



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL 128,129,130,131 & 132 OF 2010

(Appeal against conviction and sentence from the original Criminal Case No. 412 of 2009 in the Senior Resident Magistrate's Court at Butere.

STEAPHEN MAKOKHA OMUKANGU 1ST APPELLANT

FREDRICK ATSULU NALIANYA 2ND APPELLANT

STEPHEN ATSULU NALIANYA 3RD APPELLANT

WILLIAM OUTA 4TH APPELLANT

AGGREY GORI 5TH APPELLANT

*(Consolidated Criminal Appeals Nos. 128, 129,
130, 131 and 132 of 2010)*

J U D G M E N T

The appellants were 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 appellants on the night of 27th and 28th April 2009 at Mulambo market, Shinamwenyuli sub-location, Township location, Butere District within Western Province jointly with others not before court while armed with dangerous weapons namely pangas and rungas robbed **WYCLIFFE NANDWA MBAKA** of shop goods namely sugar, cooking fats, bar soaps, lessos and torch and other assorted goods all valued at KShs.44,000/= and immediately before such robbery used actual violence to the said **WYCLIFFE NANDWA MBAKA**. The 1st and 4th

appellants were also charged with the offence of handling stolen property contrary to **Section 322(2)** of the **Penal Code**. The appellants were convicted of the main offence of robbery with violence and sentenced to death. They preferred the current appeal.

The 1st appellant **STEPHEN MAKOKHA OMUKANGU**'s grounds of appeal are that the ingredients of the offence of robbery with violence were not proved, that he was arrested on 1st of May 2009 vide OB number 25/1/5/2009 and there was nothing booked with him, that PW1 did not give his name to the police and that the prosecution evidence was inconsistent, uncorroborated, scanty, contradictory and incredible. The appellant also filed written submissions where he expounded his grounds of appeal. He relied on the cases of **R. V. TURNBULL [1976] 3 ALL E.R. 549** and **TEKERALI S/O KORONGOS V R. [1952] VOL.19 259**. The main issues raised in the written submissions are that the alleged recognition was not proper, the first report to the police did not mention his name, the occurrence book did not indicate the items he was booked with, the circumstances at the scene were not conducive for identification and that the prosecution evidence is full of contradiction and inconsistencies.

The 2nd appellant **FREDRICK ATSULU**'s grounds of appeal are that the prosecution evidence did not meet the required standard to sustain the conviction of robbery with violence charge, no identification parade was done, the identification was not positive and that the court reached at a premeditated conclusion. In his written submissions the 2nd appellant submits that there was only one identifying witness and the circumstances under which the offence was committed were not conducive for positive identification. The appellant also contend that his alibi defence was not considered.

The 3rd appellant **STEPHEN ATSULU NALIANYA**'s grounds of appeal are that no identification parade was conducted, the prosecution evidence could not sustain the conviction, the identification by the watchman was not positive and that the trial court reached a premeditated conclusion. In his submissions the 3rd appellant submitted that the conditions prevailing at the scene were not conducive for positive identification, that the first report to the police did not mention his name, the case was not proved beyond reasonable doubt, and that the prosecution evidence is full contradictions and inconsistencies.

The 4th appellant **WILLIAM OUTA**'s grounds of appeal are that the prosecution case was not proved to the required standard, the items he was booked with in OB No.38/28/4/09 were not produced in court, the watchman who is known to him did not give his description to the police, the identification cannot be held to have been positive and that the prosecution evidence was unsound, inconsistent, scanty, contradictory and incredible. In his submissions the 4th appellant expounded on his grounds of appeal.

The 5th appellant **AGGREY KORI OMOLLO**'s grounds of appeal are that there was no identification parade, that he was arrested on 7th of May 2009 yet the offence had been committed on the night of 27th and 28th of April 2009 and the watchman knew him, the prosecution did not prove its case and the court introduced extraneous matters. The 5th appellant further submitted that the first report did not mention his name and that the circumstances at the scene were not conducive for positive identification.

Mr. Orinda, state counsel, opposed the appeals and submitted that the 1st appellant was both identified and was found with the stolen items. There were several torches at the scene and the names of the 1st, 4th and 5th appellant were given immediately after the crime had been committed,. Counsel further submitted that the 2nd and 3rd appellants were also identified and PW1 gave their names and this led to their arrest.

