



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL APPEAL 174 OF 2010

(Appeal arising from the conviction and sentence in the Chief Magistrate's Court, Criminal Case No.59 of 2009 against the judgment of [H. I. ONG'UNDI, C.M.] dated 17th August 2010)

SIMON WITABA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that the appellant on the 27th day of December 2008 at Rosterman village, Shirere sub-location, Bukhungu location in Kakamega Central District within Western Province jointly with others not before court while armed with dangerous weapons namely panga, robbed **NKOMO SHIMONYO MBWABI** of KShs.700/= and immediately before the time of such robbery used actual violence to the said **NKOMO SHIMONYO MBWABI**. He was convicted of the charge and sentenced to death. The appellant filed this appeal and the grounds of appeal are that:-

1. *The trial magistrate failed to notice that there was no proper identification*
2. *The conviction is based on hearsay evidence*
3. *The prosecution evidence is circumstantial*
4. *The prosecution evidence is inconsistency*
5. *The trial court failed to evaluate and analyze the evidence on record*
6. *The trial court took undue regard to extraneous matters in arriving at its decision*
7. *The appellant's mitigation was not considered*

The appellant filed written submissions and the same expound on the above grounds. It is the appellant's contention that the offence was allegedly committed at between 1.00 a.m and 2.00 a.m. and it was dark. The complainant stated that he used moonlight as well as light from his mobile phone and that light

was not adequate for positive identification. The complainant also did not give the description of his attackers. This meant that the identification was not conclusive. It is the appellant's submission that the evidence of PW2, PW3 and PW5 amounted to nothing but hearsay as it portrayed him as a criminal yet the trial court believed the witnesses.

The state counsel, Mr. Orinda, opposed the appeal and submitted that the complainant knew the appellant as someone who used to sell pork at Amalemba. PW3 also saw the appellant that night with blood stains on his clothes and claimed he had finished someone who tried to steal his phone. The victim of the robbery survived and when the appellant saw him he ran away. The appellant disappeared and he was arrested later.

The record of the trial court indicates that six witnesses testified for the prosecution. **PW1, NKOMO SHIMONYO MBWABI** was the complainant. He testified that on the night of 26th/27th December 2008 there was a commemoration ceremony at his neighbor's home. He left the ceremony at about between 1.00 a.m and 2.00 a.m. heading to his house and as he approached his home he noticed some movement near his fence. There was moonlight and he used his mobile phone to flash and noticed three people. The people told him not to flash them and he identified one of them as the appellant whom he knew as someone who used to sell pork at his brother's butchery at Amalemba. PW1 asked them to leave but the appellant went closer to him and told him "*usituletee uasikari yako hapa*". PW1 was an officer working with the National Security Intelligence Services (NSIS) and he realized that those people knew him. The appellant held on to him, put his hands in his pocket and took KShs.700/=. PW1 realized that he was being robbed and threw the appellant back. The other two people who were with the appellant went to assist the appellant. The appellant pulled something from his trouser and started assaulting PW1. PW1 was cut on the right and left arms and on sensing danger ran back to where the ceremony was. He lost consciousness at the neighbour's compound where there was the ceremony and he was taken to Nala Hospital. PW1 later sought treatment in Nairobi as some of his nerves had been damaged. It is PW1's further evidence that he did not give the appellant's name to the neighbor but he told them it was someone he knew and that he lost consciousness.

PW2, ATNASS IKOLOMANI was the village elder of Rosterman village. On the 9th of January 2009 at about 9.30 p.m. the chief of Bukhulunya location gave him a letter to go and arrest the appellant. PW2 together with some police officers and the village elder of Bukhulunya area went to the appellant's home. The appellant's wife opened the door and told them that the appellant was not in but on searching the house found the appellant under one of the seats. They arrested him and took him to Kakamega Police Station .

PW3, REUBEN MUHALI NYAMBWEYI testified that he was a security guard on the night of 26th December 2008 at the home of **UKANGA NGOLIA**. While on his usual security rounds he met the appellant together with three other people. PW3 knew the appellant who told him that someone at a memorial ceremony at Rosterman wanted to rob him of his phone and he had cut him with a panga. PW3 did not see the panga but saw the appellant's shirt and hand had blood stains. PW3 advised the appellant to report the matter to the police. The following day PW3 heard that the complainant PW1 had been assaulted. PW3 assisted him looking for the appellant and was present when the appellant was arrested. **PW4, DR. DUNCAN NYIKULI** was based at the Kakamega Provincial Hospital and filled the P3 form for PW1. According to PW4, PW1 had deep cut wounds on both hands and categorized the degree of injury as maim.

