REPUBLIC OF KENYA

IN THE HIGH COURT

AT KAKAMEGA

Criminal Appeal 157 of 2010

(Appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Butere in Criminal Case No. 292 of 2010

[B. O. OCHIENG, SRM])

BENSON MWANDILI.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant herein, **BENSON MWANDILI** was charged with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code.

In count I, the particulars of the offence are that on the 24th day of April, 2010 at around 7.00 p.m. at Mundaha village, Mundaha Sub-location in Khwisero District within Western Province,while armed with a dangerous weapon namely a slasher, robbed JOSEPHINE AYEMBA of one mobile phone make Nokia 1200 valued at Kshs.3,000/=, two robes, one T-shirt, 2 lessos and cash Kshs.4,100/= all valued at Kshs.7,500/= and at or immediately before the time of such robbery wounded the said Josephine Ayumba.

In the alternative, the appellant was charged with the offence of handling stolen property Contrary to Section 322 (2) of the Penal Code.

The particulars of the offence are that on the 25th day of April 2010 at Mundaha village, mundaha sub-location in Khwisero District within Western Province otherwise than in the course of stealing dishonestly retained two robes clothes, one T-shirt and two lessos having reason to believe the same to have been stolen or unlawfully obtained.

In count II, the particulars of the offence are that on the 24th day of April, 2010 at around 7.00 p.m. at Mundaha village, Mundaha Sub-location in Khwisero District within Western Province, while armed with

dangerous weapon namely slasher robbed IRENE STEPHEN 2 robes cloths, 3 head scarfs, one New Testament Bible all valued at Kshs.3,000/= and at or I immediately after the time of such robbery wounded the said IRENE STEPHEN.

In the alternative, the appellant was charged with the offence of handling stolen property Contrary to Section 322 (2) of the Penal Code.

The particulars of the offence are that on the 25th day of April, 2010 at around 7.00 p.m. at Munde village, Mundaha Sub-location in Khwisero District within Western Province, otherwise than in the course of stealing dishonestly retained 2 robes clothes, 3 head scarfs and New Testament Bible having reason to believe it to have been stolen or unlawfully obtained.

After a full trial, the appellant was convicted on the two counts of robbery with violence and sentenced to death. The appellant was aggrieved by the conviction and sentence and appealed to this court.

In his Petition of Appeal, the appellant raised several grounds of appeal. He termed the prosecution as malicious and ill intended. He faulted the evidence adduced before the trial magistrate as a contradiction of the statements recorded by the same witnesses at the Police Station. The appellant took issue with the identification, stating that the witnesses did not say how they were able to identify him in the dark at 7.00 p.m. The appellant asserted that the exhibits found in his house may have been planted there to implicate him. He urged this court to allow the appeal, quash the conviction and set aside the sentence imposed on him.

Mr. Orinda for the State opposed the appeal. He submitted that the appellant was found with recently stolen property. He further submitted that the appellant was properly identified.

In summary, the case for the Prosecution was that on the 24th day of April, 2010 at about 7.00 p.m., PW1, JOSEPHINE AYEMBA and PW2 IRENE STEPHEN, the complainants herein were walking to their homes in Mundaha area of Khwisero District. They met the appellant on the way. The appellant according to the evidence of the complainant's attacked them with a slasher and robbed them of the bags that they were carrying. The bags contained cash Kshs.4,100/= which were offerings from the complainant's **Legio Maria** Church. The bags also contained clothing items, a bible and a mobile phone.

The matter was reported to the village elder. The following morning the village elder and the area Assistant Chief together with the Complainants looked for the appellant and arrested him. The items the complainants were robbed of were recovered from the house of the appellant but the mobile phone and the money were not recovered. The complainants were issued with P3 forms and treated at Khwisero Health Centre. The appellant was taken to the Administration Police Camp and later escorted to the Police Station where he was subsequently charged with the offences that he was convicted of in the lower court.

In his defence, the appellant gave unsworn evidence. He stated that on the 25th day of April, 2010 he had gone to tether his cows when he was confronted by the Assistant Chief who was with the other people and the complainants herein. That they tied him up and took him to his house where a search was conducted and nothing was recovered. That he was beaten up and escorted to the Administration Police Camp then to the Police Station where the charges herein were preferred against him.

This being a first appeal, it is the duty of this court to re-evaluate and to re-consider the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any determination regarding the demeanour of the witnesses (*see* **Okeno v Republic [1972] EA 32**).

The complainant narrated to the trial court how they were robbed of their properties. Both complainants (PW1 & PW2) gave evidence that they knew the appellant who was from the same area that the complainants came from. This is evidence of recognition. PW1 and PW2 stated that although the material time was at about 7.00 p.m., it was not yet dark and they could see.

As stated in the case of ***ANJONI AND ANOR. V R. [1980] KLR*** ***"a case of recognition, not identification, is more satisfactory, more assuring, and more reliable than that of identification of a stranger because it depends with the personal knowledge of the assailant in one form or the other."***

The evidence of the complainants is corroborative and is further corroborated by that of the area Assistant Chief, PW5, FLORENCE AFUE regarding the recovery of the goods that the complainants were robbed of. The recovered goods were produced in the trial court as exhibits. There were no reasons advanced by the appellant why the complainants and the Assistant Chief would plant the said goods on the appellant. According to the evidence of the complainant, they had no grudge with the appellant. The trial court was right in arriving at the conclusion that the stolen goods were recovered from the appellant. Having been found with the properties complained of, the burden shifted from the prosecution to the appellant to explain the possession (see ***MALINGI V. R. [1982] KLR 225***). There was no explanation by the appellant on the said possession.

Another ground of appeal raised by the appellant is that the evidence adduced before the trial court contradicted the statements recorded by witnesses at the Police Station. The appellant also submitted that the 1st report did not mention his name. The issue of the statements and the first report were not raised before the trial court and the same were therefore not produced as exhibits. It appears that the appellant raised these issues on second thoughts during the appeal stage.

The ingredients of robbery with violence were proved. The evidence shows that the appellant was armed with a dangerous weapon to wit a slasher. The complainants were also robbed of their properties and wounded. PW4, JOSEPH MAYABE produced the P3 forms. The P3 forms show that the complainants suffered "harm".

The conviction was based on sound evidence. However, we have noted that the appellant was sentenced to death in both Count I & II. The sentence in count II ought to be held in abeyance (see **GANZI & 2 OTHERS VS R. 2005 I KLR 52)**

Count II is therefore held in abeyance and is to be executed only if for any lawful reason the death sentence in count I is set aside.

Judgment delivered at Kakamega on the 6th day of June, 2012

S. J. CHITEMBWE
J U D G E

B. THURANIRA JADEN
J U D G E