



REPUBLIC OF KENYA
IN THE HIGH COURT
AT KAKAMEGA
Criminal Appeal 189 of 2009

*(An Appeal against both conviction and sentence from the Principal Magistrate's Court at Mumias
in Criminal Case No. 660 of 20010[E. K. MAKORI, PM])*

EDWARD BARASA
NYONGESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, **EDWARD BARASA NYONGESA**, was charged with seven counts as follows:-

Count 1: Robbery with violence contrary to section 296 (2) of the Penal Code.

Particulars of the offence: On the 9th day of April 2009, at Sio River Bridge, Matungu Division in Mumias District within Western Province jointly with others not before court, while armed with dangerous weapons namely a firearm robbed Collins Ganira of a mobile phone make Nokia 6020 valued at Kshs.7,800/= and cash Kshs.378,561 all to the total value of Kshs. 386,361/=and at the time of such robbery used actual violence on the said COLLIN GANIRA.

Count II: Robbery with violence contrary to section 296 (2) of the Penal Code.

Particulars of the offence: On the 9th day of April 2009, at Sio River Bridge, Matungu Division in Mumias District within Western Province jointly with others not before court, while armed with a dangerous weapon namely a firearm robbed Beatrice Ogondola of a mobile phone make Nokia 1100 valued at Kshs.2,500/= and cash Kshs.300,000/= all to the totaling Kshs. 302,500/=and at the time of such robbery used actual violence on BEATRICE ONGONDOLA.

Count III: Robbery with violence contrary to section 296 (2) of the Penal Code.

Particulars of the offence: On the 9th day of April 2009, at Sio River Bridge, Matungu Division in Mumias District within Western Province jointly with others not before court, while armed with a dangerous weapon namely a firearm robbed of Winrose Odouri, cash Kshs.500,000/= and at the time of such robbery used actual violence on the said WINROSE ODOURI.

Count IV: Robbery with violence contrary to section 296 (2) of the Penal Code.

Particulars of the offence: On the 9th day of April 2009, at Silo River Bridge, Matungu Division in Mumias District within Western Province jointly with others not before court, while armed with dangerous weapon namely a firearm robbed of Patrick Makokha a mobile phone make Nokia 1110 valued at Kshs.3,500/= and cash Kshs.500/= all to the total value of Kshs. 4000/=and at the time of such robbery used actual violence on the said PATRICK MAKOKHA.

Count V: Robbery with violence contrary to section 296 (2) of the Penal Code.

Particulars of the offence: On the 9th day of April 2009, at Sio River Bridge, Matungu Division in Mumias District within Western Province jointly with others not before court, while armed with a dangerous weapon namely a firearm robbed of Caroline Njoki Ng'ang'a a mobile phone make Sumsang valued at Kshs.13,000/= and at the time of such robbery used actual violence on the said CAROLINE NJOKI NG'ANG'A.

Count VI: Being in possession of a Firearm contrary to Section 4(1) as read with Section 4 (8) of the Firearm Act Cap 114 Laws of Kenya.

Particulars of the offence: On the 9th day of April 2009, at Sio River Bridge, Matungu Division in Mumias District within Western Province was found in possession of an AK 47 Firearm S/No.19775512734 without a firearm certificate from the registrar.

Count VII: Being in possession of Ammunition contrary to Section 4 (2) (a) of the Firearm Act Cap 114 of the Firearm Act.

Particulars of the offence: On the 9th day of April 2009, at Sio River Bridge, Matungu Division in Mumias District within Western Province was found in possession of thirty (30) rounds of 7.62 mm special ammunitions without the Firearm certificate.

The appellant pleaded not guilty before the trial magistrate's court. After a full trial, the appellant was acquitted in count I, VI & VII but convicted in all the other counts (count II, III, IV & V). Aggrieved by the conviction and sentence in count II, III, IV & V, the appellant appealed to this court.

In his petition of appeal, the appellant raised several grounds of appeal. During the hearing of the appeal, the appellant's counsel, Mr. Barongo categorized the grounds of appeal into three. That is lack of proper identification, contradictions in the prosecution case and weaknesses of the prosecution case.

Mr. Barongo submitted that the identification parade in which the appellant was identified was not free from error; that the witnesses who identified the appellant at the identification parade had not given a description of the appellant immediately after the robbery; that the prosecution evidence on the Serial Number of the gun and the motor vehicle used in the commission of the offence was contradictory and that there was variance between the evidence and the particulars of the offences. The prosecution case was faulted as being weak in that the motor vehicle recovered was not produced; that there was no audit report of the money lost and that the appellant was not arrested with anything that incriminated him.