PW5, ELIAKIM MUHATI testified that on the 27th of December 2008 he was at a memorial ceremony at Rosterman. While at the ceremony he saw two people pushing towards where he was and there was electricity light. One of those two people was the appellant. They stopped at the gate and a group of people went to the gate where the appellant was. The appellant told them that there was a person at an area called Multipurpose who tried to steal his phone and he had finished him by cutting him with a panga. The appellant removed a blood stained panga and showed it to those who were there. Shortly PW1 appeared from the direction of Multipurpose area while crying. When the appellant saw PW1 coming he took off and ran through the crowd with his panga. It is the evidence of PW5 that there were lights everywhere at the ceremony. He saw PW1 bleeding on his hands and PW1 told them the person who had

assaulted him had ran towards the direction where the ceremony was. PW5 knew the appellant by the name **WITAMBA**.

PW6, PC JAMES KIILU was based at the Kakamega Police station. On the 9th of January 2009 together with other officers went to arrest the appellant who had been kept at an AP Camp at Rosterman. There was a report of a robbery which had occurred at a memorial function. The appellant was later charged with the offence.

The appellant was put on his defence and he gave sworn testimony. He testified that he works as a conductor of a vehicle plying the SEMBELOYA –Kisumu route. He was arrested on the 1st of January 2009 for failing to attend court. On the 2nd of January 2009 he was at the AP Camp cells where he was beaten by a crowd of people. The complainant went to the camp and told the appellant that he knew nothing about him. He was charged in court on 12th of January 2009 and denied that he was arrested on 9th January 2009. His further evidence was that on 27th December 2008 he was at home and no one went to his home to check on him. The appellant further testified that he had been charged with possession of bhang and he had absconded. The main issue for determination is whether it was the appellant who robbed the complainant on the night of 26th/27th December 2008. Did the prosecution prove its case beyond reasonable doubt?

The prosecution evidence did establish that **PW1, NKOMO SHIMONYO MBWABI** was assaulted and robbed of KShs.700/= on the night of 26th/27th December 2008. He was assaulted by three people at about between 1.00 a.m. to 2.00 a.m. He was alone and testified that there was moonlight. Using the moonlight and light from his mobile phone he was able to see the three people. He was assaulted and robbed of KShs.700/=. He was admitted at Nala Hospital and was later treated in Nairobi. PW4 produced medical evidence on the injuries sustained by PW1. We do find that PW1 was violently robbed by three people on the night of 26th/27th December 2008. There was more than one person who robbed the appellant and violence was used on him. He sustained injuries on his hands.

The next issue is whether the appellant was one of three people who robbed PW1. It is PW1's evidence that he identified the appellant using moonlight and light from his mobile phone. He later threw his mobile phone as he struggled with the robbers. It is PW1's evidence that the people who robbed him ran towards the place where there was commemoration ceremony. PW5 testified that he saw the appellant at the ceremony. He had a panga which he showed to some people stating that he had finished someone who had tried to steal his phone. Similarly, PW3, Reuben Muhali Nyambweyi saw the appellant that night of 26th/27th December 2008. Although PW3 did not see the appellant with a panga, the appellant told him that he had cut someone who had tried to steal his phone with a panga. PW3 saw the appellant's shirt and hands had blood stains and he advised him to report the matter to the police.

On his part, the appellant testified that he was arrested on 1st of January 2009 and taken to an AP camp. He was assaulted by a crowd of people while at the A.P. Camp and the complainant told him that he knew nothing about him. He was at home on 27th December 2008 and no one went there. He was arrested on the 1st of January 2008 and he was facing a Criminal case of possessing bhang and had absconded.

From the evidence of PW1, it is doubtful whether he positively identified the appellant. The offence occurred at about 2.00 a.m. and it is not clear how bright the moonlight was. It is not also clear whether the light from PW1's mobile phone could enable him identify the appellant. We do find that PW1 could not positively identify the appellant.

It is the evidence of PW3 Reuben Muholi and PW5, Eliakim Mulah that they saw the appellant that night. He told them that he had finished someone with a panga. PW5 saw the blood stained panga and when PW1 appeared at the ceremony, the appellant ran away. It is the evidence of PW5 that there were lights at the ceremony. PW5 saw PW1 bleeding and PW1 reported that his attackers had ran towards the place where there was the ceremony. According to PW5, PW1 appeared at the ceremony shortly after the

appellant had shown his blood stained panga and the appellant ran away. Given the above evidence, we are satisfied that it was the appellant who violently robbed PW1 on the night of 26th/27th December 2008. The appellant's evidence that he was at home on 27th December 2008 does not disprove the evidence of PW3 and PW5 that they saw him that night. The appellant talked to PW3 who advised him to report to the police. The date of arrest does not disprove PW1's evidence that he was assaulted on the night of 26th/27th December 2008. Even if the appellant was arrested on 1st January 2009 and not 9th January 2009, that was some days after the robbery had taken place. The prosecution did not allege that the appellant had disappeared from his home.

In the end we do find that the prosecution did prove its case beyond reasonable doubt. The trial court came to the correct decision. We do find that the appeal lacks merit and the same is disallowed.

Dated, delivered 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

J U D G E