From the record of the trial court seven witnesses testified. **PW1, WYCLIFFE NANDWA** was a watchman employed by PW2. PW2 owned a shop at Mulambo market. On the night of 27th and 28th April 2009, PW1 was at his place of work as a watchman. It was raining heavily and that at about 1.00 a.m. he saw people coming with torches and he raised an alarm. He was held and cut on the head three times and fell down. The people broke into PW2's shop and stole some items. PW1 crawled for about 50 yards and went to notify a fellow watchman. The owner of the shop was called and PW1 was taken to hospital. According to PW1 he managed to identify Makokha, Outa, Atsulu, and Kori.

PW2, WILLIAM ONGOLA testified that on the 27th April 2009 during the day the 5th appellant Aggrey Kori Omolo went to his shop alleging that he had been sent by the landlord to take measurements of the door. PW2 later checked with the landlord and found out that the 5th appellant had not been sent to measure the door. On the same day at about 3.00 a.m. that night, PW2 was informed of the robbery at his shop and went to the scene. He took PW1 to hospital. According to PW2, PW1 told him the following morning that he had seen the appellant at the scene. PW2 went with police officers to the homes of the appellants and some items were recovered.

PW3, KWEYU was a watchman in a neighbouring shop. On the night of 27th to 28th April 2009 at about 1.00 a.m. PW1 went to him having been injured. PW3 testified that PW1 was bleeding and could not see. He called PW2 who went to the scene. According to PW3, PW1 went to him while crawling and PW1 never told him about the attackers. **PW4 ISIAH WESONGA** also owned a shop at Mulambo market and his watchman was PW3. On the night of 28th April 2009 at about 3.00 a.m. PW3 informed him about the robbery and went with PW2 to the scene. According to PW4, PW1 could not talk. **PW5, AGGREY NYONGESA** filled in the P3 form for PW1. The injuries sustained by PW1 were multiple lacerations around the left eye, cut wound on the right parietal region of the head, cut wound on the front head. PW1 had laceration on the scalp and was developing blindness.

PW6, PC THOMAS KOMEN was at the Musanda police base on the 2nd May 2009. He was notified of the incident and went to the home of the 1st appellant together with the area assistant chief. The appellant was not there but they recovered two packets of baking flour, four kilos of maize flour and half kilo of cooking fat. The items were being destroyed by rats and the maize flour was in bucket. The complainant identified the items as his as they had the price written on them according to PW6 the price tag was not visible.

PW7, INSPECTOR ALOICE MBOYA was informed of the robbery on the night of 27th and 28th April 2009 when he was at Butere police station at about 4.00 a.m. He went to the scene with sniffer dogs but it had rained heavily and the dogs could not assist them. The following day they interviewed PW1 who told them the names of the robbers. They went to the home of the 1st appellant and recovered some items. The appellant was not there and they arrested his wife who was also charged. It is the evidence of PW7 that PW1 informed him that the robbers were **ATSULU STEPHEN NALIANYA, STEPHEN MAKOKHA, PATRICK NALIANYA ATSULU, WILLIAM OUTA** and **AGGREY KORI**. All the suspects were arrested on the same day. From the home of **STEPHEN MAKOKHA** they recovered a lesa and oils. They also recovered some items from Josephine Kombo who the 4th accused. The owner of the shop PW2 informed the investigators that he had put some marks on his shop items and that **AGGREY GORI** had gone to his shop masquerading as a blacksmith sent by the landlord that day.

The appellants were put on their defence. 1st appellant **STEPHEN MAKOKHA OMUKANGU** gave sworn evidence. He testified that on the 1st of May 2009 he went to his shamba and later to Shinyalu Primary School. He then left for a chang'aa den. Police went to the CHANG'AA place and he was arrested. They asked him to produce KShs.15,000/= but he did not have the money and he was charged with the offence on the 11th of May 2009. He called for the O.B. from the Butere police station for the 25th of May 2009 and it indicated that he was not arrested with anything. He produced the O.B. extract as his exhibit.

The 2nd appellant, **FREDRICK ATSULU NALIANYA** gave sworn evidence and testified that on the 27th/28th April 2009 police went to his house demanding to be shown illicit liquor which he used to sell. He was with his wife and children. He was taken to the police station where he stayed for 13 days before he was charged on the 11th of May 2009.

