



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL 8 OF 2011

*(Appeal from the conviction and sentence by H. WANDERE,
Senior Resident Magistrate's Mumias Court in Criminal
Case No. 1443 of 2008 delivered on 19th day of January 2011)*

JUMA OKAKA OKONJI APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

The appellant, **JUMA OKAKA OKONJI** was charged and convicted of the offence of robbery with violence Contrary to Section 296 (2) of the Penal Code.

The particulars of the offence were that on the 13th day of November 2008 at Ekeru shopping center in Mumias District of Western Province jointly with another not before court while armed with dangerous weapon namely panga, robbed STEPHEN MURUNGA motor cycle Registration Number KBE 296A make Ranger Nebilla valued at Kshs.98,000/= the property of STEPHEN MURUNGA and at the time of such robbery used actual violence on the said STEPHEN MURUNGA by injuring him.

The appellant pleaded not guilty before the Lower Court. After a full trial, the appellant was found guilty and convicted and sentenced to death.

The appellant was aggrieved by the conviction and appealed to this court.

The grounds of appeal and the supplementary grounds of appeal can be summarized as follows:-

- That the charge sheet was defective.
- That the witnesses gave contradictory evidence that was full of hearsay and lacked corroboration.

- That the trial magistrate shifted the burden of proof to the appellant.
- That the trial magistrate disregarded and ignored the appellant's evidence.

Mr. Ateya Advocate appeared for the appellant. In his submissions he termed the charge sheet as defective and also pointed out the gaps in the prosecution evidence.

Mr. Orinda appeared for the State. He did not oppose the appeal. He pointed out that the case was riddled with poor investigations and poor prosecution but stated that the charge sheet is not defective.

The case for the prosecution was that the complainant, PW1, **STEPHEN MURUNGA** operated a "boda boda" business along the Mumias-Shipala road using a motor cycle registration No. KBE 296A. At the material time the complainant was at a petrol station in Mumias Town when a person who he identified as the appellant approached him. The appellant wanted to be ferried to Ekeru trading centre. They negotiated and agreed at a fare of Kshs.50/=. The appellant boarded the motor cycle and they started the journey. The complainant stopped at a gate where the appellant directed him. While the appellant was ostensibly removing money from his pocket to pay the fare, the complainant was cut at the back of the head with a panga. The complainant fell down from the motor cycle and lost consciousness. When the complainant came to he was alone and the motor cycle was nowhere to be seen. The complainant looked for help and was escorted to the Mumias Police Station where he made a report. The complainant was taken to St. Mary's hospital where he was admitted for four days. Other "boda boda" operators mounted an operation to trace the culprit. Following a tip off, the "boda boda" operators posed as sellers of a motor cycle laid a trap and the appellant was arrested and escorted to the Police station.

In his defence, the appellant stated that he was arrested from his house by Administration Police Officers. That his house was searched and nothing was recovered. That the same Police Officers had arrested him previously with 15 litres of "chang'aa" but he bribed them and they left him alone. This round, the Administration Police Officers made a demand of Kshs.3,800/= which he did not have and they escorted him to Mumias Police Station. He ended up in court over false claims. He denied the charge and stated that the prosecution witnesses were strangers to him.

As a first appeal, 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. We have also given due consideration to the submissions by the appellant's counsel.

The evidence of the complainant has described the attack. There is no doubt that the robbery took place. The complainant's evidence on the injuries and loss of the motor cycle was corroborated by that of his employer, PW4, **ALEXANDER WAFULA MAKHULA** and that of fellow "boda boda" operators PW2, **PETER MAKOKHA** and PW3, **SAMUEL NYAROTSO ODUORI**. The evidence of the Clinical Officer, PW5 ISACK MUKHWANA confirmed that the complainant was injured.

The evidence of the Prosecution witnesses proved the ingredients of the charge of robbery with violence. The charge sheet is not defective and the particulars of the offence are not at variance with the charge as submitted by the appellant's counsel.

According to the appellant's evidence, he was approached by the appellant at a petrol station where there were electricity lights. The offence took place at night. The complainant did not know the appellant before. These were difficult circumstances. No identification parade was carried out to confirm if the complainant could identify his attacker without any possibility of error. The evidence of the complainant does not come out clearly to show whether the attackers were one or two. According to the complainant, he was cut at the back of the head from behind. His evidence was that he did not see the person who cut him.

PW2 and PW3 are the two "boda boda" operators who laid a trap and had the appellant arrested. The

Administration Police Officers said to have effected the arrest did not testify. PW6, **RAMDHANI KUMZIGO** is the one who tipped other “boda boda” operators that the appellant was one of those who had robbed the complainant. According to PW6, he had overheard the appellant boasting about having robbed somebody of a motor cycle and that he headed to sell the same. PW6 talked of “**ALEXANDER KILO**” as the owner of the motor cycle. The owner of the motor cycle according to the prosecution case is **ALEXANDER WAFULA MAKHULA**. It is not clear from the evidence whether these names refer to one and the same person or whether it is specifically the same motor cycle that was being talked about. The motor cycle was not recovered.

With the foregoing, we arrive at the conclusion that the conviction was not based on sound evidence. The appeal has merits and is allowed. The conviction is quashed and the sentence set aside. The appellant is at liberty unless otherwise lawfully held.

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