementary grounds of appeal capture more or less the same issues as follows:-

“1. That the Learned Trial Magistrate erred in law and in fact in shifting the burden of proof to the appellant.

2. That the Learned Trial Magistrate erred in law and in fact in holding that the appellant was identified and/or recognized contrary to the evidence on record.

3. That the Trial Magistrate erred in law and in fact in holding that the prosecution had proved the case against the appellant contrary to the evidence on record.

4. That the Learned Trial Magistrate erred in law and in fact in convicting the appellant against the weight of evidence on record.”

Mr. Anziya Advocate appeared for the appellant and Mr. Orinda appeared for the State. Mr. Anziya Advocate argued in support of the grounds of appeal. He also raised issues with the taking over of the case by a different trial magistrate without compliance with Section 200 Criminal Procedure Code.

Mr. Orinda for the State opposed the appeal. He argued that the case was a good one with sufficient facts to sustain a conviction. His stand was that if no directions were given under Section 200 of the Criminal Procedure Code, then the case is worth a retrial.

The case for the Prosecution was that the complainant in the robbery count, PW1, GEOFFREY MACHACHU is a shop-keeper at ESUMEYA Sub-location. On the night of 2nd May, 2003, the said complainant was asleep in his house when he heard people outside who claimed to be police officers. There was torch light outside and the door to his house was forced open. A gang of about ten people entered the house. According to the said complainant, the appellant whom he knew as a customer at his shop was amongst the assailants. The complainant was robbed of Kshs.10,000/=, one radio and two mobile phones. The complainant was hit and he fell down.

Other family members within the homestead were woken up by the commotion. Amongst them was PW1's father, JOASH LICHENI MUSIOMI (PW2) who came out with a torch. He was cut by the assailants and fell down. A brother to PW1 JOSHUA MUSIAYI LILECHI (PW6) came out with a piece of wood in his hands and hit one of the assailants with it but he was cut and fell down.

Neighbours and other family members who went to the complainants homestead in response to the alarm raised were also attacked by the assailants. They included PW3, WAFULA MAKATII MALINYI, PW4, DANIEL MACHIKA, PW5, JULIA KASUKA and PW7, JOSEPHAT OEYESWA MALLINYI. Police were called to the scene. The injured were taken to hospital.

The appellant who was named as one of the assailants by the victims was traced after one year and arrested.

In his defence, the appellant stated that the Asst. Chief and the other people arrested him from his place of work and escorted him to Kakamega Police Station. He was threatened in order to admit charges that he did not know about. He denied the charges and was detained in police custody for two weeks then brought before court.

As a first appellate court, it is the duty of this court to re-evaluate the evidence and draw its own conclusions (*see OKENO V R. [1972] EA 32*).

We have perused the record of appeal and carefully examined the evidence adduced before the trial magistrate by both the prosecution and the defence. We have also given due consideration to the

submissions made by the appellant's counsel, Mr. Anziya and by Mr. Orinda, the State Counsel.

The evidence of the witnesses from the scene include that of PW1, GEOFFREY MACHANCHU who is the complainant in the robbery count, PW2, JOASH LICHENI MUSINDI and PW6, JOSPHAT MUSIAYI who are the complainants in the counts of assault causing actual bodily harm. PW4, DANIEL MACHIKA who are all members of the same family. PW1, PW4 and PW6 are brothers according to their evidence and PW2 is their father. These family members testified that the appellant was amongst the assailants. PW1's evidence is that he knew the appellant as a customer. His evidence is that the appellant had a stick and that it was the appellant who picked the radio. It is PW1's evidence that although he was told to lie down, he stood and gave out cash therefore had a chance to see the appellant clearly through the torch light from the other attackers.

PW2 who is the father to PW1 and is also a complainant in one of the counts of assault also named the appellant as the one he saw holding a club and a radio. PW2's evidence is that he saw the appellant through the lights from the torches and he recognized him. According to PW2 the appellant wore a black trouser and a green pullover at the material time.