The 3rd appellant, **STEPHEN ATSULU NALIANYA** also gave sworn evidence and testified that on the 28th of April 2009 he was asleep in his house when the area assistant chief in the company of three police officers arrested him and took him to the police station. He was later charged on the 11th of May 2009

with the offence.

The 4th appellant **WILLIAM OUTA** was the 5th accused before the trial court. He gave sworn evidence and testified that on the 28th of April 2009 at about 10.00 p.m. he was asleep when police officers went to arrest him. He was taken to the police station and after about two days the complainant, Mzee Nandwa, whose daughter had burnt the 4th appellant's house went to the station and told him that he was going to be punished. The appellant was later charged in court and his case was enjoined with that of other people whom he did not know. According to 4th appellant the 1st report indicated that the complainant was robbed by unknown people who broke and entered into the shop.

The 5th appellant **AGGREY KORI OMOLLO** was the 6th accused before the trial court. He gave sworn evidence that on the 30th of May 2009 he went to his shamba and left at 11.00 a.m. to the local market. He reached near Butere police station where he met Sgt. Salu who arrested him. He was taken to the police station and on the 3rd of June 2009 was taken to the crime office and a file of one **WYCLIFFE MIMBAKA** who was to be charged was brought to him. The police told him that he was a cattle thief and had attacked Nandwa, but he told them that on the date of the alleged attack he was in jail as he had been imprisoned for two years for stock theft. The police confirmed that he was imprisoned on the 23rd November 2007. On the 11th of May 2009 he was charged with the offence. According to the appellant he was convicted in criminal case no. 1125 of 2006 and convicted on 23rd November 2007 for two years. He served seventeen months and he was released on 19th April 2009.

From the prosecution evidence the main issues for determination is whether PW1 identified his attackers and whether the appellants were found with recently stolen items that belonged to PW2. It is the evidence of PW1 that he was working at his place of work as a watchman on the night of 27th/28th April 2009. It was about 1.00 a.m. and it was raining heavily. The robbers went there with torches and he raised alarm. PW1 was cut on the head three times and he fell down. PW1 did not testify as to how long the robbers took to reach him as well as the time it took the robbers to conduct their robbery. It is the evidence of **PW3, Kweyu**, that PW1 could not walk and went crawling to him. It is also PW1's evidence that he rolled for about 50 yards and went to notify PW3. The evidence of **PW5 AGGREY NYONGESA** is that PW1 sustained several injuries and he was developing blindness. It is the evidence of PW7 that PW1 gave the names of seven (7) robbers. Given the circumstances under which the robbery took place we do find that the circumstances were not conducive for positive identification. It was raining heavily as per the evidence of PW1 and he was hit on the head. He fell down and the robbers broke in the shop and stole the items. According to PW4, PW1 could not talk. That shows that PW1 sustained serious injuries as a result of the attack and could not be able to positively identify the robbers.

The next issue for determination is whether the stolen items were found in possession of the appellant. According to PW6 they went to the home of the 1st appellant and he was not there, they recovered two packets of baking flour, four kilos of maize flour and half a kilo of cooking fat. The items were being destroyed by rats and the maize flour was in a bucket. PW7's evidence is that they recovered a lesa from the 1st appellant. Some other items were recovered from **JOSEPHINE KOMBO** namely 50gms of Kasuku, two packets of Bahari flour and home baking unga.

From the list of exhibit produced by the prosecution the items that were recovered include ten half pieces of Toyo bar soap, five pieces of cooking fat, 500gms of Kasuku cooking fat, two kilograms of wheat flour, one kilogram of maize flour, two kilograms of wheat flour, one kilogram of Bahari maize flour and two kilogram of Bahari wheat flour. From the charge sheet the stolen items were assorted shop goods valued at **KShs.44,000/=** we do find that the items that were recovered from some of the appellants were ordinary items which could be found in any homestead. Although the shop owner PW2 claimed that he had placed some marks on his items, according to **PW6 PC THOMAS KOMEN** that those marks were not visible.

From the prosecution evidence, it is difficult to conclude that the appellants were found in possession of recently stolen items. We do find that the appellants were not accorded the benefit of doubt which they

are entitled to. Some of the appellants were not found in possession of anything and the Occurrence Book was produced which established that fact. We find the appeals to be merited and the same is allowed. The appellants 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

B. THURANIRA JADEN

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