



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAKAMEGA

Criminal Appeal 24 of 2010 & 25 OF 2011

*(Appeal from the conviction and sentence of the Senior Resident Magistrate's
Court at Butere in Criminal Case No. 472 of 2008 [B. O. OCHIENG SRM])*

HARRISON CHITERI ESHUKULU 1ST APPELLANT

MOSES ERIAKA SHABANJI 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The 1st appellant, **HARRISON CHITERI ESHUKULU** and the 2nd appellant, **MOSES ERIAKA SHABANJI** filed Appeal No. 24 of 2010 and 25 of 2011 which were consolidated on 28.02.2012. The appellants were charged and convicted of the offence of attempted robbery with violence contrary to Section 297 (2) of the Penal Code.

The particulars of the offence were that on the 10th day of February 2008 at Mulusi village, Muyundi Sub-location in Butere District within Western Province jointly with others not before court while armed with dangerous weapons namely a pistol of 9 mm caliber, pangas, metal bars attempted to rob ALBERT TUNGANI SHIKULE of his property and immediately before the time of such robbery wounded the said ALBERT TUNGANI SHIKHULE.

The appellants pleaded not guilty to the charge. After a full trial, the appellants were convicted and sentenced to death. Aggrieved by the said conviction and sentence, they appealed to this court.

The main grounds of appeal raised by the appellants can be summarized as follows:-

- That the evidence of recognition was not free from error due to the prevailing circumstances.
- That the trial magistrate erred in relying on the evidence of identification parades which had been irregularly carried out
- That the trial magistrate erred in relying on the evidence of a witness who had been declared hostile.

The appellants filed written submissions. Mr. Orinda for the State opposed the appeal. He submitted that there was sufficient evidence. He submitted that the complainant had a torch and he recognized the appellants who he also identified at the identification parade.

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 considered the submissions made by the appellants and by Mr. Orinda, the State counsel.

The facts of the prosecution case were that PW1, ALBERT SHIKHULE SHIKANDA, the complainant, was in his house on the material day at about 9.15 p.m. when he was attacked by people who he referred to as “boys in his village”.

According to PW1, he heard a knock at the door and took a torch and went to open the door. He then found some young men who he knew as his village mates. The young men wore jungle jackets and posed as Police Officers. They fired a gun and shot the complainant on the shoulder. The complainant pushed the door and closed the same and ran out through the back door and jumped over the fence and went to his cousin’s house. He informed his cousin what had happened. They then made a report to the area Chief who called the police. The complainant later proceeded to hospital where he was treated and a P3 form filled in. Identification parades were latter carried out by PW5 IP Mboya, PW7, Joseph Kiko, Ag. Superintendent of Police and PW8, IP. Nelson Omwenga. The 1st and 2nd appellants who were identified at the identification parades were subsequently charged with four counts but were convicted of the one court that is subject matter of this appeal.

The 1st appellant, **ALFRED CHITERI ESHUKULU** in his statement of defence denied the charge. He stated that the complainant (PW1) knew him and used to be his teacher. He wondered why the complainant never mentioned him in the first report which the complainant made to the police. The 1st appellant stated that nothing was recovered from him. He faulted the manner in which the identification parade was carried out since the complainant knew him.

The 2nd appellant, **Moses Eriaka Shabanji** stated in his defence that he was arrested by police officers who were led to his house by his brother William Ombuko with whom he had differed over a parcel of land left behind by their father. The 2nd appellant stated that he was identified at the identification parade by the complainant who was in the company of the said brother.

PW1, the complainant is the key witness. His evidence is that he had a torch light and was able to see the appellant. He described the appellants as people he knew. However, the intensity of the torch light was not described by the complainant. The offence took place at night. It is strange that the complainant did not name his attackers in his first report. He did not also mention the names of the attackers to his cousin where he ran for help. The evidence of the complainant is not corroborated by any other material evidence. PW2, Elizabeth Atieno Omusula, PW3, Violet Ower Shikunga and PW6 Susan Muchumba who encountered the same gang of robbers failed to identify any of the appellants and PW2 was declared a hostile witness. The evidence of recognition by the complainant is that of a single witness in difficult circumstances.

The evidence of PW5 IP. Mboka, PW7 Joseph Kuko, Superintendent of Police and PW8, IP. Nelson

Omwenga relating to the identification parades that they conducted adds no value to the prosecution case since it was quite clear that the identifying witness knew the appellants as they all came from the same neighbourhood.

With the foregoing, we come to the conclusion that the conviction was not based on sound evidence. We therefore quash the conviction and set aside the sentence. The appellants are at liberty unless otherwise lawfully held.

It is so ordered.

Judgment delivered at Kakamega on the 7th day of June, 2012

S. J. CHITEMBWE

B. THURANIRA JADEN

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