



REPUBLIC OF KENYA
IN THE HIGH COURT OF KINYA AT BUSIA
CRIMINAL APPEAL 80 OF 2011

((Being appeal from the conviction and sentence by the Senior Resident Magistrate Hon. E. H. Keago at Busia in Cr. Case No.1819 of 2009))

ANTONY BARASA MAKOKHA:::::::::::::::::: APPELLANT

~VRS~

REPUBLIC ::::::::::;:::::::::::::::::: RESPONDENT

JUDGMENT

The prosecution evidence as recorded was that on 31/10/2009 a bus registration number KBA 334 A belonging to Palmdown Bus Company and which was carrying 64 passengers left Nairobi at 6.30 p.m for Busia. The driver was Emmanuel Kemei (PW2) and the conductor was Stanley Kipngeno Mutai (PW1). The bus stopped at Nakuru, Kericho, Luanda and at Segga. Unknown to the occupants of the bus, they had among them robbers posing as passengers. They attacked PW1, PW2 and the passengers and took their belongings. At Bumala, the bus was commanded to drive off the tarmac road to the right on a rough road. At some point a man waved the but to stop. The attackers had been communicating with the man. He boarded and joined in the robbery. At some centre the attackers ordered the bus to stop. They alighted with the robbed goods. PW2 drove the bus to Nambale Police Patrol Base where they reported the incident.

Subsequently, three men were arrested and charged with robbery with violence contrary to section 296 (2) of the Penal Code in four counts. The three men were Humprey Kwaki Ekesa (1st accused), Antony Barasa Makokha (2nd accused) and Robert Ouma alias Rasta (3rd accused). Following trial (in respect of counts 1, 2 and 4 as count 3 was withdrawn) the 1st and 3rd accused were found not guilty and were acquitted. The 2nd accused was convicted on each charge and sentenced to death. He is the Appellant. He appealed against the conviction and sentence. Mr. Obiri for the State conceded the appeal.

PW1, PW2 and a passenger Fredrick Oduori Wagatie (PW3) testified that the man who stopped and entered the bus when it was on the rough road was the Appellant. PW1 and PW2 did not know him before but PW3's evidence was that he knew him as they were related by marriage and they used to stay together in Kawangware in Nairobi. PW3 testified that when the incident was reported to police he led officers to the Appellant's rural home but they did not find him. He was eventually arrested on 25/11/2009 at a stage in Kawangware by P. C. Isaiah Wanyama (PW6) after he was identified by one Dancan Ouma who had been a passenger in the bus during the incident. This Duncan Ouma was the complainant in count 3 but did not testify leading to the withdrawal of the charge.

The Appellant was picked on 11/12/2009 in an identification parade conducted by Inspector Kalvin Abanga (PW7) at Busia Police Station. Regarding how he was identified on the attack, the evidence of PW2 was that during the attack the robbers were talking on phone to a person out there. These attackers

directed him to where he stopped and picked their colleague. He stated that he was able to identify the man (the Appellant) by use of the headlights. The Appellant had a tracksuit that was zipped. The jacket was long sleeved. PW1 testified that he saw the Appellant entering the bus and he had a track trouser with red and white strips and a T-shirt. He hit PW1 on the head after his colleagues said he (PW1) was causing trouble. PW3 testified that when the Appellant entered he asked who was causing disturbance. His colleagues responded that it was PW1. He hit PW1 on the head. He was wearing a blue track suit. When the Appellant was arrested police removed a track trouser (exhibit 1) from his house. PW1, PW2 and PW3 each said he was wearing it in the attack.

According to another passenger Samwel Ruhiu Njega (PW4), when the attackers struck after the bus had left Sega all the passengers were ordered to lie down and the driver ordered to put off the lights. It was not clarified whether as a result of the order to put off the lights the driver (PW2) put off lights in the vehicle and the headlights. If only the lights in the vehicle were put off (because PW2 stated that he used the headlights to identify the Appellant) then there was no way PW1 and PW3 could identify the Appellant in darkness. Regarding PW2, he was not interrogated for how long the headlights fell on the Appellant and there is no indication that he described him to any police officer when he made the initial report. The prosecution evidence does not say that immediately after the attack, and the attackers had left, PW3 told PW1 or PW2 that he knew one of the attackers or that one of the attackers was his relative by marriage.

There was no agreement regarding how the Appellant was dressed in the attack. PW1 said the Appellant had the track trouser (exhibit 1) and a T-shirt. The trouser had red and white strips. PW2 stated that he had a tracksuit whose jacket was long-sleeved and was zipped up to the neck. PW3 testified that the Appellant had a blue tracksuit. It is certain that the evidence regarding how the Appellant was dressed was materially contradictory.

We recall what the Court of Appeal said in **Cleophas Otieno Wamunga v. R. Criminal Appeal no.20 of 1989 at Kisumu:**

“Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance of the correctness of the identification.”

It is clear that the trial court did not caution itself before convicting on the evidence of identification. PW2’s evidence was that he knew the Appellant before. The court was therefore dealing with recognition. In the case of **R. V. Turnbull [1976] 3 ALL ER 549, 552** Lord Widgery C.J stated as follows:

“recognition may be more reliable than identification of a stranger, but even where the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition by close relatives and friends are sometimes made.”

The trial court was not alive to the possibility of mistake even as PW2 said he recognized the Appellant, his relative.

In short, the circumstances as revealed by the case were difficult and did not favour positive identification and/or recognition. The appeal was rightly conceded. We allow the appeal and quash the conviction. The Appellant is set at liberty forthwith unless he is otherwise legally held.

Dated, signed and delivered at Bungoma this 17th day of July 2012.

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L. KIMARU

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A. O. MUCHELULE

JUDGE

JUDGE