PW4, DANIEL MACHIKA, the other brother of the family members also gave evidence that he recognized the appellant by appearance and by voice. His evidence is that the appellant is a neighbour and he heard the appellant's voice saying that he should be cut at the neck and killed. PW4 also mentioned that he was able to see the appellant through the torch light. PW6 JOSHUA MUSIAYI LILECHI, the complainant in the other count of assault testified on how he also found his door looked from outside and went out through the window. His evidence is that he was cut with a panga by one of the assailants and fell unconscious. He did not manage to identify the attackers.

The P3 forms issued to PW1, PW2 and PW6 were produced as exhibits by the Doctor, PW8, Dr. Stephen Akayi. The doctor assessed the degree of injury in each of the aforesaid complainants as (PW1, PW2 and PW6) as harm.

In addition to the evidence of the family members, there is the evidence of the neighbours who responded to the distress call. PW3, WAFULA NEKATI described the clothes the appellant was wearing as a green sweater and a black trouser and stated that the appellant had not covered his face. PW3 also pointed out that one of the assailants lit a torch and he was able to see. PW5, JULIA KASUA who was with her husband (PW3), also gave evidence that there was torch light and she was able to recognize the appellant whom she described as a neighbour. According to PW5 she also recognized the voice of the appellant.

PW7, JOSEPHAT OYESWA MALINYI who was a watchman at a clinic in the same neighbourhood was also attacked by the same group of assailants and cut with an axe on the shoulder, hit on the leg and stabbed with a knife all over and fell unconscious. It is the evidence of the said watchman that he flashed a torch on the assailants and saw the appellant whom he knew as a clansman. According to the watchman, when he came to he told the police that he had recognized the appellant during the attack. The watchman denied any possibility of mistaken identity and stated that he even held a conversation with the appellant. It is noteworthy that the watchman also described the appellant as having worn a black trouser and a green sweater which is the attire the other witnesses described.

According to the investigation officer, PW9 PC. JAMES KIOGORA, the appellant was arrested one year later from his hideout in Kitale. This finds support in the evidence of PW2 JOASH LICHENI MUSIOMI and PW5 JULIA KASIKA who testified that the appellant disappeared from their neighbourhood until one year later when he was arrested.

What comes out through the evidence of the witnesses from the scene is that they saw the appellant who was known to them and they recognized him. Only PW6 who fell unconscious did not identify the appellant. The witnesses from the scene who stated that they saw the appellant are six in total. Each described how the torch lights assisted them to see. In the case of PW4 (DANIEL MACHIKA) and PW5 JULIA KASUKA there was also evidence of voice recognition. The encounter between these witnesses and the appellant was close. According to the PW3, PW4 and PW6 the appellant is the one who cut

them. PW2, PW3 and PW7 have all given details of the clothes that the appellant wore, that is black trouser and green pullover.

As stated in the case of *ANJONI AND ANOR. V R. [1980] KLR* “*a case of recognition, not identification, is more satisfactory, more assuring, and more reliable than that of identification of a stranger because it depends with the personal knowledge of the assailant in one form or the other.*”

After re-evaluating the evidence on record, we are satisfied that the appellant was identified without any possibility of error. The defence by the appellant that he was arrested and threatened to admit the charges is not plausible given the overwhelming evidence from the prosecution witnesses. There are no reasons given why the police officers and the Assistant Chief or any of the witnesses would want to frame up this case on the appellant.

We have anxiously considered the non compliance with Section. 200 Criminal Procedure Code when the case was taken over by another magistrate. We are of the view that to prejudice was suffered by the defence. The appellant had a chance to cross-examine the single witness who had testified before the initial trial magistrate.

The conviction and sentence were based on sound evidence and we do not see it necessary to order a retrial.

With the foregoing, the conviction and sentence of the trial magistrate upheld as the appeal has no merit. The sentences for the two counts of assault are however held in abeyance unless for any lawful reason the sentence in the robbery count is set aside.

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

SAID J. CHITEMBWE
J U D G E

B. THURANIRA JADEN
J U D G E