Mr. Orinda for the State did not support the conviction. He pointed out that there were contradictions in the prosecution case. He faulted the evidence on the investigations carried out as being full of gaps. He

also took issue with the lack of evidence that described the attackers.

This being 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 carefully re-evaluated the evidence that was adduced before the trial magistrate and considered the submissions made by Mr. Barongo for the appellant and Mr. Orinda for the State.

The facts of the prosecution case were that on the 9th April 2009, three officers from SUKARI SACCO were on their way to Nambale and Nashianda to make payments to their members. The said officers included PW1 BEATRICE WAWIRE who had been issued with Kshs.300,000/= and PW2 WINROSE NALIAKA ODUOR who had been issued with Kshs.500,000/= in cash and Kshs.15,000/= M-Pesa deposits. The officers were being driven to the payment venue by the office driver, PW3 PATRICK VICTOR MAKOKHA in a van Registration No. KAQ 988V. The money was in a cash-box. A Police Officer, PW6, PC CAROLYNE NG'ANG'A was the security escort. The police officer was armed with a G3 rifle and sat with the driver at the driver's cabin. Upon reaching Sio Bridge, the motor vehicle slowed down at a place where there were pot-holes on the road. Another motor vehicle suddenly emerged from the forest and blocked their way. They were attacked by robbers who were armed with an AK 47 gun and a panga. The police officer was disarmed by the robbers. They were robbed of the money they had carried and mobile phones. The police officer was hijacked and bundled into the boot of the assailant's motor vehicle. The police officer was later dumped at a sugar plantation and her rifle returned to her but without the magazine.

The robbery was reported to the police. Investigations were commenced. The cash-box was recovered but without any money. On 16.6.2009, following a tip off by a police informer, the appellant was arrested in Kitale town in connection with other offences. The appellant was subsequently charged with the present offence after an identification parade was carried out.

In his defence, the appellant gave unsworn evidence. The appellant stated that he was arrested on 16.6.2009 and escorted to the Police Station where he was beaten and people called to identify him. That he was pointed out to the people who identified him. The appellant denied the offence and blamed the police for the robbery. He termed the robbery an in-house matter.

We have carefully re-evaluated the evidence adduced before the trial court and considered the submissions made by Mr. Barongo on behalf of the appellant and by Mr. Orinda on behalf of the State.

It is apparent from the record of the trial magistrate that the appellant was convicted essentially on the evidence of identification at an identification parade. The witnesses from the scene who testified were PW1, Beatrice Wawire and PW2, Winrose Naliaka Oduori who were the paying out clerks, PW3 Patrick Victor Makokha the driver and PW6, PC Caroline Ng'ang'a, the security escort.

It is the evidence of PW1, PW3 and PW6 that they saw the appellant during the attack. PW2 however stated in her evidence that she did not see the attackers well and was not able to identify them.

Although three witnesses from the scene stated that they saw the appellant at the scene and PW1 and PW3 identified the appellant at the identification parade, none of the witnesses gave a description of their attackers immediately after the attack. No defining physical marks regarding the appellant's appearance were described by the witnesses to enable them identify the appellant more than two months later without making any errors. The evidence of the prosecution witnesses also lacks details on how long the incident took or whether the witnesses saw the attackers fleetingly or trained their eyes on them for some time. According to the evidence of the witnesses at the scene, they were ordered by the attackers to face down. In that regard, we agree with the submissions made by Mr. Barongo for the appellant and Mr. Orinda for the State.

In count II, the complainants name is reflected as BEATRICE OGONDOLA. The witness who testified in support of the particular count identified herself as BEATRICE WAWIRE. It was not confirmed by way

of evidence whether these names belongs to the same person. The particulars of the offence in count II are therefore at variance with the evidence.

On the arrest of the appellant, there are gaps in the prosecution case on how the appellant was linked with the present case after having been arrested in connection with other offences. The motor vehicle said to have been recovered was not produced as an exhibit. It is not clear from the evidence of PW9, Ag. IP Daniel Kairu how the recovered motor vehicle was involved in the commission of the offences herein. It is also noteworthy that the appellant was not arrested with anything linked to the offences herein.

Taking into consideration the totality of the prosecution evidence, we reach the conclusion that the prosecution case was not proved beyond reasonable doubt. The appeal filed by the appellant has merits. Consequently we quash the conviction and set aside the sentence. The appellant is at liberty unless otherwise lawfully held.

Delivered, dated and signed at Kakamega this 7th day of June, 2012

SAID J. CHITEMBWE
J U D G E

B. THURANIRA JADEN
J U D G E